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Replay That Tune: Defending Bakke on Stare Decisis Grounds

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REPLAY THAT TUNE: DEFENDING *BAKKE* ON STARE DECISIS GROUNDS

CHARLES ADSIDE, III*

ABSTRACT

The announcement from the United States Supreme Court to reconsider *Fisher v. University of Texas at Austin (Fisher I)*¹ presents an opportunity to revisit *Regents of the University of California v. Bakke*, which controls affirmative action jurisprudence. This Article argues that *Bakke* is immune from reversal under stare decisis principles, because the use of race in admission programs is deeply engrained in our constitutional law. The Court's race ideologues seek, however, to alter *Bakke* to reflect their vision of racial equality. In *Fisher II*, the Court should not change its jurisprudence to reflect any doctrinal extreme.

Arguing that *Bakke* was incorrectly decided is not enough to justify reversal. Stare decisis doctrine requires that opponents offer a prudential reason to overturn it. Removing racial preferences from university admissions would devastate higher education. *Bakke* sparked the creation of bureaucracies at universities that steer diverse students to pursue enrollment. Moreover, reversal would unsettle workable rules that guide higher education in this area. Not only is the stability of affirmative action doctrine at stake, but the future of race-relations is also in play.

Many argue that a strictly color-blind approach to affirmative action will foster racial harmony. However, the movement to enact this theory at the state level has

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¹ *Fisher I* and *Fisher II* both involve challenges to the University of Texas at Austin's affirmative action admission plan. In *Fisher I*, the Court, in a 7-1 decision, held that the district court and the Fifth Circuit did not apply correctly strict scrutiny in upholding the University's admission plan. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013). The Court remanded the case to the Fifth Circuit to apply the correct standard. *Id.* The Fifth Circuit, purporting to apply the Court's prescribed scrutiny, again upheld the University's admission plan. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 659-660 (5th Cir. 2014). The Court then granted certiorari to determine the constitutionality of the University's plan. *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (*Fisher II*).

short-circuited the debate by denying all sides the opportunity to express their concerns on race policy. *Bakke* reinforces democratic values by permitting society to craft policies designed to improve racial health.

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INTRODUCTION

Stare decisis is the most powerful doctrine in American legal history. It commands that jurisprudence is followed and that law is consistently applied from case to case. Despite the idea that a judge should respect the decisions of his or her predecessors, there are moments when precedent no longer fits society's expectations and the Court concludes that a doctrinal shift is required. As a result, legendary decisions emerge, spawning new principles that develop into canons whose constitutionality become unassailable over time. Such is the prominence of these decisions in our legal culture that they carry as much force as either the Bill of Rights or an amendment to the Constitution. Precedent that recognized unenumerated rights, legal tender, and even the administrative state so fundamentally changed the legal, economic, and political landscape of this nation that ordinary citizens cannot imagine society operating free from their influence.² Departure from these landmark cases would not only outrage the public but would be blasphemous to judges as well; therefore, lawyers are careful to advance their claims in concert with the principles enshrined in these jurisprudential icons.

But the fact that a decision has been followed repeatedly does not explain why it should be. The Court does, in fact, reverse precedent.³ So, there is precedent that the Court will overturn while there are others that are shielded from reversal. This begs a couple of questions: what distinguishes cases that are immune to reconsideration from those that are not? More specifically, how does a case whose ruling the Framers did even not intend become as powerful as the most revered clauses of the Constitution? A helpful comparison between music hits and Supreme Court precedent provides an insightful answer. The way a case receives notoriety as a doctrinal idol in legal culture is similar to how songs become engrained in popular culture.

Listeners tune into shows on radio, TV, and the Internet, giving them quick access to both ancient and modern popular music. These forums also introduce fans to popular talent and music show hosts, like Casey Kasem and Ryan Seacrest, who provide expert analysis on all genres ranging from rock to country and hip-hop.

² Jed Rubenfeld, *Right to Privacy*, 102 HARV. L. REV. 737, 740-747 (1989) (explaining Supreme Court jurisprudence where it recognized unmentioned rights in the Constitution); *Legal Tender Cases*, 79 U.S. 497 (1871) (holding that paper money did not violate the Constitution); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (holding a state minimum wage law as constitutional and thus overturned the *Lochner* doctrine that established economic substantive due process).

³ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (invalidating minimum wage law for women and children on due process grounds as violation of liberty of contract), *overruled in part by West Coast v. Parrish*, 300 U.S. 379 (1937). Fourth Amendment jurisprudence experienced a similar transformation in the last century when the Court in *Katz v. United States*, 389 U.S. 347 (1967), reversed *Olmstead v. United States*, 277 U.S. 438 (1928). *Katz* rejected *Olmstead's* holding that unwarranted telephone wiretapping by police officials did not violate the Constitution. *Katz*, 389 U.S. at 353.

Through the years, certain songs and albums become artistic standards.⁴ New listeners continue to enjoy these tunes and artists return to these works to inspire their own unique creations. Although these iconic songs no longer play on “America’s Top 40,” “oldies” stations continue to remind its listeners of the importance of these tunes; their rhythmic, melodic, and thematic structures still influence the creation of new music. Similarly, lawyers, judges, and law professors cite to certain foundational cases that set the tone, much like a top hit, for challenges against government policy. Let us review a few examples. First, with the help of popular crime television shows, *Miranda v. Arizona*⁵ has become an embedded feature of our national life. Nearly every citizen remembers and can recite the so-called *Miranda* warnings verbatim if asked. In addition law students are required and forced to rehearse key concepts from landmark decisions in class. Second, when law students hear about a challenge over a religious display under the Establishment Clause, they instantly recall *Lemon v. Kurtzman* and the infamous three-pronged *Lemon* test.⁶ There are other classics, to be sure.

In addition to “top-hit” cases, there are jurisprudential doctrines that are also engrained in every law student and lawyer’s memory. Take for example, the three-tiers of review for the Due Process and Equal Protection Clause. These tiers are like lyrics that have been rehearsed by every person who has studied the law. Possible violations of fundamental rights or the use of suspect classifications make lawyers recall the verses from the doctrine of strict scrutiny review. That doctrine is an “oldie but goodie” in Fourteenth Amendment jurisprudence, which demands that government measures that either infringe on fundamental rights or target a suspect classification “are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”⁷ They can also repeat a mantra, which some Justices echo in affirmative action decisions. “Strict scrutiny must not be,” they assert, “strict in theory, but fatal in fact.”⁸ The Court’s affirmative action jurisprudence—a line of cases in the Court’s race cannon—has a top hit, or precedent, whose rhythm all affirmative action decisions claim to follow.

It has been nearly four decades since Justice Powell, in his decisive opinion in *Regents of the University of California v. Bakke*, announced the principle, which guides race-conscious admission programs today: “The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”⁹ The Court reaffirmed this rule on three occasions in *Grutter v.*

⁴ For example, “Fortunate Son” is the anthem of Vietnam War protest. “Billie Jean” embodies ‘80s pop music. And N.W.A.’s *Straight Outta Compton* has lasting power as the pioneering album of “gangsta rap.”

⁵ 384 U.S. 436 (1966). *Miranda* requires that officers inform citizens of their rights when they are placed in police custody prior to interrogation. *Id.* at 444-45.

⁶ 403 U.S. 602 (1971). Students also recite principles in Establishment Clause jurisprudence, which hold that those factors are evaluated through the perspective of an “objective observer” who can discern whether the display endorses or disapproves of religion. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring).

⁷ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

⁸ *Id.* at 237.

⁹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978).

Bollinger,¹⁰ *Gratz v. Bollinger*,¹¹ and again in *Fisher v. University of Texas at Austin (Fisher I)*.¹² However, this does not calm the impassioned doctrinal debate between the Court's race ideologues.

Fervent proponents of race-conscious constitutionalism desire to alter affirmative action rules to require deference to color-conscious government action designed to ameliorate the perceived effects of "an overtly discriminatory past."¹³ Colorblind purists, on the other doctrinal extreme, advocate for a strictly colorblind constitution, that is, a wholesale rejection of race-conscious government activity.¹⁴ Some purists, in fact, believe that the doctrine of strict scrutiny review is insufficient to protect citizens from invidious racial discrimination.¹⁵

As illustrated in *Fisher I*, the Justices divided themselves along predictable, ideological lines, advancing their respective visions of racial equality. In *Fisher I*, Justice Thomas stated again his intention to recalibrate the Court's jurisprudence to follow a strictly colorblind approach to affirmative action policy: "The constitution abhors classifications based on race because every time the government places citizens on racial registers and makes races relevant in the provision of burdens or

¹⁰ 539 U.S. 306 (2003).

¹¹ 539 U.S. 244 (2003).

¹² 133 S. Ct. 2411 (2013).

¹³ *Id.* at 2433 (Ginsburg, J., dissenting).

¹⁴ Justices Scalia and Thomas contended that campus diversity could never serve as a compelling state interest to justify racial discrimination. *Id.* at 2422 (Scalia, J., concurring) ("The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.") (quoting *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part)); *id.* at 2422 (Thomas, J., concurring) ("[A] State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause."). Chief Justice Roberts and Justice Alito have written opinions that appear to support a strictly colorblind constitution. See *Ricci v. DeStefano*, 557 U.S. 557, 598-605 (2009) (Alito, J., concurring) (describing the denial of certification exam results for vacancies at a local fire department as influenced by racial politics); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). It must be noted that the vacancy on the Supreme Court caused by Justice Scalia's recent death raises the possibility that the Court may not provide a clear answer in *Fisher II*. Whoever occupies his seat may determine the direction of the Court's affirmative action jurisprudence in the future.

¹⁵ John Marquez Lundin, *The Call for Color-Blind Law*, 30 COLUM. J.L. & SOC. PROBS. 407, 424-25 (1997) ("In many important ways the law has undergone significant changes in the time since *Plessy*. While de facto racial discrimination still exists, de jure discrimination is generally a thing of the past. Both the Black Codes, which prompted the Reconstruction Congress to enact the Civil Rights Act and the Fourteenth Amendment, and the repressive Jim Crow laws upheld in *Plessy* have long since been repealed. Yet, in fundamental ways, the law has not changed. The principle established in *Plessy*— that the law may distinguish between citizens because of their race—remains. While the Court subjects race-conscious laws to strict scrutiny and requires that they be justified by a compelling government interest, one need look no further than *Korematsu*, where this test was applied, to see that the courts can be subject to the same passions and prejudices as legislatures.").

benefits, it demeans us all.”¹⁶ In her dissent, however, Justice Ginsburg mocked colorblind constitutionalism in whole, suggesting that the Court’s preference for race-neutral alternatives is a sleight of hand: “I have said before and reiterate here that only an ostrich,” she wrote, “could regard the supposedly neutral alternatives as race unconscious.”¹⁷ Indeed, these “lyrics” are representative of the ideological sides in affirmative action opinions, and each side was practiced and mimicked in *Fisher I*. However, the ideologues added nothing insightful to the debate. In order to address the fundamental questions at the heart of constitutional adjudication, both ideological sides of affirmative action jurisprudence must be analyzed through a broader constitutional framework.

Despite the debate between colorblind purists and race-conscious ideologues, this Article finds that neither side has made a case that Justice Powell’s opinion in *Bakke* fails to serve our legal system’s need for “consistency, stability, predictability, and societal reliance” that respect for precedent is calculated to accomplish.¹⁸ Because race ideologues, like Justices Thomas and Ginsburg, do not give Justice Powell’s opinion weight in affirmative action jurisprudence, this Article will show that the opinion carries sufficient purchase in the First Amendment canon to control judicial scrutiny over race-conscious admission programs.

This Article proceeds as follows. Part I argues that the First Amendment provides sufficient grounds to allow higher education to use race classifications in order to achieve freedom of expression. Part I examines *Bakke* on its merits to determine whether it comports with the Court’s First Amendment jurisprudence in *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents of University of State of New York*. This Part then examines and responds to the criticisms of *Bakke*, ultimately concluding that *Bakke* is not an erroneous decision and does not require reconsideration by the Court. Part II finds that *Bakke* should not be reversed because it is protected under the stare decisis doctrine. This Part aims to prove that *Bakke* does not meet any of the four considerations required to overturn precedent, because *Bakke* is both workable and reliable. Part III then analyzes why adherence to *Bakke* benefits democracy and eases race-tensions that are currently hindering our nation. Finally, this Article concludes by identifying options for our country to consider in the current public debate over affirmative action.

I. FREE SPEECH CLAUSE, ACADEMIC FREEDOM, AND *BAKKE*: CONSTITUTIONAL FOUNDATIONS OF THE DIVERSITY DOCTRINE

Some scholars contend that academic freedom, the canonical parent to the diversity doctrine, lacks textual or historical roots in the First Amendment to allow colleges to use racial classifications in order to achieve its interest in free expression. But a more careful look at Justice Powell’s opinion in *Bakke* shows that his reasoning is not a radical departure from Free Speech principles.

¹⁶ *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring) (quoting *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part)).

¹⁷ *Id.* at 2433 (Ginsburg, J., dissenting).

¹⁸ Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1206 (2006).

This Part first examines Justice Powell's opinion in *Bakke* on the merits¹⁹ by critically analyzing whether *Bakke*'s reasoning comports with Free Speech jurisprudence as articulated in *Sweezy* and *Keyishian*. Justice Powell employed those decisions as the basis for the diversity doctrine, which identified a compelling state interest in student body diversity under the Equal Protection Clause. This Part then entertains substantive criticisms leveled against *Bakke*.

A. *Sweezy, Keyishian, and Bakke: Marxists, Classrooms, and Student Body Diversity*

1. *Sweezy v. New Hampshire*

a. *The Plurality Opinion*

At the height of Cold War hysteria, Socialist, and Marxist economist, Paul Sweezy lectured on three occasions at the University of New Hampshire on Marxist ideology.²⁰ He also wrote an article, where he predicted that socialistic movements would overthrow capitalist governments like the United States.²¹ The state attorney general summoned Sweezy, pursuant to the New Hampshire Subversive Activities Act, to answer questions concerning his lectures, his political ideology, and his membership in the Communist and Progressive Parties.²² The Act barred "subversive persons" from public employment, including state universities, and outlawed "subversive organizations" from operating in New Hampshire.²³ The Act also empowered the attorney general to subpoena witnesses or documents, petition the courts to hold witnesses in contempt, and decide what witnesses, documents, and evidence were relevant to the legislative investigation on subversive activities.²⁴ Sweezy cooperated by answering questions and volunteering information; however, he refused to answer questions about the content of his lectures or his knowledge about the Progressive Party.²⁵ As a consequence, a New Hampshire state court jailed Sweezy for contempt of court.²⁶

In *Sweezy*, a plurality of the United States Supreme Court struck down the New Hampshire Subversive Activities Act, because it violated Sweezy's Fourteenth Amendment due process rights.²⁷ Additionally, the Court found that the Act

¹⁹ If a reviewing court concludes that a precedent is correct on the merits, then it will simply reaffirm the decision and follow it without consulting *stare decisis*. See Randy J. Kozel, *Stare Decisis as Judicial Review*, 67 WASH. & LEE L. REV. 411, 417 n.27 (2010) (quoting Richard H. Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001) ("If a court believes a prior decision to be correct, it can reaffirm that decision on the merits without reference to *stare decisis*.")).

²⁰ *Sweezy v. New Hampshire*, 354 U.S. 234, 242 (1957).

²¹ *Id.* at 236-38.

²² *Id.* at 236.

²³ *Id.*

²⁴ *Id.* at 238.

²⁵ *Id.* at 243.

²⁶ *Id.* at 244-45.

²⁷ *Id.* at 254-55.

infringed upon broader protections afforded to Sweezy under the Free Speech Clause.²⁸ The Court found it alarming that the Act delegated a “sweeping and uncertain mandate” to the attorney general in selecting what witnesses were summoned, what questions were asked, and what kinds of evidence demanded.²⁹ Such broad discretion, the Court concluded, empowered the attorney general to gather information that was not needed to identify subversive activity and thus enabled the attorney general “to screen the citizenry of New Hampshire to bring to light anyone who fits into the expansive definitions.”³⁰

But the Act went beyond denial of due process protection. The legislative investigation also burdened the academic freedom and political expression exercised by scholars and political activists. In a brief discussion, the Court reasoned that an investigation that scrutinized an individual’s beliefs and associations could stifle the exchange of information critical to expression in a democratic society.³¹ The Court stated that freedom of expression is paramount in the college and university setting, because these institutions serve a truth-finding function in the nation’s Free Speech traditions.³² Colleges and universities, like the University of New Hampshire, are places where students develop skills that better prepare them for democratic participation.³³ Therefore, the Court found that when the government inquires into the content of lectures, beliefs, and associations, it impairs this function because “[s]cholarship 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.”³⁴ While the plurality employed the Due Process Clause to invalidate the Act, the opinion offered new insight into the reach of the Free Speech Clause into academic activity as a First Amendment concern. Justice Frankfurter elaborated on this subject in greater detail in his concurring opinion.

b. Justice Frankfurter’s Concurring Opinion: The Four Freedoms

Justice Frankfurter agreed that the Act violated Sweezy’s due process rights; however, his opinion focused primarily on academic freedom.³⁵ In his opinion, Justice Frankfurter contended it was self-evident that a “free society” depended upon “free universities,” requiring “the exclusion of governmental intervention in the intellectual life of a university.”³⁶ To Justice Frankfurter, academic freedom would flourish when members of the academic community possessed political autonomy from government intrusion. As Justice Frankfurter stated:

²⁸ *Id.* at 254.

²⁹ *Id.* at 253.

³⁰ *Id.* at 253.

³¹ *Id.* at 250.

³² *Id.*

³³ *Id.* at 250-51.

³⁴ *Id.* at 250.

³⁵ *Id.* at 250.

³⁶ *Id.* at 262 (Frankfurter, J., concurring).

The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible.³⁷

To achieve this end, institutions of higher learning must remain free from government interference. Quoting from South African scholars, Justice Frankfurter famously identified, and fused, the so-called “four freedoms” to the Free Speech canon:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds *who may teach, what may be taught, how it shall be taught, and who may be admitted to study*.³⁸

Justice Frankfurter found that the Act interfered with academic freedom when the attorney general intruded into *Sweezy's* “political autonomy” when he asked him about; (1) the contents of his lectures, (2) membership in political parties, and (3) the political activities of others.³⁹ In Justice Frankfurter’s opinion academic freedom was protected under the Constitution and therefore state laws compelling academics to disclose his or her political ideology violated his or her First Amendment rights.⁴⁰ Ten years later, the Court would be presented with yet another First Amendment challenge to academic admissions in *Keyishian*.⁴¹

2. *Keyishian v. Board of Regents*

Similar to the statute challenged in *Sweezy*, *Keyishian* reviewed the constitutionality of New York’s Feinberg Law (“Feinberg Law”),⁴² which directed the State Board of Regents to compile a list of “subversive” organizations, which were defined as: “organizations which advocate the doctrine of overthrow of government by force, violence, or any unlawful means.”⁴³ Members of these organizations could be disqualified from public employment as a result of the Feinberg Law.⁴⁴

Under the Feinberg Law, the Board identified the Communist Party as a subversive organization and demanded that all employees sign a certificate affirming

³⁷ *Id.* at 261-62.

³⁸ *Id.* at 263 (emphasis added).

³⁹ *Id.* at 265-66.

⁴⁰ *Id.* at 267.

⁴¹ *Keyishian v. Bd. of Regents of Univ. State of N.Y.*, 385 U.S. 589, 591 (1967).

⁴² N.Y. EDUC. LAW § 3022 (McKinney); N.Y. CIV. SERV. LAW § 105 (McKinney).

⁴³ *Keyishian*, 385 U.S. at 594.

⁴⁴ *Id.*

they were not members of the Communist Party as a pre-condition to employment.⁴⁵ Five faculty and staff members at the University of Buffalo refused to sign the certificate; as a consequence, the University dismissed them and threatened to terminate their employment.⁴⁶

In *Keyishian*, the Court held the Feinberg Law was unconstitutionally vague because it allowed educational elites to suppress academic and political freedoms in and outside of the classroom.⁴⁷ Specifically, the Court focused on the language of section 105 of the Feinberg Law. Section 105 barred employment to any person who “by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine of forcible government overthrow.”⁴⁸ It also required dismissal of an employee if he or she was involved in “the distribution of written material ‘containing or advocating, advising or teaching the doctrine of forceful overthrow, and who himself advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein.’”⁴⁹ Further, section 105 disqualified “any person who advocates the overthrow of government by force.”⁵⁰ The Court found these provisions rendered the Feinberg Law unconstitutionally vague because these provisions were extraordinarily ambiguous and “[m]en of common intelligence must necessarily guess at its meaning and differ as to its application.”⁵¹

Given the vagueness of these provisions, Justice Brennan, writing for the Court, found these provisions were vulnerable to “sweeping and improper application” and thus could “prohibit the employment of one who merely advocates the doctrine in the abstract, without any attempt to indoctrinate others or incite others to action in furtherance of unlawful aims.”⁵² Justice Brennan offered a parade of horrors to illustrate the point. For example, a “teacher who carrie[d] a copy of the Communist Manifesto on a public street” would be committing “criminal anarchy.”⁵³ He further questioned whether the statute barred the teaching of the “histories of the evolution of Marxist doctrine or tracing the background of the French, American, or Russian revolutions” in the classroom.⁵⁴ The Feinberg Law’s uncertain scope, Justice Brennan found, adversely affected the teaching profession and thus prohibited the “free play of the spirit which all teachers . . . cultivate and practice.”⁵⁵

The Feinberg Law not only restricted the scholarship of individual instructors, but it also chilled “academic freedom,” which the Court found was a “special

⁴⁵ *Id.* at 595-96.

⁴⁶ *Id.* at 592-93.

⁴⁷ *Id.* at 601-02.

⁴⁸ *Id.* at 599 (citing N.Y. CIV. SERV. LAW § 105(1)(b) (McKinney)).

⁴⁹ *Id.* at 600; *see also* N.Y. CIV. SERV. LAW § 105 (McKinney).

⁵⁰ *Keyishian*, 385 U.S. at 604.

⁵¹ *Id.* at 604 (citing *Baggett v. Bullitt*, 377 U.S. 360, 367 (1964)).

⁵² *Id.* at 599-600.

⁵³ *Id.* at 599.

⁵⁴ *Id.* at 601

⁵⁵ *Id.*

concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”⁵⁶ Here, Justice Brennan pointed to intellectual exchanges within the classroom as integral to that freedom which provides a “marketplace of ideas” to students.⁵⁷ Because the Feinberg Law restricted the range of subjects taught by instructors, Justice Brennan identified the classroom as the mechanism in which colleges achieve their truth-finding function in First Amendment jurisprudence: “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.”⁵⁸ In order to link the classroom as the marketplace of ideas to academic freedom, he cited directly to *Sweezy* for support:

“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.”⁵⁹

In both *Sweezy* and *Keyishian* the Court struck down far-reaching laws restricting intellectual exchanges in the classroom by identifying academic freedom as a liberty interest under the First Amendment.

Both cases endorse academic freedom at colleges and universities, because these institutions train citizens and future leaders in developing truth-finding skills that are essential to democratic participation.⁶⁰ However, *Keyishian* took the reasoning behind academic freedom a step further. The Court characterized the classroom dynamic, which provides the opportunity for the exchange of ideas among students, as the mechanism in which truth can be discovered. Thus, any law that interfered with such exchanges infringed upon academic freedom. Justice Brennan’s observations along with *Sweezy* provided the doctrinal foundation for the diversity doctrine established in *Bakke*.

3. *Regents of the University of California v. Bakke*

Bakke involved a challenge to a race-conscious admissions program, which produced a splintered decision; four Justices found the program was constitutional⁶¹ and four Justices invalidated the program wholesale.⁶² Those Justices finding that the program was constitutional based their conclusion on the theory that government officials should be given deference when employing racial classifications aimed at

⁵⁶ *Id.* at 603.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

⁶⁰ *Id.*

⁶¹ *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 324-386 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in judgment in part and dissenting in part).

⁶² *Id.* at 408-421 (Stevens, Stewart, Rehnquist, JJ., & Burger, C.J., concurring in part and dissenting in part).

ameliorating the perceived effects of past discrimination against racial minorities.⁶³ As Justice Brennan wrote, “[g]overnment may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.”⁶⁴ Whereas those Justices stating the program was invalid argued that it violated Title VI of the Civil Rights Act of 1964,⁶⁵ This left Justice Powell’s opinion as decisive in resolving the case, and pivotal in identifying the standard that would control review over race-conscious admission programs.⁶⁶

Bakke reviewed an admissions policy at the University of California Medical School at Davis. The program had a two-tracked admissions system. Most candidates were evaluated through the regular admissions program while underrepresented racial minorities were also eligible for a special admissions program.⁶⁷ That program reserved sixteen out of one hundred seats for minority applicants and did not evaluate them against candidates in the regular admissions process.⁶⁸ Justice Powell reviewed the constitutionality of the program under strict scrutiny, because the Court’s Equal Protection doctrine considers all racial classifications, regardless of the group targeted, as inherently suspect.⁶⁹

Applying strict scrutiny review, Justice Powell examined if the medical school possessed a compelling state interest to justify its race-conscious admission policy.⁷⁰ Justice Powell’s decision at this point appeared largely mainstream, even unremarkable, because he rejected claimed justifications for race-conscious government action that the Court dismissed in prior decisions.⁷¹ Justice Powell’s discussion took an unusual turn, however, when he consulted First Amendment cases—materials outside Equal Protection jurisprudence—to identify a compelling state interest to justify the use of race in college admissions.⁷² Consistent with the reasoning articulated in *Sweezy* and *Keyishian*, Justice Powell found that colleges

⁶³ *Id.* at 328 (Brennan, J., concurring in part and dissenting in part).

⁶⁴ *Id.* at 325.

⁶⁵ *Id.* at 412-13 (Stevens, J., concurring in part and dissenting in part). The Civil Rights Act of 1964 forbade any program, which received federal funds from excluding any person on the basis of race. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 243 (codified as amended at 42 U.S.C. §§ 2000(e)-2000(h)(6) (2012)).

⁶⁶ Mark S. Kende, *Is Bakke Now a Super-Precedent and Does It Matter?*, 16 J. CONST. L. ONLINE 15, 19 n.32 (2013).

⁶⁷ *Bakke*, 438 U.S. at 274.

⁶⁸ *Id.* at 275.

⁶⁹ *Id.* at 290, 294-95.

⁷⁰ *Id.* at 307.

⁷¹ *Id.* at 310. Justice Powell rejected justifications for race-conscious government action in *Teamsters v. United States*, 431 U.S. 324, 367-376 (1977), *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 155-156 (1977), and *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

⁷² *Bakke*, 438 U.S. at 312.

played a unique role in our First Amendment traditions, which made academic freedom a special concern.⁷³

Justice Powell took the Court's academic freedom doctrine a step further by identifying the process upon which colleges select students (i.e., admission programs) as a method for providing a market place of ideas to its students.⁷⁴ Justice Powell reasoned that diversity-oriented programs, which holistically evaluate an individual applicant for admission, are used to create classroom environments that allow students to engage in speculation, experimentation, and creation on campus.⁷⁵ Race, he concluded, could be used as an ingredient in campus diversity.⁷⁶

Any use of race, Justice Powell explained, must be narrowly tailored if it is used as "only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."⁷⁷ On a doctrinal level, Justice Powell's opinion fused the First Amendment with the Equal Protection Clause, transforming litigation over admission policies into hybrid cases. As a result, courts today must balance the college's interest in academic freedom against an individual applicant's protection from government sponsored racial discrimination by screening the challenged policy through strict scrutiny.⁷⁸

B. A Critical Look at Justice Powell's Bakke Opinion on Its Merits

This Part explores salient criticisms of Justice Powell's opinion and places them under three main categories. Part I.B. lays out three arguments against *Bakke*. Part I.C. responds to these criticisms. I conclude that *Bakke* is not clearly erroneous to require reconsideration of the Court's entire affirmative action jurisprudence. The decision fits within the First Amendment canon.

1. Textual and Historical Criticisms

One potent criticism of Justice Powell's opinion is that academic freedom, the doctrinal basis for the diversity principle, is not a legitimate liberty interest under the Free Speech Clause. *Sweezy* and *Keyishian*, as the critique goes, did not cite to any textual or historical evidence to support the existence of this freedom. Rather, both opinions evoked conclusory, yet rhetorically appealing, statements as a substitute for constitutional evidence: "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."⁷⁹ Yet, the missing note in this score is the evidence that explains *why* the freedom is regarded as an "essentiality," that is, a fundamental ingredient in the exercise of political rights.

⁷³ *Id.*

⁷⁴ *Id.* at 317.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 314.

⁷⁸ *Id.*

⁷⁹ *Keyishian v. Bd. of Regents of State of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

Professor Horwitz suggests that Justice Powell's focus on this language missed the point entirely.⁸⁰ The fact that *Sweezy* and *Keyishian* spilled little ink on this matter—he suggests—shows that those cases did not intend for academic freedom to be taken seriously.⁸¹ *Bakke*'s brief analysis of these opinions, to develop an interest in student body diversity as a related interest to academic freedom, overlooked the fact that the holdings in *Sweezy* and *Keyishian* did not rest on that doctrine at all.⁸² Academic freedom was—Horwitz argues—entirely unessential to the holdings.⁸³ The Court invalidated the laws in *Sweezy* and *Keyishian*, because they were vague and enabled education elites to suppress core political speech.⁸⁴ Discussion on academic freedom was, therefore, incidental in those cases.⁸⁵

2. Workability Criticisms

Another contention against *Bakke* is that academic freedom, as presented in *Sweezy* and *Keyishian*, is not concretely defined to give adequate guidance to courts for two reasons.⁸⁶ First, the doctrine does not identify *who* or *what* it protects. There is language in *Sweezy* and *Keyishian* that indicates the doctrine safeguards individuals like teachers or students.⁸⁷ But institutions, like colleges and universities, could exercise the right based on a broader reading of those cases.⁸⁸ Judges are thus left to wonder if they can adjudicate claims asserted only by individuals or by institutions.⁸⁹

Secondly, the cases do not precisely describe the scope of the freedom they identify. This leaves reviewing courts with no cohesive theory to explain the doctrine's role in the Court's overall Free Speech jurisprudence. It is crucial for constitutional theories to be clearly defined, because it gives direction to judges on how to both monitor government action designed to suppress fundamental rights and expose potential infringements on those rights. Unfortunately, no unified theory is offered in academic freedom cases.

While *Sweezy*, *Keyishian*, and *Bakke* all recognize that academic freedom provides a truth-finding function in preparing students for democratic participation, *Keyishian* and *Bakke* identify two other functions that are essential for the meaningful exercise of that right.⁹⁰ *Keyishian* found that the classroom dynamic provided a "multitude of tongues" or the "robust exchange of ideas," which aided

⁸⁰ Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 492 (2005).

⁸¹ *Id.* at 493.

⁸² *Id.* at 488.

⁸³ *Id.* at 492-93.

⁸⁴ *Id.* at 487.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 485.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 489.

students in their quest for truth.⁹¹ *Bakke* concludes that *Keyishian* provides the basis for another interest that facilitated intellectual exchanges in the classroom, that is, campus diversity.⁹² The problem is *Keyishian* and *Bakke* identified interests (i.e., intellectual exchanges and campus diversity) that are not at the heart of academic freedom, but are supplemental to it. The logic taken in these cases provide no principle, which can be neutrally applied, to cabin the doctrine. Yet it is not entirely clear, as some argue,⁹³ that a broad reading of academic freedom reaches admission programs.

3. *Bakke* Cannot Be Expanded to Admissions Programs

Assuming, for argument's sake, that academic freedom is a legitimate liberty interest, the academic freedom doctrine does not reach *Bakke*. As previously explained,⁹⁴ *Sweezy* and *Keyishian* involved state laws that filtered out university faculty and staff based upon political viewpoints. Justice Frankfurter's concurring opinion in *Sweezy*, devoted a considerable amount of analysis to the "extensive questioning" and the "exhaustive scope" of the inquiry into *Sweezy*'s political beliefs.⁹⁵ *Bakke*, on the other hand, did not involve any direct regulation of speech uttered in the classroom.⁹⁶ Rather, *Bakke* involved race-conscious programs that trigger the suspect classification canon that emanates from Equal Protection jurisprudence.⁹⁷

That canon, it could be argued, is entirely unrelated to the facts in *Sweezy* or *Keyishian*. Those cases did not involve admission programs, let alone the use of race in admission decisions.⁹⁸ Thus, Justice Powell's opinion pulled the academic freedom doctrine beyond its context.⁹⁹ Both *Sweezy* and *Keyishian* pointed to the truth-seeking role institutions of higher learning provided in training students for political expression. *Bakke* linked diversity—without any specific support—to academic freedom without explaining how classroom diversity, and more specifically ethnic diversity, is necessary to prepare students for democratic participation.¹⁰⁰

⁹¹ *Id.*

⁹² *Id.* at 492.

⁹³ *Id.* at 492-93.

⁹⁴ *Id.* at 488.

⁹⁵ *Sweezy v. New Hampshire*, 354 U.S. 234, 257 (1957).

⁹⁶ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 273-76 (1978).

⁹⁷ *Id.* at 287-288.

⁹⁸ Horwitz, *supra* note 80, at 492 n.158.

⁹⁹ *Id.* at 492.

¹⁰⁰ *Id.* at 493.

C. Bakke Revisited: A Closer Look at the Merits

1. Academic Freedom as a Non-Textual Right Under the Free Speech Clause
Presents Few Constitutional Difficulties

a. Academic Freedom as an Implied Right

Although academic freedom is not explicitly mentioned in the Constitution, the Court has historically announced other canons that recognize unspecified rights arising from the Bill of Rights.¹⁰¹ The Constitution affords citizens autonomy from government regulation in an array of areas.¹⁰² In keeping with this tradition, the Court has developed doctrines under the First Amendment identifying non-textual rights that allow citizens to explore the full range of human expression.¹⁰³ The

¹⁰¹ *Id.* at 494.

¹⁰² The doctrine of substantive due process expanded the meaning of “liberty” in the Due Process Clause. Today, liberty means more than “fair process” and “the absence of physical restraint.” *See* *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). Over the years, the Court identified unspecified rights in the Constitution under the Due Process Clause. These rights include the freedom of parents to control their children’s education free from government intrusion. *See, e.g.,* *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 263 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Liberty also protects the right to procreate, to access contraception, to abort a fetus prior to viability outside the womb, to marry, and to refuse medical treatment. *See, e.g.,* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (affirming *Roe v. Wade*’s essential holding that recognized a woman’s right to choose an abortion before fetal viability); *Cruzan by Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990) (holding that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (holding that the right to marry is a fundamental right); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon the right of marital privacy); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (holding that procreation was a fundamental right and invalidating a sterilization statute).

¹⁰³ The Free Speech Clause reaches beyond the right to speak but it also protects a range of human expression and communication. In *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring), Justice Brandeis found that free speech broadly protected those pursuits and activities that inform individual expression and thought:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. The belief that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine They recognized the risks to which all human institutions are subject. But they knew . . . that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.

Id. According to Brandeis, the Framers intended the First Amendment to make citizens free from government regulation that would suppress: (1) the development of the faculties of the

doctrine of Free Speech is a prime example. Free Speech protects verbal communication from government censorship, and protects the written word from government screening before publication. However, it does more than protect the written and spoken word it also protects political expressions, such as a protester shouting through a megaphone on a soapbox, or activists passing out pamphlets in the town square. In sum, the Free Speech Clause, includes a “bundle of sticks,” or rights, that are integral to the exercise of political expression, but which might not be expressly listed in the text of the Clause.¹⁰⁴

In *NAACP v. Alabama*, the Court reversed a civil contempt order against the Alabama chapter of the National Association for the Advancement of Colored People for refusing to produce the names and addresses of its rank-and-file members.¹⁰⁵ The Court found the disclosure of such a list rendered its members vulnerable to social and economic reprisal and thus restricted its members’ freedom of association.¹⁰⁶ The Court stated that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”¹⁰⁷

Like the freedom of association, the discovery and spread of truth is another interest protected under the First Amendment. As Justice Oliver Wendell Holmes wrote in *Abrams v. United States*:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.¹⁰⁸

The “discovery of truth” is even recognized as a First Amendment concern by scholars who adopt a narrow view of the Clause.

For example, Judge Robert Bork concluded that the First Amendment does not cover scientific, educational, commercial, or literary expression because the First Amendment only protects “explicitly political speech.”¹⁰⁹ But even under this narrow reading of the First Amendment, Judge Bork found that the “discovery and spread of political truth” merited judicial protection because it is an essential function of

individual; (2) the happiness to be derived from engaging in the activity; (3) the provision of a safety value for society; and, (4) the discovery and spread of political truth. *Id.*

¹⁰⁴ See Anna di Robilant, *A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 870-74 (2013). The freedom of association, for instance, is not expressly mentioned in the First Amendment, but the Court has recognized it as an essential dimension of political activity. See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976).

¹⁰⁵ *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 288-91 (1964).

¹⁰⁶ *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

¹⁰⁷ *Id.*

¹⁰⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁰⁹ Robert H. Bork, *Neutral Principles And Some First Amendment Problems*, 47 IND. L.J. 1, 28 (1971).

political speech, which includes, “speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda.”¹¹⁰

Both narrow and expansive readings of the First Amendment can be reconciled with *Bakke*. Diversity facilitates the exchange of ideas on campuses. It creates opportunities for students to discover truth through interactions with their peers. In this way, students are trained in exercising their political rights under the First Amendment.¹¹¹

Admittedly, *Bakke* does not exactly mirror the academic freedom cases because the decision did not review laws designed to regulate the speech of teachers and faculty expressed in the classroom by basing employment in part on political viewpoint. Instead, Justice Powell’s holding, that campus diversity serves a compelling interest in admissions allowed colleges to determine who may be admitted to study on campus, protects the freedom of expression in pursuit of academic truth against policies designed to either gerrymander or suppress speech in the classroom.

Campus diversity creates an atmosphere “which is most conducive to speculation, experiment and creation,” providing students with the means to discover “truth out of a multitude of tongues rather than through any kind of authoritative selection.”¹¹² In this way, Justice Powell’s opinion “fits well into the existing First Amendment doctrinal universe by reinforcing the core right of ‘political speech’ through [the academic freedom doctrine, which advances] the First Amendment’s primary goal of protecting robust debate so the people can make informed political and personal decisions.”¹¹³ Though Justice Powell might have extended the principle of academic freedom further than the context of its foundational cases, his opinion neither contradicts nor inhibits the doctrine’s goal of protecting the discovery of truth through a robust exchange of ideas in the classroom. In fact, it enhances the principle’s core concept—the discovery of truth—by making expression a part of the criteria in selecting students who are likely to contribute to truth-seeking exchanges.¹¹⁴

b. The First Amendment and Racial Problems

Though *Bakke* may not cause disruption in First Amendment jurisprudence, many believe its reasoning creates Equal Protection problems.¹¹⁵ Justice Powell’s holding—critics contend—make race-conscious programs into hybrid cases that present doctrinal tensions between concerns for academic freedom pulling on one

¹¹⁰ *Id.*

¹¹¹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978).

¹¹² See *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957); see also *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

¹¹³ James G. Wilson, *Taking Stare Decisis Seriously: A Cautionary Tale for a Progressive Supreme Court*, 10 J. JURIS. 327, 360 (2011).

¹¹⁴ Mae Kuykendall & Charles Adside, III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Racial Legacy of Silence*, 22 WM. & MARY BILL RTS. J. 1011, 1054-55 (2014).

¹¹⁵ *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting).

end and guarantees against racial discrimination pulling on the other.¹¹⁶ Yet this tension between race and First Amendment principles is not a novel legal problem, as illustrated in *R.A.V. v. City of St. Paul*¹¹⁷ and *Virginia v. Black*.¹¹⁸

In *R.A.V.*, the Court invalidated an ordinance that prohibited a person from knowingly using symbols that “arouse[d] anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender”¹¹⁹ Justice Scalia held that a law violates the First Amendment’s prohibition on content-based regulations when it forbids “fighting words,” a traditionally unprotected category of speech, while “impos[ing] special prohibitions on those speakers who express views on disfavored subjects.”¹²⁰ In *R.A.V.*, the ordinance prohibited public displays containing “odious racial epithets” but permitted placards that expressed fighting words “on the basis of political affiliation, union membership, or homosexuality.”¹²¹ Justice Scalia concluded that legislation regulating “fighting words” could not be content-based, because the government would “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”¹²² Although racial epithets maybe offensive, and even endanger interracial harmony, *R.A.V.* made it abundantly clear that government may not address the effects of hate speech by restricting expression.

In *Virginia v. Black*, legislation designed to address the effects of hate speech again conflicted with the First Amendment.¹²³ In *Black*, the Court struck down a provision in a statute that made cross-burning prima facie evidence of intent to intimidate, because the statute did not distinguish between conduct intended to intimidate from conduct intended to advance a political ideology.¹²⁴ Though cross burning was historically a symbol of race-based violence, the Court held the First Amendment did not give states the flexibility to ban conduct that expresses an ideology that was intended to inflame “anger or resentment.”¹²⁵

R.A.V. and *Black* illustrate competing interests between legislation designed to combat socially disruptive effects of racial hate speech and the individual’s right to free expression. In both *R.A.V.* and *Black*, the Court sided with the individual’s right to free expression, although the Court had concerns that hate speech presented risks to social tranquility.¹²⁶ Affirmative action jurisprudence, much like *R.A.V.* and *Black*, also places a higher constitutional premium on intellectual exchanges facilitated by

¹¹⁶ *Id.*

¹¹⁷ 505 U.S. 377 (1992).

¹¹⁸ 538 U.S. 343 (2003).

¹¹⁹ *R.A.V.*, 505 U.S. at 380.

¹²⁰ *Id.* at 391.

¹²¹ *Id.*

¹²² *Id.* at 392.

¹²³ *Black*, 538 U.S. at 347.

¹²⁴ *Id.* at 364.

¹²⁵ *Id.* at 366.

¹²⁶ *Id.* at 362.

diversity programs than on the perceived benefits that could arise from prohibiting racial preferences in college admissions.

c. Bakke and the Equal Protection Clause

College administrators cannot, however, use racial categories *carte blanche*.¹²⁷ *Fisher I* clarified strict scrutiny rules for race-conscious college admission plans. It placed the burden on colleges to show that race-neutral alternatives cannot achieve their pedagogical goals and that race-conscious programming is necessary to achieve them.¹²⁸ “[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.”¹²⁹ The standard does not afford colleges “deference” nor does it assume “good faith” on the part of administrators when they implement racial preferences.¹³⁰ Abstract assertions are not enough: “Strict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way,” Justice Kennedy explained, “without a court giving close analysis to the evidence of how the process works in practice.”¹³¹ Thus, reviewing courts must examine whether an admissions program achieves the educational benefits that flow from diversity.¹³²

This is not to say that Justice Powell read the Equal Protection doctrine pristinely. Justice Powell consulted case law outside the doctrine to identify a compelling interest in campus diversity. The decision, though, has not produced confusion or logical errors in subsequent decisions. There is little misperception among institutional stakeholders about what *Bakke* demands. Justice Powell clearly stated that colleges must prove race-based programs are necessary to achieve educational goals.¹³³ *Bakke*’s limited reach entrenches the decision further under *stare decisis*, removing the urgency for the Court to correct prevalent constitutional errors.

Any perceived legal defects in *Bakke* are limited to the collegiate context. The Court has refused to export *Bakke* rules into other areas. For example, in *Parents Involved in Community Schools v. Seattle*, Chief Justice Roberts held that race-based school assignments for primary and secondary schools could not pass constitutional muster, even if the programs were modeled after Powell’s opinion, because *Bakke* recognized “a broad-based diversity” limited to the “unique context of higher education.”¹³⁴ “[T]he expansive freedoms of speech and thought associated with the university environment,” he wrote, “[made] universities occupy a special niche in our constitutional tradition.”¹³⁵ Narrowing *Bakke* to its facts serves prudential goals

¹²⁷ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978).

¹²⁸ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420-22 (2013).

¹²⁹ *Id.* at 2420.

¹³⁰ *Id.* at 2419-20.

¹³¹ *Id.* at 2421.

¹³² *Id.*

¹³³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978).

¹³⁴ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007).

¹³⁵ *Id.* at 724.

by maintaining protection against racial discrimination under the strict scrutiny doctrine.

2. Members of Academic Communities Are Protected Under Academic Freedom and Not Institutions.

Professor Horwitz argued that the Court did not provide adequate guidance in how to apply the academic freedom doctrine, which is described in broad terms:

There is no hint at this point that government ought to steer clear of other aspects of university life. Nor does the Court indicate that it would be concerned with restrictions on speech initiated by a public university itself, rather than the state. Moreover, although the passage embraces “[t]eachers and students” alike, it leaves unaddressed the questions of whether a university is entitled to restrict or to penalize speech by teachers, whether a university may restrict speech by students, and whether teachers in turn may restrict student speech.¹³⁶

But a fair reading of *Sweezy* and *Keyishian* shows that the right is not as vague as Professor Horwitz believes. Although *Sweezy* and *Keyishian* discuss the collective benefits the academic freedom doctrine provides to higher education and to the nation, the doctrine covered activities performed by individuals like “teachers,” “students,” or, more generally, “intellectual leaders.”¹³⁷ Most notably, these rights are activated when they are exercised in the college setting.¹³⁸

Borrowing from Fourth Amendment terminology, academic freedoms are triggered when a person engages in certain activities that take place in a “constitutionally protected area.”¹³⁹ So the liberty interest is heightened when a professor, teaching assistant, or a student engages in the myriad of intellectual activities, such as research, writing, or debate, which are related to their status as a member of that academic community.¹⁴⁰ Accordingly, the academic freedom

¹³⁶ Horwitz, *supra* note 80, at 483.

¹³⁷ *Id.*

¹³⁸ The principle that fundamental rights are activated when exercised in constitutionally recognized areas is not novel. Take the Fourth Amendment as an example. While that amendment affords citizens autonomy from government intrusion into areas where they have a reasonable expectation of privacy, it does not establish a generalized right to privacy. That amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” U.S. CONST. amend. IV. The text suggests that privacy rights are contextual, that is, the amendment is “designed in part to protect privacy at certain times and places with respect to certain activities.” *Griswold v. Connecticut*, 381 U.S. 479, 508 (1965) (Black, J., dissenting). An individual right to academic freedom operates much in the same manner as privacy does. Just as a citizen’s home is a “constitutionally protected area” under the Fourth Amendment, *see Kylo v. United States*, 533 U.S. 27, 34 (2001), the college and university campus is a protected space under the First Amendment where an array of academic activities are protected from government intrusion.

¹³⁹ *Kylo*, 533 U.S. at 34.

¹⁴⁰ Even if academic freedom is construed as an institutional right, such an interpretation presents little constitutional difficulties. Institutional rights are recognized in other areas of First Amendment jurisprudence as shown in recent Court decisions in *Citizens United v. FEC*,

doctrine applies generally to any person who is a member of the academic community rather than to the academic institution itself.

3. Academic Freedom is Broad Enough to Incorporate Admission Programs

As explained previously, some contend that academic freedom does not reach the circumstances presented in *Bakke*.¹⁴¹ *Sweezy* and *Keyishian* arose from direct government regulation of political speech in the classroom and thus such laws constitute paradigm infringements of that right.¹⁴² However, the Court did not limit the academic freedom doctrine only to the facts in *Sweezy* and *Keyishian*. Justice Frankfurter found that academic freedom meant more than being free from government suppression of political viewpoints.¹⁴³ Instead, it broadly protects other related liberties, such as the right of a college to select “whom may be admitted to study.”¹⁴⁴ His opinion implicitly recognized that admission programs serve a crucial role in a college’s effort to maintain an environment where students may engage in the discovery of truth.¹⁴⁵

Keyishian provides the reasoning, which ties *Sweezy*’s concern for truth and *Bakke*’s diversity rationale together in the free speech doctrine. *Keyishian* reasoned that the discovery of truth is facilitated through the robust exchange of ideas, which is a unique feature of a diverse college environment.¹⁴⁶ Recognizing student body

558 U.S. 310 (2010), and *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014). *Citizens United* held that government could not limit independent expenditures spent by corporations for electioneering purposes based in part on the recognition that individuals use the corporate form to engage in political speech to contribute to the “discussion, debate, and dissemination of information of ideas.” *Citizens United*, 558 U.S. at 343. The Court again recognized the existence of institutional based rights in *Hobby Lobby*. There, the Court explained that even when the Court extends constitutional or statutory rights to institutions, such as corporations, it does so for the individual’s benefit:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

Hobby Lobby, 134 S.Ct. at 2768. Admittedly, *Citizens United* and *Hobby Lobby* do not involve race-conscious admission programs. That being said, both decisions are instructive in highlighting the point that rights are not reserved for individuals only but are also conferred upon institutions as well. So assuming Justice Powell described the freedom as a right exercised by colleges, the description of that right is consistent with *Citizens United* and *Hobby Lobby* in principle. Thus, the criticism that academic freedom does not clearly identify its stakeholder is harmless.

¹⁴¹ See *supra* Part I.B.

¹⁴² *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967)

¹⁴³ *Sweezy*, 354 U.S. at 263 (1957) (Frankfurter, J., concurring).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Keyishian*, 385 U.S. at 602.

diversity as an interest enables colleges to compose learning communities with students of diverse backgrounds in order to provide robust exchanges and thus facilitate the discovery of truth. Accordingly, a broad reading of *Keyishian* and *Sweezy* provides the foundational principles to argue that academic freedom doctrine is broad enough to encompass college admission's programs given that academic freedom and diversity are integral principles in affirmative action law.

II. *BAKKE*, STARE DECISIS, AND RACIAL DIVERSITY AS AN EMBEDDED PRINCIPLE IN AFFIRMATIVE ACTION JURISPRUDENCE.

Despite the fact that academic freedom and diversity are integral principles in affirmative action law, *Bakke* is still the target of criticism by race ideologues. Part II will show that these criticisms carry no jurisprudential weight, because the decision is immune from reversal under the doctrine of stare decisis. But the Court does not always follow precedent blindly and has developed criteria to guide it when it formally reconsiders a prior decision.

A. *Stare Decisis Criteria: Revisiting Bakke*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the joint opinion explained the criteria the Court employs to identify circumstances that justify reversal.¹⁴⁷ When revisiting precedent, the Court will consider if: (1) the decision has engendered widespread reliance among its stakeholders, (2) the rule is unworkable; (3) the Court abandoned or eroded the doctrine in the decision in later cases, and (4) the facts that justified the rule in the decision no longer exist to justify continued application of the rule.¹⁴⁸

The last two factors are not in serious contention. First, as it relates to the third factor, Justice Powell's opinion is in no way a relic of an abandoned doctrine. Every affirmative action case since *Bakke* has followed Justice Powell's opinion to resolve Equal Protection questions relating to admission programs.¹⁴⁹ *Bakke* stands as the fulcrum in affirmative action jurisprudence, because the rules announced by Justice Powell serves as the touchstone of constitutional analysis in the area.¹⁵⁰ Second, as it relates to the fourth factor, circumstances have not changed to render the decision irrelevant to modern admission plans. Colleges follow *Bakke* in how they craft race-conscious programs.

¹⁴⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867-68 (1992).

¹⁴⁸ *Id.*

¹⁴⁹ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013) ("Among the Court's cases involving racial classifications in education, there are three decisions that directly address the question of considering racial minority status as a positive or favorable factor in a university's admissions process, with the goal of achieving the educational benefits of a more diverse student body: [*Bakke*, *Gratz*, and *Grutter*]."); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) ("[W]e endorse Justice Powell's view [in *Bakke*] that student body diversity is a compelling state interest that can justify the use of race in university admissions."); *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) ("Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education.").

¹⁵⁰ *Id.*

Therefore, the primary focus of this Part will be on the reliance and workability factors. This Part will show that colleges rely upon *Bakke* in how they organize their campuses each year, as reflected in diversity mission statements, recruitment efforts, and in hiring practices. Moreover, *Bakke* provides adequate guidance to reviewing courts and administrators by providing workable rules and models that identify those policies that would comport with and violate the Constitution.

1. Reliance: *Bakke* and the Diversity Bureaucracy.

Calculating reliance is crucial in stare decisis analysis.¹⁵¹ When considering reliance interests, the Court considers the respective costs incurred by those persons and institutions whose “settled expectations” would be uprooted if the Court overturned precedent.¹⁵² In prior cases, reliance interests weighed heavily in the Court’s decision to reaffirm precedents that received scathing criticism for perceived departures from the Constitution’s original meaning or from historical practice.¹⁵³ Reliance interest weighs strongly in favor of upholding *Bakke* on stare decisis principles because diversity is now *the* organizing principle at the nation’s colleges and universities.

The costs incurred and the investments made by institutions of higher learning to achieve student body diversity are substantial.¹⁵⁴ An extensive review of mission

¹⁵¹ *Casey*, 505 U.S. at 855-856.

¹⁵² Kozel, *supra* note 19, at 446.

¹⁵³ *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Roe v. Wade*, 410 U.S. 113 (1973), are two landmark decisions that sparked intense criticism over the reasoning the Court used to identify individual rights. These cases were reaffirmed in subsequent decisions on the basis that the decisions engendered widespread social reliance among citizens. In *Dickerson v. United States*, 530 U.S. 428, 443 (2000), Chief Justice Rehnquist rejected the claim that *Miranda* warnings were not constitutionally required under the Fifth Amendment, finding that *Miranda* established widespread expectations among the public: “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.” Likewise *Casey* reaffirmed *Roe*’s essential holding based upon reliance reasoning; it found that women had become reliant on the availability of abortion:

For two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

Casey, 505 U.S. at 856.

¹⁵⁴ The Deans of Harvard and Yale Law Schools submitted a joint amicus brief in *Fisher II*. Like this Article, they argue that race-conscious admissions programs should be reaffirmed on stare decisis grounds. They explain how their institutions spent a considerable amount of resources to craft policies that follow the principles announced in *Bakke*:

Harvard and Yale Law Schools have relied on [*Bakke*] in fashioning resource- and time-intensive processes designed both to identify students who possess the potential to become future leaders and to enrich their own institutional educational environments. Implementing these policies has required dozens of admissions officers and faculty reviewers, multiple rounds of evaluations, and significant expenditures of time and money. In undertaking such review processes, Harvard and Yale Law

statements posted on the websites of both public and private colleges and universities reveal that diversity, with an emphasis on race inclusion, is an integral part of their educational missions.¹⁵⁵

a. Diversity Mission Statements

College administrators and faculty members believe that “student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’”¹⁵⁶ Brown University, a leading Ivy League institution, states that “[d]iversity is at the foundation of [our] academic enterprise.”¹⁵⁷ Similarly, Louisiana State University makes clear that “[d]iversity is fundamental to [its] mission.”¹⁵⁸

College mission statements also announce the means or principles that will be pursued to achieve diversity. For example, Louisiana State University administrators and faculty found that in order to achieve diversity “it must make ‘[c]ultural inclusion [the] highest priority.’”¹⁵⁹ Princeton University’s statement adopted the rationale for diversity, which *Bakke* and *Grutter* employed to justify racial preferences, explaining that diversity creates an environment that produces educational benefits: “[a] diverse environment is more intellectually and socially stimulating. The variety of viewpoints creates more debate and encourages people to

Schools have determined they cannot isolate race and exclude it from the otherwise comprehensive, individualized assessments necessary to fulfill their educational missions.

Brief of Dean Robert Post and Dean Martha Minow as Amici Curiae Supporting Respondents at 26, *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (No. 11-345), 2015 WL 6735850.

¹⁵⁵ I want to express my gratitude to Richard A. Plowden for his contribution to Appendix A. He spent long hours coding college websites for diversity language, which was essential to creating this Appendix. Richard’s efforts substantiated the claims made in this section. Appendix A provides mission statements posted on the websites of twenty-seven colleges and universities from the Ivy Leagues, the Southeastern Conference, and the Big Ten. The Appendix presents statements, from both undergraduate and graduate programs that announce the individual school’s commitment to campus diversity with many programs declaring its goal to admit underrepresented minorities. Because these statements are taken from many of the nation’s leading universities, they are representative of competitive college programs across the country. A cursory review of these statements reveals some of the following themes or language that are commonly used by these institutions to articulate their missions. These statements refer to “diversity,” “race,” “ethnicity,” “inclusion,” “perspectives,” and “viewpoints.”

¹⁵⁶ *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quoting amicus briefs).

¹⁵⁷ *Exploring Diversity at Brown*, BROWN U., <http://www.brown.edu/academics/college/orientation/exploring-diversity-brown> (last visited Mar. 7, 2016).

¹⁵⁸ *Diversity Statement*, LSU OFF. DIVERSITY, <http://uiswcmweb.prod.lsu.edu/edco/edco/DiversityStatement/item25970.html> (last visited Mar. 7, 2016).

¹⁵⁹ *Id.*

re-examine their own positions [because] diversity decrease[s] negative stereotypes and biases, and create[s] awareness of inequalities and discrimination”¹⁶⁰

Graduate programs, like law colleges, medical schools, and engineering programs, also adopt diversity statements and, in the process, reinforce the institutional commitment to diversity.¹⁶¹ In line with the University of Georgia’s diversity policy, the graduate school, for instance, announced its commitment “to promote diversity by encouraging enrollment of students from historically underrepresented groups and qualified programs abroad.”¹⁶² The commitment to

¹⁶⁰ See *Many Voices, One future, an Inclusive Princeton*, PRINCETON U., <http://inclusive.princeton.edu/about/why> (last visited Mar. 7, 2016). Another example is the University of Minnesota, which in its strategic framework explained the school’s role in the Nation’s Free Speech traditions. The University of Minnesota identified diversity, in its strategic framework, designed to achieve academic excellence, as “a *necessary condition* for excellence,” which is “achievable *only* in an environment that fully supports engagement with diverse cultures and perspectives.” *Vision Implementation Summary*, U. MINN. EQUITY & DIVERSITY VISION FRAMEWORK (Nov. 2011), (emphasis added), <https://diversity.umn.edu/sites/default/files/U%20of%20MN%2C%20Equity%20and%20Diversity%20Vision%20Framework.pdf>.

¹⁶¹ The University of Missouri has a campus-wide mission statement, advancing what it refers to as “Mizzou Diversity.” In addition to this statement, the school’s other thirteen colleges and schools have also adopted mission statements. See *About Diversity at Mizzou*, MIZZOU DIVERSITY, <http://diversity.missouri.edu/about/mission-vision.php> (last visited Mar. 7, 2016). For example, the law school expressed its commitment to diversity in the following way:

The Law School’s approach to diversity and cultural awareness is twofold. First, we are committed to recruiting and retaining a diverse community (students, staff and faculty) because we believe that a diverse community enriches the professional and personal experiences of our students, faculty and staff. The law school is better when it is comprised of folks who have varied backgrounds and experiences. These differences are manifested in classrooms discussions and in interactions outside of the classroom. In addition to creating a diverse community, we also offer course work that highlight diverse perspectives and thereby enhances students’ understanding of cross-cultural perspectives. The Law School also offers clinic and externship opportunities to students that require that they interact with clients who often times come from cultural backgrounds that are very dissimilar to their own.

University of Missouri Statements on Diversity Enhancement, U. MO., <http://facultycouncil.missouri.edu/issues/diversity-statements/index.html#law> (last visited Mar. 7, 2016). Another example of a graduate program, which identifies racial diversity as an organizing principle is the Ohio State University Medical School: “Students underrepresented in medicine and biomedical sciences are more likely to serve minority and lower socioeconomic communities after completion of medical training; thereby improving the health care access and diminishing health care disparities.” *Our Diversity Vision*, OHIO ST. U. C. MED., <http://medicine.osu.edu/students/diversity/ourdiversityvision/pages/index.aspx> (last visited Mar. 7, 2016).

¹⁶² University of Georgia Graduate Program Diversity Statement:

The Graduate School aims to promote excellence in graduate education by recruiting top students to the University of Georgia. While striving to increase overall enrollment, the Graduate School also seeks to promote diversity by encouraging enrollment of students from historically underrepresented groups and qualified programs abroad. The Graduate School’s definition of underrepresented includes

diversity at the nation's leading colleges is not limited to rhetoric announced in mission statements. Undergraduate and graduate programs employ measures to calibrate their respective institutions to achieve the type of diversity they intend to attain. This is particularly true with respect to racial diversity.

Race remains an important factor in the composition of student bodies. According to the National Association of College Admission Counseling, forty-five percent of the 446 four-year colleges that responded to surveys stated that race and ethnicity played either a "considerable," "moderate," or "limited" role in admission decisions.¹⁶³ This is not to say that race plays a decisive role in admission decisions. While race remains an important factor in the admission process, it is only a single factor.¹⁶⁴ It appears that colleges are careful to craft programs that are atheistically compliant with *Bakke*.

But colleges have now extended their commitment to ethnic diversity beyond the admissions process. As a high-ranking administrator at Vanderbilt University stated, "[w]e recognize that top students can be found among all racial, ethnic, and socioeconomic groups, and our recruiters work hard to identify them and to make them aware of the opportunities available to Vanderbilt students."¹⁶⁵ To this end, colleges employ, in the words of Cornell University, "novel approaches [to] improve campus culture and . . . demographic composition."¹⁶⁶ Colleges no longer hope for diverse applicant pools. They now search for candidates that will enhance student body diversity.

b. Student Recruitment and Retention Programs

In addition to admission plans, colleges employ innovative recruitment efforts that collaborate with primary and secondary schools in predominately minority

race/ethnicity, gender within discipline, first generation, non-traditional age and/or a self-identified aspect of a uniquely diverse background.

Recruitment & Diversity Initiatives, GRADUATE SCH.: U. GA., <http://grad.uga.edu/index.php/current-students/recruitment-diversity/> (last visited Mar. 7, 2016).

¹⁶³ STATE OF COLLEGE ADMISSION, NAT'L ASS'N. FOR COLLEGE ADMISSION COUNSELING 27 (2013), <http://www.lkeducationalconsulting.com/images/soca2013.pdf>.

¹⁶⁴ In the same survey, the Association collected data from 1993 to 2012 [and found that colleges listed an array of race-neutral factors, which they attribute "considerable importance" to when they evaluate applicants. *Id.* Colleges consider, for example, the strength of a teacher's recommendation, a student's participation in extracurricular activities, their class rank, and the grades they earned in college preparatory courses. *Id.*

¹⁶⁵ Douglas Christiansen, Vice Provost for University Enrollment Affairs and Dean of Admissions and Financial Aid, said, "[w]e recognize that top students can be found among all racial, ethnic, and socioeconomic groups, and our recruiters work hard to identify them and to make them aware of the opportunities available to Vanderbilt students." *Undergraduate Admissions*, VAND. U., <http://admissions.vanderbilt.edu/life/diversity.php> (last visited Mar. 5, 2016).

¹⁶⁶ *Diversity & Inclusion: Commitment to Inclusion*, CORNELL U., <http://diversity.cornell.edu/commitment-to-inclusion> (last visited Mar. 5, 2016) ("Cornell's approach to institutional inclusion and diversity planning is holistic. Our commitments, both regulatory and strategic, involve novel approaches to improve campus culture and our demographic composition.").

communities to “publicize and discuss opportunities at their universities; developing minority-specific advertising and public relations materials; sponsoring fairs and open houses specifically for minority students.”¹⁶⁷ These efforts give these institutions notoriety but also physical presence in majority-minority communities. The strategy is to encourage underrepresented minority students to apply to predominantly white universities.¹⁶⁸ Colleges, particularly the most prestigious institutions, launch outreach and recruitment efforts across the nation.¹⁶⁹

The admissions office at Harvard University sponsors an Undergraduate Minority Recruitment Program, which is staffed by current college students who field questions from potential applicants about their college experience.¹⁷⁰ The program organizes “on-campus and overnight visits, in addition to special information sessions and tours.”¹⁷¹ The stated goal for the program is “to help expand the diversity of incoming classes by encouraging minority students to consider applying to Harvard College.”¹⁷²

Some institutions believe that they can diversify campus demographics by assisting high school students preparing for standardized testing. As part of its mission to “integrate individuals from varied backgrounds and characteristics,” the University of Arkansas offers a Summer ACT Academy for eligible students to equip them with test-taking skills for five days as they stay in residence halls and

¹⁶⁷ CHARTING THE FUTURE OF COLLEGE AFFIRMATIVE ACTION: LEGAL VICTORIES, CONTINUING ATTACKS, AND NEW RESEARCH, CIVIL RIGHTS PROJECT 27 (2007), <http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/charting-the-future-of-college-affirmative-action-legal-victories-continuing-attacks-and-new-research>.

¹⁶⁸ *Id.* at 28.

¹⁶⁹ See *Welcome to Educational Equity: Fostering Diversity and Inclusion at Penn State*, PENN ST. EDUC. EQUITY, <http://equity.psu.edu/about> (last visited Mar. 5, 2016) (“Created in July 1990, the Office of the Vice Provost for Educational Equity is charged with fostering diversity and inclusion at Penn State and creating a climate of diversity, equity, and inclusion throughout the University’s faculty, staff, leadership, and student body. This mission encompasses leadership for the University-wide strategic planning for diversity and inclusion, student academic success services and Federal TRIO Programs for underrepresented students, and support of educational access for targeted groups of low-income, potential first-generation college students both here at Penn State and at sites throughout the state, and serving as a catalyst and advocate for Penn State’s diversity and inclusion initiatives by providing University-wide leadership to increase our capacity for diversity Beyond the University, in targeted high schools and counties, the office helps low-income youth and adults to overcome the social, cultural, and educational barriers to success in higher education.”).

¹⁷⁰ *Find Rich Cultural Communities and Opportunities*, HARV. C. ADMISSIONS & FIN. AID, <https://college.harvard.edu/admissions/hear-our-students/multicultural-diversity> (last visited Mar. 5, 2016).

¹⁷¹ *Id.*

¹⁷² *Id.* Similar to the recruitment program at Harvard, the undergraduate admissions office at Columbia University has organized a Multicultural Recruitment Committee, which is a group of six college students who assist the office in identifying and recruiting applicants from historically underrepresented backgrounds to create “a vibrant and dynamic first-year class.” *Multicultural Recruitment Committee*, COLUM. UNDERGRADUATE ADMISSIONS, <https://undergrad.admissions.columbia.edu/learn/studentlife/diversity/mrc> (last visited Mar. 5, 2016).

become acquainted with the opportunities the school has to offer them.¹⁷³ Carnegie-Mellon University, as another example, provides a rigorous six-week summer academy for high school students considering careers in math, science, or engineering to build their “academic and personal skills” in preparing them for admission into selective colleges.¹⁷⁴

Other institutions take its recruitment effort to the next level by establishing a physical presence in targeted communities. The University of Michigan, for instance, established the Detroit Center to serve “as a gateway for University and urban communities to take advantage of each other’s learning, research and cultural activities,” such as symposiums, musicals, and film series.¹⁷⁵ The University of Michigan’s Detroit Center is on the vanguard of university programs aimed at recruiting future minority students. The Center has forged partnerships with local K-12 schools, providing lectures and workshops aimed at coaching students in the metropolitan area in preparation for college.¹⁷⁶ Another one-of-a-kind program is the Medical Experience Academy, organized by the Medical School at the University of South Carolina, which builds education “pipeline partnerships” with colleges and universities that “encourage healthcare careers among diverse, underrepresented, underserved, and socioeconomically challenged populations.”¹⁷⁷ The Academy also exposes aspiring medical students to “health care through simulations, lectures, workshops, research and community service.”¹⁷⁸

Even after enrollment, many elite universities administer programs designed to increase retention and graduation rates among their minority students. Yale University, for example, has a Cultural Connections program, which is “designed to introduce freshmen to Yale’s cultural resources as well as to explore the diversity of student experiences on the Yale campus, with emphasis on the experiences of traditionally underrepresented students and issues related to racial identity.”¹⁷⁹ The program is a mini-mentoring program where sophomores and juniors act as either a big brother or sister to incoming minority freshman during their five-day stay on campus.¹⁸⁰

Universities have also institutionalized their retention plans in the form of special advising offices that are usually placed under the auspice of their multicultural office. For instance, the Office of Pluralism and Leadership at Dartmouth College

¹⁷³ *Arkansas High School Students Attending ACT Academy*, U. ARK. (June 25, 2015), <http://news.uark.edu/articles/27776/arkansas-high-school-students-attending-act-academy>.

¹⁷⁴ *SAMS: Summer Academy for Math + Science*, CARNEGIE MELLON UNDERGRADUATE ADMISSION, <http://admission.enrollment.cmu.edu/pages/diversity-sams> (last visited Mar. 5, 2016).

¹⁷⁵ *Detroit Center*, U. MICH., <http://detroitcenter.umich.edu/about> (last visited Mar. 5, 2016).

¹⁷⁶ *Id.*

¹⁷⁷ *Clinical University: Pipeline Partners*, GREENVILLE HEALTH SYS., <http://university.ghs.org/medex/partners/> (last visited Mar. 5, 2016).

¹⁷⁸ *Id.*

¹⁷⁹ *Cultural Connections*, YALE C., <http://culturalconnections.yalecollege.yale.edu/> (last visited Mar. 5, 2016).

¹⁸⁰ *Id.*

provide “sociocultural advising” through a series of programs designed to help minority students cope with a variety of issues that may hinder their academic success.¹⁸¹ These issues may pertain to social adjustment, financial aid, and even bias incidents on campus.¹⁸² In addition to this programming, undergraduate and graduate programs provide so-called “bridge programs” to incoming students, particularly to those students from underrepresented backgrounds, so they can “find peer support, academic rigor and professional networking that equip them with the skills and relationships for academic success as well as professional success.”¹⁸³ Bridge programs aim to increase success rates among minority students by making them aware of the resources available to them.¹⁸⁴ These practices demonstrate a strong

¹⁸¹ *Office of Pluralism and Leadership*, DARTMOUTH DIRECT, <http://www.dartmouth.edu/~dartmouthdirect/2013/12/guest-post-welcome-from-opal/> (last visited Mar. 7, 2016) (OPAL advances Dartmouth’s commitment to academic success, diversity, inclusion, and wellness by engaging all students in development of identity, community, and leadership. OPAL provides academic and sociocultural advising, designs and facilitates educational programs, and serves as advocates for all students and communities. OPAL is for all students who want to get the most from their unique Dartmouth experience).

¹⁸² *Welcome to OPAL*, DARTMOUTH DIRECT, <http://www.dartmouth.edu/~opal/> (last visited Mar. 7, 2016) (OPAL provides advising programs that target specific minority groups; these programs include the Black Student Advising, Latina/o Student Advising, Native American Program, and Pan Asian Student Advising.).

¹⁸³ *Diversity in Engineering Center: Minority Engineering Program*, U. DAYTON, https://www.udayton.edu/engineering/diversity/minority_engineering.php (last visited Mar. 7, 2016). Recognizing that minority students are underrepresented in physics programs, many universities partner with the APS Physics Bridge Program “to increase the number of physics PhDs awarded to underrepresented minority (URM) students, including African American, Hispanic American, and Native American students.” APS Physics Bridge Program: *Project Summary*, APS PHYSICS BRIDGE PROGRAM, <http://www.apsbridgeprogram.org/resources/project-summary.pdf> (last visited Mar. 7, 2016). To this end, APS financially sponsors programs at so-called bridge sites that “will host students (APS Bridge Fellows) who typically would not gain acceptance into a physics doctoral program, to spend a period of 1-2 years after their undergraduate studies enhancing their academic and research skills before applying to a doctoral program.” *Id.* Bridge sites are operated at the following universities: California State University Long Beach, Florida State University, Ohio State University, and the University of South Florida. See *APS Physics Bridge Programs: Bridge Sites*, APS PHYSICS BRIDGE PROGRAM, <http://www.apsbridgeprogram.org/institutions/bridge> (last visited Mar. 7, 2016). Similarly, the University of Dayton strives to increase the presence of minorities in highly technical fields, such as engineering. The School of Engineering at the university provides the Minority Engineering Program where: “African American, Hispanic American and Native American students find peer support, academic rigor and professional networking that equip them with the skills and relationships for academic success as well as professional success as future engineers.” *Diversity in Engineering Center: Minority Engineering Program*, U. DAYTON, https://www.udayton.edu/engineering/diversity/minority_engineering.php (last visited Mar. 7, 2016).

¹⁸⁴ *Pathways Programs: Gateway to Graduate School Bridge Program*, GRADUATE SCH., U. GA., <http://grad.uga.edu/index.php/current-students/recruitment-diversity/programs-workshops/summer-bridge-program> (last visited Mar. 7, 2016).

The Summer Bridge program allows new incoming graduate students from historically underrepresented backgrounds to begin their graduate education at UGA in the summer semester rather than the fall. The Graduate School defines underrepresented as those who self-identify with an ethnic/racial group, income

commitment by colleges and universities to both create and retain diverse student bodies. But a diverse student body is not enough if a diverse faculty does not teach it.

c. Diversity-Oriented Hiring Practices

Colleges are not only concerned with acclimating racial minorities to a collegiate environment, but they also employ strategies to recruit potential faculty members that will mirror the diversity of their student bodies. The diversity principle motivates universities to assemble diverse faculties and to develop teaching methods that maximize opportunities for exchange between students in the classroom. To this end, colleges and universities have established offices focused in part on recruiting racial minorities through faculty diversity plans.¹⁸⁵ These institutions have concluded that special efforts are required to attract minority academics because minority professors continue to be underrepresented on their faculties.¹⁸⁶ There is a sense among administrators that minority faculty members face unique challenges, and that such experiences positively contribute to scholarship in a variety of disciplines.¹⁸⁷

Skeptics claim that administrators aim to achieve the right racial balance or mix in their faculties in order to promote the image of an elite institution.¹⁸⁸ Many universities, however, do more than pay attention to the racial mix of their

background or gender in a particular discipline that has not been traditionally represented in higher education. Underrepresented also includes first generation and non-traditional age college students. To participate, students must be admitted to the University of Georgia, receive funding from their department or other campus entity, and be nominated for this program by the graduate coordinator for their department.

Id.

¹⁸⁵ As an example, the Office of Inclusion and Diversity in the Medical School at the University of Penn developed a detailed plan for faculty diversity. *See Faculty Diversity*, U. PENN., <http://www.med.upenn.edu/inclusion-and-diversity/faculty.html> (last visited Mar. 7, 2016).

¹⁸⁶ *See Office of the Senior Vice Provost: Faculty Development & Diversity*, HARV. U., <http://www.faculty.harvard.edu/diversity> (last visited Mar. 7, 2016) (“Harvard University is committed to pursuing the benefits of diversity among its faculty because these brilliant scholars are absolutely essential in keeping the institution become productive, creative, competitive, and successful in its mission to train the next generation of leaders in all fields of endeavor.”).

¹⁸⁷ *Id.* (“There continues to be underrepresentation of U.S. ethnic and racial minorities in [the Harvard faculty], including African Americans, Hispanic/Latinos, Native Americans and in certain disciplines, Asian/Asian Americans. The needs of our U.S. ethnic and racial minority groups must be understood in more nuanced contexts, taking into account the diversity of experiences and histories that different sub-groups within these categories have faced for generations. More importantly, we need to ensure that we carefully consider how minority faculty have experienced the academy, and the unique challenges they have faced.”).

¹⁸⁸ Colorblind purists can argue that race-conscious admission plans and hiring practices are intended to produce the desired “racial aesthetic” on both sides of the teaching lectern. *See Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., dissenting). The concern that government employers may advance race-based agendas or promote identity politics through hiring practices has been raised in the Court’s race jurisprudence. *Ricci v. DeStefano*, 557 U.S. 557, 596 (2009) (Alito, J., concurring).

faculties.¹⁸⁹ They also focus on the caliber of their instructors as well as the quality of teaching in the classroom. Colleges implement extensive plans to integrate diversity principles into the pedagogical methods of their instructors that attempt to materialize the claimed educational benefits that arise from classroom diversity.

The University of Michigan, for example, trains and encourages its instructors to use “inclusive teaching strategies” through a center organized to research and identify the best teaching practices for classroom instruction.¹⁹⁰ These techniques are aimed to facilitate the open exchange of ideas that are at the heart of the University’s mission. The Center for Research on Learning and Teaching at the University of Michigan explained, “[i]nclusive classrooms are classrooms in which instructors and students work together, to create and sustain an environment in which everyone feels safe, supported, and encouraged to express her or his views and concerns.”¹⁹¹ To achieve this goal, instructors are encouraged to incorporate multiple perspectives in their course curriculum in a way that does not “trivialize or marginalize” the perspectives or experiences of their minority students.¹⁹² More generally, instructors are told to employ techniques that insulate their teaching style from personal biases.¹⁹³

The Center claims these biases create an atmosphere where troublesome “assumptions” burden student-teacher interaction, such as believing minority students are experts on their race or that white students are neither interested in race nor can provide any insight on the subject.¹⁹⁴ Free exchange between students is thus inhibited. As this section shows, *Bakke* helped to lay the foundation that encouraged academics to develop an entire body of research designed to inform instructors on how to manifest the benefits that flow from campus diversity in the classroom. *Bakke*’s impact on higher education cannot be understated.

Today, an intricate system of policies, initiatives, programs, partnerships, offices, and hiring practices has grown around *Bakke*. Diversity, in which race plays an important role, serves as an organizing principle that guides how universities create their learning communities, construct their identities, and achieve their educational goals. *Bakke* has led to the creation of the modern “diversity bureaucracy” at college

¹⁸⁹ In affirmative action jurisprudence, college administrators do not violate the Constitution if they pay “some attention” to admission demographics to be aware of the racial makeup of its incoming classes when they make admission decisions. *See Grutter*, 539 U.S. at 336; *see also Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 323-34 (1978). However, attention to racial demographics can “become unlawful when race is mechanically employed to achieve racial goals in a process devoid of any meaningful individualized assessment.” Kuykendall & Adside, *supra* note 114, at 1085; *see also Gratz v. Bollinger*, 539 U.S. 244, 284 (2003).

¹⁹⁰ *Center on Research on Learning and Teaching: Inclusive Teaching Strategies*, U. MICH., <http://www.crlt.umich.edu/multicultural-teaching/inclusive-teaching-strategies> (last visited Mar. 7, 2016).

¹⁹¹ *Center on Research on Learning and Teaching: Creating Inclusive College Classrooms*, U. MICH., http://www.crlt.umich.edu/gsis/p3_1 (last visited Mar. 7, 2016).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

campuses.¹⁹⁵ The diversity bureaucrat, or administrator, is concerned with the cultural climate on campus and aims to build community among minority students and integrate them into the larger social fabric. But the creation and maintenance of campus diversity is not only the concern of diversity officials. The student body is invested in the enterprise as well. There is now a diversity culture on college campuses where students voluntarily organize events around cultural or racial identities that foster community and belonging among minority students.

While diversity officials facilitate some of these functions, many activities are products of grassroots efforts organized by student groups.¹⁹⁶ Race-based student groups, fraternities, and sororities sponsor an array of activities designed to provide a unique cultural experience to their members. These activities include: lectures, dinners, trips, film showings, dance workshops, and step show competitions.¹⁹⁷

The bureaucracy does not necessarily operate in a top-down or authoritarian fashion. It can operate bottom-up; students possess creative license to develop activities designed to establish intra-racial cohesion and interracial exchange.¹⁹⁸ The

¹⁹⁵ Some commentators use the phrase “diversity bureaucracy” as a pejorative to criticize the resources spent on employees and administrators to operate multicultural offices; critics view these expenditures as wasteful. *E.g.*, Heather MacDonald, *End UC’s Diversity Charade*, ORANGE COUNTY REG. (Oct. 16, 2014), <http://www.ocregister.com/articles/diversity-505938-faculty-university.html> (deriding the University of California System’s investment in an “ever-growing diversity bureaucracy” headed by administrators who are paid six figure salaries.); George Will, *Unintended Consequences of Racial Preferences*, WASH. POST (Nov. 30, 2011), http://www.washingtonpost.com/opinions/the-unintended-consequences-of-racial-preferences/2011/11/29/gIQAbuoPEO_story.html (accusing “diversity bureaucracies” of using minority students as “public utilities” to enrich the academic experiences of others). Notwithstanding the policy objections to diversity offices, I believe the “diversity bureaucracy” takes on a positive connotation in constitutional law. It is strong evidence of how diversity has become engrained in the admission process and culture at college campuses.

¹⁹⁶ *Connect, Experience, Lead: Explore & Discover Who You Want To Be*, HILLEL: U. MICH., <https://michiganhillel.org/experience/> (describing events, trips, and projects that are available to “all Jewish students and their friends.”); *The William Monroe Trotter Multicultural House*, U. MICH., <http://trotter.umich.edu/> (last visited Mar. 7, 2016) (listing the variety of activities sponsored by the house for Black History Month); *National Pan-Hellenic Council*, U. MICH., <http://www.umich.edu/~nphc/history.html> (last visited Mar. 7, 2016) (explaining the history and activities of historically black fraternities and sororities on campus).

¹⁹⁷ See *supra* note 196 and accompanying text.

¹⁹⁸ Yet the diversity bureaucracy and the culture it fosters can potentially be a totalitarian force on campuses, if it is not placed under close Equal Protection surveillance. Kuykendall & Adside, *supra* note 114, at 1073 (“Too much administrative control, even if done in good faith, clouds free university exchange.”). This can manifest if top-down admission programs pay close attention to the racial demographics of its incoming freshman classes without evaluating how each candidate can enrich the marketplace of ideas. *Id.* at 1076. In such an environment, students can easily isolate themselves into race-based student groups or housing arrangements where “racial groupthink” is policed by fellow peers. *Id.* at 1029. As a consequence, interracial exchange, problem solving, or exposure to differing viewpoints is limited to the artificial classroom setting. *Id.* at 1027 (“[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.’”). This point will be explored in Part III.

diversity bureaucracy and the culture it fosters carries weight in affirmative action jurisprudence, because diversity programs serve as the specific means that universities employ to manifest educational benefits that flow from campus diversity.

The direct educational benefits that flow from diversity are doctrinally important since *Fisher I* reaffirmed that strict scrutiny requires lower courts to search into whether these educational benefits manifest in practice, because “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.”¹⁹⁹ To achieve these benefits, colleges have established bureaucratic systems that are staffed to oversee the implementation of “a comprehensive range of exemplary educational programs that foster and sustain an environment that promotes academic excellence, respects differences, and accepts inclusiveness.”²⁰⁰ These bureaucracies factor heavily in *stare decisis* analysis because their existence shows widespread institutional reliance upon *Bakke* on the part of colleges and universities in the fulfillment of their respective missions.

2. Workability: *Bakke* is no *Lemon*

Bakke allowed experimentation with race in achieving educational benefits, but with clear guidelines to avoid impermissible usages of racial classifications. This section explains how Justice Powell’s rule is relatively straightforward for administrators to comprehend in crafting *Bakke* compliant policies. The rule has proven durable, providing clear guidelines for the judiciary to scrutinize diversity programs for Equal Protection violations.

The doctrine of *stare decisis* recognizes that precedent must provide adequate guidance to stakeholders so they may organize their behavior to comply with legal regimes imposed upon them. To this end, precedent limits judicial discretion, providing parties with information to reasonably predict the trajectory of jurisprudence.²⁰¹ “A persistent goal in constitutional law,” one scholar wrote, “is to yield predictable results, to increase society’s justified expectations”²⁰²

¹⁹⁹ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013).

²⁰⁰ *Office of Diversity and Multicultural Affairs*, AUBURN U., <http://develop.auburn.edu/ways/units/diversity/> (last visited Mar. 7, 2016) (“Diversity is a core value at Auburn University. The Office for Diversity and Multicultural Affairs strives to offer a comprehensive range of exemplary educational programs that foster and sustain an environment that promotes academic excellence, respects differences, and accepts inclusiveness.”). Texas A&M University, like Auburn, has established an office responsible for organizing diversity-oriented activities. The office of the Vice President and Associate Provost for Diversity, who heads a standing university-wide committee on diversity, leads the strategic coordination of university-wide diversity-related activities, consider processes for the collection of equity and climate data, diversity initiatives, as well as recruitment and retention strategies and outcomes. See *Diversity Operations Committee*, TEX. A&M U., <http://diversity.tamu.edu/Diversity-Operations-Committee> (last visited Mar. 7, 2016); see also *Office for Institutional Diversity*, U. KY., <http://www.uky.edu/Diversity/about.html> (last visited Mar. 7, 2016) (“[Office for Institutional Diversity] staff provide consultation and assistance to the various colleges in developing diversity and inclusion strategies and metrics in their individual strategic plans.”).

²⁰¹ Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1475 (2013).

²⁰² Josh Blackman, *This Lemon Comes as a Lemon: The Lemon Test and the Pursuit of a Statute’s Secular Purpose*, 20 GEO. MASON U. CIV. RTS. L.J. 351, 408 (2010).

Precedent that establishes unworkable rules, on the other hand, sparks years of litigation due in part to arbitrary lines drawn that produce inconsistent results from case to case.²⁰³ Such decisions often result in intense debate among the Justices and leave “[p]ersuasive criticism” in their wake.²⁰⁴ Take the *Lemon* test as an example, because it stands in contrast to *Bakke*.

Lemon held, in relevant part, that government practices challenged under the Establishment Clause must have, (1) a secular purpose, and (2) the primary effect of neither advancing nor inhibiting religion to survive review.²⁰⁵ In *Lynch v. Donnelly* and *County of Allegheny v. ACLU*, the Court attempted to provide additional standards to guide lower courts in applying the *Lemon*-test to identify Establishment Clause violations.²⁰⁶ Those decisions instructed courts to strike down any practices found to be “endorsements” of religion if the practices made non-adherents feel like political “outsiders” and adherents feel like “insiders” or “favored members of the political community.”²⁰⁷

However, the Court conceded that “endorsement,” as a doctrinal principle, was not “self-defining.”²⁰⁸ Justice O’Connor explained that review in this area involved “case-specific examinations” that required judges to consider the “unique circumstances” of each matter.²⁰⁹ Judges employ a hypothetical, “reasonable observer” who takes into account the “text, legislative history, and implementation” of the practice to determine if it constitutes an endorsement of religion.²¹⁰ Justice O’Connor’s attempt to provide clarity to Establishment Clause jurisprudence made the doctrinal waters murkier. The “reasonable observer” standard provoked more questions than answers. Some of these questions include: Would this reasonable

²⁰³ See *Vieth v. Jubeliner*, 541 U.S. 267, 306 (2004) (reversing *Davis v. Bandemer*, 478 U.S. 109 (1986)—which held that plaintiffs could establish political gerrymandering claims if they showed intentional discrimination to target a political group—because the standard proved not to be unmanageable, inviting eighteen years of litigation in the lower courts); see also *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).

²⁰⁴ *Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part), *abrogated by* *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

²⁰⁵ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

²⁰⁶ *Allegheny*, 492 U.S. at 625 (O’Connor, J., concurring) (citing *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (O’Connor J., concurring)) (“In my concurrence in *Lynch*, I suggested a clarification of our Establishment Clause doctrine to reinforce the concept that the Establishment Clause ‘prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.’”).

²⁰⁷ *Lynch*, 465 U.S. at 688.

²⁰⁸ *Allegheny*, 492 U.S. at 593.

²⁰⁹ *Id.* at 623 (O’Connor, J., concurring).

²¹⁰ See *id.* at 631 (“The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.”); see also *McCreary v. ACLU*, 545 U.S. 844, 862 (2005) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)) (“The eyes that look to purpose belong to an ‘objective observer,’ one who takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute,’ or comparable official act.”).

observer be an “outsider” who is a member of the religious minority? Or, would this hypothetical person be an ordinary member of the majority faith? Perhaps, the “objective observer” would be a neutral arbiter who can discern the motives of those who enacted the challenged law.²¹¹

In *Allegheny*, Justice Kennedy criticized the Establishment Clause doctrine as “flawed in its fundamentals and unworkable in practice.”²¹² Justice Thomas assailed *Lemon* as “incapable of consistent application.”²¹³ Judicial inquiries into legislative intent or purpose present evidentiary difficulties, because deriving a single intent from a multi-member body can become an “impossible task.”²¹⁴ As Chief Justice Warren warned, “[i]nquiries into [legislative] motives or purposes, are a hazardous matter.”²¹⁵ The legislative histories the Court must consult to discern intent can be—depending on the case—too voluminous, too scarce, or too manipulated to offer any meaningful insight.²¹⁶ Justices have complained that such inquiries provide little or no clear guidance on what specific pieces of history should be afforded more weight over others.²¹⁷

Unlike subjective-based standards, which place decisions like *Lemon* under withering criticism, *Bakke* operates much more like a bright-line rule. Justice Powell made clear that race is only a single factor among other characteristics in evaluating each individual applicant for admission.²¹⁸ Thus, colleges cannot employ admission

²¹¹ See FRANK S. RAVITCH, LAW AND RELIGION, A READER: CASES, CONCEPT, AND THEORY 274 (2d ed. 2008).

²¹² *Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in part and dissenting in part).

²¹³ *Van Orden v. Perry*, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).

²¹⁴ See *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting).

²¹⁵ *United States v. O’Brien*, 391 U.S. 367, 383 (1968).

²¹⁶ *Aguillard*, 482 U.S. at 637-38 (Scalia, J., dissenting). In a thought-provoking dissent, Justice Scalia posited a litany of questions to illustrate the lack of guidance that arises from subjective standards that resort to legislative history to resolve legal questions:

[W]here ought we to look for the individual legislator's purpose? We cannot of course assume that every member present (if, as is unlikely, we know who or even how many they were) agreed with the motivation expressed in a particular legislator's preenactment floor or committee statement . . . Can we assume, then, that they all agree with the motivation expressed in the staff-prepared committee reports they might have read - even though we are unwilling to assume that they agreed with the motivation expressed in the very statute that they voted for? Should we consider postenactment floor statements? Or postenactment testimony from legislators, obtained expressly for the lawsuit? Should we consider media reports on the realities of the legislative bargaining? All of these sources, of course, are eminently manipulable. Legislative histories can be contrived and sanitized, favorable media coverage orchestrated, and postenactment recollections conveniently distorted.

Id.; see also *McCreary v. ACLU*, 545 U.S. 844, 863 (2005) (“[s]avvy officials [can] disguise[] their religious intent so cleverly that the objective observer just misses it.”).

²¹⁷ See *Aguillard*, 482 U.S. at 636-37 (Scalia, J., dissenting); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 315 (1978); Blackman, *supra* note 202, at 407-09.

²¹⁸ *Bakke*, 438 U.S. at 316-17.

programs that make race the decisive factor in evaluating an applicant.²¹⁹ Justice Powell's "race—as-one-factor" rule gives courts an unambiguous mandate to follow as they examine those programs claiming to be compliant with *Bakke*, but in reality make race the dominant category.

In *Gratz*, for example, the Court invalidated, 7-2, an undergraduate admissions program that allocated points to applicants based upon specified categories under a point system.²²⁰ Under that program, applicants received points towards admission based upon a number of categories, such as grade point average, standardized test scores, strength of personal essay, and so on. But the most relevant feature of the point system was that applicants, from underrepresented racial backgrounds, received twenty points or "one-fifth of the points needed to guarantee admission."²²¹ The Court found that the automatic distribution of twenty points to minority applicants prevented the sort of individualized assessment needed to determine if a particular applicant could contribute to campus diversity.²²² In doing so, the mechanical allocation of twenty points to an applicant solely on the basis of race made the factor decisive for "virtually every minimally qualified underrepresented minority applicant."²²³

The approach adopted in *Gratz* demonstrates that *Bakke* does not require reviewing courts to canvass through a voluminous amount of evidence to imaginatively reconstruct the intent of college administrators to uncover illegitimate motives.²²⁴ *Gratz*'s reasoning mirrors *Bakke* in some ways. In *Bakke*, Justice Powell pointed to the expressed terms of the admissions program at the medical school, which reserved sixteen out of one hundred seats for minority applicants, to conclude that the program violated the Equal Protection Clause.²²⁵ Both *Bakke* and *Gratz* reveal that, at a minimum, courts are able to conduct a facial review of an admissions program for racial classifications and then evaluate the text or structure of that program to determine whether race is the dominant category. *Bakke*'s treatment of

²¹⁹ *Id.*

²²⁰ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

²²¹ *Id.* at 270.

²²² *Id.* at 271-72.

²²³ *Id.* at 272.

²²⁴ Blackman, *supra* note 202, at 363-64: ("[One approach] to intentionalism is termed imaginative reconstruction. Under this approach, '[T]he interpreter tries to discover "what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy.'" In other words, imaginative reconstruction seeks to reincarnate the dead hand of the legislature that passed the bill and ask how it would have decided the case or controversy before the court. As in the case of specific intent theory, the imaginative reconstruction approach suffers from aggregation and attribution problems, namely, determinations regarding 'whose intent the court should attempt to reconstruct.' Is it even possible to identify the 'pivotal' voter? Professor Eskridge notes that 'imaginative reconstruction may be more imaginative than reconstructive . . .').

²²⁵ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275 (1978).

the narrow tailoring prong of strict scrutiny appears simple enough for courts to apply.²²⁶

Strict scrutiny equips courts with tools to “‘smoke out’ illegitimate uses of race” in admission programs that may in practice “promote notions of racial inferiority and lead to a politics of racial hostility.”²²⁷ *Fisher I* reaffirmed basic precepts in the strict scrutiny canon. There, Justice Kennedy explained that the narrow tailoring prong of strict scrutiny instructs courts to verify that it is “‘necessary’ for a university to use race to achieve the educational benefits of diversity.”²²⁸ To that end, courts can explore whether other race-neutral alternatives would produce the university’s interest.²²⁹ If such alternatives exist, “then the university may not consider race.”²³⁰ In future cases, courts may also employ admissions data to filter out impermissible motives.²³¹ Consulting such evidence as a lens into the motives of challenged programs would be in keeping with the principle that courts cannot take college administrators’ justifications for using race at face value.²³²

III. WHY FOLLOWING *BAKKE* STRENGTHENS THE DEMOCRATIC PROCESS

Bakke engendered reliance among stakeholders and provided workable principles to control affirmative action cases. Simply put, *Bakke* advances stare decisis principles. However, this Article touches upon a historically sensitive topic during a momentous time when the nation is now hotly debating the state of race relations in

²²⁶ But courts have disagreed on how to apply *Bakke* in difficult cases. Compare *Grutter v. Bollinger*, 137 F. Supp. 2d. 821, 851 (E.D. Mich. 2001) (ruling that the Law School’s pursuit of a critical mass of underrepresented minorities was “indistinguishable from a straight quota system” and thus unconstitutional), with *Grutter v. Bollinger*, 288 F.3d 732, 747-48 (6th Cir. 2002) (en banc) (holding that the Law School’s goal to attain a critical mass of underrepresented minorities was flexible and did not transform the program into a quota system). Take *Grutter* as an example. There, Justice O’Connor held that the law school’s mission to admit a “critical mass” of underrepresented minorities did not operate as a quota. *Grutter*, 539 U.S. at 334-35. She found that Justice Powell did not disapprove of programs designed to achieve “minimum goals for minority enrollment.” *Id.* at 335 (emphasis added). Quotas, Justice O’Connor explained, are impermissible because they dictate “a fixed number or percentage which must be attained,” whereas goals are “flexible” and do not require a specified minimum or maximum number of minorities for admittance. *Id.* at 335-36. I have written elsewhere that while the distinction Justice O’Connor made between these terms maybe semantically correct (and that may even be debatable), the distinction may not carry any significance under strict scrutiny rules. Kuykendall & Adside, *supra* note 114, at 1062. In *Bakke*, the parties, like the opposing sides in *Grutter*, debated over whether the challenged admissions program should be characterized as a racial quota or a racial goal. *Bakke*, 438 U.S. at 288-89. Justice Powell concluded that the debate was over “semantic[s]” because “[w]hether [the] limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,” making the program presumptively unconstitutional. *Id.* at 289.

²²⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

²²⁸ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

²³² *Fisher*, 133 S. Ct. at 2421.

the wake of racial anxiety.²³³ Racial incidents spark debate over the appropriate role government should assume in addressing continued racial problems; affirmative action is an issue where the question is debated. Colorblind purists not only argue that the Constitution prohibits race-conscious admission programs, but their opposition to such plans expands into a broader policy statement against color-conscious activity.²³⁴ They argue that racial classifications present social dangers to our democracy and affirmative action jurisprudence should serve as a bulwark against it.²³⁵ This argument is worthy of response. This section shows how a purely colorblind approach hinders this nation's ability to rise above racial problems.

A. Colorblind Purity, Moral Outrage, and Closing the Door on the Democratic Process.

Apart from the debate among Justices and legal scholars over affirmative action jurisprudence, there is an organized movement to persuade voters and legislators to legalize race-conscious activity within the states. This section explains how statewide bans on race-conscious activity short-circuits the political process. However, it is recognized that moral outrage at color-conscious government activity is not totally without merit. Indeed, American history teaches us to be highly suspicious of the motives of government officials when they treat citizens differently on the basis of race.²³⁶

Both federal and state governments have used race to establish a social order designed to subjugate racial minorities. A white propertied aristocracy in the South invested its fortunes to protect its interest in slavery; in the Jim Crow era, it regenerated through a system of color-conscious apartheid that deprived African-Americans of their fundamental rights.²³⁷ However, the instant eradication of racial

²³³ See, e.g., Mike Levine, *Baltimore on the Brink for Decades*, ABC NEWS (Apr. 28, 2015), <http://abcnews.go.com/US/baltimore-brink-decades/story?id=30645173> (suggesting that 2015 riots in Baltimore arose from “tensions between law enforcement and some of Baltimore's black communities”); Yvonne Wenger, *Damage to Business from Baltimore Rioting Estimated at About \$ 9 Million*, WASH. POST (May 13, 2015), https://www.washingtonpost.com/local/damage-to-businesses-from-baltimore-rioting-estimated-at-9-million/2015/05/13/5848c3fe-f9a8-11e4-a13c-193b1241d51a_story.html (estimating that the destruction caused by the 2015 Baltimore riots totaled \$9 million in damage for 285 businesses); Becky Yerak, *Riot Damage to Ferguson Businesses Could Be Covered with Insurance*, CHI. TRIB. (Nov. 26, 2014), <http://www.chicagotribune.com/business/ct-ferguson-business-insurance-1128-biz-20141126-story.html> (reporting that riots in Ferguson, Missouri, caused by a grand jury not charging a white officer for shooting a eighteen-year-old black man, may cost \$5 million and that twenty-eight businesses were reported as burglarized).

²³⁴ See Orlando Patterson, *Race and Diversity in the Age of Obama*, N.Y. TIMES (Aug. 14, 2009), http://www.nytimes.com/2009/08/16/books/review/Patterson-t.html?_r=0.

²³⁵ *Fisher*, 133 S. Ct at 2422 (Thomas, J., concurring).

²³⁶ See *Croson*, 488 U.S. at 493 (“Classification based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”)

²³⁷ See GAVIN WRIGHT, *OLD SOUTH, NEW SOUTH: REVOLUTIONS IN THE SOUTHERN ECONOMY SINCE THE CIVIL WAR* 19 (1986) (finding that the average slaveholder had at least two-thirds of his wealth in African slaves); see also Nathaniel Jones, *The Harlan Dissent: The Road Not Taken—An American Tragedy*, 12 GA. ST. U. L. REV. 951, 957-958 (1996) (“[White supremacists recognized *Plessy*'s separate but equal doctrine] as a license to manipulate,

classifications from our laws, either through judicial mandate or through plebiscite, cannot erase the social and psychological imprint the legacy of slavery and discrimination made upon our country.²³⁸ While the nation has made remarkable progress in race-relations through de jure desegregation, the enactment of federal civil rights legislation, and the election of its first African American to the Presidency, racial hostility remains pervasive.²³⁹

The post-Civil Rights Era has had sporadic episodes of racial violence. The 1960s became a decade in which public order was disrupted by race riots in Watts, Detroit, and Newark. The unrest culminated in April 1968 with the assassination of Dr. Martin Luther King, Jr., which sparked ethnic violence in nearly 110 cities.²⁴⁰ Regrettably, the modern era is experiencing its share of unrest when racial animosities violently erupt in local communities when an event occurs that triggers deeply held resentments. These events include the acquittal of four white police officers who were video-taped beating an unarmed black motorist,²⁴¹ the planned march by a white supremacist group against claimed black gang activity,²⁴² or the conviction of a white transit cop of a lesser charge in the shooting of an unarmed black man.²⁴³ Racial violence reared its ugly head again in a small Missouri town, drawing worldwide attention. In 2014, a shooting by a white police officer of a black

control, and contain blacks. Behind 'the thin disguise of equal accommodation,' whites went to ridiculous lengths. Hospitals, libraries, drinking fountains, and cemeteries were segregated. States hastened to segregate the deaf, mentally retarded, and the blind by color; white nurses were forbidden to treat black males. South Carolina forbade black and white cotton workers to even look out of the same windows. Florida required African-American textbooks to be segregated in warehouses. Atlanta provided 'Jim Crow Bibles' for black witnesses in courtrooms. The *Plessy* doctrine was a conduit through which poured the venom of racism into every aspect of American life. It infected our social and legal institutions and deeply stained the fabric of American thought. A color-blind society we were not.'")

²³⁸ Orlando Patterson, *Equality*, DEMOCRACY (Winter 2009), <http://democracyjournal.org/magazine/11/equality>.

²³⁹ See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (1965); *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955) (ordering school officials to racially desegregate their institutions "with all deliberate speed."); Berta Esperanza Hernández-Truyol, *Narratives of Identity, Nation, and Outsiders Within Outsiders: Not Yet A Post-Anything World*, 14 HARV. LATINO L. REV. 325, 326 (2011) (explaining that the election of Barack Obama substantiated the view among some in media that America was "post-racial" in which race no longer mattered, becoming an irrelevant factor in daily interactions and life opportunities).

²⁴⁰ Richard Posner, *The French Riot's Comment*, BECKER-POSNER BLOG (Nov. 13, 2005), <http://www.becker-posner-blog.com/2005/11/the-french-riots--posners-comment.html>.

²⁴¹ Robert Reinhold, *Riots in Los Angeles: The Blue Line: Surprised Police React Slowly as Violence Spread*, N.Y. TIMES (May 1, 1992), <http://www.nytimes.com/books/98/02/08/home/rodney-riots.html>.

²⁴² *Planned Neo-Nazi March Sparks Violence*, CNN (Oct. 15, 2005), <http://www.cnn.com/2005/US/10/15/nazi.march/>.

²⁴³ Sean Alfano, *Oakland Shooting Verdict Sparks Riots After Johannes Mehserle Dodges Murder Rap in Oscar Grant Death*, DAILY NEWS (July 9, 2010), <http://www.nydailynews.com/news/national/oakland-shooting-verdict-sparks-riots-johannes-mehserle-dodges-murder-rap-oscar-grant-death-article-1.464411>.

teen sparked multiple days of civil unrest when a grand jury decided to not indict the officer.²⁴⁴ The riot resulted in looters burning at least twenty-five buildings in the city's business district.²⁴⁵ Clearly, this demonstrates that race remains a catalyst for social angst and disruption.

Many Americans do not discuss race productively. Citizens often look to prominent, and colorful, figures that are anointed by political elites or by the pundit class as race leaders for direction in how to discuss or view matters pertaining to race. Unfortunately, many of these individuals are not race healers. They are arsonists who pour fuel on the social fire.²⁴⁶ Their rhetoric does not provide the public with useful vocabulary to facilitate meaningful dialogue; in reality, these individuals turn up the verbal heat by evoking rhetoric that substitutes substantive disagreement with vicious, race-based insults at times.²⁴⁷ Worse still, a cottage industry of radio hosts, television personalities, and even politicians now specialize in manufacturing ethnic conflict by injecting divisive speech into political discourse; this dynamic is not limited to any political ideology or party.²⁴⁸

²⁴⁴ *The Damage in Ferguson*, N.Y. TIMES (Nov. 25, 2014), <http://www.nytimes.com/interactive/2014/11/25/us/ferguson-photos.html>.

²⁴⁵ *Id.*

²⁴⁶ Labeling individuals who engage in ethnic politics as “arsonists” is a farce borrowed from former New York Mayor Rudy Giuliani; he characterized those whom he believed wrongly racialized the Michael Brown case in Ferguson, Missouri as “racial arsonists.” *Rudy Giuliani on Darren Wilson Breaking His Silence*, FOX NEWS (Nov. 26, 2014), <http://www.foxnews.com/transcript/2014/11/26/rudy-giuliani-on-darren-wilson-breaking-his-silence>.

²⁴⁷ One startling example of a race-based *ad hominem* insult comes from Civil Rights activist Al Sharpton, who has advised the Obama Administration on race relations. Michelle Ye Hee Lee, *Giuliani's Claim the White House Invited Al Sharpton Up to 85 Times*, WASH. POST (Dec. 30, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/30/giulianis-claim-the-white-house-invited-al-sharpton-up-to-85-times/> (finding that visitors' logs from the White House recorded that Sharpton visited the residence at least seventy-two times). Al Sharpton attacked former New York City Mayor David Dinkins with racial epithets:

David Dinkins, you wanna be the only nigga on television, the only nigga in the newspaper, the only nigga who can talk. Don't cover them, don't talk to them, cause you got the only nigga problem. Cause you know if a black man stood up next to ya, they would see you for the whore you really are!

Rosella Age, *Breitbart.com Holds Up Sharpton Remarks For Scrutiny After Limbaugh Slap*, DAILY CALLER (Mar. 15, 2012), <http://dailycaller.com/2012/03/15/breitbart-com-holds-up-sharpton-remarks-for-scrutiny-after-limbaugh-slap/>.

²⁴⁸ See, e.g., Nicole Casta, *Savage: Arabs are “Non-humans” and “Racist, Fascist Bigots,”* MEDIA MATTERS AM. (May, 14, 2004), <http://mediamatters.org/research/2004/05/14/savage-arabs-are-non-humans-and-racist-fascist/131141>; Hilary Crosley, *Cornel West: Obama a “Republican in Blackface,”* THE ROOT (Nov. 11, 2012), <http://www.theroot.com/buzz/cornel-west-obama-republican-blackface> (reporting that Professor Cornel West called President Obama “a Rockefeller Republican in blackface”); Tim Graham, *Radio Host Mike Malloy Rips Clarence and Ginni Thomas and Says Their Marriage Will Inflammate Racist ‘Teabaggers,’* NEWSBUSTERS (Mar. 17, 2010), <http://www.newsbusters.org/blogs/tim-graham/2010/03/17/radio-host-mike-malloy-rips-clarence-and-ginni-thomas-and-says-their-mar> (reporting that Radio Host Mike Malloy called Justice Clarence Thomas a “House Negro” for his alleged personal support for the Tea Party); *Pat*

Public figures have injected race to disrupt political discourse to either distract the public from substantive issues or to achieve some personal agenda. Modern audiences have been presented with speakers, from across the political spectrum, which weigh into certain controversies as an occasion to engage in “identity politics.”²⁴⁹ Politicians, television personalities, and radio show hosts have, either through coded words or provocative language, intensified ethnic antipathies in notable controversies that exposed racial fault lines. Such controversies include the double-murder trial of a former football player;²⁵⁰ the arrest of a black professor from Harvard by a white police officer;²⁵¹ three white, lacrosse players from Duke University accused of raping a black escort;²⁵² and the tragic shooting of an unarmed black teen by a Latino neighborhood watchmen.²⁵³ These events inspire people of goodwill to question how this nation can receive relief from persistent racial bitterness. These people disagree, however, on what solutions the country should adopt.

Colorblind purists conclude that the nation’s history on race teaches that the classification is an inherently toxic category and government activity can only lead to the creation of racial entitlements or increased ethnic tensions.²⁵⁴ Total government neutrality with respect to race—they conclude—is the best antidote to remedy the lingering effects of slavery and discrimination.²⁵⁵ A purely colorblind

Buchanan: In His Own Words, ANTI-DEFAMATION LEAGUE, http://www.adl.org/special_reports/buchanan_own_words/on_immigration.asp (last visited Mar. 8, 2016) (arguing that America is “committing suicide” because the nation is becoming less white with rising minority populations); Jeff Poor, *Anti-gun Sports Columnist Jason Whitlock: ‘The NRA Is the New KKK,’* DAILY CALLER (Dec. 3, 2012), <http://dailycaller.com/2012/12/03/anti-gun-sports-columnist-jason-whitlock-the-nra-is-the-new-kkk/#ixzz2EAD4C0oX> (reporting that columnist Jason Whitlock blasted the NRA as the “new KKK” for creating a gun culture, which contributed to the murder-suicide committed by NFL star Jovan Belcher and for the arming of black youths); Jake Sherman, *Andre Carson: Tea Party Wants Blacks ‘Hanging on a Tree,’* POLITICO (Aug. 31, 2011), <http://www.politico.com/news/stories/0811/62396.html#ixzz2Dhs8y3W3> (“Rep. Andre Carson . . . said . . . ‘some of them in Congress right now of this tea party movement would love to see you and me . . . hanging on a tree.’”).

²⁴⁹ Isaac Simon, Comment, *Constitutional Theory Building in the Context of the Fourteenth Amendment: The History of Affirmative Action*, 23 CHICANO-LATINO L. REV. 113, 136 (2002).

²⁵⁰ See generally Christo Lassiter, *The O.J. Simpson Verdict A: Lesson in Black and White*, 1 MICH. J. RACE & L. 69 (1996).

²⁵¹ See generally Abby Goodnough, *Harvard Professor Jailed; Officer Is Accused of Bias*, N.Y. TIMES (July 20, 2009), http://www.nytimes.com/2009/07/21/us/21gates.html?_r=0.

²⁵² See generally Duff Wilson & David Barstow, *All Charges Dropped in Duke Case*, N.Y. TIMES (Apr. 12, 2007), <http://www.nytimes.com/2007/04/12/us/12duke.html?ref=dukelacrossesexualassaultcase>.

²⁵³ See generally Michael Martinez, *George Zimmerman Sues NBC Universal Over Edited 911 Call*, CNN (Dec. 7, 2012), <http://www.cnn.com/2012/12/06/us/florida-zimmerman-nbc-lawsuit>.

²⁵⁴ See e.g., *Adarand Constr. Inc. v. Peña*, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

²⁵⁵ *Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 747-48 (2007).

approach, these theorists contend, “ensures that policy deliberations are not infected with either racial stereotyping or racial politics.”²⁵⁶ Moreover, complete racial neutrality provides a better chance for citizens from different backgrounds to co-exist together. Colorblindness encourages citizens to support an ideology of “deep humanism” over “identity politics” in recognizing that “there is something, under the skin, common to all human beings.”²⁵⁷ In order to achieve racial harmony, colorblind purists propose that the federal and state constitutions should prohibit government decision-makers from considering race as a basis for dispensing benefits or privileges.²⁵⁸ The movement toward strict racial neutrality has gained popularity in the country, with some surveys showing that the public is strongly opposed to racial preferences.²⁵⁹

Eight states banned preferential treatment for any person on the basis of race with respect to, among other areas, public education and thus prohibited race-conscious affirmative action programs in colleges and universities.²⁶⁰ But this movement toward total racial neutrality in these states has not become the panacea for combating racial hostility as colorblind purists had hoped. An in-depth analysis of hate-crime statistics and bias incidents on college campuses reveal that there are as many incidents on campuses in states that ban race-conscious programs than there are on campuses in states that permit it.²⁶¹ Racially inspired hate crime statistics reported in California by the Federal Bureau of Investigation illustrate this point.

²⁵⁶ Kuykendall & Adside, *supra* note 114, at 1050.

²⁵⁷ Simon, *supra* note 249, at 136.

²⁵⁸ *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., dissenting) (“Justice Powell’s opinion in *Bakke* and the Court’s decision today 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. This ‘we know it when we see it’ approach to evaluating state interests is not capable of judicial application.”).

²⁵⁹ See Jeffrey M. Jones, *In U.S., Most Reject Considering Race in College Admission: Sixty-seven Percent Say Decisions Should Be Based Solely on Merit*, GALLUP (July 23, 2013), <http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx>; 55% *Oppose Affirmative Action for College Admission*, RASMUSSEN REP. (Feb. 26, 2012), http://www.rasmussenreports.com/public_content/politics/general_politics/february_2012/55_oppose_affirmative_action_policies_for_college_admissions; *U.S. Voters Disagree 3-1 with Sotomayor on Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action*, QUINNIPIAC U. (June 3, 2009), <http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/national/release-detail?ReleaseID=1307> (finding that fifty-five percent of those surveyed say affirmative action should be abolished.). *But see* Simon Waxman, *Poll: Yes to Affirmative Action, No to Racial Preferences*, BOS. REV. (Aug. 9, 2013), <http://www.bostonreview.net/blog/poll-yes-affirmative-action-no-racial-preferences>.

²⁶⁰ Drew DeSilver, *Supreme Court Says States Can Ban Affirmative Action; 8 Already Have*, PEW RES. CTR. (Apr. 22, 2014), <http://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have> (noting that Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington have adopted formal bans on racial and other preferences).

²⁶¹ Appendix B provides a comparative analysis between racially motivated hate crimes statistics occurring on college campuses in affirmative action states and campuses in non-affirmative action states. Informed by data provided by the United States Department of Education, the Appendix examines the validity of claims made by colorblind purists who assert that race-conscious government activity breeds hostility and resentment among those

College campuses in states that ban affirmative action, much like other colleges across the country, experience racial incidents that captivate public attention and contribute to the verbal lexicon on race, unearthing social activities that are usually practiced underground. In recent years, administrators had to respond to a series of hip-hop themed fraternity parties where primarily white attendees wear stereotypical clothes and create online posts that use so-called African-American vernacular, or Ebonics, to parody “black culture.”²⁶² Other incidents include the hazing of a black student, which received national media coverage, when his white roommates caricatured him as a slave figure, using racial slurs and physical assaults to humiliate him.²⁶³ When this conduct becomes the subject of public scrutiny, college administrators are expected to respond to the controversy immediately, formulating strategies that can identify root causes and implement solutions to address them.²⁶⁴

Colleges need more innovative ideas to address racial problems on campuses, particularly when students engage in behavior that counteracts diversity programs that increase the presence of underrepresented minorities on campus. For instance, there is a body of research finding that the claimed educational benefits that arise from student body diversity are inhibited by a social phenomenon where students segregate themselves along racial lines.²⁶⁵ In this environment, racial tensions are

who feel harmed by programs that favor minorities. *See Grutter*, 539 U.S. at 373 (Thomas, J., dissenting). I sincerely thank Ross N. MacPherson for his collaboration on this Appendix. His research and insight assisted my endeavor to make a meaningful contribution to the affirmative action debate. I am also grateful to Odirichi Kanu for providing a fresh pair of eyes on this Appendix in assessing the accuracy of both the statistical models employed along with the claims made.

²⁶² *See, e.g.*, Kate Abbey-Lambertz, “Hood Ratchet Thursday” Party at University of Michigan Fraternity Canceled By School, HUFFINGTON POST (Nov. 1, 2013), http://www.huffingtonpost.com/2013/11/01/hood-ratchet-thursday-party-theta-xi-u-ofm_n_4190523.html (noting a Facebook event page posted by a fraternity at U-M about a “Hood Ratchet Thursday” party, which extended invitation to “rappers, twerkers, gangsters (no Bloods allowed), thugs, basketball players, bad bitches, ratchet pussy”); Sara Hamedy, *Arizona State Fraternity Suspended After MLK-themed Party Mocks Blacks*, L.A. TIMES (Jan. 21, 2014), <http://touch.latimes.com/#section/-1/article/p2p-78986719/> (describing a themed fraternity party in which attendees wore baggy basketball jerseys and baseball caps worn backwards while drinking from watermelon cups); *Fraternity and Sorority at McDaniel College Spark Outrage After Organizing ‘Racist’ ‘CMT V. BET’ Party*, DAILY MAIL (Mar. 7, 2014), <http://www.dailymail.co.uk/news/article-2575898/Fraternity-sorority-McDaniel-College-spark-outrage-organizing-racist-CMT-vs-BET-party.html> (reporting about a CMT and BET party where guests wore baggy pants and chains); *Two Students at Lee University Attend Party in Blackface*, J. BLACKS HIGHER EDUC. (Nov. 27, 2013), <http://www.jbhe.com/2013/11/two-students-at-lee-university-attend-party-in-blackface/> (posting that two women attended a rap-themed party and wore blackface and baggy white T-shirts).

²⁶³ *3 Calif. Students Charged With Hate Crimes Expelled*, SAN JOSE MERCURY NEWS (Mar. 3, 2014), http://www.mercurynews.com/ci_25691097/3-calif-students-charged-hate-crime-expelled (reporting that San Jose University expelled three students for alleged hate crimes against their black roommate).

²⁶⁴ *See generally* Tanzina Vega, *Colorblind Notion Aside, Colleges Grapple With Racial Tension*, N.Y. TIMES (Feb. 24, 2014), <http://www.nytimes.com/2014/02/25/us/colorblind-notion-aside-colleges-grapple-with-racial-tension.html>.

²⁶⁵ *See* MICHAEL BOCIAN, HOUSING ON COLLEGE CAMPUSES: SELF-SEGREGATION, INTEGRATION, AND OTHER ALTERNATIVES 4-5 (1997) (explaining that those who advance an integrationist model towards campus life believe that programs that encourage racial

easily heightened because racial groups are alienated from one another outside the classroom.²⁶⁶ While studies suggest that black students perform better academically when they live with black roommates or participate in African-American student groups, the claimed educational benefits that black students experience are outweighed by diminished opportunities for interracial problem solving caused by self-segregation.²⁶⁷

Alienation, not always familiarity, breeds contempt. Self-segregation leads to “polarization among racial groups.”²⁶⁸ Ethnic divisions are intensified when a racially charged event occurs on campus. Meaningful interracial dialogue in this environment is rare because students, who have limited interracial interactions outside the classroom, lack the social skills needed to solve racial problems.²⁶⁹ Some researchers found that racially charged events cause white students, whose ethnic identity has been historically linked to racial oppression, to distance themselves from minority students to avoid controversial discussions that may result in them being labeled as racist.²⁷⁰ This avoidance can further “exacerbate racial tensions by validating and reaffirming racial/ethnic minority students’ perceptions of the campus climate and assumptions about their [white] peers’ racial attitudes. In addition, avoidance might prevent necessary parties from engaging in a constructive dialogue concerning the incident.”²⁷¹ Racial isolation does not only limit opportunities for

separatism have the “negative consequence of tribalizing society” and “amplifies racial divisions and tension.”); *see also* Darnell Cole, *Do Interracial Interactions Matter? An Examination of Student-Faculty Contact and Intellectual Self-Concept*, 78 J. HIGHER EDUC. 249, 274 (2007) (finding that interracial interaction does not necessarily occur at the same rate for all groups on a diverse campus and that “direct institutional intervention” is needed to encourage interracial interaction among white students at predominantly white institutions); Kuykendall & Adside, *supra* note 114, at 1076-81 (identifying university-sponsored programs or activities that encourage students to voluntarily self-segregate along racial lines with respect to social interactions and housing choices).

²⁶⁶ Jennifer C. Brooks, *The Demise of Affirmative Action and the Effect on Higher Education Admissions: A Chilling Effect or Much Ado About Nothing*, 48 DRAKE L. REV. 567, 584-85 (2000) (“Many minority students seek solace from others like them in the form of minority student organizations, thus beginning the process of minority separatism across the nation’s college campuses. Minority self-segregation consequently leads to an atmosphere of omnipresent racism on campus.”).

²⁶⁷ *See* BOCIAN, *supra* note 265, at 5 (citing to integrationist theorists who contend that self-segregation creates “‘ethnic enclaves’ encouraged by universities engender polarization among racial groups.”). *But see id.* at 10 n.22 (mentioning studies that found that blacks who live with other black students and participate in black student groups graduate at higher rates than those who do not).

²⁶⁸ *Id.* at 5.

²⁶⁹ Willis Hawley, *Cross-Racial Understanding and Reduction of Racial Prejudice*, TEACHING TOLERANCE, http://www.tolerance.org/sites/default/files/general/Cross-Racial_Understaning_and_Reduction_of_Racial_Prejudice.pdf (last visited Feb. 17, 2016).

²⁷⁰ Andrew Howard Nichols, *Campus Racism and White Stereotype Threat: Implications for Campus Racial Climates and Interracial Interactions Among Students 4* (May 2009) (Ph.D. dissertation, Pennsylvania State University).

²⁷¹ *Id.* at 5.

interracial dialogue but it can also diminish the quality of intra-racial conversations about race.

The racially polarized campus creates “racial enclaves” that students occupy.²⁷² Social pockets on campus characterized by race can be intellectually restrictive, particularly for minorities.²⁷³ The free expression and exploration of ideas, which is the hallmark of higher education, can be a potentially rare experience for minority students.²⁷⁴ Because minority participation takes place in small and insular communities on campus, conversations occur in an echo chamber where groupthink is internally policed.²⁷⁵ “Groupthink attempts to control its members, often through self-appointed regulators, by branding dissenters with verbal scarlet letters, singling them out for shunning or disrespect if they dare stray from group orthodoxy.”²⁷⁶ As a consequence, an authoritarian pall hovers over conversations about race, sending the ominous message to dissenters to either toe the ethnic line or keep silent. Questioning the status quo can result in group members stigmatizing the dissenter as a race traitor.²⁷⁷ Educational innovations, focused on interracial exchanges, are still needed in this area to break social monopolies on conversations on race. *Bakke* provides the public with choices as it evaluates the effectiveness of the overall diversity enterprise in their respective states.

B. Bakke and Leaving the Door Open to Innovation.

In *Grutter*, Justice Kennedy concluded that *Bakke* opened the door to experimentation in the field of diversity programs designed to increase the presence of underrepresented groups and improve racial health on campuses, while providing individual consideration for each applicant as mandated by the Constitution.²⁷⁸ But racial diversity is not the ends but rather a means to an end. The ultimate goal of diversity programs is to manifest the educational benefits that arise from campus diversity. Informed by *amici* from the United States military and major corporations, Justice O’Connor found that the educational benefits that flow from campus diversity were “substantial,” such as breaking down racial stereotypes and creating an environment that provides the opportunity for “livelier, more spirited” classroom discussion when campus demographics reflect “the greatest possible variety of

²⁷² BOCIAN, *supra* note 265, at 5.

²⁷³ Kuykendall & Adside, *supra* note 114, at 1078.

²⁷⁴ *Id.* at 1078-79.

²⁷⁵ *Id.* at 1079 n.392.

²⁷⁶ *Id.* at 1080.

²⁷⁷ *Id.* at 1079 n.393 (explaining a perspective on groupthink in the context of black America). Consider the following as an example of the negative effects that can arise from groupthink, where an MSNBC commentator labeled an African-American politician as a race traitor for supporting a political party that is not supported by the majority of black Americans. *Toure: Arthur Davis is like ‘Judas in a Suit’*, THE CYCLE (Aug. 20, 2012), <http://video.msnbc.msn.com/thecycle/48728988#48728988> (disparaging former Democratic Congressman Arthur Davis for changing his party affiliation from Democrat to Republican by calling him a “Judas in a suit and tie,” a “Republican trophy,” and a “black apostate.”).

²⁷⁸ *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting).

backgrounds.”²⁷⁹ Since *Fisher I* made clear that lower courts must evaluate how these programs operate in practice, colleges again received the constitutional green light to implement novel ways that will manifest educational benefits. Appendix C outlines race-conscious or race-neutral proposals developed by scholars designed to increase campus diversity that colleges and institutions can consider. These proposals can inspire diversity bureaucracies to find ways to diversify campuses in a way that targets applicants who can enhance student body diversity, while avoiding major constitutional problems.

A purely colorblind approach, however, would impose a constitutional freeze on innovation by withdrawing from the public any consideration of proposals designed to address the root causes of racial resentment. In so doing, colorblind purity would take away from citizens the opportunity to persuade one another about solutions to improve race relations through regular democratic means. Considering all the historical problems this nation has experienced with respect to race, this Article asserts that all constitutional options should remain on the table. Strict colorblind constitutionalism would, as reflected in referenda on the subject, limit citizen choice to a rigid “yes” or “no” on the question.²⁸⁰ Nor should the Court afford state actors

²⁷⁹ *Id.* at 330.

²⁸⁰ The Constitution does not, however, preclude states from barring its public institutions from considering race in its decision-making processes. In *Schuette v. Coal. to Defend Affirmative Action Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2013), the Court upheld Proposition 2, a ballot initiative approved by Michigan voters, which broadly amended the state’s constitution to ban race-conscious government activity and thus prohibited state universities and colleges from considering race in its admission decisions. *Id.* at 1638. Ballot measures of this kind are contrary to the aspirations advanced in this Article. Nevertheless, Proposition 2 is part of a long tradition where citizens, responding to Supreme Court decisions, have afforded themselves more protections or rights than what the federal constitution provides. At the state level, voters and legislatures have passed measures to grant themselves rights and protections in a variety of areas, such as education, the death penalty, doctor-assisted suicide, and eminent domain. See Josh Kagan, *A Civics Action: Interpreting “Adequacy” in State Constitutions’ Education Clauses*, 78 N.Y.U. L. REV. 2241 (2001) (“Nearly every state constitution requires the state to provide its children with an education.”); see also Mark Berman, *There Are 18 States Without the Death Penalty. A Third of Them Have Banned it Since 2007*, WASH. POST (Apr. 30, 2014), <http://www.washingtonpost.com/news/post-nation/wp/2014/04/30/there-are-18-states-without-the-death-penalty-a-third-of-them-have-banned-it-since-2007/>; *Physician Assisted Suicide Fast Facts*, CNN LIBR. (Jun. 2, 2015), <http://www.cnn.com/2014/11/26/us/physician-assisted-suicide-fast-facts/> (noting that five states permit doctor-assisted suicide for terminally-ill patients); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2102 (2009) (“Forty-three states have enacted post-*Kelo* reform legislation to curb eminent domain. The *Kelo* backlash probably resulted in more new state legislation than any other Supreme Court decision in history.”). In prior decisions, the Court held that the Constitution did not recognize any liberty interests in these areas, motivating political action on the state level. See *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) (holding that due process does not recognize a right to education); *Kelo v. City of New London*, 545 U.S. 469 (2005) (holding that the Public Use Clause of the Fifth Amendment allows the government to transfer private property to another private owner so long as the property is used for “economic development.”); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that the due process clause does not recognize a right to doctor assistance while committing suicide); *Gregg v. Georgia*, 428 U.S. 153 (1976) (holding that states can impose death penalty provided it afforded certain procedural guarantees). If the people can

deference and presume they act in “good faith” when they experiment with racial classifications.

But there is a dark cloud over affirmative action jurisprudence. The opinions written by the Court’s race ideologues play like a funeral dirge. Each side hopes for the day when it will receive an additional vote for its position, so it can bury *Bakke* in the grave.²⁸¹ That day may come when the Court decides *Fisher II*, I hope it will not be a cloudy one for the doctrine of stare decisis and for race relations.

CONCLUSION

Racism lingers and influences our young people today. This is reflected in self-segregation on college campuses, in bias incidents, and in racial upheaval in American cities. The stakes are high. The margin for error is low. The dream of racial tranquility is on the line.²⁸² *Bakke* provides the prospect for innovations that will combat racism. Democratic institutions should take the lead on these efforts and not the judiciary.

The political process should produce solutions to problems, which it is better suited to solve. Race is such a problem in the area of higher education. Race ideologues desire to change affirmative action jurisprudence but that ship has long since sailed. *Bakke* is now firmly entrenched in both the Free Speech and the Equal Protection Clause.

The decision engendered institutional reliance among the nation’s leading colleges. States invest millions of dollars each year to operate diversity bureaucracies that implement programs designed to maintain diversity. Student groups cultivate a culture in which they organize events that foster social cohesion

grant themselves greater protections on these issues, then surely they can pass referenda, which shields them completely from racial discriminatory practices that are presumptively unconstitutional under the Equal Protection Clause. However, *Schuetz*, does not conflict with *Bakke*. In *Schuetz*, the plurality explained that the Constitution leaves the door open to debate on racial preferences: “Voters might likewise consider, after debate and reflection, that programs designed to increase diversity—consistent with the Constitution—are a necessary part of progress to transcend the stigma of past racism.” *Schuetz*, 134 S. Ct. at 1638. So voters may consider programs at colleges and universities designed to produce campus diversity in which race may play an important role in that endeavor; thus, the Court’s race jurisprudence permits innovation in higher education and does not make the judiciary complicit in the effort to take from society all the constitutional options afforded to them under *Bakke*.

²⁸¹ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2013) (Scalia, J., concurring) (noting that he joined the majority opinion, because the petitioner did not ask the Court to reverse its ruling in *Grutter*, where the Court held that diversity constituted a compelling state interest to justify racial preferences in admission programs); *see also id.* (Thomas, J. concurring) (arguing that he would rule that “a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.”). *But see id.* at 2434 (Ginsburg, J., dissenting) (arguing that she would affirm the race-conscious admission program without vacating the case to the lower court, because “the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve, in appropriate measure, the educational benefits of student body diversity . . .”).

²⁸² *See* Dr. Martin Luther King, Jr., *I Have A Dream* (Aug. 28, 1963), <http://www.let.rug.nl/usa/documents/1951-/martin-luther-kings-i-have-a-dream-speech-august-28-1963.php>.

among minority students. Diversity is integral to the educational mission and identity of colleges and universities. Reversal would produce widespread disruption. These institutions would have to allocate additional expenditures to restructure multicultural offices and revise entrenched admission, recruitment, and hiring practices to comply with a new legal regime. *Bakke* has proven workable, offering clear guidance to lower courts in how to identify practices that make race the dominant factor in admission decisions. But the Court must resist the temptation to constitutionalize its preferred theory on race.

Whenever the Court jettisoned basic legal principles to impose its racial theories on society, it has led to disastrous results. Our country's history of race slavery,²⁸³ race apartheid,²⁸⁴ and race-based exclusions are regrettable reminders.²⁸⁵ History shows that when the Court weighs into the political thicket it exacerbates ideological disagreements. As Justice Scalia aptly wrote in his dissenting opinion in *Casey*,

[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for . . . differences, the Court merely prolongs and intensifies the anguish.²⁸⁶

I strongly agree with Justice Scalia's view that the Court should remain agnostic on hot button issues. In vigorous dissents, he criticized the Court for picking sides in the "culture wars" for striking down abortion regulations and anti-sodomy laws.²⁸⁷ However, I wish that colorblind purists who pontificate from the pulpit of judicial restraint on cultural issues would practice what they preach on race.

Bakke is entitled to deference under the doctrine of *stare decisis*. A federal rule, mandating either a strictly colorblind approach or deference to government actors, would either foreclose opportunities for innovation or permit unbridled uses of race among college administrators. The Court should, therefore, replay its doctrinal

²⁸³ *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that blacks are not United States citizens), *superseded by constitutional amendment*, U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

²⁸⁴ *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that the detention of persons of Japanese ancestry did not violate the Equal Protection Clause because it served military necessities).

²⁸⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that separate but equal public accommodations on the basis of race did not violate the Equal Protection Clause.), *overruled by Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

²⁸⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Scalia, J., dissenting).

²⁸⁷ *See id.* ("We should get out of [the area of abortion regulation], where we have no right to be, and where we do neither ourselves nor the country any good by remaining."); *see also Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 603-04 (2003) (Scalia, J., dissenting). *Romer v. Evans*, 517 U.S. 620, 652-53 (1996) (Scalia, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 603-04 (2003) (Scalia, J., dissenting).

symphony in this area. It will encourage society to sit at the “table of brotherhood” and strike the chord of racial harmony.²⁸⁸

²⁸⁸ See King, *supra* note 282.

APPENDIX A

Indiana University	“The Bloomington campus is committed to full diversity, academic freedom, and meeting the changing educational and research needs of the state, the nation, and the world.” ²⁸⁹
University of Illinois Urbana-Champaign	“As the state’s premier public university, the University of Illinois at Urbana-Champaign’s core mission is to serve the interests of the diverse people of the state of Illinois and beyond. The institution thus values inclusion and a pluralistic learning and research environment” ²⁹⁰
University of Maryland	“Diversity, equity and excellence are core values of the Division of Student Affairs educational mission which is to maximize the potential of students by cultivating their personal, social and intellectual development.” ²⁹¹
University of Nebraska	Core Values: “Diversity of ideas and people.” ²⁹²
Mississippi State University	“The information and resources provided on this website are intended to familiarize members of the campus and global community with the University's commitment to promote a diverse and inclusive working and learning environment. We strive for diversity and inclusion where all voices, viewpoints, and backgrounds are valued and supported.” ²⁹³
University of Tennessee	“But diversity means more than race and ethnicity; it’s about moving beyond just tolerance to a place of understanding.

²⁸⁹ *IU Bloomington – Campus Mission Statement*, IND. U., <http://trustees.iu.edu/resources/mission-statements/iu-bloomington-mission-statement.shtml> (last visited Feb. 18, 2016).

²⁹⁰ *Resolution on Diversity Values Statement*, U. IL., <http://diversity.illinois.edu/SupportingDocs/Diversity%20Values%20Statement.pdf> (last visited Feb. 18, 2016).

²⁹¹ *Student Affairs: Diversity*, U. MD., <http://www.studentaffairs.umd.edu/diversity> (last visited Feb. 17, 2016).

²⁹² *Role and Mission*, U. NEB., <http://www.unl.edu/about-unl/role-mission/> (last visited Feb. 17, 2016).

²⁹³ *Diversity @ MSU*, MISS. ST. U., <http://www.oidi.msstate.edu/diversity/> (last visited Feb. 18, 2017).

	Approaching differences in political views, religion, gender identity, values, age, abilities, and sexual orientation with an open mind helps get us there.” ²⁹⁴
University of Iowa	“The Office of Equal Opportunity and Diversity (EOD) supports a campus environment where each individual's ideas, contributions, and goals are respected and valued. EOD is charged with implementation of equal opportunity, affirmative action, and diversity policies at the University of Iowa.” ²⁹⁵
Harvard University	“Mission is advancing inclusion, diversity and equal opportunity.” ²⁹⁶
Purdue University	“Diversity Achieving it within our faculty, staff, and student body is one of Purdue Engineering's foremost initiatives.” ²⁹⁷
Dartmouth University	“Many cultures, one community. At Dartmouth, differences are embraced and ideas are challenged. Our diverse community of students, faculty, and staff come together to share perspectives, learn, and grow.” ²⁹⁸
Princeton University	“Having a diversity of perspectives is crucial for excelling in our mission of teaching and research.” ²⁹⁹
Cornell University	“A diverse community includes everyone and is the foundation for the meaningful exploration and exchange of ideas. Since its founding, Cornell University has encouraged a culture that provides for the full participation of all members of our campus community—

²⁹⁴ *Diversity*, U. TN. KNOXVILLE, <http://www.utk.edu/diversity/> (last visited Feb. 16, 2017).

²⁹⁵ *Equal Opportunity and Diversity*, U. IOWA, <http://diversity.uiowa.edu/office/equal-opportunity-and-diversity> (last visited Feb. 17, 2016).

²⁹⁶ *Institutional Diversity and Equity*, HARV. U., <http://diversity.harvard.edu/> (last visited Feb 17, 2016).

²⁹⁷ *Diversity in Engineering*, PURDUE U., <https://engineering.purdue.edu/EEE/InfoFor/Partnerships/Diversity> (last visited Feb. 18, 2016).

²⁹⁸ *Life & Community: Diversity*, DARTMOUTH, <http://dartmouth.edu/life-community/diversity> (last visited Feb. 18, 2016).

²⁹⁹ *Diversity & Inclusion*, PRINCETON U., <http://campuslife.princeton.edu/diversity-inclusion> (last visited Feb. 18, 2106).

	this keeps us at the leading edge in education and in our fields and practices.” ³⁰⁰
Columbia University	“Columbia is committed to creating and supporting a community diverse in every way: race, ethnicity, geography, religion, academic and extracurricular interest, family circumstance, sexual orientation, socioeconomic background and more.” ³⁰¹
Brown University	“Diversity is at the foundation of Brown's academic enterprise. Exposure to a broad range of perspectives, beliefs, and outlooks is key to fostering both breadth and depth in intellectual knowledge.” ³⁰²
Yale University	“Yale seeks to attract a diverse group of exceptionally talented men and women from across the nation and around the world and to educate them for leadership in scholarship, the professions, and society.” ³⁰³
University of Pennsylvania	“Understanding and appreciating diversity is fundamental to success in today's world and one of Penn's most important priorities.” ³⁰⁴
Auburn University	“Diversity at Auburn University encompasses the whole of human experience and includes such human qualities as race, gender, ethnicity, physical ability, nationality, age, religion, sexual orientation, economic status, and veteran status.” ³⁰⁵
University of Georgia	“The mission of the Office of Institutional Diversity (OID) is to lead a

³⁰⁰ *University Mission*, CORNELL U., <http://www.cornell.edu/about/mission.cfm> (last visited Feb. 18, 2016).

³⁰¹ *Diversity*, COLUM. U. UNDERGRADUATE ADMISSIONS, <https://undergrad.admissions.columbia.edu/learn/studentlife/diversity> (last visited Feb. 18, 2016).

³⁰² *Exploring Diversity at Brown*, BROWN U., <http://www.brown.edu/academics/college/orientation/exploring-diversity-brown> (last visited Feb. 18, 2016).

³⁰³ *Presidential Search Statement*, YALE U., <http://presidential-search.yale.edu/sites/default/files/Yale%20Presidential%20Search%20Statement.pdf> (last visited Feb. 18, 2016).

³⁰⁴ *Mission of the University*, U. PENN., <http://www.upenn.edu/almanac/agenda.html#mission> (last visited Feb. 18, 2016).

³⁰⁵ *About Diversity at Auburn*, AUBURN U., <https://cws.auburn.edu/diversity/pm/about> (last visited Feb. 18, 2016).

	focused institutional effort to evaluate existing programs and develop new initiatives to support diversity and equity at the University of Georgia.” ³⁰⁶
Louisiana State University	“Diversity is fundamental to LSU's mission and the University is committed to creating and maintaining a living and learning environment that embraces individual difference. Cultural inclusion is of highest priority.” ³⁰⁷
University of Arkansas	“Diversity Affairs works to enhance educational and professional diversity by seeking to integrate individuals from varied backgrounds and characteristics such as those defined by race, ethnicity, national origin, age, gender, veteran, religion, disability, sexual orientation, socioeconomic background and intellectual perspective.” ³⁰⁸
University of Florida	“Together with its undergraduate and graduate students, UF faculty participate in an educational process that links the history of Western Europe with the traditions and cultures of all societies, explores the physical and biological universes and nurtures generations of young people from diverse backgrounds to address the needs of the world's societies.” ³⁰⁹
Texas A&M University	“To fulfill its multiple missions as an institution of higher learning, Texas A&M encourages a climate that values and nurtures collegiality, diversity, pluralism and the uniqueness of the individual within our state, nation and world.” ³¹⁰
Vanderbilt University	"Vanderbilt is about striving for

³⁰⁶ *Diversity at UGA*, U. GA., <https://www.admissions.uga.edu/diversity> (last visited Feb. 18, 2016).

³⁰⁷ *Diversity Statement*, LA. ST. U., http://www.lsu.edu/diversity/about_us/diversity-statement.php (last visited Feb. 18, 2016).

³⁰⁸ *Diversity Affairs*, U. ARK., <http://diversity.uark.edu> (last visited Feb. 18, 2016).

³⁰⁹ *University of Florida Mission Statement*, U. FL. <http://www.registrar.ufl.edu/catalog1011/administration/mission.html> (last visited Feb. 18, 2016).

³¹⁰ *Commitment Statements*, TEX. A&M U., <http://diversity.tamu.edu/What-is-Diversity/Commitment-Statements> (last visited Feb. 18, 2016).

	excellence. Diversity of backgrounds, ideas and approaches helps us get there." ³¹¹
University of South Carolina	"The University of South Carolina, as the state's flagship. University, has a unique and diverse history. Today, as we move this University forward, we can reflect tremendous progress this University has made in promoting diversity by our actions and our deeds" ³¹²
University of Mississippi	"The University of Mississippi provides an academic experience that emphasizes critical thinking; encourages intellectual depth and creativity; challenges and inspires a diverse community of undergraduate, graduate, and professional students; provides enriching opportunities outside the classroom; supports lifelong learning; and develops a sense of global responsibility." ³¹³
University of Kentucky	"The Office for Institutional Diversity strives to promote campus-wide diversity initiatives, empowering colleges, schools, major units, and student-led organizations to develop their own programs and strategies. While collaborating with the many different and varied diversity efforts, the OID hopes to bring about a greater sense of community and involvement at the University of Kentucky." ³¹⁴
University of Missouri	"The Office of the Chancellor's Diversity Initiative (CDI) is centrally located in S303 Memorial Union external link on the University of Missouri campus in Columbia, Mo. Throughout the University our staff integrates diversity and inclusion through

³¹¹ *Diversity*, VAND. U., <http://admissions.vanderbilt.edu/life/diversity.php> (last visited Feb. 18, 2016).

³¹² *Celebrating Diversity*, U. S.C., <https://sc.edu/eop/diversity.pdf> (last visited Feb. 18, 2016).

³¹³ *Vision, Mission, and Core Values*, U. MISS., <http://www.olemiss.edu/aboutum/mission.html> (last visited Feb. 18, 2016).

³¹⁴ *Campus Diversity Initiatives*, U. KY., <http://www.uky.edu/Diversity/initiatives.html> (last visited Feb. 18, 2016).

	collaborative partnerships, leadership, expertise, and resources to further MU's strategic goals." ³¹⁵
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APPENDIX B

Do College Campuses That Ban Race Conscious Affirmative Action Programs Have Better Racial Climates Than Campuses With Race-Conscious Admission Programs?

A. Colorblind Constitutionalism

Colorblind constitutionalism is a potent theory in the Court's race jurisprudence, which exposes ideological rifts among the Justices as reflected in the spirited opinions offered in the Court's affirmative action cases. With Justice Scalia's sudden death, there are now four Justices who would adopt a race-neutral approach to interpreting the Equal Protection Clause.³¹⁶ But there are maybe three Justices who would dispense with *Bakke* entirely and apply a strictly colorblind approach to evaluating admission policies.³¹⁷ While Justice Kennedy would not reverse *Bakke*, he did emphasize the use of race-neutral alternatives in *Fisher I*.³¹⁸ These Justices would enforce a colorblind approach to some varying degree. The genesis of the colorblind constitution theory can be traced to the lone dissenting opinion in *Plessy v. Ferguson* where Justice Harlan declared that: "[o]ur Constitution is color-blind and neither knows nor tolerates classes among citizens."³¹⁹ The theory is informed by an exegetical analysis of the Fourteenth Amendment.³²⁰ But colorblind purists include in their legal analysis a sociological assessment on how color-conscious activity instigates racial tensions.

Justice Powell argued, without any empirical data, that such activity developed hostility within many citizens in order to refute the claim that discrimination against whites was harmless. "All state-imposed classifications that rearrange burdens and benefits on the basis of race," Justice Powell wrote, "are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived, and therefore may be perceived as invidious."³²¹ Such a view is echoed by Philosophy Professor Carl Cohen of the University of Michigan, who remarked, in regard to Michigan's ban on race-based affirmative action plans, that "when you don't have preferences, the atmosphere is healthier . . . you just don't hear any expressions of resentment that

³¹⁵ *Mission and Vision*, MIZZOU DIVERSITY, <http://diversity.missouri.edu/about/mission-vision.php> (last visited Feb. 18, 2016).

³¹⁶ Eric Lewis, *Five Justices in a Bubble: The Court's Step Back on Race*, NEW YORKER (June 26, 2013), <http://www.newyorker.com/news/news-desk/five-justices-in-a-bubble-the-courts-step-back-on-race>.

³¹⁷ See *supra* note 14.

³¹⁸ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

³¹⁹ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

³²⁰ U.S. CONST. amend. XIV.

³²¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978).

you did hear from time to time in the old days.”³²² The view that all racial discrimination is harmful, regardless of what race is burdened, motivated voters in some states to ban race-conscious government activity, beginning with California in 1996.³²³

Colorblind purists now have eight states where their theory on race relations has been adopted as law.³²⁴ The claim that race-conscious activity creates an environment of racial hostility can be tested. Assuming color-blind purists are correct that race-conscious policies, like affirmative action programs, increase racial tensions, then it would follow that those campuses with race-neutral policies would foster a more racially harmonious campus environment as compared to campuses with race-conscious policies. In an effort to scrutinize the veracity of this claim, we use data on hate crimes that occur college campuses provided by the Department of Education from 2009-2013 to measure whether there is a significant difference in racial tensions between campuses that implement race-based admission programs from campuses that ban them.³²⁵

Measuring racial prejudice is a challenging task to be sure. Bigoted views are often held privately and rarely voiced beyond closed doors; because students may conceal racial resentments, it is difficult to fully construct the racial climate on a given campus. However, criminal activity is recorded by the government and identifies the most salient racial hatreds that are present in places like college campuses. Thus, we chose hate crimes as a metric to provide insight into the state of race relations at these universities.³²⁶

B. Methodology

To develop a data set that compared incidences of hate crimes between states that ban and states that allow affirmative action, we accessed data provided by the Office

³²² Greg Stohr, *Black Enrollment Falls As Michigan Rejects Affirmative Action*, BLOOMBERG BUS. (Sept. 24, 2013), <http://www.bloomberg.com/news/articles/2013-09-24/black-enrollment-falls-as-michigan-rejects-affirmative-action>.

³²³ DeSilver, *supra* note 260. The following states have banned race-conscious affirmative action programs: Arizona (2010), California (1996), Florida (1999), Michigan (2006), Nebraska (2008), New Hampshire (2011), Oklahoma (2012), Washington (1998).

³²⁴ Halley Potter, *What Can We Learn from States that Ban Affirmative Action?*, CENTURY FOUND. (June 26, 2014), <http://www.tcf.org/work/education/detail/what-can-we-learn-from-states-that-ban-affirmative-action>.

³²⁵ *The Database of Accredited Postsecondary Institutions and Programs*, U.S. DEP'T EDUC., <http://ope.ed.gov/accreditation/Search.aspx> [hereinafter *The Database*] (last visited Feb. 18, 2016).

³²⁶ Rebecca Stotzer & Emily Hossellman, *Hate Crime on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. INTERPERSONAL VIOLENCE 644, 648 (2011), <http://jiv.sagepub.com.proxy.lib.umich.edu/content/27/4/644.full.pdf+html> (explaining research which found that surveys on hate crimes may undercount the rate of bias incidents on college campuses). Although hate crimes statistics maybe an imperfect metric for measuring racial tensions—as we discuss in the limitations section—we use them in this instance to represent the level of racial tensions on campuses because “[c]ases of ‘campus ethnviolence’ are the clearest depiction of the ‘relationships between groups in the community and the level of tension between those groups.’” *Id.*

of Postsecondary Education of the Department of Education.³²⁷ That office provides instances of arrests for hate crimes on college campuses receiving Title IV funding for federal student aid. The data comes from allegations of criminal activity reported to campus security or local law enforcement.³²⁸ Since certain criminal reports were processed by campus security, which is supervised by the university instead of the government, the reported numbers differ from those reported in the FBI Uniform Crime Report.³²⁹ The numbers have been processed into three categories: (1) average number of hate crimes per year from 2009-2013, (2) student population, and (3) average number of hate crimes per 10,000 students per year.³³⁰ The average number of hate crimes per year from 2009-2013 represents the number of hate crimes that were either racially or ethnically motivated that took place on-campus, in on-campus housing, in non-campus buildings frequently used by students, and on property owned by the educational institution.³³¹ This data includes the following crimes that manifested evidence that the perpetrator selected the victim because of racial prejudice: “murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property.”³³² Let us now explain how we conducted our analysis.

We begin collecting data for the purposes of this study in 2009 because the Department of Education began collecting and presenting its data in its current

³²⁷ See *The Database*, *supra* note 325.

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ See Appendix B *infra* at 574-75.

³³¹ See generally *The Campus Safety and Security Data Analysis Cutting Tools: Glossary of Terms*, U.S. DEP’T EDUC., <http://ope.ed.gov/security/glossaryPopup.aspx> [hereinafter *Glossary of Terms*] (follow “O” hyperlink). On-campus crime refers to those crimes that take place in “any building or property owned or controlled by an institution within the same reasonably contiguous geographic area and used by the institution in direct support of, or in a manner related to, the institution’s educational purposes, including residence hall,” or a building “that is owned by the institution but controlled by another person, is frequently used by students, and supports institutional purposes (such as a food or other retail vendor).” *Id.* On-campus housing facilities are those buildings that are “owned or controlled by the institution, or is located on property that is owned or controlled by the institution, and is within the reasonably contiguous geographic area that makes up the campus is considered an on-campus student housing facility.” *Id.* The term non-campus buildings includes “Any building or property owned or controlled by an institution that is used in direct support of, or in relation to, the institution’s educational purposes, is frequently used by students, and is not within the same reasonably contiguous geographic area of the institution.” *Id.* (follow “N” hyperlink). Public property broadly refers to “thoroughfares, streets, sidewalks, and parking facilities, that is within the campus, or immediately adjacent to and accessible from the campus.” *Id.* (follow “P” hyperlink).

³³² *Id.* (follow “U” hyperlink) (“Hate crimes must be classified using the F.B.I.’s Uniform Crime Reporting Hate Crime Data Collection Guidelines and Training Guide for Hate Crime Data Collection.”); FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HATE CRIME DATA COLLECTION GUIDELINES & TRAINING GUIDE FOR HATE CRIME DATA COLLECTION Appendix A (2015), <http://www.fbi.gov/about-us/cjis/ucr/hate-crime-data-collection-guidelines-and-training-manual.pdf>.

format in that year.³³³ Using data provided by the department, we added the student populations of all the public colleges and universities for each state, selecting those schools classified as “public, four-year or above” institutions.³³⁴ Beginning in 2009 until 2013, we then totaled all racially motivated crimes³³⁵ from the available data for hate crimes occurring “on campus”, in “on-campus student housing facilities”, in “noncampus” locations, and on “public property.”³³⁶ In so doing, we found the total number of hate crimes in a given year. To find the average number of hate crimes per year between 2009 and 2013, we averaged these totals during that timeframe.³³⁷ We then employed the following formula to find the average number of hate crimes per 10,000 students: take each state’s average number of hate crimes for 2009-2013 and divide that number by that state’s student population, and then multiply that number by 10,000 (average number of state hate crimes for 2009 - 2013 ÷ state student population x 10,000).

We calculated the average number of hate crimes per 10,000 students to control for significant population variations that exist between the states, so we may compare states of various student population sizes to measure where there is the greatest likelihood for a hate crime to occur (for example, California has over two million public college and university students, while Wyoming only has one public university).³³⁸ For a more detailed explanation on how to access data from the department website as well as direction on how to calculate the data consult the following footnote.³³⁹ The Appendix organizes the metric in charts, so that the data is provided in a reader-friendly format.

³³³ Prior to 2009, the Department did not separately recognize simple assault, larceny, intimidation, or destruction of property/vandalism crimes. Instead, these crimes were ostensibly included as an “other crime”, but we cannot be sure that these crimes were tallied. In an effort to maintain a consistent analysis, we decided only to include the years 2009-2013 where the classifications of crimes are identical.

³³⁴ *The Database, supra* note 325 (follow “Institution State or Outlying Area” field; then follow “Type of Institution” field).

³³⁵ The department classified racially motivated hate crimes in the following categories “murder/non-negligent manslaughter, sex offenses-forcible, sex offenses—non-forcible, robbery, aggravated assault, burglary, motor vehicle theft, arson, simple assault, larceny-theft, intimidation, and destruction/damage/vandalism of property” in its data collection. *See id.*

³³⁶ *See supra* text accompanying note 331.

³³⁷ *See infra* Appendix B.

³³⁸ Once we downloaded hate crime files for each category for a selected state, we added the number of hate crimes and divided the total number of hate crimes by five in order to attain the average number of hate crimes per year between 2009 and 2013. That number is divided by the total student population in that state and then multiplied by 10,000 to account for significant variation in student populations between the states. *See infra* Appendix B (presenting the average number of hate crimes per 10,000 students for states that allow affirmative action and those that do not).

³³⁹ *See The Database, supra* note 325 (follow “Institution State or Outlying Area” field; then follow “Type of Institution” field). In order to calculate the total student population in each state, we selected each stated individually in the “Institution State or Outlying Area” field and then selected “Public, 4-year or above” option as the type of institution we aimed to focus on for purposes of our analysis. When those options were selected in those fields, we then totaled the enrollments for each public-4 year institution to attain the student population

We divided the data into two groups. One group represents those states that ban affirmative action, and the other are states that permit such programs. This allowed us to compare the frequency of hate crimes on affirmative action campuses from non-affirmative action ones. Our analysis comes with two caveats, however. First, California's inclusion in our hate crimes calculus might give that state disproportional weight in our formula and may slant the results in favor of non-affirmative action states. This point will be explained in more detail in Section D of the Appendix. Second, three states, Arizona, New Hampshire, and Oklahoma, appear in both groups because those jurisdictions banned affirmative action during the 2009-2013 timeframe.³⁴⁰ Those three states contribute to the statistics of those states with affirmative action until the year the practice was banned in that state. The charts providing the average number of hate crimes per 10,000 students each year for affirmative action and non-affirmative states are provided below. The Appendix then concludes with our analysis of the data gathered.

C. Findings

States that Ban Affirmative Action

State	Average Hate Crimes Per Year 2009-2013	Student Population	Average Number of Hate Crimes Per 10,000 Students Per Year
Arizona	3.4	135,141	0.251589081
California	49.4	6,778,966	0.072872471
Florida	6.2	637,797	0.097209614
Michigan	9.6	305,454	0.314286276
Nebraska	2.4	59,389	0.40411524
New Hampshire	2.8	28,056	0.998003992
Oklahoma	3	102,796	0.291840149
Washington	4.8	179,895	0.266822313
Total	81.6	8,227,494	0.099179653

for each respective state. Once student enrollments for each state was ascertained, then we selected "continue" and clicked 2009, 2010, 2011, 2012, and 2013 to retrieve the crime files for the campuses in the state we selected. Then under "Select a Category" we clicked and downloaded individual files for "Hate Crimes" that occurred in the following categories: on-campus, on-campus Student Housing Facilities, Noncampus, and public property. See *The Campus Safety and Security Data Analysis Cutting Tools: Download Data for a Group of Campuses*, U.S. DEP'T EDUC., <http://ope.ed.gov/security/GetAggregatedData.aspx> (last visited Mar. 7, 2016).

³⁴⁰ DeSilver, *supra* note 260.

States that Allow Affirmative Action

State	Average Number of Hate Crimes Per Year 2009-2013	Student Population	Number of Hate Crimes per 10,000 Students Per Year
Alabama	0.8	165,439	0.048356192
Alaska	0.8	29,525	0.270956816
Arizona	3	135,141	0.221990366
Arkansas	1.2	97,705	0.122818689
Colorado	6.2	173,441	0.357470264
Connecticut	4.2	65,039	0.645766386
Delaware	0	26,502	0
Georgia	3.2	308,650	0.103677304
Hawaii	0	30,486	0
Idaho	1.8	51,635	0.348600755
Illinois	6.6	194,913	0.338612612
Indiana	17.8	237,145	0.750595627
Iowa	2.2	74,862	0.293874062
Kansas	0.6	102,674	0.058437384
Kentucky	4.2	126,535	0.331923974
Louisiana	1.8	235,060	0.076576193
Maine	3.2	31,383	1.019660326
Maryland	12.8	162,722	0.786617667
Massachusetts	2.4	123,892	0.193717108
Minnesota	11.8	136,044	0.86736644
Mississippi	0	79,708	0
Missouri	4.4	149,329	0.294651407
Montana	0.6	39,145	0.15327628
Nevada	0.8	91,334	0.087590602
New Hampshire	1.6	28,056	0.570287995
New Jersey	16.6	192,214	0.863620756
New Mexico	1	64,647	0.154686219
New York	27.6	356,939	0.773241366
North Carolina	2.8	220,120	0.127203344
North Dakota	7.2	41,729	1.725418774
Ohio	0	282,518	0
Oklahoma	0.8	102,796	0.07782404
Oregon	1.6	105,140	0.152178048
Pennsylvania	20.4	270,915	0.75300371
Rhode Island	3	25,087	1.195838482
South Carolina	3.6	107,733	1.195838482
South Dakota	4.2	38,027	1.104478397

State	Average Number of Hate Crimes Per Year 2009-2013	Student Population	Number of Hate Crimes per 10,000 Students Per Year
Tennessee	3	139,579	0.214932046
Texas	5	567,626	0.088086169
Utah	0.4	148,417	0.026951091
Vermont	0.4	19,652	0.203541624
Virginia	3.4	215,370	0.157867855
West Virginia	10.4	70,303	1.479310982
Wisconsin	15.8	180,618	0.874774386
Wyoming	0	12,778	0
Total	213.8	5,792,580	0.099179653

These numbers show that there is an average of 0.099179653 hate crimes per 10,000 students each year on college campuses that ban affirmative action and an average of 0.369092874 hate crimes per 10,000 students each year on college campuses that allow affirmative action. Comparatively, there are 3.72 times more hate crimes on affirmative action campuses than campuses that ban affirmative action programs. We will proceed to place these findings in context.

D. Limitations

Perhaps, hate crimes are slightly less prevalent in schools that ban affirmative action programs simply because fewer minorities are admitted into those universities. Absent preferential treatment in the admissions process, some minority applicants may no longer qualify for admission. This is certainly the case at some of the most selective universities. For instance, black student enrollment at the University of Michigan declined significantly after voters passed Proposal 2, which banned affirmative action in 2006.³⁴¹ That year 7.1% of the student population was African American.³⁴² In 2014, the university reported that only 4% of the student body was black.³⁴³ Michigan State University experienced a similar decline in black enrollment. Over ten percent of its incoming class was black in 1999 but now African Americans make up a lower percentage of incoming freshman classes at State.³⁴⁴ In 2006, 8.8% of freshman class was black; the percentage of black freshman at State fell to 7.5% in 2013.³⁴⁵

³⁴¹ Stohr, *supra* note 322.

³⁴² *Id.*

³⁴³ *Compare Ethnicity and Gender for Term 1610 (Fall 2006)*, U. MICH., <http://ro.umich.edu/report/06fa816.pdf> (showing Michigan's black enrollment at 7.1% in 2006), with *Ethnicity Reports*, U. MICH. OFF. REGISTRAR, <http://ro.umich.edu/enrollment/ethnicity.php?limit=none#r816> (follow "816: Enrollment by School or College, Location, Ethnicity, and Gender" hyperlink) (showing Michigan's black enrollment at 4% in 2014).

³⁴⁴ Stohr, *supra* note 322.

³⁴⁵ *Id.*

California experienced the same phenomenon with respect to black enrollment. While more Latinos are now admitted into California public universities at a greater proportion than whites, black representation at California public universities plummeted to 4.2% in 2013.³⁴⁶ While scholars disagree over whether the presence of racial minorities in significant numbers catalyzes or reduces racial tensions on college campuses, that discussion may not fully explain why non-affirmative action campuses have slightly less hate crimes.³⁴⁷ Perhaps an outlier state, which may present a comparatively more positive racial climate on non-affirmative action campuses, can explain this result.

California's student population may carry disproportionate weight in our study. In fact, public colleges and universities in that state alone supply more than two-thirds of the banned affirmative action population.³⁴⁸ Removing California from the hate crime calculus for non-affirmative action jurisdictions might provide statistics that are more representative of the frequency of hate crimes that occur on campuses in those jurisdictions. Below we have provided an alternative table, which calculates the number of hate crimes without California.

States that Ban Affirmative Action without California

State	Average Hate Crimes Per Year 2009-2013	Student Population	Average Number of Hate Crimes Per 10,000 Students Per Year
Arizona	3.4	135,141	0.251589081
Florida	6.2	637,797	0.097209614
Michigan	9.6	305,454	0.314286276
Nebraska	2.4	59,389	0.40411524
New Hampshire	2.8	28,056	0.998003992
Oklahoma	3	102,796	0.291840149
Washington	4.8	179,895	0.266822313
Total	28.2	1,448,528	0.194680393

As the table indicates, colleges that ban affirmative action experience an average of 0.194680393 hate crimes per 10,000 students. In contrast to our initial calculation, which showed 3.72 times more hate crimes on affirmative action campuses, when

³⁴⁶ See Miriam Jordan, *Hispanics Gain at California Colleges, University System Admits More Latinos Than Whites for First Time*, WALL ST. J. (Apr. 20, 2014), <http://www.wsj.com/articles/SB10001424052702303825604579514030158706454>; see also Sharon Bernstein, *Black Students Lagging in Admission to University of California*, REUTERS (Dec. 5, 2013), <http://www.reuters.com/article/2013/12/06/us-usa-california-raceidUSBRE9B504120131206>.

³⁴⁷ See Stotzer & Hossellman, *supra* note 326, at 647-50, 654-57 (explaining the competing viewpoints on the effects that diversity has on racially motivated hate crimes on college campuses).

³⁴⁸ See Table: States that Ban Affirmative Action, *supra* Appendix A., (showing 6,778,966 out of 8,227,494 students were from California).

California is taken out of the calculus, affirmative action campuses have only 1.90 times more hate crimes than non-affirmative action campuses.

E. Conclusion and Analysis

From the data presented above, we found that there is no strong correlation between prohibiting race-conscious affirmative action programs and decreased incidences of reported hate crimes on college campuses. At first glance, the data shows that affirmative action universities have nearly four times the amount of racially motivated hate crimes per 10,000 students each year than universities that ban such programs. Yet, a closer examination of these figures reveal that the difference in the levels of racial violence between these campuses is actually *de minimis* when analyzed over a marked period of time and calculated without identified outliers that likely skewed our initial findings. As explained before, California's inclusion into the hate crimes calculus may provide an inaccurate depiction of race relations on non-affirmative action campuses, since it makes up two-thirds of the student population for those colleges. Non-affirmative action campuses, in fact, experience two or three times more hate crimes than campuses in California.³⁴⁹

With California factored into the equation, a non-affirmative action university with an undergraduate program of approximately 20,000 students can expect to experience a hate crime roughly once every five years over a twenty-year period.³⁵⁰

³⁴⁹ From 2009-2013, California campuses experiences 0.072872471 hate crimes per 10,000 students while other non-affirmative action campuses in other states experience 0.194680393 hate crimes in that same time period. Consequently, non-affirmative action campuses in other states experience 2.67 times more hate crimes than non-affirmative action campuses in California. See *infra* Appendix B.

³⁵⁰ Our ideal university with 20,000 students is not the exact average for undergraduate enrollments in the United States. Undergraduate enrollments vary widely across the country depending upon the reputation, and exclusiveness, of the institution. Exceedingly competitive admission plans, for example, may produce student populations with only a few thousand students. See *Facts About Brown*, BROWN U., <http://www.brown.edu/about/facts> (citing that Brown University had 6264 undergraduates in 2014); see also *Yale "Factsheet"*, YALE U., <http://oir.yale.edu/yale-factsheet#FallEnrollment> (posting that Yale had 5,453 undergraduates). Some universities attain large undergraduate enrollments with over 30,000 students. See *About Florida State*, FL. ST. U., <https://www.fsu.edu/about/students.html> (reporting that approximately 31,000 undergraduate students were enrolled at the university in 2010); see also *Class Profile*, IND. U., <http://admissions.indiana.edu/education/class-profile.html> (36,419 students in undergraduate program in Fall 2014). Of course, university populations fall between these two extremes with many undergraduate enrollments ranging from over 10,000 to under 30,000 students. See *Enrollment*, U. MICH., <http://ro.umich.edu/enrollment/enrollment.php> (follow "101: Comparative Enrollment by School or College and Gender : Winter 2015" hyperlink) (posting that University of Michigan-Ann had 18, 713 undergrads in Winter 2015); see also *Enrollment Statistics*, AUBURN U., <http://bulletin.auburn.edu/generalinformation/enrollmentstatistics/#all> (declaring 25,912 undergraduate students at Auburn in Fall 2014); *University Facts: Cornell by the Numbers*, CORNELL U., <https://www.cornell.edu/about/facts.cfm> (reporting that Cornell had 14, 393 undergraduate students). We chose 20,000 as the most typical size for a fairly, large undergraduate population.

We made the following calculations to find the average number of hate crimes for a non-affirmative action college with 20,000 undergraduate students within a twenty-year time

Affirmative action campuses appear to have significantly higher rates of hate crimes in comparison, with an incident occurring about once every year and a half.³⁵¹ But there is more to these findings than meets the eye. In fact, the hate crime formula reveals that the frequency of racially motivated violence on non-affirmative action campuses is not much better than campuses with race-conscious admissions plans when it is revised to account for any statistical outliers.

When California is removed from the calculation, we found that the frequency of hate crimes on campuses banning affirmative action more than doubled, bringing the gap in the frequency of hate crimes between both groups significantly closer. In this revised calculation, non-affirmative action campuses experience a hate crime once every two and a half years, instead of one every five years as originally found.³⁵² This finding places the claimed impact of affirmative action programs on racially motivated crimes at college campuses into better focus. The practical difference between the two campuses is that an affirmative action campus may experience a hate crime during an academic year when a non-affirmative action campus may not.³⁵³ This difference is likely too small to prove any sort of correlation between the implementation of affirmative action and incidences of hate crimes. Thus, we cannot confirm the claim, advanced by colorblind purists, that race-conscious activity is the impetus for racial hostility. Additionally, our findings do not conflict with research, which suggest that diversity may actually reduce interracial tensions and produce positive educational outcomes.³⁵⁴

The Appendix does not, however, intend to minimize hate crimes through our comparative analysis. All hate crimes have the same pernicious effect upon individual victims and society, regardless as to where they occur. In reality, hate crimes are acts of terrorism, “because they cause reverberating harms, not only to the

period. Take the average number of hate crimes per 10,000 students and multiply by two and then again by 20. In this case: $0.099179653 \times 2 \times 20 = 3.96$. See *infra* Appendix B. In practical terms, on average non-affirmative action campuses have a hate crime one every five years during a twenty-year time period.

³⁵¹ Using the formula explained in *supra* note 350, we found the average number of hate crimes per 10,000 students on affirmative action campuses in a twenty-year timeframe: $0.369092874 \times 2 \times 20 = 14.76$. See *infra* Appendix B.

³⁵² As indicated in *supra* note 390, non-affirmative action campuses experience 3.96 hate crimes over a twenty-year period or roughly one hate crime 350 five years. When California is not factored into the calculation, non-affirmative action campuses experience 7.797 or about eight hate crimes during that period. These campuses thus experience at least one every two and a half years. See *supra* Appendix.A, Table, States that Ban Affirmative Action without California.

³⁵³ As we have found, affirmative action campuses experience a hate crime once every year and a half, whereas non-affirmative action states, excluding California, have an incident once every two and a half years. Taking the difference between these two groups, we estimate that in any given academic year a non-affirmative action state will not experience racial violence but an affirmative action campus will.

³⁵⁴ See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (citing to research finding that campus diversity creates vibrant classroom interaction among students and improves overall racial health); see also Stotzer & Hossellman, *supra* note 326, at 654.

victim, but also to members of the broader community.”³⁵⁵ Racially-motivated crimes are “aimed towards those groups of people who have traditionally held the least amount of power, in order to send the message that those victims are, and will continue to be, ‘stigmatized and marginalized’ by society.”³⁵⁶ Still, the country is at a loss as it seeks to address persistent ethnic resentments.

While the federal government and nearly every state has enacted anti-hate crimes legislation, allowing federal and local prosecutors to pursue racially-motivated crimes, statutory law in this area does not answer the broader public policy question on what theory should the government adopt to ease racial tensions.³⁵⁷ These tensions can lead to violence. Strict colorblind constitutionalism presents itself as an antidote to racial resentment and accuses race-conscious activity by the state as being an instigator of racial antagonism.³⁵⁸ This Appendix does not lend any statistical support to moralistic claims made against government implementation of racial classifications.

Color-blind purists have yet to empirically prove that affirmative action is the driver of racial resentment, as reflected in the insignificant difference between the frequency of racial violence on non-affirmative action and affirmative action campuses. Absent a larger data set that demonstrates a greater divide between schools implementing affirmative action and schools banning it, the assertion that racial preferences increases ethnic resentment appears to be based more on heated, moral objections than research.³⁵⁹ Because purely colorblind approaches to

³⁵⁵ Kami Chavis Simmons, *Subverting Symbolism: The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act and Cooperative Federalism*, 49 AM. CRIM. L. REV. 1863, 1890 (2012).

³⁵⁶ *Id.* at 1890.

³⁵⁷ *Id.* at 1874-75.

³⁵⁸ Simon, *supra* note 249, at 136.

³⁵⁹ The claim that affirmative action causes many citizens to feel wronged by racial preferences has merit. The government cannot penalize citizens for arbitrary reasons; due process requires that deprivations “bear some relation to individual responsibility or wrongdoing.” *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972). The Nobility and Bill of Attainder Clauses support the principle that individuals should be awarded or punished for reasons based *solely* on their own conduct. *See* U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States.”); *id.* art. I, § 10, cl. 1 (No State shall . . . grant any Title of Nobility.”); *id.* art. III, § 3, cl. 2 (“[N]o Attainder of Treason shall work Corruption of Blood.”); *id.* art. IV, § 4 (The United States shall guarantee to every State in this Union a Republican Form of Government.”); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (Scalia, J., concurring). *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 770 (1999). Affirmative action critics believe that racial preferences turn the rules of fair play on their head. Racial preferences burden individuals that had nothing to do with past injustices, they argue. White and Asian applicants, many of them politically powerless teenagers, suffer discrimination, so colleges can experiment with race. As a result, rejected applicants from non-favored groups may feel anger towards beneficiaries of racial preferences. However, the Fourteenth Amendment does not contain an Anti-Resentment Clause. No case measures racial antagonism as a way to evaluate the constitutionality of challenged admission programs. Constitutional law must rest on stronger grounds than on the hurt feelings shared by those who oppose affirmative action.

admission plans have not been proven to produce campus environments with comparatively more racial peace than campuses with color-conscious plans, the public should reject policies designed to ban all race-conscious programs at public universities.

APPENDIX C

Race-Conscious or Race-Neutral Proposal	Description
<p style="text-align: center;">Student-Led Race-Conscious Admission Programs and Diversity-Oriented Learning Communities</p>	<p>Colleges may establish “a experimental residential college, created to establish learning communities and set pedagogical goals around racial awareness”³⁶⁰ Admissions offices will offer seats to applicants who meet minimum standards and submit an essay describing how their racial background as well as personal qualities will be “important in an overall evaluation of how she will contribute to the learning community goals.”³⁶¹ These communities can insulate the admissions process from attempts by administrators to achieve racial balancing by restricting consultation of admission data and by permitting students to participate in admission decisions.³⁶² “Student participation in admissions programs,” two scholars wrote “is an effective means to counterbalance administrators who may taint the program with race-based theories or paternalistic attitudes.”³⁶³ Such programs can also serve as a social petri dish in which interaction between students can inspire new ideas that can establish programs that can either enrich the learning community or can be employed into larger programs that facilitate dialogue between the races campus-wide.³⁶⁴</p>

³⁶⁰ Kuykendall & Adside, *supra* note 114, at 1081.

³⁶¹ *Id.* at 1084.

³⁶² *Id.*

³⁶³ *Id.* at 1087.

³⁶⁴ *See id.*

Race-Conscious or Race-Neutral Proposal	Description
Race-Conscious Financial Aid Programs	An offer of admission into a college or university may not be enough to entice a student with “diversity- enhancing characteristics” to enroll; ³⁶⁵ therefore, “[t]he further inducement of financial aid based on the applicant's value may be both necessary and desirable.” ³⁶⁶ To remain <i>Bakke</i> compliant, the program should consider race-neutral characteristics, such as a candidate’s “occupational experiences, adversities overcome, family history, social and economic class . . . to demonstrate how they would contribute meaningfully to the diversity of the institution.” ³⁶⁷ Race can be also considered as a factor when awarding financial aid, because extending an offer of admission does not provide a meaningful representation of minority students alone. Minority applicants must choose to attend in a meaningful way. “A significant factor effecting students' choices of which institution to attend is the award of financial aid,” one scholar wrote, “[i]n this way, achieving . . . [meaningful minority representation] is as much a factor of financial aid as it is a factor of admission.” ³⁶⁸
Diversity-Oriented Scholarships	Universities have implemented race or diversity-conscious scholarship programs that follow <i>Bakke</i> as well. For instance, Vanderbilt University has the Chancellor’s Scholarship, which identifies applicants with a “deep-seated commitment to diversity and social justice.” ³⁶⁹ Scholarship recipients are

³⁶⁵ Thomas J. Graca, *Diversity-Conscious Financial Aid After Gratz and Grutter*, 34 J.L. & EDUC. 519, 526 (2005).

³⁶⁶ *Id.* at 525.

³⁶⁷ *Id.* at 526-27.

³⁶⁸ *Id.* at 528.

³⁶⁹ *Merit Scholarship Opportunities: Chancellor's Scholars*, VAND. U., <http://www.vanderbilt.edu/scholarships/chancellor.php> (last visited Feb. 18, 2016).

Race-Conscious or Race-Neutral Proposal	Description
	<p>expected to serve as diversity agents on campus because of their past commitment to interracial collaboration. “Chancellor's Scholars have worked to build strong high school communities by bridging gaps among economically, socially, and racially diverse groups and have demonstrated significant interest in issues of diversity education, tolerance, and social justice. Chancellor's Scholars are expected to build upon these earlier commitments through continued active engagement in academic and leadership opportunities at Vanderbilt.”³⁷⁰</p>
Diversity-Conscious Certification Programs	<p>The program guarantees admission to students from partner high schools or undergraduate programs that enrolled in pre-approved courses offered by the partner school, attained a competitive GPA, or earned a particular score on a standardized text.³⁷¹ Such programs can serve as pipelines for underrepresented minorities to attain admission into elite universities, particularly if the program partners with schools with majority-minority student bodies.</p>

³⁷⁰ *Id.*

³⁷¹ *See generally Earn Your Undergraduate and Law Degree in Six Year: 3 + 3 Legal Education Admission Program*, MICH. ST. U. C. L., <https://www.law.msu.edu/admissions/GVSULEAPPoliSci.pdf> (last visited Feb. 18, 2016) (exemplifying graduate schools that have partnered with undergraduate programs to grant automatic admission to students who earn a competitive GPA, obtain a minimum score on a standardized test, or satisfy other program specific requirements).

