

May 2014

## Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence

Mae Kuykendall

Charles Adside III

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Civil Rights and Discrimination Commons](#), and the [Education Law Commons](#)

---

### Repository Citation

Mae Kuykendall and Charles Adside III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 Wm. & Mary Bill Rts. J. 1011 (2014), <https://scholarship.law.wm.edu/wmborj/vol22/iss4/2>

Copyright c 2014 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

## UNMUTING THE VOLUME: *FISHER*, AFFIRMATIVE ACTION JURISPRUDENCE, AND THE LEGACY OF RACIAL SILENCE

Mae Kuykendall\* and Charles Adside, III\*\*

### ABSTRACT

As typified by its recent decisions in *Fisher v. University of Texas at Austin* and *Shelby County v. Holder*, the Supreme Court's jurisprudence concerning race has long imposed strict judicial oversight over any use of race for the formulation of public policy. This top-down approach has invited various undesirable outcomes, the most pernicious of which are the endorsement of silence on the subject of race and the delegitimizing of most public deliberations about race by non-Court actors. Consequently, speech within universities and other learning environments regarding race has become a psychologically challenging risk for both students and faculty, who justifiably perceive themselves as lacking either the competence or the authorization to venture into the realm of race. At the same time, the Court has delegated to university administrators a role for race in admissions on the condition that they master locutions marking discourse about race as an expert argot.

This Article proposes an alternative path in which control of race is wrested from the courts—and their appointed delegates in university administration—through the creation of small, experimental university communities. Such communities would select their own membership with a conscious concern for a healthy racial discourse in higher education. This shift in responsibility for racial discourse and community

---

\* Professor of Law, Michigan State University College of Law. Director, Legal E-Marriage Project. I wish to thank my research assistants Mary Elizabeth Oshei and Yassaman Hajivalizadeh, my husband Robert C. Rich, my colleague Professor Phil Pucillo, and librarians Barbara Bean and Brent Domann for close readings and useful comments. I am indebted to and greatly appreciative of Katie Eyer, Paul Horwitz, and Mark Tushnet for useful feedback on a draft of this Article. I also benefitted from presenting early versions at the Loyola University Chicago School of Law's Third Annual Constitutional Law Colloquium, November 2 & 3, 2012, and at a summer faculty workshop at Michigan State University College of Law. All errors of any kind belong to me if I insisted on a point that my co-author did not agree with, or sneaked it in. I am immensely grateful to Charles Adside, whose collaboration on the subject of this Article has been immensely enriching and rewarding, and with whom I enjoy robust debates occasionally worthy of raised voices.

\*\* Lecturer, Department of Political Science, University of Michigan, Ann Arbor. J.D., Michigan State University College of Law. B.A., University of Michigan, Ann Arbor. I thank the following people for their contribution as well as their encouragement in this effort: my parents, Stephen G. Bayer, Sean Rohan, Jared M. Runkel, Nicholas Timm, and Jonathan Warner. I would also like to express my deepest gratitude to Professor Kuykendall for her friendship and for the intellectual power she brought to this project. In my opinion, she is a scholar par excellence who has provided challenging, yet uplifting, insights into a controversial, and often neglected, subject matter.

composition to a wider set of actors, including young adults who are inclined toward openness to diversity, will transform the discussion over race from one requiring the sanction of judges and administrators to one that is genuinely frank and open.

|  |      |
|--|------|
| INTRODUCTION   | 1013 |
| I. BRIEFLY, <i>FISHER V. UNIVERSITY OF TEXAS AT AUSTIN</i>   | 1017 |
| II. THE SUPREME COURT, RACIAL SILENCE, AND MAKE-BELIEVE:<br>PAST AND PRESENT   | 1020 |
| A. <i>Railway Cars and Classrooms: Social Spaces Then and Now</i>  | 1020 |
| B. <i>Parceling out Race Agency Then and Now</i>   | 1023 |
| III. AGENCY, SPEECH, EQUALITY: THE UNIVERSITY, COMMUNITY,<br>AND RACE  | 1026 |
| A. <i>Managed Race Discourse in a Free Speech Setting</i>  | 1026 |
| B. <i>Sharing Agency with Students: Students Admitting Students</i>  | 1029 |
| C. <i>Impoverishing Race Discourse in the University (and the Nation)</i>  | 1032 |
| IV. RACE, SILENCE, AND THE COURT   | 1038 |
| A. <i>Racial History: Power, Silences</i>  | 1038 |
| B. <i>Persisting Racial Silences</i>   | 1044 |
| C. <i>Racial Silence, Higher Education, and Supreme Court<br/>Racial Jurisprudence</i>   | 1046 |
| V. COLOR-BLIND DOGMA, COLOR-CONSCIOUSNESS, AND <i>BAKKE</i> :<br>JURISPRUDENCE OF SILENCE, OPEN ANTISUBORDINATION RACIAL<br>INCLUSION, AND APPROVED ADMINISTRATOR CODE | 1048 |
| A. <i>The Color-Blind and Color-Conscious Theories</i>   | 1048 |
| B. <i>Bakke's "Multitude of Tongues": Breaking Silence Through<br/>Academic Freedom</i>  | 1054 |
| VI. <i>GRUTTER V. BOLLINGER</i> : CONTEXT MATTERS WHEN EVALUATING RACE   | 1056 |
| A. <i>The Grutter Majority Opinion: Leaving the Door Open to<br/>Something Called "Critical Mass"</i>  | 1056 |
| B. <i>The Grutter Dissents</i>   | 1059 |
| C. <i>Refreshed Race-Conscious Jurisprudence</i>   | 1060 |
| 1. <i>Critical Mass: An Elusive Goal</i>   | 1060 |
| 2. <i>Grutter-Style Strict Scrutiny: Tilting the Scales in Favor of<br/>Race Consciousness</i>   | 1063 |
| 3. <i>Fifth Circuit, per Higginbotham: A Calm Judicial Voice</i>   | 1066 |
| VII. LEARNING COMMUNITIES: A MULTITUDE OF TONGUES  | 1071 |
| A. <i>Repairing the Public Forum for Racial Dialogue</i>   | 1071 |
| 1. <i>The Classroom</i>  | 1071 |
| 2. <i>Ending Self-Segregation: Race Consciousness Without<br/>Identity Apartheid</i>   | 1076 |
| B. <i>Proposed Admissions Program and Educational Goals</i>  | 1081 |
| 1. <i>Goal: Cross-Racial Exchange Facilitated by a Rigorous<br/>Academic Environment</i>   | 1081 |

|   |      |
|---|------|
| 2. Initiating Racial Discourse by Applicants: The Tool to Gauge Applicant Ability to Contribute to the Community . . . . .                          | 1084 |
| C. <i>Top-Down Admissions Programs: Is There a Better Alternative? Student-Led Admissions Free from Numeric Goals and Racial Theories</i> . . . . . | 1084 |
| D. <i>Considering First Amendment Objections</i> . . . . .  | 1088 |
| CONCLUSION . . . . .  | 1090 |

#### INTRODUCTION

The expectation that *Fisher v. University of Texas at Austin*<sup>1</sup> might mark a watershed in Supreme Court jurisprudence on race admissions to universities rested on a nose count between two existing judicial camps and not on a hope for new insights about our racial heritage.<sup>2</sup> That simple bimodal anticipation highlights the conceptual dead end into which American race jurisprudence has fallen. One rhetorical strain in the opinions of the Court claims that all use of race, if overt and acknowledged, is toxic, constitutionally forbidden, and socially ineffectual as a path to racial progress or individual justice.<sup>3</sup> The counter-rhetoric contains at least a grain of paternalistic concern for a minority group that has been, for much of history, variously deprived of agency, depicted from a white perspective,<sup>4</sup> and seen as a subject for remedial work.<sup>5</sup>

<sup>1</sup> 133 S. Ct. 2411 (2013).

<sup>2</sup> See generally Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. COLLOQUY 74 (July 19, 2012), <http://colloquy.law.northwestern.edu/main/2012/07/affirmative-action-justice-kennedy-and-the-virtues-of-the-middle-ground.html> (explaining the potential votes of the Supreme Court Justices deciding the *Fisher* case).

<sup>3</sup> *Grutter v. Bollinger*, 539 U.S. 306, 353 (2003) (Thomas, J., dissenting) (“The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”).

<sup>4</sup> For a depiction of the erasure of black agency from a narrative about white history using black narrators as the interpreter of a contest that renders black people invisible in the story, see DAVID W. BLIGHT, *BEYOND THE BATTLEFIELD: RACE, MEMORY, AND THE AMERICAN CIVIL WAR 195–96* (2002). See also ERIC FONER, *FOREVER FREE: THE STORY OF EMANCIPATION AND RECONSTRUCTION 28* (2005) [hereinafter FONER, *FOREVER FREE*] (referring to “the conspiracy of silence that sought to preserve national unity” before the Civil War). For an interesting treatment of representations of African Americans in art designed to sell Charleston, South Carolina, as a tourist destination bathed in a soft light of myth, see STEPHANIE E. YUHL, *A GOLDEN HAZE OF MEMORY: THE MAKING OF HISTORIC CHARLESTON 83* (2005) (describing a Charleston artist’s use of images of African Americans as “anonymous and quaint props” intended for a picturesque effect, “like a mansion’s balustrade or a church’s steeple”).

<sup>5</sup> In dissent in a case about federal contracting preferences, Justice Stevens emphasized a history of “racial subjugation” and the lack of social skills that may handicap minority

None of the opinions in *Fisher* pointed to an exit from the exhausted arguments. Justice Ginsburg depicted the other side's vision as that of the ostrich, its head firmly planted in the sand to avoid admitting that race-neutral university admission programs rely on racial segregation in secondary schools as a proxy for race in university admissions.<sup>6</sup> The other Justices covered their ears and ignored her jibe.<sup>7</sup> Perhaps she and her liberal colleagues have been the barnyard roosters in race jurisprudence, announcing the dawn of new days just like the last, alerting the country to the continuing facts about a historic legacy of race. The sunrise comes again, and the same bulletin alerts us to a new chance to awaken and see the day clearly and do needed chores.

Neither the ostrich nor the barnyard rooster tells us anything new. One calls for a traditional silence about race, arguing that race is not a basis for official action.<sup>8</sup> The other argues that a majority must make amends for the effects of a great injustice.<sup>9</sup> The result is an argument within the Court that conveys little insight for addressing the legacy of a fraught racial history in a nation aspiring to be post-racial but unable to form a consensus about the path to racial fairness.

This Article addresses the shortfall in Supreme Court race jurisprudence and official race discourse. With few exceptions, the jurisprudence of the Court today frames race as a matter for which public silence is the constitutional norm. In our phrase, the Court hits the mute button.<sup>10</sup> The Court claims exclusive institutional control over the forms that official action may take, and hence much control over public discourse and judgment. In reply, a current minority argues for sharing control with other decisionmakers who would formulate race-conscious programs to achieve racial harmony and group advancement, primarily for the African-American descendants of an oppressed American group. A shaky compromise, contained in *Grutter*<sup>11</sup> and now *Fisher*,<sup>12</sup> allows another set of decisionmakers, such as democratically selected bodies of legislators or governing boards and education administrators in universities, to play a limited role, using locutions blessed and monitored by the Court. The three paths share historic flaws, envisioning race in terms that limit a common partnership among races, envision the majority race as a source of agency in the interests of the

---

contractors. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 253, 261 (1995) (Stevens, J., dissenting).

<sup>6</sup> *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (citing *Gratz v. Bollinger*, 539 U.S. 244, 303–04 n.10 (2003) (Ginsburg, J., dissenting)).

<sup>7</sup> *See id.* at 2415–22 (majority opinion).

<sup>8</sup> *See, e.g., Grutter*, 539 U.S. 353.

<sup>9</sup> The demonstrative rooster points to portraits of a past that figures black people stranded in antebellum Charleston, while the ostrich urges us not to look at either the past or the present.

<sup>10</sup> Without reviewing the body of jurisprudence attached to a mute button, we note, in particular that the Court engaged in summary affirmances in the immediate post-*Brown* era to avoid open statement of its new race approach, with the purpose of “dialing down” the potential for conflict.

<sup>11</sup> *See generally Grutter*, 539 U.S. 306.

<sup>12</sup> *See generally Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

historically minority group, or inhibit the construction of a knowledgeable racial discourse. The *Grutter/Fisher* compromise casts race as a concern within the university environment into a dark hole of administrative fiat, a fiat that too readily obfuscates and manipulates campus race dynamics for the appearance of health. The very goal that diversity purports to advance—in Justice Breyer’s evocative term, *fraternity*<sup>13</sup>—may well be undermined by the role played by administrators who rely on convenient language to mask an uneasy mixture of rationales and to avoid the hard work of building fraternity as the democratic, liberty-enhancing purpose of race-conscious admissions.

The formation of an approved discourse about race in university admissions, devised in a crucible of interaction among ideologically entrenched judicial dogmas<sup>14</sup> and strategic university leaders, has implications for the very undertaking of the university—encouraging wide-ranging, imaginative, and bold thinking and expression about difficult issues. A linguistically complicated solution, with a specialized vocabulary shared by the Court and an education hierarchy, may well be damaging to the capacity of the university as a First Amendment institution to draw upon the energy of its youngest members and thereby evolve away from a history of constraint of speech about race, a problematic national habit that need not be a permanent legacy from past generations.<sup>15</sup> The university, an incubator of ideas, social trends, and personal networks, has at times been the subject of outside pressures to conform to prevailing views on race that are convenient to influential university patrons.<sup>16</sup> The

---

<sup>13</sup> Writing about “active liberty,” Justice Breyer provides a helpful typology of the differing approaches. See STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 75–84 (2005). In Breyer’s terms, the color-blind view and the benign remedy view function as competing interpretations of the norm of *equality* contained in the Fourteenth Amendment. See *id.* He argues that diversity in *Grutter* rests not on the concept of the university as a repository of First Amendment aspirations, but on the “ancient” idea of *active liberty*, which emphasizes the active participation of all citizens in governing their society. See *id.* He encapsulates the idea using the terms “solidarity” and “fraternity.” *Id.* We add here the strong link between fraternity and open exchange based on a community bond.

<sup>14</sup> Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 841–43 (2006) [hereinafter Winkler, *Fatal*] (reporting and analyzing data showing judicial treatments of race cases to be heavily associated with the ideology of the judges).

<sup>15</sup> RUSSELL B. NYE, *FETTERED FREEDOM: CIVIL LIBERTIES AND THE SLAVERY CONTROVERSY, 1830–1860*, at 79–81 (1949) (characterizing a “sterile silence” in the South created by the “refusal of the South to allow freedom of discussion . . . in its institutions of higher learning” and describing the choice of Northern business interests to reassure the South by “suppress[ing] in educational institutions any [discussion of slavery] to which the South might object”).

<sup>16</sup> WALTER P. METZGER, *ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY* 8 (1955) (recounting the suppression in 1833 of an anti-slavery society at Lane Theological Seminary by trustees made up of “solid businessmen and some clergymen”). Professor Anita Bernstein suggests that businesses today support diversity out of an embrace of “[p]rereogative[s] for [m]anagers,” whether the theory of diversity yields profit or not for their companies or useful outcomes for students. Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201,

jurisprudence of the Court and pressures from business interests are forms of outside pressures<sup>17</sup> that today shape the atmosphere in university environments in which racial understandings and forms of exchange among students, with one another and with faculty, are structured.<sup>18</sup> The role of the Court is central in doling out speech empowerment through permissions, prohibitions, and the example of its own forms of silence.<sup>19</sup>

With a shared history of racial avoidance and silence about race,<sup>20</sup> the university, and hence the country, do not gain from the Court's race jurisprudence. The managed silence that Supreme Court race jurisprudence serves to institute<sup>21</sup> damages the

---

214–16 (2012). Bernstein explains that managers like discretion and a free hand without constraint by facts; diversity provides that, as fixed “quotas” do not. *Id.* at 214–18. She notes that managers in the public domain are equally fond of the prerogative that the diversity rationale confers. *Id.* at 215–16.

<sup>17</sup> See generally Paul Horwitz, Fisher, *Academic Freedom, and Distrust*, 59 LOY. L. REV. 489 (2013) (expressing concern about the erosion of universities' academic freedom as a result of intervention by outsiders and noting the influence of business interests in fostering diversity protocols).

<sup>18</sup> In a characteristically witty essay, Professor Walter Metzger in 1996 reviewed the periodic denunciations of universities for claimed faculty deficiencies and indicated that faculty are good targets and poor combatants. Walter P. Metzger, *Critics of College Teaching*, in THE NEA 1996 ALMANAC OF HIGHER EDUCATION 35, 46–47 (1996). Though classifying much of the cyclical critique as ideological in source, often from the right, Professor Metzger noted concern expressed from the hard-to-classify, anti-elites scholar, Eugene Genovese, at the atmosphere around identities, including race. *Id.* at 38; cf. generally Eugene Genovese, *Heresy, Yes—Sensitivity, No: An Argument for Counterterrorism in the Academy*, NEW REPUBLIC, Apr. 15, 1991, at 30–35 (describing purges in the 1950s of left-wing professors as resulting from craven administrators and not from a takeover of universities by the right and suggesting that “political correctness” in the 1990s presented similar threats of administrative misconduct under a veil of classically liberal values, with damage to the ability of professors to teach about race and other identity-related matters and to black students to receive instruction untainted by posturing).

<sup>19</sup> Our claim throughout this Article that the creation of an approved script by the Supreme Court, and its effectuation by education bureaucrats, chills open discourse by students and faculty is supported by both common knowledge among those groups and the careful and nuanced writing of Professor Randall Kennedy. See, e.g., RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 218 (2013) (“A criticism of academic culture on many campuses is that it stifles robust debate regarding affirmative action, preferring instead rote acquiescence.”). We suggest that the Court impoverishes our race discourse, reducing the occasions for official speech about race and rebuking attempts at open discourse. The Court's stance as the policeman of race as a public category blunts the creation of forums for debate, experimentation, and action.

<sup>20</sup> A companion piece develops a theme of a recurring historic silence about race in the culture and in the official response to race issues throughout American history. See generally Mae Kuykendall, *Pressing the Mute Button: Racial Silence in American Law and Culture* (2013) (unpublished manuscript) (on file with author) [hereinafter Kuykendall, *Pressing the Mute Button*].

<sup>21</sup> In a 1995 article, Adam Winkler identified the problematic focus of the Supreme Court in affirmative action cases, which focused on conceptions of particular institutions rather

public's capacity for engaging in a healthy discourse on race. A constrained atmosphere limiting open exchange about race in the country generally, and in universities most especially, is a serious obstacle to racial harmony and to a shared dignity of citizenship. This Article proposes an approach to free the university community—faculty and students—to participate in creating the premises for a racially diverse, exchange-rich learning community. Insofar as the reform proposal is underdeveloped, the proposal cannot function as a counterfactual revealing of the lost potential in the diversity *modus vivendi*.

The strands of Supreme Court jurisprudence that permit racial considerations in composing a learning or collaborative group, fueled by the protections of the First Amendment for forming dialogic groupings, can be fashioned to permit a degree of community control over the premises for diversity. Community self-composition allocates agency to the racial minority, an agency shared by the majority, and overcomes the perceived paternalistic implications of benign racial measures. The long-sought goal of an enriched society, aware of a troubled racial past and committed to a future of harmony and progress, might begin to be realized if the Court reforms its race rhetoric to authorize and encourage robust communities self-composed with racial exchange as a learning purpose.<sup>22</sup>

The Article proceeds directly to the Court's opinion in *Fisher* as a coda to the Court's strong embrace of its primary superintendence of race as a formal category and its continuing inability to engage one another with an enriched race vocabulary by which to encourage, and permit, collective efforts by communities to address race using state-supplied resources.

#### I. BRIEFLY, *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN*

In the opinion for the Court, Justice Kennedy relied upon a restatement of affirmative action opinions across contexts,<sup>23</sup> using quotations that function as constitutional

---

than on race justice. *See generally* Adam Winkler, *Sounds of Silence: The Supreme Court and Affirmative Action*, 28 LOY. L.A. L. REV. 923 (1995) [hereinafter Winkler, *Sounds of Silence*]. Thematically addressing the "Sounds of Silence" by the Court, Winkler's work prefigures the emphasis here on the forms and effects of a historic silence about race in law and culture and, crucially, in contemporary Supreme Court "speech." *See id.* at 923–25; *see also* Bernstein, *supra* note 16, at 210–11 (characterizing each of the Powell rationales for diversity—heterogeneity, managerial prerogative, and rejection of quotas—as "pointedly silent about segregation and subordination").

<sup>22</sup> For exploration of the potential for allocating greater authority to local bodies to experiment in ways that enhance constitutional rights norms and free expression, see Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 9 (2010) ("Federalism-all-the-way-down can provide a structural means for achieving goals traditionally associated with rights-protecting amendments like the First and Fourteenth.").

<sup>23</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417–19 (2013) (variously addressing the university context, city awards of contracts, federal contracting, marriage, interracial

icons.<sup>24</sup> He repeatedly cited the Court as the only final authority on permissible use of race by university administrators or by any other public actor.<sup>25</sup> The touchstones were Justice Powell's *Bakke* protocol<sup>26</sup> and *Grutter*'s limited permission for universities to predicate admissions on the goal of fostering diversity.<sup>27</sup> The *Fisher* opinion added emphasis on the necessity that the university demonstrate to a court's satisfaction that no reasonable alternative to the use of a "racial classification" was possible once a plaintiff carried the burden of showing a scheme of racial classification.<sup>28</sup> While giving credit to the university's judgment that the admissions process is a critical component of the pedagogical mission of higher education, the Court assumed that any race consciousness in admissions is a racial classification.<sup>29</sup> The existence of racial classification led the Court to apply the full range of Court doctrine to the educator's choice of implementation strategies to achieve the goal of educational diversity.<sup>30</sup> Yet race consciousness is also a form of expressive enrichment of policy choices.

Justice Ginsburg, in dissent, mocked the bright-line distinction between racial classifications as "race consciousness" and race-neutral alternatives that achieve race diversity as innocent of race consciousness.<sup>31</sup> Her skepticism is effectively a *sub*

---

cohabitation, secondary education, school district layoff policy, and gender-based admissions to a state nursing school).

<sup>24</sup> *Id.* at 2418–19.

<sup>25</sup> *Id.* at 2417 ("Any racial classification must meet strict scrutiny."); *id.* at 2418 (asserting that race admissions are permitted "only if a clear precondition is met: The particular admissions process used for this objective is subject to judicial review."); *id.* at 2419 ("Strict scrutiny is a searching examination, and it is the government that bears the burden to prove [legitimate use]."); *id.* ("A court, of course, should ensure that there is a reasoned, principled explanation for the academic decision."); *id.* at 2419–20 ("Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference."); *id.* at 2420 ("[I]t remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine."); *id.* ("Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity."); *id.* ("The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."); *id.* ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."); *id.* at 2421 ("Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice."); *id.* ("The higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts.")

<sup>26</sup> *Id.* at 2417–18; *see also* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–325 (1978).

<sup>27</sup> *Grutter v. Bollinger*, 539 U.S. 306, 311–44 (2003).

<sup>28</sup> *Fisher*, 133 S. Ct. at 2419–20.

<sup>29</sup> *Id.* at 2420–21.

<sup>30</sup> *See generally id.*

<sup>31</sup> *Id.* at 2433 (Ginsburg, J., dissenting) (using "ostrich" jibe).

*silenzio* theme in the Court's race jurisprudence; she even relegated part of it to a footnote, thereby functioning as the irreverent outsider rather than the interlocutor in reasoned, authoritative discourse.<sup>32</sup> The preference noted throughout this Article for silence about race is well illustrated by the assumptions about what counts as an overt racial classification and by the lack of engagement by the Court majority with the contestable meaning of the key term, racial classification.<sup>33</sup>

Justice Thomas's concurrence functioned more as a dissent than a concurrence, with a frontal attack on *Grutter* as precedent,<sup>34</sup> and with bold claims asserting moral and doctrinal continuity between segregationist rationales for using race as a barrier to admission to public accommodations and schools and, today, rationales associated with affirmative action and diversity.<sup>35</sup> Strikingly, Thomas referred to the *Plessy/Grutter* line of cases,<sup>36</sup> a rhetorical move surely designed to infuriate proponents of diversity in the composition of healthy university environments or classic affirmative action. Yet this Article in draft already contained an examination of a commonality in the settings enabled by the *Plessy* and *Grutter* cases: that of the segregated railway car and the "managed" classroom as based on attribution of choice and social preference to the occupants.<sup>37</sup> In each instance, speech and social health is attributed to silent groupings, with claims that the attribution serves social need and effectuates preferences and interests in a positive way for all.<sup>38</sup> The insight by Justice Thomas coincides with a visually narrated railcar setting in early 1900s Alabama and a contemporary classroom composed for diversity by education elites and interpreted by *Grutter's*

---

<sup>32</sup> *Id.* at 2425 n.2. Horwitz interprets Justice Ginsburg as suggesting, though not directly stating, that universities will use race no matter what the rules say, so they should be permitted to do it openly and honestly. See Horwitz, *supra* note 17, at 527–28. For a perspective supportive of affirmative action programs, see, for example, Katie Eyer, *Fisher and the Issue of Race-Neutrality*, CONCURRING OPINIONS (June 24, 2013), <http://www.concurringopinions.com/archives/2013/06/fisher-and-the-issue-of-race-neutrality.html> (expressing concern that Justice Ginsburg's phrasing will be used to attack race-neutral programs as requiring strict scrutiny because they are not really race-neutral).

<sup>33</sup> Indeed, Justin Driver has identified a lacuna in the Court's command of a vocabulary of race, one in which the Court has no discernible normative concept of when to "recognize race" in opinion writing by identifying, or not, the race of litigants. Justin Driver, *Recognizing Race*, 112 COLUM. L. REV. 404, 404 (2012) (arguing that the Court and legal scholars fail to understand that "opinions can adhere to the anticlassification principle while avoiding the colorblindness principle—two distinct concepts that legal scholars have incorrectly conflated" and thus the Court and scholars err both by "asymmetric racial recognition and gratuitous racial recognition"). This lacuna in the Court's command over a conscious awareness of the apt choice of when to "recognize race" is consonant with the theme suggested here of a shortfall in the critically important role the Court assumes in race constitutionalism. *Id.*

<sup>34</sup> *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

<sup>35</sup> *Id.* at 2425–26.

<sup>36</sup> *Id.* at 2429.

<sup>37</sup> See *infra* Part II.A (discussing the parallels between the railcar and the classroom).

<sup>38</sup> See *infra* Part II.A.

rationale.<sup>39</sup> Though Justice Thomas may overstate the moral equivalence between segregationist claims used to exclude a minority from full access to civil society and integrationist aspirations to create a broadly inclusive society, his critique of the existing framework for inclusion has sufficient purchase on the distance between conception and reality to merit close attention.

As will be argued, however, his flat rejection of diversity as a compelling interest is extreme. A university may surely find means to create an environment that supports an educational mission that includes a discursively rich exchange about race supported by the composition of the student body.

## II. THE SUPREME COURT, RACIAL SILENCE, AND MAKE-BELIEVE: PAST AND PRESENT

The Supreme Court's jurisprudence on race, restated in *Fisher v. University of Texas at Austin*, sharply restricts state use of race to apportion access to desirable goods. Justices who embrace race-restricting jurisprudence argue there is a critical need for a judicial shield to guard the nation from degraded race discourse. These Justices fear the effects on race relations if groups compete for public goods—seen for universities as seats in the student body—on the basis of group racial identity. Paradoxically, the Court's warnings about race, with accompanying restrictions on its overt use by public bodies as a basis to award benefits, limit the potential for constructive racial discourse by disabling community forums as sites for official speech about race and by signaling disapproval of race as a public concern. The very effort to preclude toxic discourse empowers subterranean speech and gives toxic speech a hardiness and durability.<sup>40</sup> The most powerful impact of the Court's work is thus in framing race as a matter for which public silence is the constitutional norm.<sup>41</sup>

### *A. Railway Cars and Classrooms: Social Spaces Then and Now*

In *Fisher*, the Court attempted to reconcile silence as a constitutional norm with the First Amendment mission of universities to foster diversity of speech and speakers.<sup>42</sup> In concurrence, Justice Thomas argued passionately that the effort to use

---

<sup>39</sup> See *Fisher*, 133 S. Ct. at 2431–32 (discussing the consequences of the “discriminating admission program” on both white and minority students).

<sup>40</sup> This Article is part of a joint project. For a full exploration of the impact on race discourse, see Charles Adside, III, *Turning Up the Volume: Racial Silence, Race Jurisprudence, and Race Baiting in the Public Forum* (Aug. 15, 2013) (unpublished manuscript) (on file with author).

<sup>41</sup> For an exploration of the history of an official norm and a political practice of silence about race in the United States, see generally Kuykendall, *Pressing the Mute Button*, *supra* note 20.

<sup>42</sup> The high water mark of such an approach came in Justice Powell's influential opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265, 269–320 (1978). Powell's

diversity rhetoric as a means of blending race discretion with attempts to use students as embodied carriers of symbolic race discourse positions the Court in a line of cases that starts with *Plessy* and uses race to achieve goals said to be for public welfare.<sup>43</sup> In his view, both *Grutter* and *Plessy* involve claims about the positive results that official mandates prescribing racial interaction can achieve.<sup>44</sup> In *Plessy*, the Court argued that the most socially workable setting for both races was mandated segregation in railway cars because it conformed to popular needs and preferences.<sup>45</sup> The Court further suggested that any offense taken by segregated black citizens was without basis, thus asserting that the atmosphere in the railway cars was pleasant for all passengers.<sup>46</sup> In *Grutter*, supported by *Fisher*,<sup>47</sup> the Court suggests that classrooms that include a mixture of races chosen by administrators for diversity will be beneficial for racial harmony and understanding.<sup>48</sup> In a similar fashion, proponents of diversity-based admissions policies portray a classroom of races engaged with one another in an atmosphere of comfortable social dynamics that supports enhanced learning and understanding. The students, without being consulted, are cast as agents of racial healing and new kinds of connection. The occupants of both the nineteenth-century railway car and the twenty-first-century classroom are conscripted for an imaginary social benefit and are described as collaborators in the fancied result of racial harmony and mutual respect. They have ascribed agency in a narrative written for them and students of any race, for which their parts are not their own.<sup>49</sup>

---

theory of vindicating the First Amendment authority of university administrators to create education benefits in a diverse society has been the touchstone for the education bureaucracy and the Court since Powell devised the approach. *Id.* at 311–12. Despite the useful and generative insight of Powell’s opinion, as a former school board President, *Lewis F. Powell*, WASH. & LEE U., <http://law.wlu.edu/alumni/bios/powell.asp> (last visited Apr. 15, 2014), Powell emphasized the top-down control of education elites and the judiciary, *Bakke*, 428 U.S. at 312, rather than the concept advanced by Justice Breyer of *fraternity*, see *supra* note 13 and accompanying text. That feature of the possible payoff of diversity has languished as a feature of either the Court’s jurisprudence, with its theme of final Court say and acceptance of the claims for diversity as a self-executing form of educational benefit, or the work of the education leadership. The Court has continued to rely heavily on a perplexed and perplexing view of race as a legacy that stands apart from the problem-solving capacity of our democracy.

<sup>43</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422–32 (2013) (Thomas, J., concurring).

<sup>44</sup> See *id.* at 2429.

<sup>45</sup> *Plessy v. Ferguson*, 169 U.S. 537, 551–52 (1898).

<sup>46</sup> See *id.* at 551.

<sup>47</sup> See generally *Fisher*, 133 S. Ct. 2411.

<sup>48</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>49</sup> One scholar has recently argued that groups identified as racial minorities constitute a valuable asset that those identified as white trade as a commodity for their benefit. Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013). In our doubts about the purity of administrative motivations, we credit such claims. Nonetheless, we also believe that all racial groups are damaged by being co-opted into a script that is an artifice for administrators to

Reports on the reality of the social spaces once defined by racially segregated train cars and today by diversity-populated classrooms offers a picture unlike the idealized portrait of healthy racial dynamics. Alabama native Clarence Cason, a writer about the atmosphere that prevailed in the South in the late nineteenth and early twentieth centuries, provided a vividly corrective narrative of the true atmosphere in Southern railway cars in the late nineteenth century.<sup>50</sup> As a young sensitive man first riding on a train in Alabama, he understood the black porter as the ultimate arbiter of good character and manners, and he craved above all the approval of such an August figure.<sup>51</sup> By contrast, newly prosperous white passengers, from a less genteel class than Cason's family, visited conspicuous and discourteous demands for service on porters, and rougher white passengers rewarded the black porters with rank racist insults.<sup>52</sup> The license given to white passengers to bully vulnerable black passengers created ugly scenes reported in occasional personal reports of other passengers.<sup>53</sup> The rules permitting black nurses attending children allowed for white people to position any black woman permitted on the train as subservient, nonsexual, and inferior to white women traveling in the same car, thus imposing a construction that could not be reasonably described as a circumstance of equality and simple social preference between the races.<sup>54</sup>

Empirical reports and some personal accounts by faculty and students today also present a different reality in classrooms from the idealized one adopted by the Court,<sup>55</sup>

---

use for personal advantage. White students who are discomfited by the knowledge there is an assigned script, albeit one over which they lack mastery, are damaged in their capacity for growth, for exploration, and for cross-racial connections. While some white students may feel morally elevated by their "acceptance" of their minority colleagues, others are simply cut off from the possibility of genuine exchange in a group that feels organic and authentic. In addition, the temporary psychic income some consume may stunt their moral growth in ways that can be seen as a cheat by educators, who owe their students foundations for learning for a multi-ethnic society.

<sup>50</sup> CLARENCE CASON, 90 DEGREES IN THE SHADE 121–24 (1935).

<sup>51</sup> *Id.* at 122–23.

<sup>52</sup> *Id.* at 123–24.

<sup>53</sup> See JOSIAH QUINCY, FIGURES OF THE PAST: FROM THE LEAVES OF OLD JOURNALS 341–43 (1882). Quincy's book contains an account of a pre-Civil War encounter in a first-class compartment in Massachusetts, set aside for African Americans, in which a slaveholder from the South was astonished to find a black passenger able to ride in dignity, and, after setting upon him, was ordered by the president of the road to leave or be arrested. See *id.* *Plessy v. Ferguson* gave the sanction of law to crude conduct by white Southerners after Reconstruction yet rested on a claim to be no more than a respectful concession to the right of personal association and the needs of social harmony. 163 U.S. 537, 551–52 (1896).

<sup>54</sup> See Kenneth W. Mack, *Law, Society, Identity, and the Making of the Jim Crow South: Travel and Segregation on Tennessee Railroads, 1875–1905*, 24 LAW & SOC. INQUIRY 377, 389 (1999).

<sup>55</sup> As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 850 (E.D.

a reality of awkward silences, circumspection, and unease.<sup>56</sup> Administrators widely acknowledge the shortfall in classroom dynamics by sponsoring “safe spaces” for minority students.<sup>57</sup> Many faculty members strive to avoid creating discomfort with an awkward phrase or a potentially tense discussion about racial topics, or, in some reports, faculty members give offense to students in a class.<sup>58</sup>

### *B. Parceling out Race Agency Then and Now*

Before the litany of cases in the *Fisher* Court opinion was decided, a majority of the Court conceived race as a matter for which the agency of a white-American majority could provide answers for the benefit of the racial minority. That view is still present on the Court but has lost power to persuade a majority of the Court or to sway public opinion.<sup>59</sup> The fear of race as a formal category for government action has effectively undermined the appeal to white agency to remedy the lingering effects of slavery and the racial oppression that followed the end of slavery. Exacerbating that general fear is the increasing racial and ethnic diversity of American society, which fuels resentments, misunderstanding, and cynicism about the manipulability of race categories.<sup>60</sup> Further, an appeal to majoritarian agency in aid of a historically

---

Mich. 2001); Petition for Writ of Certiorari at 246a, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241). These benefits are “important and laudable” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have the greatest possible variety of backgrounds. *Grutter*, 137 F. Supp. 2d at 849–50; see also *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). Notably, the courts do not cite empirical studies that report data on the student experience.

<sup>56</sup> See Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 104 (2011).

<sup>57</sup> In today’s climate of diversity within homogeneity, minorities adopt strategies of “counterspaces.” See Walter R. Allen & Daniel Solorzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 258–59 (2001). In a successful pedagogy constructed around a mission of cross-group connections, counterspaces would lack significance to an engaged community.

<sup>58</sup> Studies show minimal achievement of the goal of cross-racial exchanges in diverse classrooms. See, e.g., Deo, *supra* note 56, at 63 (concluding that “lively discussions drawing from diversity” rarely occur in the classroom).

<sup>59</sup> See CAL. CONST., art. I, § 3 (banning affirmative action); MICH. CONST. art. I, § 26 (banning affirmative action). See generally *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007). In both California and Michigan, the voters approved initiatives that forbade any use of race for university admissions. See Tamar Lewin, *Affirmative Action Ban in Michigan is Rejected*, N.Y. TIMES, Nov. 16, 2012, at A25.

<sup>60</sup> See Russell K. Nieli, *Diversity’s Discontents: The “Contact Hypothesis” Exploded*, 21 ACAD. QUESTIONS 409, 411 (2008) (reviewing assertions by prominent legal academics, for example, Alan Dershowitz and Randall Kennedy, that diversity is a pretext for now rejected pre-*Bakke* remedial goals for racial justice).

disempowered group contains echoes of the traditional portrayal of African Americans as a subject for remedial action rather than one partner in building a fair, ethnically diverse society.<sup>61</sup> Though a morally powerful argument, the claim for benign efforts to remedy race sins can neither command general agreement nor move past the portrait of majority, or white, agency as the path to racial progress. Receptive listeners are relatively rare. The judicial advocates of benign racial classifications for social justice resemble the barnyard rooster<sup>62</sup> when they announce, predictably and perhaps reasonably, a critical need to see the facts of race history as a present force in our social life. The barnyard rooster goes unheard because of his relentless repetition, and the ostrich will not see. The ostrich, boy or girl, wastes the gift of eyesight, and the cock-a-doodle-doing rooster squanders the gift of voice.<sup>63</sup>

In light of the discursive problems with a norm of official race silence as well as with a call for reliance on majority agency as a remedial race program, the competing race narratives contained in the Court's jurisprudence do little good and considerable harm to a project of public dialogue and knowledge about race history. In a manner resembling the general effects of its established claim of final ownership of constitutional interpretation, the Court's claimed monopoly over racial discourse muffles other sources of interpretation and resolution of the morally fraught issues of racial harmony and progress.<sup>64</sup> In *Fisher*, Justice Kennedy repeatedly hammered home the Court's claim to a monopoly, invoking the exclusive responsibility of a court to make final determinations about a university's use of race-conscious methods to achieve diversity, as well as to scrutinize whether diversity is a compelling interest.<sup>65</sup>

---

<sup>61</sup> For examples of historic erasure of black agency, see *supra* note 4.

<sup>62</sup> The opposite of the ostrich is the barnyard rooster, who is alert and awake early to see what is on the horizon (and still present from the past). Rather than spread fear and a need for withdrawal from the day, he crows loudly a warning to be heeded by all. The ostrich appeals for relief from potentially bad news. Uncharitably, one poem derides the character of the ostrich: "Peek-a-Boo, I can't see you, / Everything must be grand. / Boo-ka-Pe, they can't see me, / As long as I've got me head in the sand. / Peek-a-Boo, it may be true, / There's something in what you've said, / But we've got enough troubles in everyday life, / I just bury me head." *The Ostrich*, HOPE TO THE END, <http://hopetotheend.com/ostrich> (last visited Apr. 15, 2014).

<sup>63</sup> See *supra* text accompanying notes 6–9. To be fair, the rooster is not a welcome presence in the city. See, e.g., Jennie Grant, *A Rooster's Fate: Modern Chicken-Keeper Practices in the U.S. Do Little for the Future of Majestic Roosters*, URB. FARM (Jan. 14, 2013, 10:37 PM), <http://www.urbanfarmonline.com/urban-livestock/chickens/roosters-fate.aspx> ("It's illegal to keep roosters in many cities.").

<sup>64</sup> See ABNER S. GREENE, AGAINST OBLIGATION: THE MULTIPLE SOURCES OF AUTHORITY IN A LIBERAL DEMOCRACY 3–4 (2012) (suggesting that the function of law to "settle [contestable] matters . . . risks alienating power from its true source—the people, as citizens" and advancing a view of "constitutional interpretation as plural" as a means of "preserving citizen sovereignty").

<sup>65</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) ("Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination."); see *id.* at 2414 ("On this point [narrow

The Court is thus the source of the primary official pronouncements on race. The Justices thus assume a responsibility that rightly should be measured by their contribution to American racial discourse.

Unfortunately, each approach on the Court to race jurisprudence contains an implicit race narrative that echoes a troubled past. The Court's sense of discovery of a color-blind race jurisprudence, conceived as a rejection of past use of race as a formal category in law, in fact revives the dysfunctions associated with official race silence.<sup>66</sup> On the other hand, the story of racial oppression as a matter for remedy by the agency of a repentant majority replicates a legal and cultural erasure of black agency while fueling white resentment.<sup>67</sup> Recounting the past typically adopts a white perspective with missing acknowledgment or recognition of the active roles of African Americans in building a common cultural heritage,<sup>68</sup> their own liberation from enslavement,<sup>69</sup> and their gradual advancement as citizens.<sup>70</sup> Thus, the jurisprudence of

---

tailoring] the University receives no deference."); *see also id.* at 2421 ("Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.").

<sup>66</sup> *See supra* notes 63–65 and accompanying text; *infra* Part IV.

<sup>67</sup> On erasure of black agency, *see supra* note 4. On racial resentment, *see generally* EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES* (2d ed. 2006), and Winkler, *Sounds of Silence*, *supra* note 21, at 937.

<sup>68</sup> *See generally* EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (1974) (explaining the Afro-American culture the slaves helped create and the organic bond between the races that existed in the slave system within a context of antagonism and an imposed white-controlled family structure that made those held as slaves part of one plantation family). For the bondsman's contribution to the colonial economy and the cultural heritage from early economic activities, *see* PETER H. WOOD, *BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA FROM 1670 THROUGH THE STONO REBELLION 35–62* (1974) (suggesting that African know-how about cultivating and processing rice led to the successful production of rice in South Carolina as a mainstay of the early economy).

<sup>69</sup> In addition to the companion piece by Kuykendall on racial silence, *see generally* Kuykendall, *Pressing the Mute Button*, *supra* note 20, there are provocative and useful explanations of the cultural, literary, and official conventions that have tended to suppress open discourse about race. *See generally* DANIEL A. AARON, *THE UNWRITTEN WAR: AMERICAN WRITERS AND THE CIVIL WAR* (1973) (discussing the difficulty of authors' discussing the "real" war); MICHAEL KENT CURTIS, *FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY* (2000) (discussing the suppression of criticisms of slavery); MICHAEL T. GILMORE, *THE WAR ON WORDS: SLAVERY, RACE, AND FREE SPEECH IN AMERICAN LITERATURE* (2010) (discussing "perseverance of . . . censor[ing]").

<sup>70</sup> *See generally* JOHN DITTMER, *LOCAL PEOPLE: THE STRUGGLE FOR CIVIL RIGHTS IN MISSISSIPPI* (1994) (discussing a ground-level look at the work of individuals to advance African Americans as full citizens, able to participate as voters, civic leaders, and contributing members of the economy).

the Court lacks narrative richness about a race history in which the races have been intertwined.<sup>71</sup> Nor does any endorsement by the Court of a strategy for racial health contemplate the partnership of these historically connected groups.<sup>72</sup> Color-blind ideology severs the connection created by history, and color-consciousness echoes past treatment of black persons as objects for another's agency.

### III. AGENCY, SPEECH, EQUALITY: THE UNIVERSITY, COMMUNITY, AND RACE

As seedbeds for vibrant discourse on many topics, universities rightly seek to foster a discursively rich racial environment. Yet the language of diversity, created for race-conscious admissions policies and blessed in *Grutter v. Bollinger*<sup>73</sup> and again in *Fisher*,<sup>74</sup> grants administrators space and the incentive to invent evasions and coded understandings about race.

#### A. Managed Race Discourse in a Free Speech Setting

The *Grutter* opening to race considerations assigns agency to university bureaucrats to position some students as passive recipients of a racial pedagogy and other students as aiding the learning process by embodying a message of race complexity by their presence.<sup>75</sup> Race and race meaning become categories managed by hierarchies that control public language about race, using the racial identity of students as the form of hierarchical discourse. Racial identity is the medium by which the Court and its nominees, education administrators, speak for students. This method creates two dimensions of an agency/silencing issue—white majority as agency versus minority as subjects, and administrators as agency versus students as subject. The former is a feature of institutional arrangements in a setting that is still white dominated and can be, historically, a basis for black separatist movements.<sup>76</sup> Yet the combination of the

---

<sup>71</sup> See generally Driver, *Recognizing Race*, *supra* note 33 (showing the lack of a command over basic choices of when to identify the race of figures in a Supreme Court opinion as one glimpse at the weak narrative command at the Supreme Court over the American story of race).

<sup>72</sup> Numerous writers explain the deep intertwining of the predominant white-American culture with that of the African Americans who worked with them, lived with them, and contributed knowledge to solve problems for much of the formative history of the nation. See *supra* notes 68–70 and accompanying text.

<sup>73</sup> 539 U.S. 306, 343–44 (2003).

<sup>74</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013).

<sup>75</sup> See *Grutter*, 539 U.S. 306.

<sup>76</sup> Professor Mark Tushnet pointed out the two dimensions of the silence thesis in this paper, as well as the relevance of such writings as Harold Cruse's *The Crisis of the Negro Intellectual: A Historical Analysis of the Failure of Black Leadership* as a source for consideration of sentiments for black separatism as an agency solution. E-mail from Mark Tushnet, William Nelson Cromwell, Professor of Law, Harvard Law Sch., to author (Oct. 6, 2013,

two agency/subject maneuvers, directed at students collectively, helps shift the focus to the discursive effects of the manner in which agent and subject are positioned in the communities created by diversity rationales for university admissions.

The effect is to withdraw race speech from public currency but leave space for its manipulation in coded managerial terminology. The combination of public evasion and insider code tends to create passive learning communities.<sup>77</sup> Hierarchies, those of the Court and administrators, hold a monopoly over appropriate official race speech, and the communities created by this stylized control are drafted as subjects, not empowered as speakers and listeners in a vibrant learning community.<sup>78</sup> Students of all racial backgrounds lose a sense of agency that goes with membership in an authentic community or exposure to the unplanned diversity of the world outside the university. They enter an environment constructed as a muted statement, one that communicates too much and too little.<sup>79</sup>

Students gather in classrooms assembled by a bureaucrat's vision of classroom diversity. Seeing one another as pieces on an administrator's game board surely makes the formation of an engaged community unlikely. Indeed, a classroom is a place that has the potential to be sterile or what has been called a non-place, meaning a "space which cannot be defined as relational, or historical, or concerned with identity."<sup>80</sup>

---

10:46 AM) (on file with author) (citing HAROLD CRUSE, *THE CRISIS OF THE NEGRO INTELLECTUAL: A HISTORICAL ANALYSIS OF THE FAILURE OF BLACK LEADERSHIP* (1967)).

<sup>77</sup> See Allen & Solorzano, *supra* note 57, at 249–300 (discussing a case study of students at the University of Michigan in preparation for their role as court experts in *Grutter*).

<sup>78</sup> See Winkler, *Sounds of Silence*, *supra* note 21, at 931 (referring to "[t]he etiquette of racial discourse and the silences it produces" and "the racial silence [the Court] encourages").

<sup>79</sup> The commitment to diversity in admissions creates resentment and harm to the reputation of black and Hispanic students, *see id.* at 937, yet one study has shown that the theorized benefits of the University of Michigan Law School "seldom [take] place within the classroom," Deo, *supra* note 56, at 63 (asserting an absence of efforts in law schools to foster diversity discussions in classrooms).

<sup>80</sup> Sharon Halevi & Orna Blumen, *What a Difference a Place Makes: The Reflexive (Mis)management of a City's Pasts*, 37 J. URB. HIST. 384, 389 (2011) (internal quotation marks omitted). The cues sent by the classroom setting are surely complicated and worthy of the closest scrutiny, applying to a *Grutter*-selected class the acute observations of group dynamics bequeathed to us by sociologist Erving Goffman. See ERVING GOFFMAN, *INTERACTION RITUAL: ESSAYS IN FACE-TO-FACE BEHAVIOR* 5–7 (defining "face" as "the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact" and explaining that "the person's face clearly is something that is not lodged in or on his body, but rather something that is diffusely located in the flow of events in the encounter and becomes manifest only when these events are read and interpreted for the appraisals expressed in them"). In *Interaction Ritual*, Goffman explains how human beings maintain "face" in encounters by entering an interaction ritual that derives from universal human nature yet makes of a human, when presenting face, a "construct built up not from inner psychic propensities but from moral rules that are impressed up on him from without." *Id.* at 44–45. In this passage, Goffman assumes a relatively abstract group cooperating in a human ritual and a generally shared ability to master the ritual. *Id.* In another work, Goffman

These are described as characterized by “detachment between [the place] and the people traversing it.”<sup>81</sup> Insofar as a place bears the burden of constructing the idea of shared values and beliefs, “nonplanned neighborhoods with a history”<sup>82</sup> are a much more likely source of human connection and shared values.<sup>83</sup> When a place, like a classroom, has the potential for aridness, the human peer connection presumably must arise from the unplanned composition of the grouping of student occupants, or other sources of a feeling of bonding and shared identity. As in a neighborhood, the students are most likely to form bonds if they have the sense of discovering one another as organic to the location, not as human artifacts designed for planned “discovery.”<sup>84</sup>

---

acknowledges that teams may form to manipulate impressions to their advantage. ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 7 (1973) [hereinafter GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*]. In addition, Goffman defines stigma as a departure from an expected norm, such as white skin, fully functioning limbs, normal speech, and so forth. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 5 (1986). Those in possession of a stigma must make special efforts in connection with managing interaction ritual. *See id.* at 6. Hence, in a setting such as the classroom, signals in the interaction ritual are surely thrown off by the presence of individuals with a stigma. Moreover, the face-saving capacity of the person with stigma may be impaired. Note that Goffman’s use of stigma is a neutral classification, unlike the use of it by opponents of affirmative action, who use it to suggest an entire group’s achievements are degraded in public opinion by the attribution to everyone of an unearned advantage. But the fact of stigma as a neutral description does suggest that successful group “interaction ritual” could be achieved by group participation in constituting the group with the dimensions of “normal” defined by a common interest in diversity.

<sup>81</sup> Halevi & Blumen, *supra* note 80, at 389.

<sup>82</sup> *Id.*

<sup>83</sup> Erving Goffman studied group behavior as a type of theater, in which each person, “in the moment,” is engaged in “impression management” consonant with the staging of the moment in which he finds himself. GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, *supra* note 80, at 229. The implications for any classroom group are surely considerable, with manifold combinations of impression management based on the formation of what Goffman calls “teams” who pre-plan their own staging, in some cases to cast a favorable light on the team by comparison with a nonmember. *See id.* at 77–105. Given the continuing salience of race, combined with some understanding by some students that minority students are not present as a spontaneous, organic outgrowth of admissions but as an artifice designed by administrators, the odds that teams may implicitly form and engage in staging to the disadvantage of perceived outsiders is likely to be nontrivial. *Id.* Goffman discusses variations in the extent to which the participants believe in the staging and performances as real being related to the idea of performances that are an “unintentional product of” an unselfconscious individual. *Id.* at 70. Such an assumption is disrupted if the staging of the collective performance is visible to the participations. *See id.* at 111–14 (discussing the backstage of performances).

<sup>84</sup> Indeed, the sense of artifice in the presence of identifiable diversity admittees may well feed the tendency of human individuals to mark others and treat them punitively on the basis of trivial differences. *See The Baby Lab*, 60 MINUTES (Nov. 18, 2012), [http://www.cbsnews.com/8301-18560\\_162-57551557/babies-help-unlock-the-origins-of-morality/](http://www.cbsnews.com/8301-18560_162-57551557/babies-help-unlock-the-origins-of-morality/) (discussing a social experiment with infant behavior).

Purely merit-based selection may lead students to see the classroom as a natural composition, created by a neutral metric that creates an unplanned community with a basis for a shared interest and a bond. Today, such university communities often are homogeneous, the products of prosperous homes able to nurture and educate their offspring for expected participation in a common culture of achievement.<sup>85</sup> But the path to a dynamic community that contains greater diversity, and hence greater exposure for students across dimensions of culture and life experience, may be found in “messy planning,” the proposed permission to communities to build premises for connection across cultural differences.<sup>86</sup> Today’s approach to diversity does not build or nurture premises of connection and discovery. Rather, artifice undermines them.<sup>87</sup>

### *B. Sharing Agency with Students: Students Admitting Students*

Student input, through a carefully designed format containing safeguards against racial groupthink, could be a path to designing learning communities for social health.<sup>88</sup> A shared agency would remove the threat of stigma by giving the members a personal involvement in the community they have helped create. The strands of the Supreme Court jurisprudence that permit racial considerations in composing a learning or collaborative group can be fashioned to permit a degree of community control over the premises for diversity. The protections of the First Amendment for forming dialogic groupings within the academy give especially strong support for student input fashioned

---

<sup>85</sup> See generally SEAN F. REARDON ET AL., RACE, INCOME, AND ENROLLMENT PATTERNS IN HIGHLY SELECTIVE COLLEGES, 1982–2004 (2012), available at <http://cepa.stanford.edu/sites/default/files/race%20income%20%26%20selective%20college%20enrollment%20august%203%202012.pdf> (finding comparatively low chances of enrollment in elite schools for black and Hispanic students compared with white students and low- and middle-income students compared with students from top-income-quintile families).

<sup>86</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417–18 (2013) (“Part of the business of a university [is] to provide that atmosphere which is most conducive to speculation, experiment and creation.” (citations omitted)).

<sup>87</sup> I am grateful to Paul Horwitz for the following comment:

[W]hile I agree with much of this, I wonder whether you’re focusing too much on the bureaucrats here and not enough on individual teachers and classrooms. Messy planning might take place on a classroom level despite the formalized structures that appear in the bureaucrats’ documents, which are framed in large measure with a court as the intended audience. To be sure, however, the canned discourse of diversity also ends up becoming part of the individual teachers’ rhetoric and may encourage them, too, to offer up a tamed version of diversity even at the classroom level.

E-mail from Paul Horwitz, Professor of Law, Univ. of Ala., to author (Oct. 4, 2013, 9:50 AM) (on file with author).

<sup>88</sup> See generally Allen & Solorzano, *supra* note 57 (examining race and gender climates at undergraduate and graduate level campuses).

to energize the exchange of ideas and social knowledge.<sup>89</sup> Community self-composition allocates agency to the racial minority, an agency shared by the majority, and overcomes the paternalistic implications of benign racial measures.<sup>90</sup> The long-sought goal of an enriched society, aware of a troubled racial past and committed to a future of harmony and progress, might begin to be realized if the Court reforms its race rhetoric to authorize and encourage robust communities self-composed with racial exchange as a learning purpose.

The race category has been denied or avoided by the national government<sup>91</sup> and censored by states in forums for exchange fostered by local institutions.<sup>92</sup> Race has been viewed as a toxic category and has been ruled out of order as a subject for official recognition for much of our history, with the modern Civil Rights Movement as the strongest exception since Reconstruction.<sup>93</sup> The history of race in the United States contains great injustice for which remedies are elusive and the long-term consequences

---

<sup>89</sup> See *infra* Part VII.

<sup>90</sup> Kuykendall writes about the absence of personification of black students or other minorities in the jurisprudence of diversity. See generally Kuykendall, Pressing the Mute Button, *supra* note 20. The University of Michigan intervenors felt the necessity of bringing their agency, and their experience, to the *Grutter* lawsuit. See Reply Brief for Defendant-Intervenors at 3, *Grutter v. Bollinger*, 247 F.3d 631 (6th Cir. 2001) (No. 01-1516).

<sup>91</sup> Reply Brief for Defendant-Intervenors, *supra* note 90, at 8–9. The framers of the original Constitution acquiesced to slave owners' demands that free states return runaway slaves, yet avoided use of the word 'slave':

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

U.S. CONST. art. IV, § 2, cl. 3 (1791), nullified by U.S. CONST. amend. XIII.

We make no claim that white opinion has been in consensus and hence a source of a universal reticence about race. Rather, the mixture of power by forces hostile to racial discourse, constitutional doctrine that made race a volatile subject during the pre-Civil War period, happy myths about the past that are easily spread, and emerging dogma about becoming a color-blind society have played various roles. These multiple factors have tended toward a suppression of full and open public discourse on race. For an account of the substantial pre-Civil War debate in Congress about race, with open debate about the role of race in the constitutional order, see generally JAMES OAKES, *FREEDOM NATIONAL: THE DESTRUCTION OF SLAVERY IN THE UNITED STATES, 1861–1865* (2012). For a recounting and critique of historical interpretations that negatively portray the Northern racial climate during the Civil War and in later history, see generally GARY W. GALLAGHER, *THE UNION WAR* (2011).

<sup>92</sup> In Arizona, the Governor signed a law in 2010 that was designed to prohibit ethnic studies classes in public schools, including charter schools. H.B. 2281, 49th Leg. (Ariz. 2010), amending ARIZ. REV. STAT. ANN. § 15-1-1, available at <http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf>; see also Gregory Rodriguez, *The White Majority Strikes Back*, L.A. TIMES, Feb. 20, 2012, at A15.

<sup>93</sup> See *infra* notes 159–65 and accompanying text.

tenacious. Yet silence and loss of memory of the past are often the preferred answers.<sup>94</sup> In fact, these comforting evasions ask nothing of anyone and provide no answers for a diverse society with a history of racial injustice.

After the civil-rights era, there is again a call for a veiling of the nation's unfortunate racial history and its present-day traces. Repeatedly, we imagine that a form of forgetting and silence about race heralds the dawn of a new insight about race in official understanding and cultural practice.<sup>95</sup> Yet the "new" forms revive past evasions<sup>96</sup> and reinforce an impoverishment of public discussion in favor of a hidden, uncorrected racial subtext fed by public silence.<sup>97</sup> Educational opportunities are a critical site for contestation over race as a public category on which to predicate policy.<sup>98</sup>

With a conceptual focus on distribution of life prospects by race, and with opportunity seen as a limited good, conscious actions that affect the composition of learning communities raise the stakes and trigger anxiety about race-based redistribution. With rare exceptions relating to administrative claims of necessity, such as separating prisoners by race to prevent gang violence in prisons, the Court has come close to holding that race may not be the basis for official action of any kind.<sup>99</sup> As a result, the Court is, perhaps inadvertently, suppressing the public discussion of race as a category. In particular, the jurisprudence restricting, and with *Fisher v. University of Texas at Austin* potentially narrowing even further,<sup>100</sup> direct concern for racial equality or

---

<sup>94</sup> See BLIGHT, *supra* note 4, at 196 (describing African Americans in the semi-centennial of the Civil War as "deeply interested and implicated, but segregated and invisible"); FONER, FOREVER FREE, *supra* note 4, at XVI, XX (explaining the ideological victory of the South in shaping the memory of the Civil War).

<sup>95</sup> Strong statements of this trope of America were provoked by the acquittal of George Zimmerman for the killing of an unarmed black teenager. See, e.g., Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 14, 2013, at A1.

<sup>96</sup> See *infra* text accompanying notes 148–57. See generally Justin Driver, *The Southern Manifesto and the Politics of Judicial Supremacy* (unpublished manuscript) (on file with author) (relating race jurisprudence today to the arguments advanced by the Southern Manifesto).

<sup>97</sup> See *infra* text accompanying notes 148–57.

<sup>98</sup> See generally WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION (Balkin ed., 2001) (asserting that the meaning of *Brown v. Board* is heavily contested, with claims on its heritage by on a variety of perspectives on race).

<sup>99</sup> In *Johnson v. California*, the Supreme Court subjected race-conscious prisoner intake to strict scrutiny. 543 U.S. 499 (2005). The two most conservative Justices participating—Scalia and Thomas—would have applied a relaxed standard of review for the prison setting. *Id.* at 524 (Thomas, J., dissenting). By contrast, the more liberal Justice Stevens argued that the five-member majority had not in truth applied strict scrutiny. *Id.* at 517–19 (Stevens, J., dissenting). He posited that, in remanding the case for proceedings in light of the opinion, the majority had forgiven the transparent inability of the state to offer evidence at trial in support of a strong state interest in the use of race to assign new prisoners to temporary cells. *Id.*

<sup>100</sup> Before the fix came, some scholars anticipated a strong holding against diversity-enhancing affirmative action. Ellen D. Katz, *On Overreaching, or Why Rick Perry May Save*

democratic participatory access,<sup>101</sup> the ability of universities to use race as a factor in composing their learning communities reduces local input into the goals set by admissions process at these institutions. With the tightening of any room for race-aware admissions, administrators and state officials, and the people at large, could lose all means of fostering a discourse about race in connection with composing a learning community that enables further racial exchange. The potential loss may affect two specific discursive locations: the deliberations in university boards and exchange, however constrained in today's race environment under *Grutter* principles, in the classroom. The impact in the two prime sites for addressing race would reduce public discourse as well, both in the planning of university communities and in the enrichment of race discourse that must surely result from the university experiences of alumni of engaging learned communities. If boards may not consider race in comprising the university community, there will be no deliberation in this public body, and less diversity in the university.<sup>102</sup>

A strong official signal favoring silence about race may appear as the easiest way to extinguish racist views and to eradicate ethnic conflict. But for race, "pressing the mute button" does not safeguard communal harmony in the long term.<sup>103</sup> Rather, it gives short-term relief from open conflict and race anxiety and contributes to long-term failure of open discourse.

### *C. Impoverishing Race Discourse in the University (and the Nation)*

The consequence for the university of the Court's failure to examine race as a social category in need of enrichment through programs of engagement built by communities granted state resources is that students and faculty act like the ostrich of Justice Ginsburg's metaphor, with only a few taking on the work of the barnyard rooster.<sup>104</sup> The mastery of speech about race is awarded to administrators and withdrawn from the community at large, with a loss of a large potential for the young to forge new paths.<sup>105</sup> The Court insists on a purist view of a color-blind social and

---

*the Voting Rights Act but Destroy Affirmative Action*, 11 ELECTION L.J. 420, 420 (2012) (suggesting a likely strong holding against diversity-enhancing affirmative action). Since the holding, opinion over the likely direction set by the Court has been divided. Horwitz, *supra* note 17, at 493 (summarizing reactions).

<sup>101</sup> See BREYER, *supra* note 13, at 80–84 (addressing the element of liberty implicated in using race to compose a university community).

<sup>102</sup> For an argument that Michigan's constitutional prohibition of race as a factor in university admissions prevents advocates for race as a consideration comparable to legacy admissions from utilizing the democratic process, see Brief in Opposition, at I, Schuette v. Coal. to Defend Affirmative Action (Feb. 4, 2013) (No. 12-682).

<sup>103</sup> See generally Kuykendall, Pressing the Mute Button, *supra* note 20.

<sup>104</sup> See *supra* notes 6–8 and accompanying text.

<sup>105</sup> There is evidence that a young demographic values diversity. See JAMES E. RYAN, FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL

political order, which borrows from past race narratives to shape official discourse about race.<sup>106</sup> The court's explanation of race becomes dominant as an official creed, one that deepens silence about race. By blocking creative local forces and marginalizing the voices of a younger generation, the Court adds to a tragic history of official suppression of race as a matter for public discussion and remedial action aimed at communal harmony.<sup>107</sup> The predominant Court approach certifies a norm of race silence as constitutional etiquette.

The risk in the Court's jurisprudence is not backlash from pressing for progressive change,<sup>108</sup> but the sponsorship of an unhealthy silence.<sup>109</sup> Such silence renders race a suppressed fact, ignored even where official policies create conditions akin to a "[n]ew Jim Crow,"<sup>110</sup> and leaves the culture to repeat emotional habits and mistakes

---

OPPORTUNITY IN MODERN AMERICA 15–16 (2010) (citing empirical evidence of a generational change in which younger respondents express a high level of support for diversity compared with previous generations).

<sup>106</sup> Katie Eyer has shown that the Court engages in a *sub rosa* practice of permitting race-conscious action in family law and other domains because the Court believes the uses made of race in some contexts are benign. Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537 (2014). The Court avoids open acknowledgment of its view that race has a proper role in some state actions. *Id.* at 538. The unacknowledged acceptance of race-influenced government decisions is a special instance of the Court's silencing approach to race, one that furtively permits the use of race, while the Court asserts in its marquee opinions on affirmative action that race is virtually never a legitimate consideration on which to base state action. *See generally* Eyer, *supra*. This aspect of the Court's approach to race, in Eyer's view, contains "serious process, legitimacy, and substantive concerns." *Id.* at 538.

<sup>107</sup> Efforts by the executive to fill the gap do not succeed. The attempt by President Bill Clinton to foster racial discourse in a commission charged with energizing a public forum for considering racial history and contemporary dynamics foundered from the critical reception it received at its inception and the negative reviews of its relevance on its completion. *See* Claire Jean Kim, *Clinton's Race Initiative: Recasting the American Dilemma*, 33 POLITY 175, 176 (2000). There was resistance and criticism from the beginning about the executive rationale and propriety of sponsorship of a forum for community discourse on race. *See id.*

<sup>108</sup> *See, e.g.,* Thomas M. Keck, *Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights*, 43 LAW & SOC'Y REV. 151, 152 (2009) (critiquing claims that progressive judicial decisions harm progressive causes by generating backlash).

<sup>109</sup> *See* TALIMENDELBERG, *THE RACE CARD: CAMPAIGN STRATEGY, IMPLICIT MESSAGES, AND THE NORM OF EQUALITY* 106 (2001) ("The abandonment of explicit rhetoric only reflects a positive development when it is replaced by true silence, but not when it is replaced by implicit rhetoric. If silence conceals opposition to racial equality, it makes that opposition harder to combat.").

<sup>110</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 164 (2010) (explaining the radiating harm of the "silence that hovers over" the large-scale imprisonment of black men). We are in alignment with the critique by Professor Alexander of the color-blind ideal as harmful to citizens' capacity to see one another and harmful to the interests of African Americans. We hasten to add that the color-blind myth is harmful to a common interest in knowledge of the past and the present, and to all citizens (though not identically across a monochromatic world without race). In Professor Alexander's words:

of the past.<sup>111</sup> *Fisher* presented a key moment for the Court either to deepen its claimed monopoly on race discourse or to recognize the need to refine its teaching on race and open up race discourse to other state actors. Justice Kennedy, for the Court, emphasized that university actions must survive close judicial scrutiny by the Court designed to detect improper uses of race.<sup>112</sup> The Court faces no greater test of constitutional judgment for a democratic society than properly identifying other actors who may participate with the Court in fashioning room for sensitive treatments of race by communities seeking betterment and security for all.<sup>113</sup> Preventing all others from taking

---

“We should hope not for a colorblind society but instead for a world in which we can see each other fully, learn from each other, and do what we can to respond to each other with love.” *Id.* at 231.

<sup>111</sup> There are many treatments of the period of Southern white supremacy and Northern complacency. *See generally, e.g.*, ROBERT PENN WARREN, *THE LEGACY OF THE CIVIL WAR* (1961) (providing a classic exposition). Warren reflected on the extended results of the Civil War. *See generally id.* He charged Northerners with seeing their region as the “Treasury of Virtue” for their role in freeing enslaved people in the South, and Southerners with relying on the “Great Alibi” to avoid facing their region’s lag in economic progress and racial fairness. *Id.* at 53–66. For a description of the forces and trends that undermined the Northern commitment to Reconstruction and led to the re-establishment in the South of white supremacy, see ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 412–511 (1988) [hereinafter FONER, *RECONSTRUCTION*]. C. Vann Woodward’s *Origins of the New South, 1877–1913* provides an account of the gradual reversal of Reconstruction by Redeemer governments, with a rapprochement between Northern money interests and a Southern planter class that allowed the South to reverse black political power, install methods to prevent free and fair elections and frustrate the development of political efficacy among poor whites. C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877–1913*, at 50–74 (1951). Woodward depicts methods for disenfranchisement of African Americans that “could be employed against whites of the same economic or educational status.” *Id.* at 55. In effect, white supremacy, in Woodward’s telling, served until populism to maintain rule by financial interests compatible with “the new economic order [of the North].” *Id.* at 50; *see also* CASON, *supra* note 50 (providing a narrative account of the long-term effects of the Civil War on life in the South, in a manner that foreshadowed the interpretive gloss offered by Penn Warren).

<sup>112</sup> Professor Horwitz comments as follows on the Court’s mixture of trust and avowals of scrutiny:

[A]nother way of thinking about its move here is that, by going so lightly over the compelling interest argument and more or less accepting it arguendo, while focusing its firepower on the least restrictive means test, it 1) accepts only the most milquetoast statements about race at this level and 2) renders them less important and more of a rote exercise.

E-mail from Paul Horwitz to author, *supra* note 87. With prisons, the most conservative race purists would permit officials to sort by race, for the health of the prisoners, and with the effect of segregating them. *See Johnson v. California*, 543 U.S. 499, 506, 515 n.3, 526 (2005).

<sup>113</sup> For example, using strict but less-than-fatal scrutiny, in the time of mass incarceration of black men, for segregating prisoners by race, accompanied by a flat prohibition on using race to create racially healthy learning environments, would suggest that race jurisprudence has a cramped vision of what makes a compelling state interest, focusing the state’s coercive

a role in shaping race discourse, with some use of public resources with distributive import, improperly seizes an undue portion of our common, shared life.

The Court's teachings about the risks presented by unrestrained affirmative action programs are not without basis.<sup>114</sup> Drawing from these teachings, we frame the problem of race-conscious programs as one with significant risk that hierarchies will divert goods—both material and discursive—based upon political agendas, self-advancement, and private motives.<sup>115</sup> Therefore, we accept the need for judicial scrutiny in this area. At the same time, we reject an approach that effectively monopolizes race discourse in courts and then ends it altogether. We propose a new approach that claims race as a proper concern in constituting communities, one that shifts responsibility for addressing the concern to carefully designed community choice.

Complete judicial suppression of racial categories in admissions programs, except as an occasional warning against the use of race,<sup>116</sup> would be unwise because it would prohibit educational institutions from implementing race-conscious programs designed to remove obstacles in the way of their core mission to provide a marketplace of ideas for their students. The Equal Protection Clause does not preclude universities from using innovative measures to root out social dynamics that *inhibit* dialogue so long as those measures are narrowly tailored to achieve a compelling state interest.<sup>117</sup> We propose, as a means of advancing effective speech capacity about race for race-conscious admissions, to incorporate student participation and displace the top-down approach to admissions, which lacks the buy-in of a population that could easily be well disposed to serving as partners in building a diverse community. Without strong student engagement, the abstract claims lack an empirical, or even common-sense,

---

power on preventing racial violence and not on its interest in educating a healthy citizenry for racial health and peace. See ALEXANDER, *supra* note 110, at 169.

<sup>114</sup> See generally *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (explaining the dangers of political deal-making to distribute government benefits).

<sup>115</sup> It is a commonplace understanding that agents in corporations may impose agency costs on the principal, in other words, the shareholders, by diverting value to themselves that should belong to the principal. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (“We define an agency relationship as a contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent. If both parties to the relationship are utility maximizers, there is good reason to believe that the agent will not always act in the best interests of the principal.”).

<sup>116</sup> See Ellen D. Katz, *Grutter's Denouement: Three Templates from the Roberts Court*, 107 NW. U. L. REV. COLLOQUY 1045, 1048–51 (2013), <http://www.law.northwestern.edu/lawreview/colloquy/2012/15/LRColl2012n15Katz.pdf> (describing methods by which the Court could avoid overturning *Grutter* in *Fisher* yet issue a warning that *Grutter* lacks continuing force). In *Fisher*, the Court issued a warning about the importance of strict scrutiny by courts but stopped short of suppression. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013).

<sup>117</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

psychological basis, while they may allow some administrators to achieve political agendas rather than pedagogical goals.<sup>118</sup>

We have identified silence about race as a persisting problem in American jurisprudence. To establish the deep roots of a habit of racial silence, we provided a telescoped review of history on race, detailing specific periods in which silence dominated and adversely affected the nation's racial health. Silence has long influenced the Court's jurisprudence on race, serving to shift the locus of race rules to privatized racial bigotry and to the evasions of a system of white supremacy. Today, silence still influences the Court, reducing constitutional race law to a stale debate between two views—the increasingly influential ideal of a color-blind constitution and the weakening impact of the moral reading of the Fourteenth Amendment as about racial justice for African Americans. The form and the outcome of the ongoing disagreement reduce space in other public forums for race discourse.

Building on our view that race jurisprudence lacks a rich account of race, today and in the past, we argued that the Court's jurisprudence for university admissions slights the importance of allocating agency to the students for whom diversity is said to be a benefit. Such an agency would be shared agency among the students, including those who have been historically deprived of agency and could energize the kind of exchange that is thought desirable in a university setting. Justice Powell's opinion in *Regents of the University of California v. Bakke* usefully explained that admissions programs implicate dual constitutional concerns under both the First and Fourteenth Amendments, explicated by Justice Breyer in his writings on active liberty as containing a feature of fraternity.<sup>119</sup> Academic freedom gives colleges the right to identify diversity as an educational objective but does not give administrators carte blanche to implement racial classifications in any fashion they deem appropriate without achieving the claimed benefit to the learning environment. Universities create resources for the public square by admitting students who will contribute to the ongoing project intended to enrich the quality and quantity of citizen engagement. Rank use of race primarily to confer private advantage, either on students or administrators, creates social costs that may exceed the gain, particularly given the plausible reasons to doubt the right or capacity of administrators to act as racial superintendents. But communities of learners have a strong interest in helping to create the predicate for a healthy society in which the silence that impairs racial progress is broken by their involvement in composing their learning community with awareness of race and other forms of diversity as a critical component.

---

<sup>118</sup> Professor Horwitz provides the following caution:

I think you're right but as a matter of university administration and academic freedom, including a plurality of approaches among universities, I think I would emphasize allowing and encouraging student participation rather than mandate it or see it as a necessary element of university decisionmaking in this or other areas.

E-mail from Paul Horwitz to author, *supra* note 87.

<sup>119</sup> See generally BREYER, *supra* note 13.

The tradition of silence about race and the connection between control over the form of discourse about race and social and political power point to a need to empower student communities, and hence free speech about race. Myths have tended to supplant greater historical understanding. As a result, we argue, the turn to the rubric of diversity, managed by administrators, is not an especially good break with a history of reticence about race.

While subsequent affirmative action opinions, in particular Justice O'Connor's opinion in *City of Richmond v. J. A. Croson Co.*,<sup>120</sup> add useful analysis and caveats to the entire body of affirmative action constitutional doctrine, Justice Powell's opinion in *Bakke* stands out as having struck a conceptual balance for racial health between personal rights to a benefit and First Amendment freedoms in the academy and implicitly in other contexts.<sup>121</sup> Yet, we express concern that the current Court could be poised to break this balance after *Fisher* and could eventually mandate adherence to strict color blindness.

The framework set out in *Grutter v. Bollinger*, which permitted a degree of deference to university administrators, was applied by the Fifth Circuit in its *Fisher* opinion and then "fixed" by the Court in its *Fisher* opinion. The *Fisher* "fix" is incomplete, lacking a template for going forward, as by apportioning "agency" to the whole university community.<sup>122</sup> We contend that after *Fisher*, the Court should adapt its affirmative action jurisprudence to a revised, renewed *Bakke* vision of shared agency<sup>123</sup> and reject strict color-blind constitutionalism, which would foreclose opportunities for educational and other community institutions to implement measures that can overcome racial problems through interracial dialogue. *Bakke* is by no means perfect. The language of diversity is implicated in strengthening the tradition of silence about race.<sup>124</sup> Moreover, *Bakke* is top-down in spirit with an appeal to expertise.<sup>125</sup> Yet *Bakke* has seeds for constructing a shared agency in the university.

Innovative measures to achieve real racial discourse on campus are a path forward. Learning communities designed to select students with unique perspectives on race can create an environment of cross-racial exchange that comports with the college's "special niche" in our First Amendment traditions.<sup>126</sup> Student participation in admissions, either as a real-world reform or a contrast to the constitutional perils posed by top-down admissions programs that are vulnerable to administrative manipulation

---

<sup>120</sup> See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

<sup>121</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>122</sup> See Gail Heriot, *Fisher v. University of Texas: The Court (Belatedly) Attempts to Invoke Reason and Principle*, 2013 CATO. SUP. CT. REV. 63, 87–88 ("As a result [of the *Fisher* decision], we have now a two-track strict scrutiny test for campus diversity policies . . . [Such] [d]ouble standards, however, tend to be unstable.").

<sup>123</sup> *Bakke*, 428 U.S. at 292–93.

<sup>124</sup> See, e.g., Winkler, *Sounds of Silence*, *supra* note 21.

<sup>125</sup> *Bakke*, 438 U.S. at 316 (using Harvard admissions as the model).

<sup>126</sup> *Id.* at 311–12.

of racial categories, is a concept that can generate creative proposals with the potential to open up healthy racial discourse on campuses.

#### IV. RACE, SILENCE, AND THE COURT

Race is an essential part of the American story. Despite its centrality to the story of the nation, it has dropped from sight as a subject for frank public discussion or remedial action in the era of slavery, during the writing of the Constitution, after Reconstruction, and in much of the twentieth century. Because silence is the central shortfall in our national story of race, we add here to our earlier evocation of the past reticences about race.

##### *A. Racial History: Power, Silences*

With the creation of a nation state, what some called the “Slave Power” became a controlling feature of American politics for a significant part of the nation’s early history, posing a moral challenge to the Union in demanding that slavery be excluded from political attack.<sup>127</sup> The power of the slave states was sufficient to impose a gag rule in the House of Representatives that sought to prevent any matter related to slavery from being considered, or even read, on the floor of Congress.<sup>128</sup> Tolerated for eight years, and evaded with debates about the rule itself, the gag rule is emblematic of subsequent periods and of today: Race was so salient that a rule of silence was sought by the legislative branch, distorting the normal function of that institution.<sup>129</sup>

---

<sup>127</sup> See WILLIAM W. FREEHLING, *THE ROAD TO DISUNION: SECESSIONISTS TRIUMPHANT, 1854–1861*, at xii (1990) (“Northerners called the militant slavocracy the Slave Power, meaning that those with autocratic power over blacks also deployed undemocratic power over whites.”). The idea of the “Slave Power” as a political force was contested for some period after the Civil War but has support from historians. For discussion of Northern views at the time of the *Dred Scott* case, see DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT’S RELATIONS TO SLAVERY* 281–82 (Ward M. McAfee ed., 2001). See also LEONARD L. RICHARDS, *THE SLAVE POWER: THE FREE NORTH AND SOUTHERN DOMINATION, 1780–1860*, at 10 n.15 (citing studies showing a disproportionate presence of Southerners in national government).

<sup>128</sup> See FEHRENBACHER, *supra* note 127, at 76 (recounting the initial adoption of the gag rule by a vote of 117 to 68 in 1836, means of evading it, and its adoption as a standing rule in 1840, formally preventing the House from receiving or “entertained in any way whatever” anti-slavery petitions); *id.* at 76–77 (regarding the standing rule from 1840–1844). James Oakes emphasizes and recounts that vigorous debate nonetheless occurred during the period of the gag rules. See OAKES, *supra* note 91, at 36–40.

<sup>129</sup> MICHAEL T. GILMORE, *THE WAR ON WORDS: SLAVERY, RACE, AND FREE SPEECH IN AMERICAN LITERATURE* (2010) (describing at length a thesis about silence). Gilmore connects the evasions in the founding documents, such as the three-fifths clause, the clause affecting “persons ‘held to service or Labor in one State,’” the gag rule, and the pre-Civil War attacks on open speech about slavery to the “forcible muzzling” of writing about race in literary works and attacks on the speech of black persons. *Id.* at 5–10.

Ironically, a body designed for robust debate ruled the subject of race off limits at a time when race was a national preoccupation. The use of the mail to deliver anti-slavery literature to the South was sabotaged by postmasters and opposed by a president.<sup>130</sup> Indeed, tight control over the postal service to prevent its becoming a means of breaking the silence imposed on black Americans was first implemented in 1802, when a rule was enforced forbidding any black person in the North from being employed by the postal service or handling mail in any role.<sup>131</sup> The goal was to prevent any black person from learning and providing information that might become the basis of resistance to a regime of white rule over both black slaves and free black Northerners, who were granted little claim on the normal rights of white Americans.<sup>132</sup> Blocking access to information positioned black people as only subjects, deprived of the agency that would be conferred by information that might enable them to break a pervasive rule of racial silence. As discussed in a related piece, a tendency toward silence in the North about the racial basis for the war and the fate of enslaved Southerners and a practice of censorship in the South were a feature of the official approach and of popular opinion during the war.<sup>133</sup>

After the Civil War, political reconciliation between Northern and Southern whites was pushed by revisionist historians who supported a widespread amnesia about slavery as the cause of the war.<sup>134</sup> The cessation of hostilities between the states

---

<sup>130</sup> This example of the official distaste for race discourse was given a striking expression when Northern abolitionists undertook a mail campaign to the South, using the postal service to direct abolitionist newspapers and other tracts to Southern elites and officials. See Smithsonian Nat'l Postal Museum, *America's First Direct Mail Campaign*, PUSHING THE ENVELOPE BLOG (July 29, 2010), <http://postalmuseumblog.si.edu/2010/07/americas-first-direct-mail-campaign.html>. Southern postal officials dragged their feet in their job requirement of delivering the mail, allowing mobs to destroy the mail in the post office, and were backed by the Postmaster General. *Id.* President Jackson sought a law prohibiting the use of the mail to deliver anti-slavery messages to the South. *Id.* Again, official policy sought to suppress race as a category about which dispute was possible or policy change conceivable. Race was benign so long as a full circulation of disparate views was kept off limits. *Id.*; see also FEHRENBACHER, *supra* note 127, at 76–77 (recounting the initial adoption of the gag rule by a vote of 117 to 68 in 1836, means of evading it, and its role as a starting rule in 1840 preventing the House from receiving or “entertain[ing] in any way whatever” anti-slavery petitions).

<sup>131</sup> See LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, at 57 (1961) [hereinafter LITWACK, *NORTH OF SLAVERY*] (describing Postmaster General Granger’s expressed concern about “objections to Negro mail carriers ‘of a nature too delicate to engraft into a report which may become public, yet too important to be omitted or passed over without full consideration’”).

<sup>132</sup> *Id.* (“Negro . . . [mail carriers] constituted a peril to the nation’s security, for employment in the postal service afforded them an opportunity to co-ordinate insurrectionary activities, mix with other people, and acquire subversive information and ideas.”). Granger wished to prevent free black Americans learning about natural rights and having “an opportunity of associating . . . and of establishing a chain or line of intelligence.” *Id.* at 57–58.

<sup>133</sup> See generally Kuykendall, *Pressing the Mute Button*, *supra* note 20.

<sup>134</sup> See JAMES M. MCPHERSON, *THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 4–8* (2007) (reviewing the dominance into the twentieth century of now-discredited blends

ushered the country into a preliminary national discussion on the place of newly freed slaves in a transformed Southern economy built around free labor, as well as the scope of federal power in protecting the rights of these free laborers.<sup>135</sup> For the first period—the Johnson Reconstruction—harsh “black codes” were enacted that effectively reinstated involuntary servitude.<sup>136</sup> After race riots in Memphis and New Orleans that resulted in many deaths of freed persons, a political backlash elected a strong Republican Congress.<sup>137</sup> The Republican victory launched a rare political dialogue on black citizenship and the constitutional policies that would shape the “essence of Reconstruction.”<sup>138</sup> Vindicating the aspiration for equal legal rights as a basis for political and economic progress, the Congress proposed, and states ratified, constitutional amendments to abolish involuntary servitude,<sup>139</sup> confer citizenship rights,<sup>140</sup> and guarantee suffrage.<sup>141</sup> The Reconstruction period ensued, during which black men and women briefly functioned as partners with white Republicans in addressing demands for public policies that might build a healthy South with interracial amity.<sup>142</sup>

That period of partnerships between white Republicans and black Southerners ended with the loss of commitment in the North to oversee a South still set on racial separation and white supremacy. Gradually, a “wave of counterrevolutionary terror . . . swept over large parts of the South.”<sup>143</sup> The goal was to stop Reconstruction in its tracks, use violence or other means to censor any discussion of racial equality,<sup>144</sup> and, importantly, treat all political involvement by black citizens as speech treasonous to the lingering Southern culture of white dominance and black subservience.<sup>145</sup>

---

of Progressive interpretation treating economics as mainly explanatory of American politics, Southern insistence on a states’ rights interpretation, and revisionists who implied Northern abolitionists and even Abraham Lincoln were responsible for releasing passions that magnified sectional conflicts that were not uniquely serious).

<sup>135</sup> See FONER, RECONSTRUCTION, *supra* note 111, at 35–36.

<sup>136</sup> *Id.* at 198–201.

<sup>137</sup> See *id.* at 261–71.

<sup>138</sup> *Id.* at 35.

<sup>139</sup> U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude . . . shall exist within the United States.”).

<sup>140</sup> U.S. CONST. amend. XIV.

<sup>141</sup> U.S. CONST. amend. XV.

<sup>142</sup> See FONER, RECONSTRUCTION, *supra* note 111, at 281–345.

<sup>143</sup> *Id.* at 425.

<sup>144</sup> *Id.* at 426. To this end, terrorist groups, like the Ku Klux Klan, targeted reformers: “The object of it is to kill out the leading men of the [R]epublican party,” said one Klan victim, “men who have taken a prominent stand.” *Id.*

<sup>145</sup> A critical event, the Colfax Massacre in Louisiana, crystallized the violent determination of the white South to use any means to regain racial dominance and pointed the way to Northern withdrawal from concern for the citizenship of Southern black people. LEEANNA KEITH, THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION 88–110 (2008). In addition, the rule of silence rendered in

This impulse to censorship became pervasive over time, even reaching into efforts to silence some Southern scholars, less brutally but with equal force.<sup>146</sup> The implicit acknowledgment of a continuity of de facto African-American citizenship from the beginning of our history gave way to de facto “non-citizens[hip].”<sup>147</sup>

As part of an arrangement to settle the election of 1876, when the South almost elected the first Democratic president since the Civil War, President Rutherford B. Hayes ordered the withdrawal of federal troops from the South and tacitly granted the region home rule in the management of its domestic affairs, particularly on matters pertaining to the status of its black citizens.<sup>148</sup> Over the next two decades, the old guard slowly gained control over state legislatures and enacted laws to “redeem” the South by reinstating white supremacy and white rule.<sup>149</sup> Silence once again enveloped the matter of race. Over time, the myth of the “Lost Cause,” became a common myth influencing national understanding.<sup>150</sup> In the atmosphere of North/South reconciliation, blacks lost allies in law.

With the overhang of myth about a lost benign racial hierarchy, and the preference of Southern aristocrats for elite control over both whites and blacks, a system that kept elite control in place by setting poor whites apart from potential black allies came into being.<sup>151</sup> With the end of slavery, there was increasingly physical separation between the races and a dwindling basis for a sense of personal connection.<sup>152</sup> *Plessy v. Ferguson* adopted, from an existing palette of judicial reasoning about race as a private matter,<sup>153</sup> an ideology about race—one remitting to silence the return of race suppression—and claimed that public meaning did not arise from legally mandated segregation. In *Plessy*, the Court situated race as a private category to which meaning

---

local memory the massacre of blacks as a “riot” by blacks, a false memory nicely labeled a “semantic victory” for the silencing of black reality. *See id.* at xiv.

<sup>146</sup> *See infra* note 344.

<sup>147</sup> *Margaret Washington: Obstacles Faced by African-Americans*, AM. EXPERIENCE PBS, [http://www.pbs.org/wgbh/amex/1900/filmmore/reference/interview/washing\\_obstaclesfaced.html](http://www.pbs.org/wgbh/amex/1900/filmmore/reference/interview/washing_obstaclesfaced.html) (last visited Apr. 15, 2014).

<sup>148</sup> *See* FONER, *RECONSTRUCTION*, *supra* note 111, at 587.

<sup>149</sup> *See* WOODWARD, *supra* note 111, at 54–55.

<sup>150</sup> *See* GAINES M. FOSTER, *GHOSTS OF THE CONFEDERACY: DEFEAT, THE LOST CAUSE, AND THE EMERGENCE OF THE NEW SOUTH, 1865–1913*, at 63–75 (1987) (describing how Civil War veterans began to express mutual respect for one another and thus to “refocus” their memory of the war). The Lost Cause involved pictures of a system of benign plantations that managed slaves and gave them moral guidance, the economic cause of the Civil War, and reconciliation between whites who had fought. *Id.*

<sup>151</sup> *See* WOODWARD, *supra* note 111, at 51–74 (discussing economic reasons to encourage racial division).

<sup>152</sup> *See generally* JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 5–52 (1984).

<sup>153</sup> *Roberts v. Boston*, 59 Mass. (5 Cush.) 198, 209 (1850) (establishing the doctrine of separate but equal and averring that “prejudice, if it exists, is not created by law, and probably cannot be changed by law”).

might be assigned by the races; whites could treat enforced segregation as a private social preference with no attached meaning meant to be read by blacks, and blacks could treat it as an insult if they chose to give it a private but unwarranted “construction.”<sup>154</sup> Even as government enforced a race practice, the meanings were deemed to be private and hence neutral and in harmony with the post–Civil War amendments. The Southern “law” of race was held to be something other than law and hence to contain no state-enforced message about race.<sup>155</sup> Yet the mechanism of a court opinion denying public or even private meaning to enforced separation in civic life conveyed additional insult. In *Plessy*, race existed as a disadvantage in fact, set forth in the opinion, and yet did not exist in the legal framework announced to permit states to impose disadvantage about a category the Court removed from its docket of legal concerns.<sup>156</sup> The Court had earlier, without announcing any theory of racial meaning, neatly excised from the Fourteenth Amendment any role for public, national law to enforce equality in access to public places.<sup>157</sup>

In the twentieth century, racist demagogues refined methods to control public discourse, encouraging hysteria about desegregation as an alien threat to Southern life.<sup>158</sup> The federal courts avoided direct rebukes when neutral doctrine could impose a check on crude attacks on civil rights. Attempts to deploy corporation law and libel law to drive civil rights leaders out of Southern states led to new constitutional doctrine about associational rights and free speech, but without explicit connection to race speech.<sup>159</sup>

---

<sup>154</sup> *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896).

<sup>155</sup> Rebecca Scott analyzes the phrase “public rights,” meaning a right to be treated with dignity in a public sphere. Rebecca J. Scott, *Public Rights, Social Equality, and the Conceptual Roots of the Plessy Challenge*, 106 MICH. L. REV. 777, 781 (2008). The term was in use in Louisiana, with French roots and with an appearance in the Louisiana Constitution. See generally *id.* It neatly separated the connotations that the term “social equality” created relating to social intimacy and hence to anxieties about interracial sexual connections from the public sphere, which many elements of Louisiana society understood as the arena in which “the dignitary dimension of public life” should be protected. *Id.* at 787. Opponents successfully conflated the “notion of public respect” with forced social equality in a private, even intimate sphere. *Id.* at 788. Thus, the public sphere became the private sphere, and the forced arrangements backed by state law were placed outside official notice, in a purported space containing the uncoerced social choices of individuals. The state was able to enforce a rule of race while claiming to be a silent bystander, indifferent to and uninvolved in private interactions. See *id.* at 792. Scott refers to “the fiction of consent.” *Id.*

<sup>156</sup> *Plessy*, 163 U.S. at 542.

<sup>157</sup> *Slaughter-House Cases*, 83 U.S. 36, 74–76 (1873).

<sup>158</sup> See NUMAN V. BARTLEY, *THE NEW SOUTH: 1945–1980*, at 236–37 (1995). As part of linking race with other categories of threat to the Southern order, the White Citizens Council called its crusade against desegregation a war against “atheism, communism, and mongrelization,” *id.* at 205, thereby creating the specter of “homosexual integrationist Communists,” *id.* at 221.

<sup>159</sup> See generally, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *NAACP v. Alabama*, 357 U.S. 449 (1958).

The struggles of the black Southerner for a voice often yielded abstract victories for association and speech but did not produce any significant judicial chastisement of official state actors for their involvement with the mechanisms of racial silence.<sup>160</sup>

The Civil Rights era was an exception to the reign of calculated and imposed silence. The late 1940s to the early 1970s marked a period of real public, official efforts to address the race legacy.<sup>161</sup> The aftermath of World War II brought white and black citizens into a common effort to renew American ideals in individual rights and equality in post-war life.<sup>162</sup> This created a context for a legal strategy on the part of civil rights lawyers, leading to a slow disassembling of the doctrine of “separate but equal” established in the late nineteenth century *Plessy* embrace of a rule of Jim Crow—validating race evasion.<sup>163</sup>

In the silence-disrupting case of *Brown v. Board of Education*,<sup>164</sup> the Court reversed not only a point of doctrine, but ended the denial that meaning attached to state-enforced racial segregation and committed the country to an era of open discourse about race, thus conceding the impact of public silence on private lives and the need for public action to address the effects of a history of injustice supported by tactics of evasion.<sup>165</sup> The holding in *Brown* directly refuted the race psychology of *Plessy* by insisting that “separate but equal” public school facilities psychologically harmed black children.<sup>166</sup> *Brown*’s statement about the meaning of segregation was a bold embrace of a discourse about race. Yet, with a bold invitation to treat race as a category of public concern, it has been noted that the *Brown* Court never frankly announced that the *Brown* doctrine, rationalized as a needed corrective to harm inflicted upon children, was a new rule about race, applicable to public parks<sup>167</sup> and other municipal facilities.<sup>168</sup>

---

<sup>160</sup> For a discussion of the strong component of racial harassment in the litigating choices in *New York Times Co. v. Sullivan*, see Garrett Epps, *The Other Sullivan Case*, 1 N.Y.U. J.L. & LIBERTY 783, 785 (2005).

<sup>161</sup> See Theodore M. Shaw, *The Race Convention and Civil Rights in the United States*, 3 N.Y. CITY L. REV. 19, 35 (1998) (citing World War II as a major factor in bringing about social change with regard to race).

<sup>162</sup> See *id.*

<sup>163</sup> *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

<sup>164</sup> 399 U.S. 294 (1955).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 298. The Court denied that racially segregated schools could be separate but equal.

<sup>167</sup> See *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam).

<sup>168</sup> See *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (courtroom); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam) (airport restaurant); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (bus); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (public golf course). In defending *Brown v. Board of Education* against the criticisms of Herbert Wechsler in *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 22–34 (1959), Charles Black lodged only one critique: The failure of the Court to “[spell] out that segregation . . . is perceptibly a means of ghettoizing the imputedly inferior race.” Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421,

*B. Persisting Racial Silences*

Even though *Brown* set the nation forth on a new era in which a *classification* by race could be never again be said to have no meaning, race did not disappear from the nation's life. New work describing and making salient the pattern in incarceration of black males as a form of social control is both a recognition of and challenge to the persistence of racial silence.<sup>169</sup> The grain of truth in *Plessy*, that white social preference was the behavioral driver of separation of the races, remains part of American life. Race is pervasive in private decisions regarding housing,<sup>170</sup> schooling,<sup>171</sup> employment,<sup>172</sup> marriage,<sup>173</sup> and social interactions arising from proximity created by

---

430 n.25 (1960). Black speculated that even *Brown*, despite its acceptance of common sense about the *Plessy* error as to the psychology of enforced segregation, contained one bow to the prevailing silence about race: “[R]eluctance to go into the distasteful details of the southern caste system.” *Id.*

<sup>169</sup> See ALEXANDER, *supra* note 110, at 164. Alexander develops a comparison of the mass incarceration of racial minorities as a result of the War on Drugs to the operation of Jim Crow Laws. See *id.* She maintains that the purported color blindness of mass incarceration coupled with the “mistaken belief that racial animus is necessary for the creation and maintenance of racialized systems” perpetuate our nation’s “deep denial” regarding race and social control. *Id.* at 178.

<sup>170</sup> See Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 1994 n.35 (2000).

<sup>171</sup> See Donald E. Lively & Stephen Plass, *Equal Protection: The Jurisprudence of Denial and Evasion*, 40 AM. U. L. REV. 1307, 1338 n.168 (1991).

<sup>172</sup> See Leticia M. Saucedo, *The Browning of the American Workplace: Protecting Workers in Increasingly Latino-ized Occupations*, 80 NOTRE DAME L. REV. 303, 313 (2004) (“[A]n analysis of brown-collar occupations in eighteen immigrant-receiving, ethnically heterogeneous metropolitan areas shows that whites are the population most likely to be segregated from brown collar workers, followed by native blacks, native Latinos, and earlier immigrant Latinos. White males benefit because segregated jobs tend to ‘crowd’ white males into higher-paying positions. . . . The trend is especially troubling because it may signal the re-segregation of the workplace throughout the South and Midwest.”).

<sup>173</sup> See RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 2–3 (2012) (referring to African Americans as “the most unmarried people in our nation,” noting the absence of marriage partners for college-educated black women and asserting that black women “marry down but not out”); see also PAUL TAYLOR ET AL., PEW RESEARCH SOCIAL & DEMOGRAPHIC TRENDS, *MARRYING OUT: ONE-IN-SEVEN NEW U.S. MARRIAGES IS INTERRACIAL OR INTERETHNIC* (2010), available at <http://pewresearch.org/pubs/1616/american-marriage-interracial-interethnic> (providing statistics on interracial marriage rates). Although the rate of interracial marriage has doubled over the past thirty years, see RYAN, *supra* note 105, at 292–93, over eighty-five percent of the public prefers to marry a person from the same race. See TAYLOR ET AL., *supra*. According to Pew Research, in 1980, 6.7% and now 14.6% of newlyweds are interracial couples, but the rates vary by racial demographic, with Hispanics and Asians experiencing little to no growth, while “[r]ates more than doubled among whites and nearly tripled among blacks.” *Id.* at ii.

housing and employment. The historical residue carried over from the nation's past of private racial rules and separations lures some citizens to live behind a wall of racial silence in which they are shielded from interacting with other ethnic groups in their daily lives. Consequently, race discussion occurs in private undertones and in occasional eruptions about a racially polarizing incident.<sup>174</sup> National controversies, such as cross-racial murder charges or the arrest of a Harvard professor for entering his home, generate loud arguments on cable television and on internet websites, but rarely contain the seeds of official deliberation over race.<sup>175</sup> Colorable accusations of racism, especially if class is also an element, create volatile reactions that often demand a disavowal of the claim. If the charge hits someone who figures as a stand-in for "color-blind" authority, it becomes a speech act in need of erasure.<sup>176</sup> Charges that threaten the "raceless" reading of disputed interactions trigger responses of the deepest resentment and repudiation.<sup>177</sup> The dialogue that occurs is submerged in opinion polls,

---

<sup>174</sup> The trial of the football star O.J. Simpson for murder, the arrest in his Cambridge home of Professor "Skip" Gates as a possible intruder, and the trial for the killing of teenager Trayvon Martin by a neighborhood watchman are all sufficiently notorious to rank as common knowledge.

<sup>175</sup> *AP Poll: Majority Harbor Prejudice Against Blacks*, POLITICO (Oct. 27, 2012, 10:37 AM), <http://www.politico.com/news/stories/1012/82964.html> ("'Part of it is growing polarization within American society,' said Fredrick Harris, director of the Institute for Research in African-American Studies at Columbia University. 'The last Democrat in the White House said we had to have a national discussion about race. There's been total silence around issues of race with this president. . . . It will take more generations, I suspect, before we eliminate these deep feelings.'").

<sup>176</sup> The incident involving the arrest in his home of Professor Gates generated strong reactions denying race could have played any part:

Amid the accusations of racial profiling, many online commentators, bloggers, and analysts came to Crowley's defense, saying he was putting his life on the line responding to a report of a crime in progress, basically doing honest police work. But for Gates's bellicosity, those people said, the arrest would not have occurred and the encounter would have gone unpublicized.

Tracy Jan, *No Charge, but Gates Case Seethes*, BOS. GLOBE (July 22, 2009), [http://www.boston.com/news/local/massachusetts/articles/2009/07/22/no\\_charge\\_but\\_gates\\_case\\_seethes/](http://www.boston.com/news/local/massachusetts/articles/2009/07/22/no_charge_but_gates_case_seethes/).

<sup>177</sup> Even the first black President must minimize his claim on "agency" in race politics by avoiding frank discussion of race uproars. President Obama has learned to avoid comments on such incidents, lest he be seen as "taking sides" between an African-American elite professor—as a stand-in both for black suspects and snobbish intellectuals—and a working-class white policeman. In the occasional cacophony of voices over race, the dialogue becomes a sideshow, lacking any part in a public agenda of racial discourse or policy-making to address race. See *Obama Remark on Gates' Arrest Angers Cops*, USA TODAY (July 23, 2009, 7:31 PM), [http://www.usatoday.com/news/nation/2009-07-23-cops-reaction\\_N.htm](http://www.usatoday.com/news/nation/2009-07-23-cops-reaction_N.htm) (quoting claims that Obama's comments calling the arrest of Professor Gates in his home "stupid" will make it more difficult for "police to work with people of color"); see also Ta-Nehisi Coates, *Fear of a Black President*, ATLANTIC MONTHLY, Sept. 2012, at 76, 78 (discussing the reticence of President Barack Obama to discuss race, describing "indelible blackness" as "irradiat[ing] everything

call-in programs, and comment sections on the Internet.<sup>178</sup> It has been argued that the charge of racism can only be understood and afforded rhetorical power if the form that it takes “refer[s] to no identifiable object, literally means nothing.”<sup>179</sup> Race as a public category is both avoided and manipulated.

*C. Racial Silence, Higher Education, and Supreme Court Racial Jurisprudence*

A potential asset in building racial discourse is higher education. Ideally, the nation’s campuses would be a source of energy and initiative in enriching understanding of the country’s racial past and helping shape its future as a racially diverse society. Yet critics (or cynics), including some Supreme Court Justices, assert that college administrators use race to fashion programs that lack a commitment to cross-racial understanding and union in diversity.<sup>180</sup> Some argue that race-based admissions

---

he touches,” and asserting that “African Americans have historically been restricted to the realm of protest and agitation” rather than power); Frederick C. Harris, *The Price of a Black President: Have African-American Elites Given Obama a Pass, Accepting Symbolism over Substance?*, N.Y. TIMES, Oct. 28, 2012, at SR1 (describing the Obama presidency as having “marked the decline, rather than the pinnacle, of a political vision centered on challenging racial inequality”).

<sup>178</sup> Often, black and white opinion differs markedly. *See, e.g.*, PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, BIG RACIAL DIVIDE OVER ZIMMERMAN VERDICT: WHITES SAY TOO MUCH FOCUS ON RACE, BLACKS DISAGREE 1 (2013) (finding that only five percent of black respondents were satisfied with the acquittal of the defendant in the shooting of teenager, Trayvon Martin, compared with forty-nine percent of white respondents). The portrait of a “diverse” society, imagined as a mixture of individuals blending together across racial and ethnic lines and sorted into cohorts of affinity by life experience and work and other roles, displays strong traces of racial sorting beneath the new layer of paint. Yet there is normally more talk of an imagined diversity than of the underlying sharp lines of separation. Again, there is an easy adoption of an image over a confrontation with remnants of our racial legacy.

<sup>179</sup> *See* Claudia Brodsky Lacour, *Doing Things with Words: “Racism” as Speech Act, and the Undoing of Justice*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 127, 138–39 (Toni Morrison ed., 1992) (interpreting the “bifurcation of ‘racism’ from the realm of literal referents” in connection with Supreme Court nominee Clarence Thomas’s charge that Anita Hill’s testimony against him constituted racism). Instances in which a single derogatory racial remark can end a career provide some refutation of this characterization, leaving the land-mines of speech affecting race buried in uncharted terrain.

<sup>180</sup> At their most scathing, the Justices accuse university administrators of indulging in an aesthetics of race for their own personal gratification:

Because the Equal Protection Clause renders the color of one’s skin constitutionally irrelevant to the Law School’s mission, I refer to the Law School’s interest as an “aesthetic.” That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them.

*Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting).

that create racially diverse campuses, without a programmatic plan for exchange, leads to a social climate in which students are given group resources to segregate themselves along racial lines. Indeed, the concept of “counterspaces” as a remedy for racial discomfort encourages some degree of racial separation.<sup>181</sup>

Campus diversity is promoted as a design for amelioration of tensions in a largely peaceful society. Yet, there is some indication in empirical examinations that diverse campuses may have surprisingly high levels of racial tension.<sup>182</sup> Empirical evidence on the educational and social impact of campus diversity is, despite the link of such evidence to the claims for diversity designed by university bureaucrats, virtually absent from the extensive Supreme Court analytic efforts to fashion racial jurisprudence for social health in educational settings and in society generally.<sup>183</sup> The low visibility of such information in legal materials, other than to determine whether race is used as a determinative factor in admissions,<sup>184</sup> leads the Court to rely heavily upon constitutional platitudes.<sup>185</sup> Such platitudes have the effect of “framing” the race discussion in ways that tend to replicate, rather than enhance, the available cultural material that gives shape to understandings for “cataloging Blacks.”<sup>186</sup>

With such thin empirical knowledge as a base, the Court has devised a limited menu of choices for judicial decisionmaking on race-conscious government programs.<sup>187</sup> As much as race penetrates the American psyche and impacts individual

<sup>181</sup> See Allen & Solorzano, *supra* note 57, at 258–63 (describing counterspaces).

<sup>182</sup> See, e.g., Sylvia Hurtado, *The Campus Racial Climate: Contexts of Conflict*, 63 J. HIGHER EDUC. 539, 541–43 (1992) (discussing the phenomenon of racial conflict on American campuses in the 1980s, relating the level of conflict to selectivity, and calling for more research to identify factors that contribute to different groups’ development in the university environment).

<sup>183</sup> See Justin Pidot, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761, 795–96 (2006) (suggesting that the courts may draw unsupported conclusions from the diversity studies presented in litigation); see also *id.* at 805 (“Like the dueling opinions issued by the Sixth Circuit, neither the majority nor Justice Thomas’s dissent in *Grutter* explained why certain social science evidence was convincing.”).

<sup>184</sup> See generally, e.g., Gratz v. Bollinger, 539 U.S. 244 (2003).

<sup>185</sup> While we do not wish to be uncharitable in characterizing the Court’s contribution in advancing constitutional dialogue on race, it is nonetheless worth considering the extent of the distance between core claims by the Court about race and the stories called by Professor Eduardo Bonilla-Silva “ideological ‘of course’ racial narratives.” BONILLA-SILVA, *supra* note 67, at 76. Professor Bonilla-Silva calls these stories “social products,” with generic characters (“a black man”), the use of similar phrases (“the past is the past”), and an ideological function that places “the story tellers and their audiences” in a shared, factual universe. *Id.*; see *supra* text accompanying notes 14–15.

<sup>186</sup> ROBERT M. ENTMAN & ANDREW ROJECKI, THE BLACK IMAGE IN THE WHITE MIND: MEDIA AND RACE IN AMERICA 49 (2000) (explaining “framing” as a type of schema that selectively defines problems and creates images and propounds moral judgments and, with race, helps support latent prejudice).

<sup>187</sup> The opinion in *Fisher* provides a mini-treatise on the existing protocol on the limited

decisionmaking, poorly articulated, even intuitive and informal attitudes about race influence the Court's response to efforts to address the legacy of racial injustice. The jurisprudence it has generated cannot be called sociological, with the much-critiqued exception of *Brown*.<sup>188</sup> It can scarcely be called path-breaking in terms of enriching race discourse. It comes today to rest on opposing moral claims that can neither be settled by reasoned debate nor used to create constructive public exchange addressing the legacy of race. The Court's jurisprudence does not create discourse linking our racial past to our present racial world. Nor does it give to the rising generations, being sorted by numerical and other comparisons into educational settings often lacking a basis for community of any kind, the tools with which to change the direction of our racial journey. The Court's jurisprudence now limits exploration into official discourse on race to mainly two competing, unnuanced theories that either withhold opportunities for innovation or provide too much deference to a purported government expertise in this area.<sup>189</sup> The ensuing debate between these schools of thought reinforces the nation's propensity for silence and inhibits meaningful efforts to improve racial health. One effect is a significant amount of segregation in secondary education, and even within "diverse" university environments. Without repeating a wholesale embrace of de jure segregation, contemporary jurisprudence tends toward reproducing "[t]he separation of the races in the schools" and "perpetuat[ing] a separation of cultures" that came to characterize the South for many years.<sup>190</sup>

V. COLOR-BLIND DOGMA, COLOR-CONSCIOUSNESS, AND *BAKKE*:  
 JURISPRUDENCE OF SILENCE, OPEN ANTISUBORDINATION RACIAL  
 INCLUSION, AND APPROVED ADMINISTRATOR CODE

*A. The Color-Blind and Color-Conscious Theories*

In all the ink spilled in its race cases, the Court has constructed mainly two competing ideologies that superintend government action aimed at addressing past racial wrongs and in the process chart the perimeters of official discourse on race. The anti-subordination theory conceives a Fourteenth Amendment that restricts the state from creating classifications intended to "stigmatize or exclude."<sup>191</sup> This theory affords the government some leeway in experimenting with racial categories that are benign, meaning that racial classifications are constitutional so long as they remedy the social effects of past discrimination against minorities as well as the legacy of slavery. This

---

permissions to use race classifications. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417–20 (2013).

<sup>188</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>189</sup> See *infra* notes 191–206.

<sup>190</sup> WILLIAMSON, *supra* note 152, at 252.

<sup>191</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 771, 799 (2007) (Stevens, J., dissenting).

interpretation has a moral component. White supremacy, these theorists contend, is not the equivalent of measures taken by the majority to benefit the minority, which are legitimated in our entire jurisprudence as the antistatutory principle.<sup>192</sup>

It also is a good fit for the overall jurisprudence of the Court on the Fourteenth Amendment, which emphasizes that the Fourteenth Amendment is meant to protect against an intentional abuse of government power with a purpose to inflict harm.<sup>193</sup> The doctrine holds that a discriminatory effect of a program not designed with a purpose to harm a group, though the effect is certain to occur, does not violate the Fourteenth Amendment.<sup>194</sup> Thus, because programs designed to create a public commitment to modest racial ameliorations are not plausibly aimed at harming white people, the anti-subordination theory has support in other Fourteenth Amendment doctrines embraced by the conservative Justices on the Court.<sup>195</sup> This is admittedly an aggressive interpretation of cases mainly about the ability of legislatures to help a group even when there is predictable harm to an entirely different group. Insofar as any effort to aid a racial group or groups harms the racial population group or groups not aided, the argument is defective. Indeed, some of the anticlassification rhetoric in affirmative action cases attempt to claim antistatutory for white applicants to schools, who are presented as victims harmed by belonging to a disfavored race.<sup>196</sup> Whether all populations not

---

<sup>192</sup> For an explication of the source of the antistatutory theory in the writings of Owen Fiss, its comparison with the anticlassification theory, and an argument that antistatutory remains an element of American constitutional law, see generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIAMI L. REV. 9 (2003).

<sup>193</sup> See, e.g., *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 768 (2005) (holding that a property interest must have some ascertainable monetary value); *Daniels v. Williams*, 474 U.S. 327, 335–36 (1986) (holding that where a government official's act causing injury to life, liberty, or property is merely negligent, no procedure for compensation is constitutionally required).

<sup>194</sup> Except for the formalism of the anticlassification principle, cases that allow state actions with a predictable discriminatory result if they are not motivated by a discriminatory motive adopt a rule that forgives damaging effects on an impacted group if there is no animus or motive to harm the group. See, e.g., *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274–75 (1979) (regarding gender); *Washington v. Davis*, 426 U.S. 229, 239–45 (1976) (regarding race).

<sup>195</sup> See *supra* note 191.

<sup>196</sup> Justice Scalia's assertion that "there can be no . . . debtor race" casts the white majority as a group potentially burdened by a status subordinate to that of the "creditor . . . race." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). Though much of the U.S. population has taken on consumer debt, there is a stigma historically associated with the idea of being a debtor, particularly one that has a long overdue amount owing. Indeed, the denial that the white race can be a debtor race resonates oddly with the metaphor in Martin Luther King's *I Have A Dream* speech, in which he asserted, "America has given the Negro people a bad check, a check which has come back marked 'insufficient funds.'" Rev. Martin Luther King, Jr., *I Have A Dream* (Aug. 28, 1963). Scalia's echo of debtor language suggests a group at risk of being assigned to a long-term subordinate status based on the collective stigma of moral insolvency.

aided by a formal classification are intended to be harmed is the nub of the argument. Large programs aimed at expressive richness in a university are not necessarily the equivalent of reverse discrimination aimed at individuals with malicious intent.<sup>197</sup> They do deal in a common classification and cannot be seen as affecting a classification.

The opposing theory is that of the color-blind constitution. A “color-blind” mandate embraces strict anticlassification or antidiscrimination principles. The anticlassification principle frames the theory as a barrier against the harmful effects that arise from race-conscious government decisionmaking.<sup>198</sup> Color blindness, in the view of its proponents, ensures that policy deliberations are not infected with either racial stereotyping or racial politics.<sup>199</sup> It removes the category from discourse, particularly among government officials who wield considerable power to dispense benefits to favored groups.<sup>200</sup> In addition, these advocates insist that racial consciousness “has inevitably led to divisiveness,”<sup>201</sup> priming Americans to see themselves as members of their distinct racial group as opposed to viewing themselves primarily as citizens that “share more commonalities than distinctions” with their fellow countrymen.<sup>202</sup> This facilitates, they conclude, “identity politics,” making groups compete for government benefits at the expense of targeted groups.<sup>203</sup> The effect is surely heightened when the affected group—university students—lacks all agency as a common partner in creating a community and hence lack a bond provided by a sense of collective psychological investment.<sup>204</sup>

Despite a reasonable concern with racial identity politics, the “purist” version of the color-blind view consists heavily of assertion and repetition, without nuance.<sup>205</sup>

---

<sup>197</sup> See *infra* text accompanying notes 207–09.

<sup>198</sup> Though the opinion for the Court in *City of Richmond v. J. A. Croson Co.* leaves some room for race-conscious action to ameliorate ongoing societal discrimination—in which a government program may play a passive role that helps effectuate its distributional effects—Justice O’Connor’s opinion provides instruction on the risks of political motivation affecting race. 488 U.S. 469, 731 (1989) (“[T]here is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics.”). Justice Thomas’s concurrence in *Fisher* provides an almost surely comprehensive enumeration of all the arguably negative features of race-conscious university admissions. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422–34 (2013) (Thomas, J., concurring).

<sup>199</sup> *City of Richmond*, 488 U.S. at 493 (referring to “racial politics”).

<sup>200</sup> *Id.*

<sup>201</sup> Isaac Simon, *Constitutional Theory Building in the Context of the Fourteenth Amendment: The History of Affirmative Action*, 23 CHICANO-LATINO L. REV. 113, 136 (2002).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 135–36.

<sup>204</sup> Building a community is an undertaking with critical psychological components which are not discussed in any of the Court’s writings on the benefits of diversity admissions to build a learning community. See generally SEYMOUR B. SARASON, *THE PSYCHOLOGICAL SENSE OF COMMUNITY: PROSPECTS FOR A COMMUNITY PSYCHOLOGY* (1974) (providing founding work on the psychology of community).

<sup>205</sup> Though Justice Thomas’s lengthy discussion in *Fisher* is undeniably creative and thought-provoking, it nonetheless has the legal form of advocacy for persuasion and relies

Racial classifications are wrong, we are told, and they are presumptively unconstitutional. The assertion is forceful, but the moral theory is not stated with any effort to align it with the theory of the Fourteenth Amendment as a barrier to the use of government power to oppress in ways at odds with core liberties.<sup>206</sup> There is a strong basis for the view that the theoretical loss of a seat in a school because of aspirations to better racial health and dialogue does not carry with it the concerns that assertion of white superiority would.<sup>207</sup> Thus, even if the effects of benign racial programs are unwise, such claimed imperfections are seemingly not at the core of the constitutional concerns in the Fourteenth Amendment. Further, the stance of race “purism” does not necessarily prevent racial politics and may obstruct solutions to persisting dynamics of racially motivated harms in political domains.<sup>208</sup>

Nonetheless, it is also deeply problematic for the Supreme Court and those to whom it implicitly delegates authority to assign a grade to racial injury. The effect is to sponsor a franchise in today’s multiracial society for comparing racial injuries, potentially doing direct harm to identified members of a group, on the basis of a race-tinged agenda. The effect of setting up a faux language that evades open discussion of race is often to empower thinly disguised uses of shared public resources by inside players to advance racial agendas. These agendas can be for personal racial advantage by cynical recipients of “racial entitlement” or for use by racial “majorities” seeking to gain advantage from parceling out thinly disguised racial rewards. In groups that have been encouraged to use coded race language for racial goals, the group may even act on transparently racial animus against members of the shared “majority,” whose weaknesses are magnified while those of racial minorities are treated as unacceptable for open discussion. The motive may be retaliation for opposing racial

---

on a legal style of argumentative assertion. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2424–26 (2013) (Thomas, J., concurring). For example, Justice Thomas asserts: “As should be obvious, there is nothing ‘pressing’ or ‘necessary’ about obtaining whatever educational benefits may flow from racial diversity,” and “[i]f the Court were actually applying strict scrutiny, it would require Texas either to close the University or to stop discriminating against applicants based on their race.” *Id.*; see also Carole J. Buckner, *Realizing Grutter v. Bollinger’s “Compelling Educational Benefits of Diversity”—Transforming Aspirational Rhetoric into Experience*, 72 UMKCL. REV. 877, 877–78 (2004) (noting the need for diverse interactions among students with diverse viewpoints and suggesting admissions, without more, is merely rhetoric); Pidot, *supra* note 183, at 778 (suggesting that the *Grutter* majority relied more on intuition than science, i.e., empirical evidence).

<sup>206</sup> Again, Justice Thomas attempts a coherent claim within the limiting epistemology of legal style: “I think the lesson of history is clear enough: Racial discrimination is never benign.” *Fisher*, 133 S. Ct. at 2430.

<sup>207</sup> Justice Thomas makes clever claims in a passage quoting segregationists’ arguments for the benign effects of enforced segregation, concluding that “[t]he University’s professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.” *Id.*

<sup>208</sup> *E.g.*, 42 U.S.C. § 1973 (2012) (regarding enforcement of voter rights); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013) (striking down a portion of the Voting Rights Act).

decisionmaking, or merely a view of other members of the nominal “majority” as expendable in a racial game. The result is to undermine the dignity of all groups, including the sometimes unknowing recipients of race-motivated awards.

The purist claim is made with a degree of heat not present in the opinions that argue either for the antistatutory understanding of the Fourteenth Amendment or in judicial warnings about the risks race classification brings to politics.<sup>209</sup> The heat in the opinions is unidirectional, using language of moral outrage to evoke an idea of deep wrong. In truth, the judicial language and holdings of the opinions provide a problematic validation of resentful emotions that race-conscious programs can trigger.<sup>210</sup> The opinions bring to racial discourse the theme of public danger, the ominous note, as in a movie filled with dread: The warnings strive for hair-raising effects, like the whistling by Robert Mitchum in “The Night of the Hunter” that signals fear and potential violence to children he is stalking.<sup>211</sup> The argumentation contributes vivid language to public discourse—“there can be no such thing as either a creditor or a debtor race”<sup>212</sup>—but the vehemence is mainly useful in debate rather than in legal pronouncements that might command deference to a legal rule based in moral understanding.<sup>213</sup> The principle that any public action predicated on race violates a sacred moral principle is not a self-evident moral truth for a just society.<sup>214</sup> Indeed, a just society may

---

<sup>209</sup> Justices O’Connor and Powell have provided temperate statements on the risk of political uses of race, and Justices Stevens and Ginsburg have commented, without heat, on the legacy of racial injustice. See *supra* notes 5–6, 198 and accompanying text; *infra* note 237 and accompanying text.

<sup>210</sup> See *supra* text accompanying notes 66–72.

<sup>211</sup> See Matthew Gritten, *Night of the Hunter: A Masterpiece of American Cinema*, TELEGRAPH (Jan. 17, 2014, 1:26 PM), <http://www.telegraph.co.uk/culture/film/10579291/Night-of-the-Hunter-a-Masterpiece-of-American-cinema.html>.

<sup>212</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring). This formulation by Justice Scalia coincides with two of the popular framing stories described by Professor Bonilla-Silva as a collective social product of color-blind ideology. BONILLA-SILVA, *supra* note 67, at 77–82. The first is called “The Past is the Past” (for example, “I don’t know if anyone is owed anything because of the, like, past.”). *Id.* at 77–79. The second is, “I Didn’t Own any Slaves” (“Me, as a white person, I had nothing to do with slavery” and “we shouldn’t be punished real harshly for the things that our ancestors did.”). *Id.* at 79–82.

<sup>213</sup> See Pidot, *supra* note 183, at 764 (noting that the plaintiffs in *Grutter* mainly relied on legal argumentation rather than attacking the social science presented by the University of Michigan). Some of what counts in the area of race as legal argumentation, however, consists of moral and constitutional rhetoric that assumes the cast of legal argument, but is fraught with rhetorical assertions.

<sup>214</sup> For the pre-eminent political theory in the twentieth century of the conditions for a just society, see JOHN RAWLS, *A THEORY OF JUSTICE* (rev. ed. 1999). For a treatment of Rawls’s silence in the book on racial justice, see Charles W. Mills, *Rawls on Race/Race in Rawls*, 47 S. J. PHIL. 161, 162 (2009) (explaining that Rawls does not address race as a result of “a crucial ambiguity: ‘ideally just’ as meaning a society without *any* previous history of injustice and ‘ideally just’ as meaning a society with an unjust history that has now been *completely corrected for*”).

require correction for past injustice before its conditions can be fulfilled.<sup>215</sup> Yet several Justices assert the color-blind principle as constitutional and moral bedrock.<sup>216</sup>

Concern for the possibility that a white litigant lost a seat at a school is seen as the basis for imposing strict requirements that may result in the loss of seats for minorities.<sup>217</sup> Such a view of race as marking an intrusion into a niche of society previously governed by a different set of rules could be seen to echo post–Civil War responses to newly gained black access to arenas formerly reserved for white people.<sup>218</sup> For universities, blackness is presumed by those opposed to all use of race to mark all that it touches if it is named and to throw the natural order of university admissions into a pit of race injustice and spoliation. The basis for resentment has changed with context, but the need to find means for a connection freed of resentments and silences remains critical. The causes of resentment have become more complex than immediately after nineteenth-century reactions by Southern whites to the ending of slavery.

---

<sup>215</sup> Philosopher Thomas Nagel has addressed affirmative action and Rawlsian justice as follows:

[A]ffirmative action . . . is probably best understood in Rawlsian terms as an attempt at corrective justice—an attempt to rectify the residual consequences of a particularly gross violation in the past of the first principle of equal rights and liberties. Affirmative action therefore does not form a part of what Rawls would call “strict compliance theory” or ideal theory, which is what the two principles of justice are supposed to describe.

Thomas Nagel, *Rawls and Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 62, 84 n.3 (Samuel Freeman ed., 2003); see also Mills, *supra* note 214, at 162.

<sup>216</sup> See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring) (“At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates . . . —can justify an exception to the principle embodied in the Fourteenth Amendment that ‘[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.’” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 780–82 (2007) (Thomas, J., concurring) (“The Constitution is not that malleable. Even if current social theories favor classroom racial engineering as necessary to ‘solve the problems at hand,’ . . . the Constitution enshrines principles independent of social theories.” (citation omitted)); *id.* at 748 (majority opinion) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

<sup>217</sup> See Stephen Clowney, *Doing Affirmative Action*, 111 MICH. L. REV. FIRST IMPRESSIONS 27, 28 (2013), <http://www.michiganlawreview.org/articles/doing-affirmative-action> (arguing that the effects of affirmative action on admissions are exaggerated and that “an attack on affirmative action—divorced from a larger project of increasing fairness in college admissions—amounts to an attack on black social mobility”).

<sup>218</sup> See LEON F. LITWACK, *TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW* 217–79 (1998) [hereinafter LITWACK, *TROUBLE IN MIND*] (discussing the methods by which the post–Civil War South re-established pre–Civil War racial rules through legal enactments and restriction of black access to public arenas).

With new forms of diversity, critical dependence on publicly funded means of advancement in a “knowledge” society, and the deepening loss of cultural memory about race, resentment has multiple sources and new means of addressing it to move toward racial health.<sup>219</sup>

The theoretical standoff between color-blind and race-conscious theorists is a damaging impasse in the Court’s affirmative-action jurisprudence, with public silence a result of the failure by the Court to engage in a discussion that advances thinking and promotes exchange. Public discourse between these groups poses a stark choice: whether the Federal Constitution demands total suppression of racial categories or permits state implementation of racial classifications so long as the discrimination is not intentional discrimination aimed at a vulnerable group.<sup>220</sup> Is such a choice the only choice we have, or does equal protection doctrine chart another approach to race-conscious government behavior that does not necessarily keep time to the beat of either the color-blind or race-conscious drum? Can room be made for official race discourse in the nation’s life?

*B. Bakke’s “Multitude of Tongues”: Breaking Silence Through Academic Freedom*

In *Board of Regents of the University of California v. Bakke*,<sup>221</sup> Justice Powell captured the essence of diversity in the university as a component of academic freedom.<sup>222</sup> Justice Powell’s opinion recognized that admissions programs implicate two constitutional interests that appear at odds with one another.<sup>223</sup> On the one hand, race-conscious admissions interfere with the “personal rights” of applicants to be evaluated for a seat at a state-sponsored college based upon individualized assessment consistent with the guarantee of “equal protection of the laws.”<sup>224</sup> But, significantly for social health and support for advancement of First Amendment goods, colleges and universities, as state actors, play a unique role in our free speech traditions and have an interest in considering all aspects of a candidate’s background, including their racial status, to determine whether they will contribute to the “robust exchange of ideas” on its campuses.<sup>225</sup> With its dual concern for “not race”<sup>226</sup> and “racial, ethnic, and cultural diversity” and

---

<sup>219</sup> See LEON F. LITWACK, *BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY* 255, 258–59 (3d ed. 1981) [hereinafter LITWACK, *BEEN IN THE STORM*] (referring to the need for freedmen to act with caution to avoid giving offense); JOEL WILLIAMSON, *AFTER SLAVERY: THE NEGRO IN SOUTH CAROLINA DURING RECONSTRUCTION, 1861–1877*, at 254 (1965) (noting that some white people were irritated by the mere freedom of the former slaves).

<sup>220</sup> See *supra* notes 191–208 and accompanying text.

<sup>221</sup> 438 U.S. 265 (1978).

<sup>222</sup> *Id.* at 281–320.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 289 (internal quotation marks omitted).

<sup>225</sup> *Id.* at 313 (internal quotation marks omitted).

<sup>226</sup> *Id.* at 403 (Blackman, J., concurring).

race,<sup>227</sup> *Bakke* stands firmly for the proposition that admissions programs aiming to achieve racial balancing or to institute a quota system are constitutionally impermissible.<sup>228</sup> At the same time, *Bakke* launched a renewed excursion by the Court into racial “sleight of hand,”<sup>229</sup> this time one where race appears and then disappears. You see it; then it’s gone. With a recognition of the agency of those provided with enriched opportunities for racial discourse and learning for a diverse society, sleight of hand can be ended in favor of open protocols for creating learning communities composed to confer genuine interracial partnerships on student groupings.

Justice Powell’s reasoning appears aligned with color-blind constitutionalism. Yet, despite concerns that “diversity” sanitizes race,<sup>230</sup> Powell’s opinion is not dogmatic. The opinion recognizes a role for race in the admissions process: “Ethnic diversity . . . is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”<sup>231</sup> In this regard, Powell parts company with color-blind purists who believe in a puritanical application of the theory to the Equal Protection Clause. The salient defect in strict colorblindness in this area is thus addressed. Racial puritanism leaves absolutely no space for academic freedom, which includes, among other things, the right of educational institutions to the presence of students who can potentially contribute to the “robust exchange of ideas” that is integral to the “fulfillment of [their] mission.”<sup>232</sup> By permitting colleges and universities to use race as a means to achieve a compelling state interest in a diverse student body, Justice Powell placed blanket appeals to pure colorblindness outside the bounds of affirmative-action jurisprudence as it relates to college admissions programs.

This is not to say, however, that *Bakke* is based upon race-conscious reasoning. On the contrary, Justice Powell’s opinion painstakingly articulated how reviewing courts should evaluate race-conscious admissions programs under the narrow tailoring prong of strict scrutiny in order to afford each applicant individualized assessment and safeguard the process from administrative efforts to achieve racial balancing.<sup>233</sup> Race, as Justice Powell explained, may only be implemented as a “plus” factor in a

---

<sup>227</sup> *Id.* at 293 (majority opinion).

<sup>228</sup> *See City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493–94 (1989).

<sup>229</sup> The view of the *Bakke* analysis as sleight of hand has multiple adherents. While some see it as hiding race and imposing a veil of silence, much as this Article argues occurs generally with race, another view is that the treatment of Alan Bakke as a victim of racial unfairness in *Bakke* is Fourteenth Amendment sleight of hand. *See* JOHN LEA, POLITICAL CORRECTNESS AND HIGHER EDUCATION: BRITISH AND AMERICAN PERSPECTIVES 122 (2009) (quoting Ronald Dworkin on the “intellectual confusion” of treating Alan Bakke as having a claim of individual rights).

<sup>230</sup> Winkler, *Sounds of Silence*, *supra* note 21, at 938 (discussing how a focus on institutions overlooks the history of race injustice and slights the black perspective on exclusionary institutions).

<sup>231</sup> *Bakke*, 438 U.S. at 314.

<sup>232</sup> *Id.* at 313.

<sup>233</sup> *See* Bernstein, *supra* note 16, at 209–12 (describing Powell’s solution to the challenge of allowing the use of race without making it mechanical or overt).

holistic evaluation of each applicant, taking into consideration an unenumerated list of race-neutral factors such as work experience, leadership potential, history of overcoming disadvantage, and so on.<sup>234</sup>

Justice Powell did recognize that the Court's affirmative-action jurisprudence permitted race-conscious programs.<sup>235</sup> But this conclusion was not based on the finding that the Equal Protection Clause allowed judicial scrutiny to weaken when the state used race with a small minus effect for a majority race and heightened when the states designed classifications to subjugate minorities. Because "the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude,"<sup>236</sup> Powell doubted that the Clause made such distinctions with regard to race. In fact, Justice Powell appealed, in a civil, unheated, and even reflective passage, to a general aspiration in the Fourteenth Amendment.<sup>237</sup> Race, Powell suggested, may be employed in the limited context of college admissions as one element, among an array of other factors, used to establish the institution's compelling interest in academic expression on its campus recognized under the First Amendment.<sup>238</sup> *Bakke* struck the delicate balance between academic freedom and equal protection as a combined commitment, not durationally limited, to a healthy academic enterprise in a multiracial society. Powell's caution, and optimism, is compatible with student agency affecting the learning environment about race.

Despite his stern cautions about the need for judicial scrutiny, Powell's approach leaves room for repeating the legacy of racial problems and presents risks: tactics of calculated silences, public distrust,<sup>239</sup> and cynicism about "diversity" as a mark for race—or as a downgrading of race as a unique moral issue—and administrative malfeasance. The Court's next opportunity to get the balance—between transparency in the interests of administrative integrity and racial discourse—came in *Grutter v. Bollinger*, in which the Court addressed the admissions program at the University of Michigan Law School.<sup>240</sup>

## VI. *GRUTTER V. BOLLINGER*: CONTEXT MATTERS WHEN EVALUATING RACE

### A. *The Grutter Majority Opinion: Leaving the Door Open to Something Called "Critical Mass"*

Litigation directed against both the undergraduate and law school admissions processes at the University of Michigan was the culmination of a period of intense public

---

<sup>234</sup> *Bakke*, 438 U.S. at 317. Rather, the diversity that advances a compelling governmental interest "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 315.

<sup>235</sup> *Id.* at 291.

<sup>236</sup> *Id.* at 293.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 317.

<sup>239</sup> See Horwitz, *supra* note 17, at 519–30.

<sup>240</sup> 539 U.S. 306 (2003).

activity aimed against higher-education affirmative action. The tone was often bitter and incriminating. There were calls for the University of Michigan to be penalized for knowingly violating governing law by operating a program of admissions predicated on racial considerations.<sup>241</sup> In California, a statewide voters initiative banned the use of race as a factor in admissions to public universities.<sup>242</sup> *Grutter* unexpectedly held that Michigan Law School admissions programs could use race to acquire a “critical mass of underrepresented minorities” along with other “soft variables,” such as the strength of recommendations, quality of an applicant’s essay, or the difficulty of the courses the applicant took at an undergraduate school in attaining the educational benefits that arise from a diverse campus.<sup>243</sup>

In a heavily criticized, perceived relaxation of judicial scrutiny, Justice O’Connor pulled the Court closer towards color-consciousness, announcing that when reviewing race-based government action, “[c]ontext matters.”<sup>244</sup> In the admissions context, *Grutter* deferred to the Law School’s use of a race-conscious program to pursue its educational goals. The Court placed emphasis on its recognition “that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”<sup>245</sup> Heavily influenced by Powell’s reasoning in *Bakke*<sup>246</sup> and by the arguments of amici in the military and education leadership ranks,<sup>247</sup> the Court implicitly rejected a norm of complete silence in a setting where robust debate is encouraged. The First Amendment peg in the opinion, without a depth of treatment, implies the importance of university control over predicates for robust exchange among a diversity of “speakers.”<sup>248</sup> The Court conceded that a mandate of entire silence would impoverish the forum that these institutions are constitutionally authorized to provide. Yet the complicated path to encouraging race exchange also authorized evasions that

---

<sup>241</sup> *Grutter*’s request for relief included punitive damages in an unspecified amount. *See* Complaint at 1, *Grutter v. Bollinger*, 16 F. Supp. 2d 797 (E.D. Mich. 1998) (No. 97-CV-75928-DT).

<sup>242</sup> *See supra* note 59 and accompanying text. After *Grutter*, the voters of Michigan enacted such a law. *See supra* note 59.

<sup>243</sup> *Grutter*, 539 U.S. at 330–38. The Court found that some of these benefits included: (1) “break[ing] down [of] racial stereotypes” through “cross-racial understanding”; (2) making classroom discussion livelier by ensuring that “students have the greatest possible variety of backgrounds”; and (3) “prepar[ing] students for an increasingly diverse workforce and society, and better prepar[ing] them as professionals.” *Id.* at 330. These findings do not have a strong evidentiary basis and have been widely questioned. *See, e.g.,* Pidot, *supra* note 183, at 778.

<sup>244</sup> *Grutter*, 539 U.S. at 327.

<sup>245</sup> *Id.* at 329.

<sup>246</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–320 (1978).

<sup>247</sup> *See, e.g.,* Brief for Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter*, 539 U.S. at 306 (No. 02-241); *see also* Brief for Nat’l Sch. Bds. Ass’n et al., *Grutter*, 539 U.S. at 306 (No. 02-241).

<sup>248</sup> *Grutter*, 539 U.S. at 329.

have fed a new silence in a setting imagined to be freed from reticence and separation. The Court's concern in *Grutter* for the mission of the university in a racially diverse society prompted it to open a forum for racial factors to be deployed as a support for learning.<sup>249</sup> The Court accepted the school's claim that its pursuit of a critical mass of underrepresented minorities was not to acquire "some specified percentage" of a racial or ethnic group on its campuses, but rather to attain the critical mass "defined by reference to the educational benefits that diversity is designed to produce."<sup>250</sup> In that way, the Court allowed an opening to speech in the university, albeit a crimped, managed version at odds with the conditions necessary for robust, shared speech capacity.

The importance of racial harmony and the critical need of the university to function as a site for a rich pedagogy may not provide adequate support for the "zone of discretion" within which administrators are encouraged to function. For that reason, disaffection with the risks of racial categories managed by a class of education administrators results. Cynicism arises from a lack of trust in "diversity" as a term for racial classifications<sup>251</sup> and from a related lack of trust in the bona fides of the university

---

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 329–30. Again, we note with gratitude a useful comment by Professor Horwitz:

[O]ne interesting aspect of *Grutter* is precisely the change in thinking about the university's mission, from a largely inward-looking one in *Bakke* to one that, in *Grutter*, is less about the mission of the university per se and more about its role "in a racially diverse society," e.g., as a pipeline to leadership jobs etc. Thus, picking up on your next line, *Grutter* was not really all that much concerned with universities' function as sites for rich pedagogy, and more about their pipeline function—which is important but, perhaps, encourages mechanical treatments and views of race and again deprives students of color of greater agency as participants in the discussion at the school level.

E-mail from Paul Horwitz, *supra* note 87.

<sup>251</sup> Jack Balkin captures the impact on discourse of Court treatment of race, identified throughout this paper as controlling race discourse, in a way that also helps to highlight the great weight the term "diversity" is asked to bear so the Court may avoid clarity about goals of social justice, redistribution, or pragmatic embrace of a need for elite institutions to admit some portion of all segments of society:

These precedents [iconic race doctrines] had "discourse shaping" or "discourse forcing" effects. If state governments wanted to practice race-conscious affirmative action, *they had to speak in certain ways*. They could not say that they were remedying past societal discrimination against minorities, nor could they say that they were remedying their own past discrimination unless they had proof that they had discriminated against each and every minority they wished to assist. That meant, for example, that the University of Michigan would have had to demonstrate that it had discriminated against Latinos or Native Americans if it wished to provide either a preference in its affirmative action policy. Thus, the rules in place forced university administrators to speak the language of diversity. Hence, they *packed all of their different aims*

administrative class.<sup>252</sup> In reaction, the dissents in *Grutter* dismissed the claims of the university as being pretextual, thus both reflecting and increasing public distrust of university racially conscious admissions.<sup>253</sup>

### B. *The Grutter Dissents*

All four dissenters concluded that critical mass, as the Michigan Law School implemented it, was a pretext to mask a de facto quota system.<sup>254</sup> Chief Justice Rehnquist slammed the theory as a “sham,” arguing that “[s]tripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.”<sup>255</sup> To support this claim, he presented admissions data, which showed a “tight correlation between the percentage of applicants and admittees of a given race,” concluding that such a correlation “must result from careful race based planning by the Law School.”<sup>256</sup>

Justices Thomas and Scalia went further, however. Justice Thomas launched a frontal assault on affirmative action programs in his dissent.<sup>257</sup> He took Justice O’Connor to task for concluding “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause.”<sup>258</sup> Justice Thomas argued that both *Bakke* and *Grutter* rest on “the fundamentally flawed proposition that racial discrimination can be contextualized so that a goal, such as classroom aesthetics, can be compelling in one context but not in another.”<sup>259</sup> He adopted a purist view in whole: “The Constitution abhors classifications based on race.”<sup>260</sup> Justice Scalia, deploying a logical claim to attack a poorly supported empirical claim, characterized any educational benefits arising from campus diversity as entirely “fabled” and “not . . . uniquely relevant to law school or uniquely ‘teachable’ in a formal educational setting.”<sup>261</sup>

While Justice Kennedy shared his fellow dissenters’ belief that critical mass had constitutional defects, he did not embrace color-blind constitutionalism.<sup>262</sup> Rather, he

---

*into the language of educational diversity, and as a result, the word  
“diversity” came to conflate several different ideas.*

Jack M. Balkin, Plessy, Brown, and *Grutter*: *A Play in Three Acts*, 26 *CARDOZO L. REV.* 1689, 1722 (2005) [hereinafter Balkin, *A Play in Three Acts*] (emphasis added) (citation omitted).

<sup>252</sup> See Horwitz, *supra* note 17, at 519–20.

<sup>253</sup> See *infra* notes 254–65 and accompanying text.

<sup>254</sup> *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting). Justices Scalia, Kennedy, and Thomas signed on to Chief Justice Rehnquist’s dissent, which claimed that the law school implemented critical mass as a means to establish a quota system. See *id.*

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 385.

<sup>257</sup> *Id.* at 349–78.

<sup>258</sup> *Id.* at 327.

<sup>259</sup> *Id.* at 357 (Thomas, J., dissenting).

<sup>260</sup> *Id.* at 353.

<sup>261</sup> *Id.* at 347 (Scalia, J., dissenting).

<sup>262</sup> *Id.* at 389 (Kennedy, J., dissenting).

recognized that the Constitution does not completely silence race in college admissions: “The opinion by Justice Powell, in my view, states the correct rule for resolving this case,” he wrote.<sup>263</sup> “Justice Powell’s approval of the use of race in university admissions reflected a tradition, grounded in the First Amendment.”<sup>264</sup> Justice O’Connor’s failure to apply strict scrutiny, in the view of the Kennedy dissent, would deter college “administrators in devising new and fairer ways to ensure individual consideration.”<sup>265</sup>

This Article answers the call for innovation with a conceptual basis for new tactics. There is room, in a refreshed discourse on race, for colleges to experiment with innovative programs that serve the institution’s interest in the *Bakke* goal of a marriage of diversity and expression in a process that is free of racial goals set by administrators.<sup>266</sup>

We believe that Justice Kennedy’s *Grutter* dissent, even as modified by his opinion for the Court in *Fisher*, signals a way forward for universities and colleges to construct meaningful race-conscious admissions programs that can compose a robust university marketplace of ideas.<sup>267</sup> We next propose an innovative program to avoid the pitfalls that attach to policies designed to achieve critical masses of racial groups, and the perils of widespread distrust of education bureaucrats. The focus on critical mass distracts colleges and universities from developing admissions policies directly tied to a pedagogy in which students participate. In addition, critical mass buys too little in the confusion it brings to the tool of strict scrutiny. At the same time, the denial of the race category as a matter for public concern would revive and reinforce a dangerous public silence about race. Silence leaves intact a wall between the races that has appeared in varied forms as we progress in racial justice.<sup>268</sup>

### C. Refreshed Race-Conscious Jurisprudence

#### 1. Critical Mass: An Elusive Goal

Scholars credit Professor Rosabeth Moss Kanter with providing the foundational framework for critical mass theory.<sup>269</sup> She contended that low numbers of minorities in the workplace isolated them as tokens, which adversely impacted their performance.<sup>270</sup>

---

<sup>263</sup> *Id.* at 387.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 393.

<sup>266</sup> See generally *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>267</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013); *Grutter*, 539 U.S. at 387–88 (Kennedy, J., dissenting).

<sup>268</sup> See WILLIAMSON, *supra* note 152, at 256–57 (explaining the separation between black and white cultures that became a feature of the South following Reconstruction).

<sup>269</sup> See, e.g., Lissa Lamkin Broome et al., *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U.L. REV. 1049, 1050–51 (2011) (noting the contributions of Drude Dahlerup).

<sup>270</sup> *Id.* at 1051–52 (citing ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 3 (1977)). Kanter contended that low relative numbers, and the accompanying

To counter this, Kanter suggested that “with an increase in relative numbers, minority members begin to become individuals differentiated from each other.”<sup>271</sup> Beyond this general understanding, there is “no agreement as to what the concept precisely means.”<sup>272</sup> In fact, there is no consensus among judges or scholars on the exact number or range of underrepresented minorities needed to achieve a critical mass so that, as *Grutter* put it, minorities “do not feel isolated or like spokespersons.”<sup>273</sup> The provenance of the term is, in truth, heavily allusive, relying on phrases such as “tokens,” and, in the work of Drude Dahlerup, borrowing the phrase “critical mass” from quantum physics, with added influence from a theory of the inherent characteristics of females.<sup>274</sup>

In *United States v. Virginia*,<sup>275</sup> the Court held that Virginia violated the Equal Protection Clause by maintaining an all-male military school.<sup>276</sup> There, the Court noted that the district court found that a critical mass of “at least 10 percent female enrollment” was sufficient “to provide the female cadets with a positive educational experience.”<sup>277</sup> Yet, in *Fisher*, the Fifth Circuit found that the University of Texas at Austin had not attained a critical mass although it had twenty-eight percent minority enrollment in its Fall 2008 freshman class.<sup>278</sup> Professor Dahlerup found, however, that a critical mass of thirty percent was needed because “a large minority can make a difference, even if still a minority.”<sup>279</sup> Other social research reported that a critical mass of at least thirty-five percent and forty percent is necessary “for overcoming negative effects associated with tokenism, such as performance pressure, increased social isolation, and being the target of stereotyping.”<sup>280</sup> Yet there is no scientific basis for any chosen number. Indeed, diversity doctrine draws noncontextually on theories about numbers in different groups and settings, with little concern for a group’s unique mission. As applied by university bureaucrats, critical mass rationales lack mission-specific design and follow-through related to First Amendment goals. The harsh skepticism of Justices Scalia and Thomas is not without a basis, but the entire Court is in

---

problems of tokenism, affected the social environment of women and minorities in the workplace, causing isolation and impeding their ability to effectively perform their jobs. *Id.*

<sup>271</sup> *Id.* at 1052 (internal quotation marks omitted).

<sup>272</sup> Mark T. Terrell, *Bucking Grutter: Why Critical Mass Should Be Thrown off the Affirmative Action Horse*, 16 TEX. J. C.L. & C.R. 233, 236 (2011) (internal quotation marks omitted).

<sup>273</sup> *Grutter v. Bollinger*, 539 U.S. 306, 319 (2003).

<sup>274</sup> Broome et al., *supra* note 269, at 1052–53; *see also* Terrell, *supra* note 272, at 234 (outlining the basis in metaphor of the term “critical mass”).

<sup>275</sup> 518 U.S. 515 (1996).

<sup>276</sup> *Id.* at 555–56.

<sup>277</sup> *Id.* at 523 (internal citation omitted).

<sup>278</sup> *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 243–44 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

<sup>279</sup> Broome et al., *supra* note 269, at 1052.

<sup>280</sup> Roger W. Reinsch et al., *Applying Indices Post-Grutter to Monitor Progress Toward Attaining a Diverse Student Body*, 7 NW. J. L. & SOC. POL’Y 372, 385 (2012).

want of nuance based in openness to creativity within the whole body of university actors as well as in empirical evidence.<sup>281</sup>

To withstand strict scrutiny, critical mass must be adequately defined because it is not an end unto itself. Instead, it is a means to an end. Critical mass is the mechanism that universities selected to produce the educational benefits *Grutter* identified. As Justice O'Connor explained, "the law school's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce."<sup>282</sup> In light of the disagreement over the meaning of critical mass, Justice O'Connor's description of the concept's purpose in the admissions process presents measurement problems for assessing its constitutional soundness in light of prevailing racial doctrine.<sup>283</sup> Critical mass may not attain the constitutional baseline of a "'fit' [to a] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."<sup>284</sup> Even if critical mass has some merit, admissions programs must, at a minimum, show that these educational benefits actually manifest themselves to justify racial discrimination to achieve them.<sup>285</sup>

The primary study that the Law School relied upon in its brief admitted that "[t]here is nothing automatic about the impact of percentage [sic] of minority students on a college campus. . . . Universities have to create educational programs and to foster actual interaction with diverse peers for campus racial diversity to have an impact on students."<sup>286</sup> If critical mass does not produce educational benefits independent from other programs implemented by colleges, then elites could simply employ the theory to achieve racial balancing, composing student bodies that are ethnically, but not intellectually, diverse. *Grutter's* application of strict scrutiny camouflaged theoretical deficits in the concept of critical mass. *Grutter* was another exercise in an empirically thin jurisprudence of race: Both sides asserted, parried, and warned, but neither had much to offer except strong conviction and commonplace ideas.<sup>287</sup>

---

<sup>281</sup> For example, in his opinion writings, Justice Thomas appears to assume that the primary purpose is to help African Americans do better economically and in achievements that can command respect. See *supra* notes 34–39 and accompanying text. In that assumption, he fails to credit the idea of partnerships and collaborations that can advance the strengthening of social bonds and mechanisms for greater overall social health in a multiracial society. Indeed, the assumption that race-conscious programs can only cast the black students as beneficiaries of remedial justice is arguably shortsighted, with at least a hint of racial separatism. Balkin has captured the inconsistent, even incoherent, goals embedded in the diversity rationale under the Fourteenth Amendment. See Balkin, *A Play in Three Acts*, *supra* note 251, at 1725 n.125.

<sup>282</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

<sup>283</sup> See *id.* at 329–33; *cf. id.* at 389 (Kennedy, J., dissenting).

<sup>284</sup> *Id.* at 333 (majority opinion).

<sup>285</sup> Terrell, *supra* note 272, at 246 (linking Justice O'Connor's reference to educational benefits to a necessity of producing such benefits).

<sup>286</sup> Pidot, *supra* note 183, at 778.

<sup>287</sup> See *id.* at 764–65; see also PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 7 (2003) (calling diversity talk in America in 2003

## 2. *Grutter*-Style Strict Scrutiny: Tilting the Scales in Favor of Race Consciousness

In *Grutter*, Justice O'Connor afforded deference to administrative judgment about the importance of diversity.<sup>288</sup> *Fisher* has, at least formally, departed from the *Grutter* conclusion that in the higher education context, "[t]he Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer."<sup>289</sup> Judicial deference was an anomaly in the Court's strict scrutiny jurisprudence. In Professor Adam Winkler's *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, he colorfully described *Grutter* as "strict scrutiny schizophrenia" because it was "unusual" in that it actually deferred to academic elites.<sup>290</sup> According to his study, survival rates for challenged state action under strict scrutiny varied by government institution, but educational institutions fared poorly.<sup>291</sup> Deference to education elites, announced in *Grutter*, was seemingly a significant departure in practice as well as theory.<sup>292</sup> Though the courts' application of strict scrutiny is "institutionally sensitive,"<sup>293</sup> the empirical evidence does not indicate that universities are particularly favored in the application of strict scrutiny.<sup>294</sup> *Fisher* restores a formal commitment to a searching scrutiny commensurate with the apparently empirical patterns in strict scrutiny of race-conscious choices made by university administrators.<sup>295</sup> Deference to administrators whose sole purpose is to assemble a student body for the direct purpose of delivering educational instruction to a racially diverse group is now rejected. The Court vows to require evidence capable, somehow, of separating those racial classifications that are aimed at attaining "educational benefits that flow from a diverse student body,"<sup>296</sup> from those designed to

---

"superficial and largely tactical" and warning against a habit of "intellectual laziness" in connection with diversity).

<sup>288</sup> *Grutter*, 539 U.S. at 328.

<sup>289</sup> *Id.*

<sup>290</sup> Winkler, *Fatal*, *supra* note 14, at 820–21 (internal quotation marks omitted) ("Under strict scrutiny, courts are relatively unlikely to uphold a challenged educational institution rule or policy. The survival rate for educational institutions under strict scrutiny is only 20 percent—not fatal, but still lower than most other types of institutions whose acts were adjudicated under the same standard.").

<sup>291</sup> *Id.* at 818–19 tbl.2.

<sup>292</sup> *Grutter*, 539 U.S. at 228–29.

<sup>293</sup> Winkler, *Fatal*, *supra* note 14, at 870.

<sup>294</sup> *Id.* at 821.

<sup>295</sup> The figure for survival rates for educational institution decisions subjected to strict scrutiny is across dimensions of strict scrutiny topics. *Id.* Winkler notes the case of *Hunter v. Regents of the University of California*, in which the Ninth Circuit Court of Appeals upheld "the partially race-based . . . policy of an innovative public laboratory school . . . [that] considered race in admissions to create a sample population with similar demographics as the typical urban public school in California." *Id.* at 820 (citing *Hunter v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1066 (9th Cir. 1999)).

<sup>296</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013).

advance a race-based agenda, or which are innocently failing to achieve benefits.<sup>297</sup> This effort in *Fisher* to discipline *Grutter*'s looser approach to strict scrutiny is well grounded in the record discussed in *Grutter*, but given low salience by the Court. While *Fisher* has useful reminders of the risks of deferring to education administrators, the overall result of the two cases as a pairing is a splatter painting of messages and outcomes: distrust and permissions afforded to education administrators, arguably increasing the cynicism among the public about "diversity" as a rationale<sup>298</sup> and muddying the principle that universities have missions infused with First Amendment protections from outside interference.<sup>299</sup>

The possibility that college administrators could create, or be perceived to create, racial classifications for political reasons is high. In Justice Kennedy's dissent in *Grutter*, he pointed to testimony from the Law School's former admissions director, who asserted that the faculty was "breathhtakingly cynical" in its discussion on which groups qualified as underrepresented minorities.<sup>300</sup> The director maintained that the faculty debated "whether Cubans should be counted as [Hispanic]" because they predominantly vote Republican.<sup>301</sup> As argued in *Grutter* by Chief Justice Rehnquist, the statistics on admissions tend to belie claims that the programs lack numeric goals.<sup>302</sup> Hierarchical admissions programs run the risk of enabling political assumptions, racial stereotyping, or merely sloppy theorizing by administrators themselves.<sup>303</sup> Perspectives shift generationally and with specialization; even the best minds may lack the potential for fresh thinking possible among the students themselves.<sup>304</sup> The risk of secretive decisionmaking by insulated administrators is high<sup>305</sup> and the consequences

---

<sup>297</sup> *Id.* at 2418–21; *see also Grutter*, 539 U.S. at 328.

<sup>298</sup> Bernstein, *supra* note 16, at 204–05.

<sup>299</sup> *See* Horwitz, *supra* note 17, at 519–30 (discussing the interests in and threats to university autonomy from distrust).

<sup>300</sup> *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting).

<sup>301</sup> *Id.*

<sup>302</sup> In 1995, the percentage of total applicants to the Michigan Law School who were black was 9.7%, and 9.4% of admitted applicants were black. *Id.* at 384 tbl.1 (Rehnquist, J., dissenting). The correlation between the percentage of applicants and admittees was nearly identical for Hispanics, who made up 5.1% of the total number of applicants: Five percent of its admitted applicants were of Hispanic ancestry. *Id.* at 384 tbl.2. Similar to the Hispanic population, there was a nearly identical correlation between Native American applicants and admittees: In 1995, 1.1% of its applicants were Native-American and 1.2% of its admittees were Native-American as well. *Id.* at 384 tbl.3.

<sup>303</sup> Horwitz emphasizes the risk that admissions offices in universities are thought (by courts) to be "operating as bureaucratic fiefdoms of their own, rather than working under the control and supervision of university faculty." Horwitz, *supra* note 17, at 529. Note, though, that faculty are also thought capable of self-serving views about admissions for diversity. *See id.* at 520–29.

<sup>304</sup> *Grutter*, 539 U.S. at 380 (Thomas, J., concurring in part and dissenting in part).

<sup>305</sup> *See* Horwitz, *supra* note 17, at 530 (noting the difficulty for critics of university admissions to obtain data from university officials).

socially damaging along many dimensions: public trust in a critical institution, actual institutional integrity as an influence on the public culture of truthfulness, and healthy racial connections within the university.

Justice O'Connor's strict-scrutiny-with-deference risked signaling to administrators that they had license to "play" with race so long as they use the approved critical mass terms.<sup>306</sup> *Grutter*'s reasoning may well have increased the danger for admissions programs to employ racial classifications in sloppy, cynical, or rigid ways that will, as Justice Kennedy argued, discourage administrators from developing "new and fairer ways to ensure individual consideration" in the admissions process.<sup>307</sup> Fair ways to evaluate individuals and afford them a sense of agency while enhancing their interests in robust exchange predicated on American diversity can be found. First, the existing stale debate needs to be replaced with creative and open consideration of community having a say over their composition for racial exchange.

Equal protection doctrine does not present two opposing objectives—individualized assessment and campus diversity—as an irreconcilable dilemma for educational institutions: choose race-conscious admissions as a means to attain diversity and damage personal rights and public harmony, or choose color-blind admissions policies and forfeit a right to cultivate a vibrant learning environment as a key element of a diverse society.

In its consideration of *Fisher v. University of Texas at Austin*,<sup>308</sup> the Court faced another opportunity to define the parameters for official discourse on race. In a nutshell, there were three apparent approaches: (1) affirm the program and not disturb *Grutter*-style strict scrutiny, which deferred to the Law School's implementation of critical mass;<sup>309</sup> (2) overturn both the University of Texas program and *Grutter* wholesale and, in so doing, reverse *Bakke*'s holding that campus diversity is a compelling state interest;<sup>310</sup> or (3) uphold the University of Texas program on the basis that *Bakke* recognized campus diversity as a compelling state interest but overturn *Grutter*-style "schizophrenic" strict scrutiny.<sup>311</sup>

Option One would have permitted judicial deference to admissions programs, with the risk of allowing college administrators to manipulate or mangle racial demographics. Option Two, which adheres to strict color-blind constitutionalism, is contrary to an entire spectrum of constitutional doctrine. The cancellation of *Grutter* would foreclose opportunities for educational institutions to develop innovative programs designed to foster First Amendment expression on campuses through cross-racial dialogue. Option Three, taken by the *Fisher* Court, allows *experimentation* in this area at a time when campus social challenges impede exchange inside and outside

---

<sup>306</sup> *Grutter*, 539 U.S. at 318–19 (majority opinion).

<sup>307</sup> *Id.* at 393 (Kennedy, J., dissenting).

<sup>308</sup> 133 S. Ct. 2411 (2013).

<sup>309</sup> *Grutter*, 539 U.S. at 318–19.

<sup>310</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269–71 (1978).

<sup>311</sup> *Grutter*, 539 U.S. at 314.

the classroom.<sup>312</sup> While the Fifth Circuit could not disturb, and did not criticize, *Grutter*-style strict scrutiny in *Fisher*, the Court reached a conclusion consistent with this Article's concern: Affirmative-action jurisprudence does not require silence on the racial category and permits a degree of public discussion and experimentation.<sup>313</sup>

### 3. Fifth Circuit, per Higginbotham: A Calm Judicial Voice

The Fifth Circuit in *Fisher v. University of Texas at Austin*<sup>314</sup> applied *Grutter v. Bollinger* and held that the University of Texas had a compelling state interest in attaining a critical mass of underrepresented minorities "in securing the educational benefits of a diverse student body."<sup>315</sup> The court rejected the claim that it should use minority enrollments from the Law School in *Grutter* as a baseline to determine whether the university had achieved its critical mass of minorities.<sup>316</sup> The Court found that the university had not achieved its critical mass because *Grutter* did not tie the concept to "fixed numerical guideposts,"<sup>317</sup> but rather to "meaningful representation" of underrepresented minorities to "[encourage] underrepresented minority students to participate in the classroom and not feel isolated."<sup>318</sup> The Fifth Circuit applied the teaching of *Grutter*: Universities have a First Amendment interest sufficient to permit a "holistic" management of classroom diversity for the benefit of interracial exchange in learning communities.<sup>319</sup> Outsiders may not impose a fixed meaning upon the phrases fashioned to afford scope for judgment to education administrators.<sup>320</sup>

The Fifth Circuit reposed a degree of trust in the good faith and expertise of the University of Texas officials who designed the plan under review.<sup>321</sup> These administrators could voice a view of race as a component of their university's health and use

---

<sup>312</sup> For numerous insights about the potential for richer discourse if courts permit institutions affected with a First Amendment missions to take measures to reinforce expressive freedom, see generally PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* (2013).

<sup>313</sup> *Fisher*, 133 S. Ct. at 2418.

<sup>314</sup> 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013).

<sup>315</sup> *Id.* at 230–31 (citation omitted).

<sup>316</sup> *Id.* at 233–44.

<sup>317</sup> *Id.* at 245.

<sup>318</sup> *Id.* at 244–45 (internal quotation marks omitted).

<sup>319</sup> *Id.* at 231–34.

<sup>320</sup> *Cf. id.* at 243.

<sup>321</sup> Those drafting the plan were of great distinction as educators and as lawyers as well. These officials drafted "with the opinions open on [their] desks." E-mail from Douglas Laycock, Professor of Law, Univ. of Va., to author (Sept. 8, 2013, 9:50 PM) (on file with author). They drafted to comply with the *Grutter* opinion, the concerns expressed in dissent by Justice Kennedy, and to avoid the errors identified in the companion case to *Grutter*. *Id.* The Fifth Circuit accorded respect to the knowledge, good faith, and proper motives of these administrators, who were specifically attempting to make a stronger student community by ensuring that minority students were not confined to a small number of majors. *See Fisher*, 631 F.3d at 231–32. The Supreme Court's refusal to afford these administrators a degree of deference might be corrected if the component of student input advocated in this Article becomes a recognized approach to building a vibrant, race-aware study community.

that view as an input into composing the learning community. They could create an approach to attaining a critical mass that drew upon their knowledge of the state, the applicant pool, and the learning needs of their students. In its nuance, the Fifth Circuit opinion presented a set of choices fraught with opportunity and risk for the Supreme Court's race jurisprudence.<sup>322</sup> In an opinion written by a conservative judge, the Fifth Circuit Court of Appeals accepted the premise of a race jurisprudence that concedes a public concern with the racial composition of a university student body.<sup>323</sup> The court evinced a comfort with the fact of racial diversity as it may relate to educational goals and the needs of a multiracial Texas society.<sup>324</sup> In a compact summary, the court extended a respect to the right of universities to exercise judgment about race as well as about the entire set of complex factors in the task of assembling a student body.<sup>325</sup> The court noted, though, that the racial category demands judicial scrutiny, given "the nation's slow march toward . . . a colorblind society."<sup>326</sup>

The Fifth Circuit opinion thus took the measured tone, that of trusting expert management of a formative institution's recognition of our racial facts—historic, present, and potential future.<sup>327</sup> The tone admits race into public language and legal discourse and recognizes the needs of a multiracial society for racial exchange in public universities. The opinion spoke of race, not to deny it, but to allow for a "zone of discretion" for administrators who confront present-day demographic facts.<sup>328</sup> In so doing, the court constructed a calm judicial voice of racial realism, one open to the public project of racial exchange and public accountability. There was no rhetoric of racial silence. The opinion touched upon the possibilities for an enriched judicial literature when Judge Higginbotham noted that "a white student who has demonstrated substantial community involvement at a predominantly Hispanic high school may contribute a unique perspective that produces a greater personal achievement score than a similarly situated Hispanic student from the same high school."<sup>329</sup> The one sentence does not offer an empirically selected sample of the race settings and meanings from which a student population can be drawn, but it opens judicial writings to a portrayal of race with reference to the human beings whose lives embody our racial story over time.<sup>330</sup> It is an opening note to our hypothetical student symphony.

At the same time, the court's grant of a "zone of discretion" respected institutional competence outside judicial cloisters, but also entrusted to universities the construction of "zones of silence" within which some administrators may manipulate race

---

<sup>322</sup> See generally *Fisher*, 631 F.3d 213.

<sup>323</sup> *Id.* at 215–47.

<sup>324</sup> *Id.* at 230–31.

<sup>325</sup> *Id.* at 232–34.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 234.

<sup>328</sup> *Id.* at 231.

<sup>329</sup> *Id.* at 236.

<sup>330</sup> See generally Kuykendall, *Pressing the Mute Button*, *supra* note 20.

by methods that would not stand the light of public exposure and open disclosure.<sup>331</sup> The “zone of discretion” contains a potential for administrative manipulation of racial categories and facades of race-respecting “holistic” programs that mask agency costs imposed by faithless agents who betray their principal: a racially diverse society seeking to find mechanisms for racial harmony and communication.<sup>332</sup>

Given the willingness of the Fifth Circuit to speak conceptually about race, the Court faced an opportunity to use the race category as a means to achieve a state interest in providing a robust forum for ideas and long-delayed progress in overcoming racial silence in the institutions of cultural advancement. The case was also a chance for the Court to develop nuanced teaching about community and race to protect the integrity of the university forum.

In this sense, the opinion of the Court, in rehearsing and embedding its existing race story, missed a large opportunity.<sup>333</sup> Post-*Fisher*, there is a risk that the Court might, based on stale debates and emotional responses even by Justices, constitutionalize strict colorblindness and preclude any consideration of race in the admissions process. Foreclosing this experiment would be a terrible loss of generational change. Placing the admissions process in hands of the rising generation to recover social and legal memories of race, make sense of them in contemporary life, and energize leaders for future discourse on race in a diverse society, would break with a legacy of tactics to censor racial meanings in our common life. A top-down edict that rules out all use of race by any level of government, except for the Court to editorialize about its danger, would not have forged a new path in our racial history. Rather, it would repeat, revive, and validate a long-standing national habit of silence on race.<sup>334</sup> Yet *Fisher* still relied on an elevation of the Court as oracles on the residue of racial dysfunction in the United States. University bureaucrats retained a key role, but the Court claimed, for judges, the final say. Justice Kennedy’s hope for administrators to develop “new and fairer ways to ensure individual consideration”<sup>335</sup> remained undeveloped in the focus on risk, Court mastery,<sup>336</sup> and the management of the elite’s choices in constructing a vital community.

The aspiration to make race irrelevant, or to code its meaning, by deeming it not a matter upon which communities may use state support to reverse a history of evasion of the category and to construct new meanings and collaborations is neither support for liberty nor enhancement of equality. Instead, it is obstruction of transformational energy, reinstatement of race denial, reimpoverishment of a public vocabulary for unmediated discourse about our race heritage and future, and, with an awareness of

---

<sup>331</sup> *Fisher*, 631 F.3d at 231.

<sup>332</sup> *Id.*

<sup>333</sup> *See generally Fisher*, 133 S. Ct. 2411.

<sup>334</sup> *See generally id.*

<sup>335</sup> *Grutter v. Bollinger*, 539 U.S. 306, 387 (2003) (Kennedy, J., dissenting).

<sup>336</sup> *See supra* note 25 (enumerating *Fisher* assertions of final court say over the use of race in university admissions or any other state action).

control to administrators using codes for race, tolerance of a separate track for the nominal form of racial rules and the in-fact permitted incursions by hierarchical manipulation of a formally un-racial public space.

Without participation by the community itself in fostering connections, the project of administrators lacks commitment by those whose proximity is supposedly creating constructive connections. So long as diversity is perceived as a project of administrators, the community lacks a sense of agency and control over the creation of a constructive discourse. Even though the factor of coercion present in bussing and other forms of forced integration in elementary and secondary education is not present in university diversity admissions,<sup>337</sup> there is the suggestion of administrative control over proper speech and manipulation of both white and black students without their participation. Speech of insiders, using code and a common parlance for racial goals, continues, while the race category languishes under the cloud cast by legal disavowal. When the Court speaks on race with messages demanding formal silence, society loses the opportunity to shape new aspirations and understandings. An unspoken use of power shapes and relocates speech capacity from an emerging cohort of citizens living in a multiracial society to muted understandings among education hierarchs. When race dialogue is commandeered by a vocabulary of a mannered and repetitive legal argument, with attendant presumptions and rhetorical conventions, the full range of speech is disabled. The administrators become the overseers of “racial etiquette,”<sup>338</sup> mastering the strategic silences, creating the permitted usages, and refereeing the apportionment of race speech within the academy. *Fisher* claims a supervisory role, but fails to chart a path to community agency. The key players after *Fisher* are lawyers, the universities, the inevitable plaintiffs, and federal judges.

In the post-Civil War South, former slave owners claimed control over the etiquette to which freedmen were required to adhere.<sup>339</sup> Although there is no suggestion that university administrators occupy a parallel racial or legal niche, it is true that *Grutter*, and even *Fisher*, empower administrators as the keepers of racial etiquette in the academy.<sup>340</sup> *Grutter* both silences open speech and empowers coded speech.<sup>341</sup> White students and faculty rarely speak openly about race; like the blacks of the post-Civil War South, they are aware of unspoken boundaries on safe speech.<sup>342</sup> While the

---

<sup>337</sup> See generally RYAN, *supra* note 105, at 14, 286, 293–94 (noting problems arising from programs seen as coercive and suggesting that new approaches are available, without the use of coercion).

<sup>338</sup> LITWACK, *BEEN IN THE STORM*, *supra* note 219, at 257 (referring to the “time-honored etiquette of race relations”).

<sup>339</sup> See *id.*

<sup>340</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013); *Grutter*, 539 U.S. at 316, 328.

<sup>341</sup> See *Grutter*, 539 U.S. at 334.

<sup>342</sup> Cf. LITWACK, *BEEN IN THE STORM*, *supra* note 219, at 256–59 (describing the white expectation of black subservience in post-Civil War society). Southern black citizens had a

stakes bear no comparison to the risks faced by newly freed former slaves, it is nonetheless true that local power over race speech norms and the ability to offer rewards or exact punishment can create an unhealthy silence. In such a silence, insiders may use the code phrases of their calling—administrative locutions shaped by legal terms coined by the Court and conveyed to administrators by legal counsel. Modern day power is not brutal, but its effects on social health are nonetheless strong.<sup>343</sup> The speech of outsiders—students, both black and white, as well as faculty in the ranks—becomes either private, or worse, even contentious and adversarial.<sup>344</sup>

Disabling all forms of state support for experimentation by communities seeking to create a collaborative learning strategy chokes off a future that belongs to the citizens at large and not to hierarchs in any part of our constitutional structure. We should not presume an incapacity for collaborative creation by younger citizens of a basis for new forms of exchange, debate, and public knowledge. New generations are not doomed to repeat a national history of race speech blockage unless resources which they might require to chart a new map are requisitioned by former generations and placed in a constitutional storeroom of condemned cultural property.

In the next Part, we explain that the Court's jurisprudence recognizes learning communities as the setting that not only affords rich exchange to the members of the community, but can serve as the tool to address those phenomena that impede cross-racial understanding.

---

more expert knowledge of where the boundaries lay, built on the basis of years of experience. *See id.* By contrast, students are amateurs at negotiating the permissible and impermissible in race etiquette, perhaps overcorrecting out of uncertainty.

<sup>343</sup> *See, e.g.*, GEORGE ORWELL, 1984, at 304–06 (1949) (depicting a fictional society in which a powerful government created a language void of certain words in an effort to make impossible any thoughts deviating from government principles).

<sup>344</sup> A recent incident at Michigan State University illustrates the way in which silence is safe, and speech challenging ideas about “identity” and displaying a range of unexpected language about race readily shatters the capacity of a community to integrate experimental speech about race into a premise of exchange and tolerance for diverse voices. *See* David Jesse, *MSU Professor Pulled from Classroom After Rant Against Republicans*, FREEP.COM (Sept. 5, 2013, 8:13 PM), <http://www.freep.com/article/20130905/NEWS06/309050139/MSU-Republican-professor>. Though the campus is racially diverse, with an increasing presence of students from many countries, the sense of fragility about race discourse was quickly evident in the efforts to have a professor removed from teaching their class because of the form his race speech took. *Compare id.*, with Lou Anna K. Simon, *President's Statement on Diversity and Inclusion*, MSU OFF. OF THE PRESIDENT, <http://president.msu.edu/statements/diversity-inclusion> (last visited Apr. 15, 2014), and Office for International Students and Scholars, *2012 Statistical Report*, MSU, <http://oiss.isp.msu.edu/about/stats12.htm> (last visited Apr. 15, 2014). In the immediate aftermath, there was very little public discourse on campus from either professors or students in reaction to the incident, except for the students who objected to his speech and a few graduates who indicated he was a valued professor.

## VII. LEARNING COMMUNITIES: A MULTITUDE OF TONGUES

*A. Repairing the Public Forum for Racial Dialogue*

## 1. The Classroom

The classroom setting is a special place that cannot be replaced for the exchange of ideas. The Court recognized this much in *Sweatt v. Painter*.<sup>345</sup> There, the Court found that “[f]ew students . . . would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.”<sup>346</sup> Consequently, “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”<sup>347</sup>

This is not to say that the interplay of ideas and the benefits that flow from it cannot occur in other settings, such as churches, social clubs, or even the local pub. Notably, though, in *Bakke*, Justice Powell contributed genuine depth to our understanding of the unique importance of the education setting to cross-group knowledge.<sup>348</sup> Justice Powell explained the practical reality that “[i]n the school context, . . . people from different backgrounds are thrown together for four years, and they are there *to learn*.”<sup>349</sup> In this regard, Justice Powell’s opinion in *Bakke* assumed that campuses provide a “safe space” or “zone” where intellectually curious minds are encouraged to discuss racial matters.<sup>350</sup> Such official attempts to compose open forums should not be judicially barred, particularly when this nation is ruled by a constitution that places a premium on free speech, racial equality, and democratic engagement.<sup>351</sup> Complete suppression of official and unofficial attempts to provide these forums would create a chilling effect in which citizens would be discouraged from addressing obstacles

---

<sup>345</sup> 339 U.S. 629 (1950).

<sup>346</sup> *Id.* at 634.

<sup>347</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweazy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

<sup>348</sup> *Id.* at 313.

<sup>349</sup> Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLAL. REV. 1745, 1776 (1996) [hereinafter Amar & Katyal, *Bakke’s Fate*].

<sup>350</sup> The core idea of diversity as a predicate for educational benefits is the constructive interaction in the classroom (and presumably in further exploration of the connections formed there) by persons of diverse backgrounds. The full expression of the idealization of racial connection that diversity admissions can create is encapsulated in the *Fisher* district court’s valorization of the atmosphere in the classrooms. *See supra* notes 54–57 and accompanying text (describing diversity admissions as the basis for breaking down racial stereotypes and bringing about “lively discussions”).

<sup>351</sup> *See* BREYER, *supra* note 13, at 10–11, 75–85 (emphasizing the multiple sources of the Court’s race jurisprudence).

to cross-racial understanding and would prevent the nation from overcoming its historical baggage.

Given the problematic cultural recordation of race history, both official and in books and film, the university is an avenue for the recovery and dissemination of race history. The university can foster interactions that avoid heat or confrontation or the chill of off-limits signs for robust exchange. The insights of “a multitude of tongues”<sup>352</sup> can become the basis for a richer use of the university to generate First Amendment goods. The frame of stories that serve a color-blind ideology, or stories of entire racial oppression, can be replaced by more varied and constructively dialogical social scripts.

In *Keyishian v. Board of Regents of New York*,<sup>353</sup> the Supreme Court articulated the vital role of universities in our national “marketplace of ideas.”<sup>354</sup> In ruling that requirements for faculty to disclaim certain activities and affiliations as a condition of employment were unconstitutional, the Court elevated the importance of “robust,” unfettered “exchange of ideas” in the university.<sup>355</sup> The Court’s description of the university as a marketplace of ideas encompasses a richness of input that must be broad and uncensored, and which inheres in a diversity of the human input that a free faculty supplies.

The focus of the concern is on a faculty free to explore, learn, teach, and create without facing the threat of an imposed orthodoxy. Indeed, such a faculty should be free to take a risk in venturing into sensitive race matters. With a community of learners prepared to engage in race exchanges, students might have few reasons to find offense in perceived breaches of an understood code of silences and reticences. In *Keyishian*, the Supreme Court provides an aspirational language in support of the ideal of the university as diversity of thought and background:

The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a *multitude of tongues*, [rather] than through any kind of authoritative selection. In *Sweezy v. New Hampshire*, . . . we said:

“The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended

---

<sup>352</sup> *Bakke*, 438 U.S. at 312 (quoting *United States v. Assoc. Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

<sup>353</sup> 385 U.S. 589 (1967).

<sup>354</sup> *Id.* at 603–10.

<sup>355</sup> *Id.*

by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>356</sup>

Today, in the contest over the means of composing a student body, the focus on human input shifts to the discursive, learning, teaching, and creative capacity of the student body. The university is the vessel for free exchange, but it is as much a guardian for “a multitude of tongues”<sup>357</sup> as a univocal source of the human materials with which to evoke free exchange and racial knowledge. Because the university is a learning community, no single source can supply its passion for exchange and growth. There must be the aspiration and openness to forms of input that unpredictably enrich community and learning.

Granting discretion to university administrators as the sole engineers, with Court review, for diversity in admissions creates risks of agency costs—the diversion of a public good to a private interest of the agent—and, even more importantly, the positioning of racial minorities as the passive object of the agency of college elites, or as potential intruders in an environment shaped by and imagined as belonging to an elite perspective.<sup>358</sup> This portrayal of the “race problem” and the palette for public response lacks rhetorical sophistication to reposition race as “a multitude of tongues” rather than a narrative that a traditionally majority white population tells itself about its comforting myths and discomfiting transitions into a racially equal society. Further, the continuing arguments before and within the Court between conceiving of any race consciousness as a moral and constitutional wrong versus differentiating racial oppression from benign racial awareness is a conceptual stand-off for which no accepted “right” answer is possible. There is no creativity that reframes the problem as one for collaboration among the affected community of learners. Justice Powell proposed the idea of collaboration and exchange, but the seed of his idea has not been planted in a rich soil.<sup>359</sup>

The *Keyishian* exhortation to avoid “orthodoxy over the classroom”<sup>360</sup> has an enriched meaning in this context: Too much administrative control, even if done in good faith, clouds free university exchange. Orthodoxy claims a place of pride in the university when administrators deploy a coded language of diversity, backed up by

---

<sup>356</sup> *Id.* at 603 (emphasis added) (citations omitted).

<sup>357</sup> *Bakke*, 438 U.S. at 312 (quoting *Assoc. Press*, 52 F. Supp. at 372).

<sup>358</sup> *Cf. supra* notes 339–44 and accompanying text; see also LITWACK, TROUBLE IN MIND, *supra* note 218, at 234–37 (providing examples of racially guarded space).

<sup>359</sup> See *Bakke*, 438 U.S. at 312.

<sup>360</sup> *Keyishian*, 388 U.S. at 603.

an implicit agency as race monopolists acting as delegees of an official monopoly claimed by the Supreme Court.<sup>361</sup>

No strand of Supreme Court doctrine or associated rhetoric, except for *Bakke*,<sup>362</sup> thus makes a clean break with a history of racial silence, evasion, and a dominant narrative. There is but one fragile underdeveloped opening to a richer narrative of race—the *Bakke* recognition of a robust academic freedom in the classroom.<sup>363</sup> The claim that “diversity” enhances learning may carry a grain of truth, but in the absence of a theory of the discursive context, it once again renders one set of people the observers/narrators and others the malleable object of an elite imagination—for under-specified cultural and totemic outcomes.<sup>364</sup> The *Grutter* Court has answered the charge that including minorities for diversity conveys the idea that they constitute typical examples of black people for white students to learn about. The *Grutter* answer is that if, for example, black students are present in classes, they are likely to demonstrate diversity among African Americans and to refute stereotypes.<sup>365</sup> Despite this nuanced explanation, however, black and other minority students are still positioned as being present for the benefit of the “normative” students.<sup>366</sup> Although the answer to charges that blacks are made representatives of their race has merit—they instead refute “stereotypes”<sup>367</sup>—they nonetheless are positioned as the observed. The staging<sup>368</sup> is under the control of administrators; the faculty assists with a performance using an implied but ambiguous script; and the students take parts as participating theatergoers, assuming roles the script may suggest for both those viewing the performance and serving as conscripted cast.

The resulting picture is not of a “multitude of tongues” afforded a forum for active collaboration in advancing race knowledge and energized by responsibility, but of a recreated racial silence lacking the dynamic change in discursive strategy that our history demands and the university should advance.

Dogma as the Constitution’s command supports an atmosphere in which race cannot be discussed, for fear, resentment, and hostility necessarily arise from the discussion of a forbidden subject.<sup>369</sup> In that atmosphere, adherents of two extreme views

---

<sup>361</sup> See Balkin, *A Play in Three Acts*, *supra* note 251, at 1722 (referring to the Court’s “discourse forcing” effects which requires administrators to adopt the Court’s language if they are to use affirmative action). The Court’s prescribing the language makes the university administrators a “delegee” of approved speech.

<sup>362</sup> *Bakke*, 438 U.S. at 266.

<sup>363</sup> *See id.* at 311.

<sup>364</sup> *See supra* note 4 and accompanying text.

<sup>365</sup> *See generally* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>366</sup> *See id.*

<sup>367</sup> *Id.* at 333.

<sup>368</sup> *See* GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE*, *supra* note 80, at 252.

<sup>369</sup> *See* Sharon E. Rush, *Talking About Race and Equality*, 22 U. FLA. J.L. & PUB. POL’Y 417, 418 (2011). Indeed, popular discourse has accused the President of “bringing race into [it]” when he responds to a question about incidents in which race is a debatable presence. *See*,

face off when speech occurs.<sup>370</sup> These polarized views contribute to racial silence. The view that race is not a salient concept in America reinforces racial silencing as a norm that controls group interaction. It is also unrealistic, perpetuating the mentality that sweeping all race discourse under the rug will somehow eventually result in racial parity and equality.<sup>371</sup>

But change requires effort. The repetition of the strict “color-blind” meme is less an objective account—or even an aspiration to a believable outcome—than a symptom of a national habit resembling a medical condition called chromophobia,<sup>372</sup> the fear of colors. The coping mechanism for race chromophobia is denial, a fantasy of not seeing color. Yet the medical treatment for chromophobia is desensitization through exposure.<sup>373</sup> Racial chromophobia can be handled by exposure to forms of acknowledgment that support healthy responses and interactions. An additional effect of an official norm of silence is the reproduction of the majority white habits denying agency to racial minorities.<sup>374</sup> *Bakke* opens up an opportunity for classrooms to serve as forums where differences on race can be discussed free from race monopolists or group-imposed orthodoxy.

One effect of *Bakke* has been to authorize spaces where race is relevant and can be discussed openly.<sup>375</sup> These safe spaces promote opportunities for more meaningful racial discourse and provide alternatives to the intermittent mainstream dialogue, which is dominated by those who rigidly adhere to either anticlassification (color-blind) or antisubordination (color-conscious) ideologies.<sup>376</sup> As such, it is appropriate

---

*e.g.*, Chuck Todd et al., *First Thoughts: Courts Could Determine the Legacy of a President*, NBC (Mar. 26, 2012, 9:16 AM), [http://firstread.nbcnews.com/\\_news/2012/03/26/10867572-first-thoughts-courts-could-determine-the-legacy-of-a-president](http://firstread.nbcnews.com/_news/2012/03/26/10867572-first-thoughts-courts-could-determine-the-legacy-of-a-president) (“Newt Gingrich called President Obama’s statement on Trayvon Martin ‘disgraceful’ and ‘appalling,’ contending the President was bringing race into it.”). It is commonplace that the President, because he is black, must be circumspect in addressing race. *See, e.g., id.*; Mark Landler & Michael D. Shear, *President Offers a Personal Take on Race in U.S.*, N.Y. TIMES, July 20, 2013, at A1.

<sup>370</sup> *See* Rush, *supra* note 369, at 419–20 (dubbing the group who believes that race should not be part of the discussion to end discrimination the “Nothing Group” and the group operating under the extreme opposite view—that race permeates all aspects of life—the “Everything Group”).

<sup>371</sup> *See id.* at 418–19.

<sup>372</sup> *Chromophobia Definition*, STEDMAN’S MEDICAL DICTIONARY 346 (27th ed. 2000) (“2. A morbid dislike of colors.”).

<sup>373</sup> *See generally* J.P. Watson et al., *Prolonged Exposure: A Rapid Treatment for Phobias*, 1 BRIT. MED. J. 13 (1971).

<sup>374</sup> *See, e.g.*, Nelson George, *Still Too Good, Too Bad or Invisible*, N.Y. TIMES, Feb. 17, 2013, at AR1; Kate Masur, *In Spielberg’s ‘Lincoln,’ Passive Black Characters*, N.Y. TIMES, (Nov. 12, 2012), <http://www.nytimes.com/2012/11/13/opinion/in-spielbergs-lincoln-passive-black-characters.html>.

<sup>375</sup> One scholar called these spaces the “Anti-Balkanization Zone (ABZ),” in which participants can “talk about race and avoid the threat that the current racial balkanization poses to our social cohesion.” Rush, *supra* note 369, at 419–20.

<sup>376</sup> *Id.* at 420–21.

for college admissions programs to factor race into their plans to achieve a diverse campus designed to create a forum for their students. Race, however, must be employed in a way that selects those students that have something to contribute to the discussion. Mere hierarchy-driven “racial aesthetics” do not create community or empower dialogic energy.<sup>377</sup>

Strict colorblindness, reinforced by the Court’s affirmative-action jurisprudence, restricts dialogue by exacerbating racial divisiveness, thus withholding opportunities for citizens to develop strategies to constructively investigate and explore race problems. In this way, silence turns racial dialogue into a choked conversation dominated by counselors of silence or loud voices of provocation. Prospect for genuine cross-racial healing and reconciliation is lost.

Our concern is that silence not only has allowed intemperate speakers to become louder in public discourse, but has also permitted college administrators to deploy race in their admissions programs to achieve political ends. Yet the purist jurisprudence of strict colorblindness would not give administrators flexibility to implement innovative programs as an alternative to unchecked race-conscious programs.<sup>378</sup> Indeed, alternatives are sorely needed in this area because unmonitored race-conscious programs present the same threat to racial dialogue as color-blind purity does.

## 2. Ending Self-Segregation: Race Consciousness Without Identity Apartheid

A noticeable side effect of unchecked affirmative-action programs is self-segregation among students on college campuses. Race-conscious programs that encourage self-segregation produce behavior that undermines the university’s goal of using race as a means to attain a robust marketplace of ideas. Self-segregation creates an atmosphere of racial silencing as well. In fact, the racial silencing that race consciousness produces is arguably more dangerous than the suppression produced from a purely color-blind approach. As explained earlier, adherents of a color-blind society believe that race should not play any role in daily life, including an individual’s decision on whom to associate with. In contrast, race consciousness can potentially tolerate a high degree of deliberate ethnic isolation.

Many colleges and universities that boast about racial diversity as a pedagogic goal have de facto segregated campuses.<sup>379</sup> At Wesleyan University, for instance,

---

<sup>377</sup> *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting).

<sup>378</sup> *Id.* at 393 (Kennedy, J., dissenting) (referring to the possible loss of the “talents and resources of the faculties and administrators in devising new and fairer ways” of combining race consciousness and “individual consideration” of applicants).

<sup>379</sup> *See id.* at 349 (Scalia, J., concurring in part and dissenting in part). Student doubts about diversity and concern for racial segregation appear in occasional writings, such as student notes. *See, e.g.*, Sean B. Seymore, Note, *I’m Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?*, 12 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 287, 316 (2006) (“Colleges that

the housing office gives its students the choice to live in race-based housing “called Malcolm X, Women of Color, Asian/Asian-American, La Casa, and even one designated Open, which is the ‘queer and queer-positive special interest house.’”<sup>380</sup> Administrators sometimes accommodate demands for separate dorms because they believe that it will limit interracial conflict.<sup>381</sup>

Just as problematic are programs that say they are designed to facilitate intercultural dialogue but, in actuality, are forums exclusive to selected groups.<sup>382</sup> The University of Michigan at Ann Arbor, for example, provides “safe spaces” for its students to discuss sensitive topics involving race.<sup>383</sup> These safe spaces at the University of Michigan cater to minority student organizations so minority students may feel sufficiently comfortable and secure to express views that they may not otherwise express in front of white students,<sup>384</sup> who are thus figured as the community norm. Given the

---

claim to be diverse may be able to tout high minority enrollment statistics, but campus self-segregation is reminiscent of the 1950s.”).

<sup>380</sup> See Stephan Thernstrom & Abigail Thernstrom, *Reflections on The Shape of the River*, 46 UCLA L. REV. 1583, 1607 (1999).

<sup>381</sup> At UCLA, race-conscious housing on campus led instead to conflict when the university decided to assign nine white students to the Malcolm X house because other spaces were not available due to an unexpectedly large freshman class. *Id.* (noting some black students at the Malcolm X house objected to living with white students, the school “solved” the problem by “consigning several white students to the basement of the philosophy building”). Schools that claim to be racially inclusive nonetheless create programs that channel students into living, eating, and even pledging with students from their own race. See Seymore, *supra* note 379, at 290. Some colleges even host segregated graduation celebrations. See Michael A. Fletcher, *Diversity or Division on Campus?; Minority Graduation Galas Highlight a Timely Issue*, WASH. POST, May 19, 2003, at A1.

<sup>382</sup> See, e.g., MESA/Trotter, *Programs & Initiatives*, U. OF MICH., <http://mesa.umich.edu/programs-initiatives> (last visited Apr. 15, 2014) [hereinafter MESA, *Programs*].

<sup>383</sup> See MESA/Trotter, *MESA/TMC Programming Initiatives*, U. OF MICH., <http://mesa.umich.edu/article/mesatmc-programming-initiatives> (last visited Apr. 15, 2014) [hereinafter *MESA/TMC Programming Initiatives*]. The University of Michigan Trotter House caters to minority student groups to provide needed “safe space” to discuss sensitive subjects. See *id.* A safe space designed for minority groups does not abide by the diversity principle, which seeks to create contact among diverse individuals, not to replicate outside segregation patterns. With thanks to Katie Eyer for bring it to our attention, see *W.E.B. Du Bois College House*, U. OF PA., <http://dubois.house.upenn.edu/frontpage> (last visited Apr. 15, 2014), for an example of a race-targeted institution said to be deeply integrated.

<sup>384</sup> See *MESA/TMC Programming Initiatives*, *supra* note 383. The University of Michigan at Ann Arbor Trotter Multicultural Center partners with the office of multicultural student affairs to develop programs that “foster the diversity within our communities, promote mature intercultural interaction, and educate our campus on issues of race, ethnicity, and social justice.” MESA, *Programs*, *supra* note 382. But it appears that any discussion on these matters is focused mostly on minority students, with a premise that openness cannot occur outside an identity-based safe space. For example, program materials describe “Nourish: A lunch series for self-identified women of color.” *MESA/TMC Programming Initiatives*, *supra* note 383. The Nourish Program is a partnership by the Office of Multi-Ethnic Student Affairs and the

premise about a need for safety, white students are not encouraged to participate in these spaces because their presence would hamper the free discourse among minority students.<sup>385</sup> The assumption of a need for self-censorship, while a factor for any group, is problematic as a salient ground for organizing a collegiate learning environment intended to foster the exchange of ideas.<sup>386</sup> The premise affords to white students an implicit permission to be closed off and unhearing and enforces in minority students a sense of separation from an impenetrably hostile majority. The existence of safe spaces, with premises of retreat and exclusivity, is logically incompatible with the claims for diversity admissions developed for Supreme Court approval.<sup>387</sup>

The phenomenon of racial isolation is diametrically opposed to the principles of diversity. It is a barrier to cross-racial dialogue. When students self-segregate in dorms, in student groups, or in safe spaces, they are not occupying an authentic forum where students, with a variety of life experiences and views, are welcome to participate. The risk is that this atmosphere can lull students into a social malaise in which they quietly accept measured or limited interaction with fellow students of other races outside the classroom. In fact, a few students at Emory University described self-segregation as a natural and common occurrence, expressing little concern about whether their decision to separate themselves along racial lines could threaten campus harmony.<sup>388</sup> Yet, ethnic isolation can potentially create a hostile racial environment in

---

Office of Counseling and Psychological Services (CAPS) addressing some of the unique needs and experiences of women of color. *Id.* The program seeks to empower women of color around issues of identity, intercultural competency, and health and wellness that affect them in an open, spirited atmosphere. *Id.* “*The program welcomes all self-identified women of color at the University of Michigan including undergraduate, graduate students, faculty, and staff. The purpose of this dialogue is to create much-needed safe spaces to discuss relevant and often sensitive issues specific to women’s experiences within marginalized communities. It offers a space for self-expression, reflection, and open dialogue.*” *Id.* (emphasis added).

<sup>385</sup> See, e.g., *MESA/TMC Programming Initiatives*, *supra* note 383 (limiting the Nourish program to “women of color”).

<sup>386</sup> KENNEDY, *supra* note 19, at 6–7 (describing group pressure from other black students at Yale Law School shortly after the *Bakke* case was released to hew to a common line on *Bakke* in class and to walk out if any opposition to affirmative action were expressed). Of his experience at Yale Law School, Professor Kennedy comments, “I remember thinking at the time that the advice was silly. How else were we—aspiring lawyers—to master the arguments and counterarguments regarding affirmative action other than by engaging antagonists?” *Id.*

<sup>387</sup> Cf. Pidot, *supra* note 183, at 765–69 (describing the development of a diversity rationale for race-conscious admissions).

<sup>388</sup> See Paige P. Parvin, *The “R” Word*, EMORY MAG., Spring 2004, at 2, available at [http://www.emory.edu/EMORY\\_MAGAZINE/spring2004/race\\_2](http://www.emory.edu/EMORY_MAGAZINE/spring2004/race_2) (“‘Emory students do self-segregate, but it is not an inherently bad thing,’ agrees Juno Lawrence, an African-American junior from Colorado majoring in international studies and Spanish with a minor in community building and social change. ‘Segregation occurs naturally with large groups of people because individuals tend to identify with people whose experiences and histories are similar to their own. However, this can, and has, become a problem when one never steps outside of that safe comfort zone.’”).

which students are not afforded opportunities to develop multi-ethnic relationships and the means to resolve ethnic differences through respectful and mature exchanges.<sup>389</sup> Without these opportunities, some students may express racial views through inflammatory and even socially destructive conduct instead.<sup>390</sup> Campuses are not exempt from incidents of race-based violence and intimidation.<sup>391</sup> The adverse effects of racial separation within diversity extend to both physical injury and frustration of the prospect for cross-racial dialogue.

Students often occupy separate spaces where the participants share the same backgrounds and may hold racially hostile views. This can create an echo chamber in which racial ideologies, even bigoted ones, are sounded and not challenged. More troubling, racial groups can become insular, conducting discourse underground, where groupthink is internally policed.<sup>392</sup> Groupthink attempts to control its members, often through self-appointed regulators,<sup>393</sup> by branding dissenters with verbal scarlet letters, singling

---

<sup>389</sup> See Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Education Outcomes*, 72 HARV. EDUC. REV. 330, 362–63 (2002) (discussing opportunity for such exchanges in college).

<sup>390</sup> See Priya Narayan Parker, *Student Racial Climate: An Analysis and Assessment* 51–52 (Apr. 2004) (unpublished B.A. thesis), available at [http://pages.shanti.virginia.edu/ucare/files/2011/06/StudentRacialClimate\\_2004.pdf](http://pages.shanti.virginia.edu/ucare/files/2011/06/StudentRacialClimate_2004.pdf) (discussing “Hate Crimes”).

<sup>391</sup> See *Hate Crimes Statistics 2011*, FBI, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2011/narratives/location-type> (last visited Apr. 15, 2014) (reporting that of 2917 hate crime incidents that were motivated by racial animus, 9.5% took place at a school or at a college campus).

<sup>392</sup> See David B. Fischer, *Bank Director Liability Under FIRREA: A New Defense for Directors and Officers of Insolvent Depository Institutions—or a Tighter Noose?*, 39 UCLA L. REV. 1703, 1729–30 (1992) (“[G]roupthink . . . [is] a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ striving for unanimity override their motivation to realistically appraise alternative courses of action. . . . In the ‘groupthink’ paradigm, members of an ‘in-group’ increasingly rely on each other for security and acceptance, especially when the group encounters an external stress that forces it into greater internal cohesion. As the group members come to depend on each other, they increasingly seek unanimity in their decisions because they desire to avoid conflict. In striving for such unanimity, they actively refrain from critical questioning, and they impede efforts to explore alternative solutions to the difficult challenges confronting them.” (internal quotation marks omitted)).

<sup>393</sup> The phenomenon of groupthink has been critically analyzed within the context of black America. Kimberly Jade Norwood, *The Virulence of Blackthink™ and How Its Threat of Ostracism Shackles Those Deemed Not Black Enough*, 93 KY. L.J. 143, 147 (2005) [hereinafter Norwood, *Virulence of Blackthink™*] (“*Blackthink* is a form of prejudice. It assumes and demands that all Black people think a certain way. It presumes that all Blacks are unquestionably liberal, pro-affirmative action, pro-choice, pro-gay rights, pro-welfare, and most definitely anti-Republican. Some segments of our society not only harbor this presumption but go a step further: they will devalue and marginalize those who fail to comply with *Blackthink*. These segments of society are the self-appointed guardians of blackness, the ‘Soul Patrol.’ Although originally composed exclusively of Black people, the Patrol now includes non-Blacks as well. The Soul Patrol, like Orwellian thought police, monitors and attempts to regulate the thoughts and beliefs of Black Americans. Autonomy and difference are stifled;

them out for shunning or disrespect if they dare stray from group orthodoxy.<sup>394</sup> The racially segregated “safe space” is vulnerable to this sort of intellectual boundary maintenance, with strong potential for affecting minority students.<sup>395</sup> White students, unlike their minority counterparts, are not huddled into small groups but rather are free to explore the full range of human expression without fear of intragroup backlash.<sup>396</sup> In this regard, race consciousness creates enclaves of silence in which inbred behavior among minority students is socially encouraged while, perversely, leaving open for white students an unimpeded privilege of access to the whole dimension of human expression, without restriction based on an imposed identity.<sup>397</sup> Indeed the idea of white student groups is seen as an incendiary provocation because they are anomalous for the possessors of existing full access to opportunities.

---

acquiescence is embraced and rewarded. . . . Based on criteria the Patrol deems determinative, the Patrol tries to decide who is Black and who is not.”)

<sup>394</sup> See A. Leon Higginbotham, Jr., *Justice Clarence Thomas in Retrospect*, 45 HASTINGS L.J. 1405, 1429 (1994) (arguing that Justice Thomas’s race jurisprudence was “absurd” and arose from “racial self-hatred”); Norwood, *Virulence of Blackthink™*, *supra* note 393, at 148 (describing the targeting of black students who express nonconforming opinions); Adolph L. Reed, Jr., *The Puzzle of Black Republicans*, N.Y. TIMES, Dec. 19, 2012, at A35 (dismissing the appointment of Tim Scott of South Carolina, a black Republican, to the U.S. Senate as “cynical tokenism”);

<sup>395</sup> See Kimberly Jade Norwood, *Blackthink™’s Acting White Stigma in Education and How it Fosters Academic Paralysis in Black Youth*, 50 HOW. L.J. 711, 717–18 (2007) (“Accusing a Black person of *acting White* is an attack on the person’s racial identity and is really part of a larger problem I call Blackthink. Blackthink is a form of discrimination. It is practiced by a group of individuals, originally Black people, but the group is no longer so limited, who judge Blackness, *i.e.*, who decide whether a given individual is really Black. Blind allegiance to what these individuals deem the true measure of Blackness results in embrace and welcome; any deviation garners rejection, marginalization, or ostracism from the Black community.” (citations omitted)).

<sup>396</sup> See Norwood, *Virulence of Blackthink™*, *supra* note 393, at 187 (“Is it the case that White Americans can be complex, multi-faceted human beings, tapping into all that America has to offer and fully exercising their constitutional rights, while the same complexities and exercises are unacceptable in Blacks? Is it true that a narrower range of permissible thought is available to Blacks? Is it really the case that, as a Black American, ‘I have no right to think the way I do because I’m black[?]’ Because racism certainly exists within the larger society, does that mean Black thought and action must continually be dictated (and thus limited) by racism?” (citations omitted)).

<sup>397</sup> See WILLIAMSON, *supra* note 152, at 48–52 (interpreting the post-Reconstruction isolation of black Southerners into enclaves cut off from the full range of social and cultural life of the country as a tragic limitation of the opportunities for black citizens to thrive within a niche suited to their various talents and potentials). Self-segregation within a university that opens its classrooms and other opportunities to all students cannot be compared to Southern apartheid that stopped interracial contact for a long period of history and deprived African Americans of the normal range of social interactions from which a common culture is created. But it nonetheless is not an ideal medium for the benefits claimed to arise from race-conscious admissions aimed at creating a critical mass of minority students.

This racial silencing stems from admission policies crafted by administrators that compose student bodies that are one-dimensionally diverse. Without programs aimed to foster meaningful cross-racial dialogue, admissions programs will admit students as race symbols that will simply reflect a statistical portrait of an ethnic composite that academic elites believe reflects the image of a prestigious campus. But the essential ingredient to any race-conscious program that claims to achieve diversity must be a contribution to the college's interest in free expression. This Article now proposes learning communities that universities create by using an array of race-neutral-but-sensitive factors to select students that will contribute to cross-racial exchange and free expression.<sup>398</sup> Such a program must be crafted to avoid the constitutional pitfalls under the Equal Protection Clause, as well as to move discourse away from popular racial memes as toward genuine exchange. We will explain the program in the context of a hypothetical or ideal college.<sup>399</sup>

*B. Proposed Admissions Program and Educational Goals*

1. Goal: Cross-Racial Exchange Facilitated by a Rigorous Academic Environment

At a hypothetical college, the admissions office will offer seats at an experimental residential college, created to establish learning communities and set pedagogical goals around racial awareness, with an emphasis on admitting students that will contribute distinctive perspectives on an array of intellectual and academic matters, particularly on matters involving race. The goal of these learning communities is to admit a diverse group of students from myriad backgrounds who can be taught in an environment where students are encouraged to challenge racial stereotypes, explore historic problems, and correct misconceptions through cross-racial dialogue. In order to achieve cross-racial exchanges while maintaining academic standards, we propose the following method for admission.

The residential college (RC) should have academic standards that reflect the standards of the broader campus community. The RC will have the opportunity to select students who display promise for the program. As with athletic programs, the RC may inform admissions offices of highly recruited prospects believed able to contribute significantly to the academic mission of fostering exchange about race and other forms of diverse experience. As with athletics, minimal standards for admission would not be related to a fixed standard derived from the typical minimum across the university, but from an assessment of the applicant's complementary strengths as a participant in the residential college.<sup>400</sup>

---

<sup>398</sup> See *infra* Part VII.B.

<sup>399</sup> See *infra* Part VII.B.

<sup>400</sup> See *Report: Exemptions Benefit Athletes*, ESPN C. FOOTBALL (Dec. 30, 2009, 1:07 PM), <http://sports.espn.go.com/nfl/news/story?id=4781264>.

Indeed, and ironically, athletes are commonly admitted under an NCAA rule permitting “special admission[s]”<sup>401</sup> for athletes, many of whom are African-American students with relatively weak academic credentials.<sup>402</sup> According to the *1999–2000 – 2009–10 NCAA Student-Athlete Race and Ethnicity Report*, African Americans made up 45.8% of student-athletes in Division I football (including the Football Bowl Subdivision and the Football Championship Subdivision), with white football players following at 45.1%.<sup>403</sup> There is a significant disparity in the percentages of African Americans as part of the broader student body compared with the percentages of African Americans who are members of NCAA Division I football and men’s basketball teams. Using the University of Michigan and the University of Texas at Austin as examples, one can see this difference in numbers: In Fall 2009, African Americans represented 4.9% of the undergraduate enrollment at University of Texas at Austin and 6.2% at the University of Michigan–Ann Arbor.<sup>404</sup> The readily accessible NCAA percentages for athletes include all Division I universities and are not directly comparable to the percentages at the University of Michigan and the University of Texas.<sup>405</sup> Nonetheless, one may surmise that if one were to look closely at the racial make-up of the football and men’s basketball teams at the University of Michigan–Ann Arbor and the University of Texas at Austin, the percentages would be similar to what the NCAA is reporting for African Americans. Thus, the disparity in the race composition of the student body, admitted in a race-neutral protocol as a result of a constitutional amendment adopted by Michigan voters,<sup>406</sup> and the composition of the football and basketball teams, admitted under special rules for athletes, is surely massive.

---

<sup>401</sup> NCAA, 2013–14 NCAA DIVISION I MANUAL 140 (2013) (“A student-athlete may be admitted under a special exception to the institution’s normal entrance requirements if the discretionary authority of the president or chancellor (or designated admissions officer or committee) to grant such exceptions is set forth in an official document published by the university (e.g., official catalog) that describes the institution’s admissions requirements.”).

<sup>402</sup> See Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 138–39, 146, 153 (2006) (discussing underperformance of student athletes generally and zero percent graduation rate of African Americans in some programs).

<sup>403</sup> *Blacks Now a Majority on Football Teams*, ESPN C. SPORTS (Dec. 9, 2010), <http://sports.espn.go.com/ncaa/news/story?id=5901855>.

<sup>404</sup> *Compare NCAA, 1999–2000 – 2009–10 NCAA STUDENT-ATHLETE ETHNICITY REPORT 56* (2010), available at <http://www.ncaapublications.com/productdownloads/SAEREP11.pdf>, with OFF. OF INFO. MGMT. & ANALYSIS, U. OF TEX. AT AUSTIN, STUDENT CHARACTERISTICS FALL 2009, FALL ENROLLMENT BY LEVEL AND ETHNICITY 6, available at <http://www.utexas.edu/academic/ima/sites/default/files/SHB09-10Students.pdf>, and OFF. OF REGISTRAR, U. OF MICH., UNDERGRADUATE ENROLLMENT OVERVIEW (2009), available at <http://www.ro.umich.edu/report/09exec.pdf>. By comparison, the percentages reported by the NCAA show that in 2009 to 2010, 45.8% of the Division I football players were African American and 60.9% of the Division I men’s basketball players were African American. NCAA, *supra*, at 56.

<sup>405</sup> See *Blacks Now a Majority on Football Teams*, *supra* note 403.

<sup>406</sup> See MICH. CONST. art. I, § 26; *supra* note 59.

Race silence again reigns, and the ostrich reappears to make law without seeing race.<sup>407</sup> Because athletes are admitted under color-blind admissions, the racial composition of the group so favored is not relevant. It is unseen by the ostrich. Further, the considerable evidence that athletes are not given sound educations, that they contribute what amounts to labor to the schools for the remuneration of white coaches and administrators,<sup>408</sup> and that they fail to graduate in considerable numbers has no legal significance.

Scholarships may be the only means for an athlete to receive a college education. Nonetheless, the rigorous schedule for a student athlete and the “demanding practice schedules, coupled with special admission for academically unprepared athletes who would likely face difficulty handling academic responsibilities under the best of circumstances,” creates an unsuccessful academic career for the college athlete.<sup>409</sup> A student’s eligibility for an athletic scholarship ends before the athlete is able to complete the degree requirements.<sup>410</sup> According to the ESPN 2002 report on college graduation rates, the African-American graduation rate, as an example, at thirty-six different Division I universities from 1990 to 1994 was at “zero percent.”<sup>411</sup>

Admitting a heavily minority group to exploit them for the large amounts of money that they generate for schools—because of their athletic talent and skill—and failing to afford them an education does not raise a claim of intentional race discrimination under the Court’s Fourteenth Amendment jurisprudence.<sup>412</sup> Schools may recruit heavily from primarily black secondary educational institutions to discover talented athletes. A focus on such schools would be because the desired talent is located there, not because they are black. Despite the exploitation, there is no colorable Equal Protection claim for race discrimination.

In similar fashion, but without an effect of exploitation, schools could recruit based on statements from applicants about their interest in race and their capacity to contribute to fruitful connections among racial groups within the university setting. In each instance, race is associated with the skills sought by a university, but in no instance are they formally grounded in race. One can seek to find talent by reference to experiences and locations that foster a capacity for contribution to a discourse about race.

---

<sup>407</sup> See *supra* note 9 and accompanying text.

<sup>408</sup> See McCormick & McCormick, *supra* note 402, at 140–41 (“Many . . . aspects of the athletes’ college experience are also structured to serve the universities’ commercial interests and are at odds with academic considerations.”).

<sup>409</sup> *Id.* at 146.

<sup>410</sup> See *id.* at 148–49.

<sup>411</sup> *Id.* at 153.

<sup>412</sup> For an overview of race and Fourteenth Amendment jurisprudence, see generally Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735 (2002).

## 2. Initiating Racial Discourse by Applicants: The Tool to Gauge Applicant Ability to Contribute to the Community

Given that the applicant satisfies the above requirements, he or she must submit an essay which explains his or her interest in the program. Although the applicant's race will be discussed in this essay, it is noteworthy that applicant's race is not used simply to classify him or her. Rather, her race as well as other personal qualities will be important in an overall evaluation of how she will contribute to the learning community's goals. To this end, each applicant must submit a five-to-seven page essay which explores the following four questions:

- What is her race?
- What are her attitudes toward other races?
- What does she think she will learn about race in a college that invites strong awareness of race and cross-racial exchange?
- What does she feel she can contribute to this community?

The essay will be evaluated based upon the following process. The admissions committee will consider an array of other factors when evaluating these essays to identify those applicants who can contribute to the RC in a significant way. We propose some of the following factors:

- Applicant's ability to communicate with people outside her own socio-economic groups
- Applicant's ability to work with others
- Applicant's exposure to different races or lack thereof
- Applicant's enthusiasm to either live, meet, or interact with people from other racial or ethnic backgrounds
- Applicant's perspective on race relations, if articulated
- Leadership potential
- Strength of recommendations
- General persuasiveness of applicant's essay

The above is not an exhaustive list of factors because experience may prompt the program to consider other race-neutral factors. These factors, however, are what an admissions program may look for when attempting to compose a diverse student body, which would be made up of students that would contribute to robust discussions on an array of subjects, particularly on matters pertaining to race. Once the RC has admitted its first class, students will participate in a collaborative community admissions process. The benefits of this aspect of the process will be explored more in Part C.

### *C. Top-Down Admissions Programs: Is There a Better Alternative? Student-Led Admissions Free from Numeric Goals and Racial Theories*

The novel aspect of this proposal is that it insists that the way for race-conscious admissions to remain faithful to equal protection principles is to substantially reduce

the influence of administrators.<sup>413</sup> Admissions programs are not tainted simply because they implement racial categories. Such programs become unlawful when race is mechanically employed to achieve racial goals in a process devoid of any meaningful individualized assessment.<sup>414</sup> Restricting consultation of data is, of course, an obvious solution in safeguarding the process from efforts to achieve racial balancing. But this does not remove the danger entirely, particularly rigid quotas are not the only threat to equal protection.<sup>415</sup> Rather, the danger to racial harmony, as affected by perceptions of unfairness, arises whenever a program engages in an activity that makes race a consideration in its pursuit of a diverse campus but without any other educational goal tied to the admissions process and without designing an educational project linked to the resulting composition of the student body.<sup>416</sup> Racial quotas are just one means for colleges to do this.<sup>417</sup>

Admissions professionals have a command of a limitless set of tools to produce race-based results.<sup>418</sup> Race-conscious programs cannot remove the risk of racial balancing unless constitutional discipline identifies and addresses the root problem to these programs—manipulation of racial categories by administrators. Embracing the legacy of racial silence is not a good solution to the agency problem of administrators with private agendas. Administrators rarely encourage unregulated discourse; they search for and find ways to impose silence in the guise of encouraging speech and a rich diversity of community. Hence, the solution to concern about the use of race as a factor in state higher education admissions is to admit race into the university square through the medium of the community for whom speech and diversity can be a work in progress, powered by constantly refreshed and strengthened commitments to a shared project. The beliefs and attitudes of earlier generations should not govern the

---

<sup>413</sup> Cf. Horwitz, *supra* note 17, at 526–28 (discussing the issue of trusting university officials with such a task).

<sup>414</sup> See *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). The Court struck down the undergraduate program at the University of Michigan because it allocated points to minority applicants for admission without any individualized evaluation. *Id.* (“We find that the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”).

<sup>415</sup> See, e.g., *id.*

<sup>416</sup> *Id.*

<sup>417</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1977) (explaining that racial or ethnic is but a sign, though important, and a constitutional element if used as “plus”).

<sup>418</sup> As discussed previously, in *Gratz*, administrators devised a mechanical allocation of points on the basis of race that nearly guaranteed admission for applicants from minority racial groups. *Gratz*, 539 U.S. at 270. The University of Texas employed a holistic system for students not admitted under its Top Ten Percent program. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2416 (2013). The *Gratz* technique failed to pass muster at the Supreme Court. *Gratz*, 539 U.S. at 270. Under *Fisher*, the University of Texas must carry a burden on remand of showing a compelling state interest and narrow tailoring. *Fisher*, 133 S. Ct. at 2414.

choices that can be made by rising generations. The heritage of unreflective thinking about race, with repetitions of earlier dysfunction imagined as a new color-blind way of life, can best be left behind by awarding control and giving a charge to a younger generation to forge new connections and forms of insight. The university is the critical site for such a break with stale ways of thinking about race.

The support for the existing hierarchical control over diversity admissions assumes that admissions programs, like governmental agencies, should be given deference when constructing learning communities because they “make complex judgments informed by administrative expertise” when deciding how to implement race-conscious programs to achieve educational goals.<sup>419</sup> *Grutter*-style strict scrutiny,<sup>420</sup> as a *Croson* method,<sup>421</sup> provides a “self-policing standard” of sorts in which schools that choose race-conscious programs must “have good administrations who . . . develop policies, amass records, periodically review their policies, form committees and make a case that the policy will work.”<sup>422</sup> Student-led admissions, one could argue, lacks this degree of institutional knowhow. Strict scrutiny, however, does not canonize government actors as saints when using the race category.<sup>423</sup> Deference to administrators in this field gives them the flexibility to conceal race-based agendas behind technical jargon (e.g., critical mass).<sup>424</sup> Student-guided admissions would lack any goal other than an environment of discourse and would thus be relatively pure as an input for academic diversity of thought.

Giving administrators a set of *dos* and *don'ts* provides incentives for a lawyered approach that treats compliance with diversity safeguards much like tax planning: practices meant to minimally comply while shaping cosmetics for best advantage in defending the procedure, if challenged, and, in an extension beyond the goals of tax counseling, advertising it as a mark of desirability. Consulting a list of legal hazards to avoid is less likely to foster programs of intellectual vibrancy about race than an atmosphere of intellectual impoverishment (except for administrators mastering legal evasions). Debate becomes dull and even dormant, and race is both present and suppressed in the academic program. Instead of developing a market of ideas, the admissions process encourages administrators to select students by studied guesses about their racial identification. Such students then may well self-segregate and/or acquiesce

---

<sup>419</sup> Annalisa Jabaily, *Color Me Colorblind: Deference, Discretion, and Voice in Higher Education After Grutter*, 17 CORNELL J.L. & PUB. POL'Y 515, 526 (2008).

<sup>420</sup> *See id.* at 526–27.

<sup>421</sup> *City of Richmond v. J. A. Croson Co.*, 488 U.S. 409 (1989).

<sup>422</sup> Jabaily, *supra* note 419, at 527.

<sup>423</sup> *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995) (“[T]here is simply no way of determining what classifications are ‘benign’ or . . . illegitimate.”). Customarily, reviewing courts do not assume that admissions officers act with good intentions when it employs the “highly suspect tool” of racial discrimination because “[m]ore than good motives should be required when government seeks to allocate [college seats] by way of an explicit racial classification system.” *Id.* (citation omitted).

<sup>424</sup> *See generally Grutter v. Bollinger*, 539 U.S. 306 (2003).

to classroom orthodoxy.<sup>425</sup> Those students, of any race or ethnicity, who remain silent serve in the classroom as little more than visual answers to what Justice Thomas derisively terms an “aesthetic” demand of administrative orthodoxy.<sup>426</sup> Indeed, one benefit of integration by sports competition was much like the claimed benefit for diversity as mere presence.<sup>427</sup>

We insist that student participation in the admissions program is an effective means to counterbalance administrators who may taint the program with race-based theories or paternalistic attitudes. This Article does not suggest that major universities or colleges should scrap complex admissions programs and replace them with student-led admission committees. We simply suggest this idea as a method for newly established learning communities or residential colleges designed to foster cross-cultural exchange. But it is an idea that we strongly suggest. Student-led admissions processes reflect our democratic principles at the most organic level as opposed to programs controlled by administrators that select applicants autocratically. The residential college will have instant legitimacy in the eyes of its members simply because it was created

---

<sup>425</sup> Worse still, top-down admissions programs are based in large part on paternalistic attitudes toward minority students. Take again the critical mass theory as an example, which holds that colleges need to admit a “meaningful representation” of minorities so those students “do not feel isolated or like spokespersons for their race.” *Id.* at 318–19. The idea that minorities would feel this way may well be influenced by racial stereotyping. Even if it may be true in many instances, it is certainly not true in all cases. But this logic is racially paternalistic, as it implicitly advances the belief that minorities are intellectually and socially less sophisticated than white people. Certainly, no one would think to ask if white people needed a critical mass of whites so they may acclimate to a collegiate environment. Some argue that affirmative action is the manifestation of this thinking, where it is assumed that black students, for instance, are scholastically handicapped as compared to their white peers and cannot compete without special consideration. But race-conscious programs do not empower minorities as collaborators in the school’s educational pursuits but instead cast them as silent victims. Our proposal avoids the paternalism problem completely by allowing all students to participate in the admissions process, affording each student an opportunity to contribute to the process. In this way, minority students are regarded as partners, not charity cases, in the pursuit to admit students that will improve racial health and create an environment for cross-cultural understanding in our progression towards a more color-blind society.

<sup>426</sup> *Id.* at 362 (Thomas, J., concurring in part and dissenting in part); *see also supra* notes 360–61 and accompanying text.

<sup>427</sup> *See* Amy Christian McCormick & Robert A. McCormick, *Race and Interest Convergence in NCAA Sports*, 2 WAKE FOREST J.L. & POL’Y 17, 25–26 (2012) (“The racial integration of college sports meant that college educations became available to many young black men who might never have otherwise attended college. Furthermore, young white men and women were exposed to more black people in the educational setting.”). Further, one negative to the positive of black athlete visibility is that “‘black athletes’ presence on campus for their athletic ability, not their intellectual promise, stereotypes them as ‘jocks,’ not learners.” *Id.* at 27. Interestingly, opponents of race consciousness who worry about stigma and stereotyping from diversity seemingly give a pass to athletic admissions that are not race conscious, but nonetheless feed stereotypes. *Cf. supra* notes 34–39 and accompanying text.

by them. Moreover, student participation in admissions gives residential colleges a sense of community awareness that these communities are autonomous and responsible for their governance.<sup>428</sup>

We think the discussion among student participants involving applicants will focus on which candidates will add to colorful classroom discussion rather than on which applicants will simply add color to the classroom. In this way, the process is further safeguarded from the contagion of racial balancing because the admissions process does not single out any applicant for being a member of a preferred minority or for being a member of a non-preferred ethnic group. Rather, an applicant's race is simply identified and then evaluated by student participants using a non-exhaustive list of race-neutral factors. In this respect, race is evaluated with "a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."<sup>429</sup> Both color-blind and race-conscious adherents should understand the social benefits that such a learning community can provide for its students. A community composed by students will serve as a setting that will foster cross-racial understanding and in the process motivate young minds to contribute to and learn from a diverse world. It can serve to reduce preconceptions and open minds to novel insights and fresh thinking.

#### *D. Considering First Amendment Objections*

Does the requirement for admissions to such a program, intended to animate First Amendment activities in classrooms, instead impose an orthodoxy on those applying for admission to the school that requires an essay about race for its diversity admissions? Does it particularly burden minority students, whose path to admission would require that they express interest in race? The question raises both policy issues affecting fairness and First Amendment doctrinal issues. As to the latter, the First Amendment rights of universities to design and foster curricular programs<sup>430</sup> that require a demonstration by applicants of suitable qualifications should be the basic doctrinal

---

<sup>428</sup> These sentiments, however, are not widely cultivated in the top-down approach to admissions programs. Minority students may not feel a part of the broader campus community because the process implies that some minorities were admitted for their skin color and not their scholastic ability. But our proposal removes any doubt that students, regardless of their background, are contributors in the common enterprise in composing their community. The mutual bonds of a self-selected interracial community should assure that all students may develop a self-conception centered on their collaboration with one another and not on a racial category that can be stigmatized for receiving preferential treatment. Put simply, student participants who benefit from this robust forum will be serious about protecting it.

<sup>429</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

<sup>430</sup> *Ward v. Polite*, 667 F.3d 727, 730 (6th Cir. 2012) ("Curriculum choices are a form of school speech, giving schools considerable flexibility in designing courses and policies and in enforcing them so long as they amount to reasonable means of furthering legitimate educational ends.").

analysis. It is common for universities to require students to submit essays with their applications. There is no monitoring of the way that admissions committees respond to the values and views expressed in such essays. The First Amendment rights of university committees to shape the character and apparent abilities of the student body, based on applicants' free-form responses to requests for self-revelation, are untested. Universities may also expel students whose views impair their ability to conform to the professional requirements for a degree. The main exception is if a school punishes religious views.<sup>431</sup> Asking that students express reasons why they are a fit for a program intended as a curricular and programmatic emphasis on diversity, with special attention to race, is not a doctrinal problem, at least in the abstract.

The question arises, however, of the legal and ethical propriety of requiring expressions of interest in race relations and other forms of diversity as the singular route to admissions by students who would not be admitted based on standard metrics, such as GPA and test scores. The same paternalism and even discrimination implicated in older approaches to race as a legal category may seem to impose a burden on minorities to harbor an interest in race to be admitted to a university. The answer presumably lies in the fact that racial minorities would have the regular path to admission open to them without using the admissions programs for race conscious programs. Further, a minority student applicant who does not have a strong interest in a program with race as a centerpiece could submit an essay challenging the premises of the project. Nothing in the concept excludes anyone for ideas, though the program does make a curricular choice tied to forms of identity- and value-influenced interests. Like white students, African-American students would face a choice of applying for the diversity program or applying through regular channels. Students could also apply to the diversity program after being admitted by regular admissions. In that way, the diversity program would contain a mixture of motivated students with a variety of standardized credentials. In this pattern, the only burden would be on minority students whose only realistic path to admissions is through expressing some sort of claim on motivation and capacity to contribute to a program concerned with advancing social health in a diverse society.

While two paths to admissions could create a stigma for those in the program using admissions influenced by the topic of race exploration, the labeling given to diversity admissions would be transformed by the basis for admissions in an open, transparent commitment to a community-based pedagogy. The sense that some applicants receive a purely race-based preference would dissipate, and the participants would be understood as having a special mission to build knowledge and create healthy networks for future collaborations across racial and ethnic lines. Further, those admitted by regular admissions processes would be likely committed to the idea that merit is

---

<sup>431</sup> *Id.* at 742 (reversing a summary judgment in favor of a school that dismissed a student for refusal to counsel gay clients in an affirming manner on the grounds that facts at trial might show a motive in hostility to her religion).

not exclusively measured by testing metrics. The program itself would be unlikely to harbor divisions based on perceived stigma or prejudice. Hence, the objections to diversity admissions as a source of harm to minority students and to race relations should be less persuasive. The First Amendment supports the authority of universities to experiment with race-conscious admissions driven by student input and tied to real programs. In addition, such experimentation provides a way out of the conceptual dead end in the Supreme Court's race jurisprudence for universities and potentially for other institutions.

#### CONCLUSION

The tragedies and sins of American racial history are dual. First, there is, in Lincoln's words, the "monstrous injustice"<sup>432</sup> of having used uncompensated labor to build wealth, with the forms of brutality deployed in the theft of lives and labor, all painful to contemplate. The second tragedy is the manipulation over more than two centuries<sup>433</sup> of the race category, with shifting silences to suppress discourse, always thought dangerous and in need of control. Some of this has happened by chance, with the vagaries of mass opinion and attitude and with human psychology. But, though the first tragedy may be irremediable, with candid recognition, the second is subject to contemporary correction. We urge others to develop alternatives to the myopic trajectory of our racial discourse and advance new visions to elevate, rather than debase, dialogue in this historically neglected area.

Healthy conversation is needed now more than ever. Regrettably, race is still ignored by politicians and the courts as a salient category, or it is hijacked by demagogues to achieve partisan ends. Driving race entirely from the public stage is not the solution, however. It would impose racial silence, and give the illusion of racial harmony until some controversy primes deep-seated racial tensions.

We insist that colleges and universities provide a unique setting in which students from different backgrounds can rise above present-day racial divisions so the next generation can be emancipated from past animosities. Top-down admissions do not produce student bodies that foster cross-racial exchanges. The current affirmative-action jurisprudence allows administrators to play politics with race by admitting minority students into their schools while sponsoring programs that foster backward exclusive thinking and behavior through race-based student groups, housing, and safe spaces. In practice, these programs create a climate of racial silencing as well. Racial dialogue is encouraged, but only between individuals of the same race in the designated safe space. A safe space that is not open to all students is no safe space at all. A forum where people from diverse backgrounds are not encouraged to participate is vulnerable

---

<sup>432</sup> Abraham Lincoln, First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1851), *available at* [http://mason.gmu.edu/~zschrage/hist120spring05/lincoln\\_ottawa.htm](http://mason.gmu.edu/~zschrage/hist120spring05/lincoln_ottawa.htm).

<sup>433</sup> *See generally* Kuykendall, Pressing the Mute Button, *supra* note 20.

to being dominated by preferred opinions. Newcomers are more likely indoctrinated on racial issues than encouraged to challenge group orthodoxy. Creating closed groups in a university setting has a long history, though not one that clearly advances the mission of universities to foster open thinking and create connections capable of prompting creativity and innovation.

This Article proposes that colleges and universities experiment with residential colleges designed to combat self-segregation and in the process break campus silence on racial issues. But the admissions process must be safeguarded from race-based numeric goals and the theories of academic elites. Student participation in the process ensures that selecting students who can contribute to the climate of free expression remains the central goal. Admittedly, our Article does not present an exhaustive plan, but it offers a general outline for colleges and universities to develop further in their quest to realize cross-cultural dialogue on their respective campuses. We believe that these institutions can begin this necessary process, so long as affirmative-action jurisprudence, as amplified by *Fisher* and subsequent cases, maintains our constitutional traditions that recognize that college and universities possess expressive interests in composing their student bodies.