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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

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Abstract

The announcement from the U.S. Supreme Court to reconsider Fisher v. University of Texas at Austin 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 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 pull its jurisprudence towards any 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 colleges in this area. Not only is the stability of doctrine at stake but the future of race-relations is also in play.

Many argue that a strictly color-blind approach fosters racial harmony. However, their movement to enact their theory at the state level short circuits 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

Music fans have their top hits, so does the legal profession. Believe it or not, court decisions command fidelity in American law much the same way songs are engrained in popular culture. Consider the following comparison between music hits and Supreme Court precedent. Listeners tune into shows on radio, TV, and the Internet, giving them quick access to popular music both ancient and modern. These forums also introduce fans to popular talent and music show hosts, like Casey Kasem and Ryan Seacrest, that provide expert analysis on all genres ranging from rock to country and hip-hop. Law has its disc jockeys too. Prominent scholars like Laurence Tribe, Richard Posner, and William Eskridge write for academics, law students, and informed readers about differing views on constitutional law. But debate on these matters is not limited to legal experts; it occurs in the living rooms of ordinary Americans.

Television keeps legal concepts, such as the Fourth Amendment’s warrant requirement or the oft-recited Miranda warnings, front and center in the public mind with the assistance of celebrity lawyers. Greta Van Susteren and Nancy Grace help their viewers apply the law to the emerging facts in the crime de jour. In this way, certain rules in constitutional law acquire a transcendent cultural meaning, which is understood by both layman and the lawyer class alike. Such doctrines garner more attention than one-hit wonders that have fleeting stardom. They remain in constant demand by consumers.
In the music industry, radio shows cater to the demands of listeners by replaying classic songs. Before Ryan Seacrest hosted the American Top 40, Casey Kasem hosted the iconic radio show.¹ During many broadcasts, he played classic songs from the Top 40 archives, like Neil Diamond’s 1969 hit *Sweet Caroline* or Michael Jackson’s *Pretty Young Thing*, which rocketed to the top of the music charts. The sound of classic tunes playing over the radio became a moment in which listeners from diverse backgrounds, and even a “multitude of tongues”, were united in one accord in song.² I am sure that these familiar tunes inspired listeners to quietly recite lyrics from memory, even though they may not have heard the song in years.

These classics have become so engrained in the public consciousness that they are frequently requested during “karaoke nights” at local bars across the country. The phenomenon of musical lyrics becoming entrenched in popular culture is quite instructive in understanding the power of Supreme Court precedent in various fields. Justices of the U.S. Supreme Court, similar to disc jockeys, replay precedent in order to justify their decisions.

Many areas of constitutional law are governed by decisions that set the tone, much like a top hit, for a lawsuit filed to challenge government action. When law students hear about a challenge over, lets say, a religious display under the Establishment Clause, they recall a decision that the Court has played over and over again in this area, that is, *Lemon v. Kurtzman*.³ Law professors ask students to explain that decision’s ruling in class; students respond by calling

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³ 403 U.S. 602 (1971).
out the three-pronged Lemon test, which the Court uses to evaluate perceived religious conduct by the state.\(^4\) They also recite principles in Establishment Clause jurisprudence, which holds that those factors are evaluated through the perspective of an “objective observer” who can discern whether the display endorses or disapproves of religion.\(^5\)

There are other classics, to be sure. The three-tiers of review for both the Due Process and Equal Protection Clauses are like lyrics that have been rehearsed by every law student. Whenever lawyers hear the sound of a possible governmental infringement upon a liberty interest or the use of a suspect classification, they 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.”\(^6\) 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.”\(^7\) The Court’s affirmative action jurisprudence – a line of cases in the Court’s race cannon – has a top hit, or precedent, whose beat 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

\(^4\) *Id.* at 612-613.


\(^7\) *Id.* at 237.
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.” 8 The Court reaffirmed this rule on three occasions in Grutter v. Bollinger, Gratz v. Bollinger, and again in Fisher v. University of Texas at Austin. 9 10 11 This does not calm impassioned exchanges between the Court’s race ideologues, however.

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.’12 Colorblind purists, on the other doctrinal extreme, advocate for a strictly colorblind constitution, that is, a wholesale rejection of race-conscious government activity.13 Some purists, in fact, believe that the doctrine of strict scrutiny review is insufficient to protect citizens from invidious racial discrimination. 14

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10 539 U.S. 244 (2003).
12 Id. at 2433 (Ginsburg, J. dissenting).
13 Both Justices Scalia and Thomas contend that campus diversity can never serve as a compelling state interest to justify racial discrimination. Fisher, 133 S. Ct at 2422 (Scalia, J., concurring) (‘The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.’); Id. at 2422 (Thomas, J.) (“[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 wrote opinions that appear to support a strictly colorblind constitution. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); 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).
As illustrated in *Fisher*, Justices divided themselves along predictable, ideological lines, advancing their respective visions of racial equality. In that case, 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,’ he proclaimed, ‘because every time the government places citizens on racial registers and makes races relevant in the provision of burdens or benefits, it degrades us all.’ 15 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.”16 Indeed, these lyrics are sung from the respective ideological sides in affirmative action opinions. They are replayed and mimicked verbatim, from memory even, by the informed reader. The ideologues added nothing insightful to the debate.

These replayed tunes from both ideological sides must be analyzed through a broader constitutional framework, because affirmative action

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.

15 *Fisher*, 133 S. Ct. at 2422 (Thomas, J., dissenting).
16 *Id.* at 2433 (Ginsburg, J., dissenting).
jurisprudence is not only affected. Fundamental questions at the heart of constitutional adjudication are impacted as well. 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 fails to serve our legal system’s need for “consistency, stability, predictability, and societal reliance” which respect for precedent is calculated to accomplish. 17 Before either theory can be adopted as an alternative, an evaluation of the degree at which affirmative action jurisprudence has embedded itself in programs developed at institutions of higher learning is necessary to measure reliance costs and other prudential considerations.

As Professor Solum explained, precedent carries more than a “presumption of validity” in which prior decisions float as ‘bursting bubble[s]’ that garner respect “until and unless there are good reasons to depart from them.” 18 “If this were the only role for precedent,” he wrote, “then it would be virtually no role at all - it takes only a slender needle of flimsy argument to burst a bubble.” 19 Solum’s observation hints at the analytical framework the Court employs when it reconsiders precedent. The Court separates its inquiry on whether a decision should be reversed from its examination on whether the precedent arose from erroneous reasoning when it initially decided it. To put it differently, the fact that the Court decided a precedent in a manner inconsistent with the Constitution’s original meaning or with the Court’s jurisprudence in a

19 Id.
given area does not answer the question entirely. It merely raises the question on whether special justifications exist to change course.  

Over the decades, the Court has identified a number of factors it considers when it formally revisits precedent. They can be summed up as follows: (1) whether the rule announced in the decision is proven to be practically unworkable, (2) whether the rule has engendered such reliance that overturning the rule would impose “special hardship” upon those who have relied upon it, (3) whether the rule in question has become a relic in that “related principles of law have so far developed as to have the old rule no more than a remnant of abandoned doctrine” or (4) “whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification . . . .” But there are scholars who have identified an elite category of decisions that are immune from reconsideration -- no matter how persuasive the arguments are on the merits.

Professor Sinclair contended that these decisions, what he and others refer to as “super precedents,” are not like the “common garden variety” rulings; they are iconic, establishing doctrines that spawn a line of decisions that follow.

As a consequence, these decisions became “so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.” Reversing precedents of this caliber, they warn,

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23 Gerhardt, *supra* note 17, at 1206.
will “greatly disturb” reliance interests and expectations among citizens and institutions that are now interwoven into the “fabric of our law.”  

They point to “foundational icons” to highlight the point.  

\[25\] \textit{Marbury v. Madison} is heralded as the paradigm, super precedent, which established the two-century old doctrine of judicial review.  

While there are those that doubt the legitimacy of judicial review, no one believes that the Court would retrench the meaning of the “judicial power” under Article III of the Constitution back to the pre-\textit{Marbury} era.  

\[27\] “[T]he decision has become legendary in the study of constitutional law,” Professor Gerhardt wrote, “and students (from grade school to law school) as well as lawyers, judges, Justices, members of Congress, and presidents accept \textit{Marbury}'s recognition of the constitutional authority for judicial review as sacrosanct in American constitutional law.”  

\[28\] \textit{Marbury} is not alone in this saintly number.

No government attorney, for instance, would ask the Court to reconsider \textit{Mapp v. Ohio}. That decision announced the time-honored exclusionary rule.  

\textit{Mapp} forbids law enforcement officials from collecting evidence in a manner contrary to the Fourth Amendment, holding that unconstitutionally acquired

\[24\] Sinclair, \textit{supra} note 22, at 402.  
\[25\] \textit{Id.} at 403.  
\[26\] \textit{Marbury v. Madison}, 5 U.S. 137, 177 (1803) (“It is emphatically the province of the judicial branch to say what the law is.”).  
\[28\] Gerhardt, \textit{supra} note 17, at 1208.  
evidence as inadmissible in court proceedings. 30 A more powerful example of a decision that commands allegiance is Brown v. Board of Education. 31

Brown is now venerated as the Holy Grail in the Court’s race jurisprudence. “Such is the moral authority of Brown that if any particular theory does not produce the conclusion that Brown was correctly decided,” Judge McConnell wrote plainly, “the theory is seriously discredited.” 32 Thus, I believe no scholar would never -- and I mean never -- argue in favor of overruling Brown, even if they disagreed with its reasoning. 33 He or she would be criticized for attempting to raise the separate but equal doctrine from the ashes. 34 The take away point is that there is a class of decisions that are sui generis, that is, unique in their stature in constitutional law, which makes it taboo to question adherence to them today.

This discussion has caused scholars to expand the number of cases that can fit this status. Professor Mark Kende suggested that Powell’s opinion maybe a super-precedent in the narrow sense of the term, since “it has shown stunning

30 Id.
33 McConnell, supra note 32, at 953 (arguing that Brown could have been based upon the original understanding of the Fourteenth Amendment instead of social science that the Court relied upon to reach its decision.); Isaac Simon, Constitutional Theory Building in the Context of the Fourteenth Amendment: The History of Affirmative Action, 23 CHICANO-LATINO L. REV. 113, 122 (“[T]he psychological findings championed in Brown are an extremely weak basis on which to rest such a mighty decision . . . A better opinion in Brown would have revived Justice Harlan's [dissent in Plessy.] Instead of beginning with why the history of the Fourteenth Amendment proved inconclusive, the Court would have begun with why the future of the amendment was uncertain. It might attempt, as I have, to show how the spirit of the amendment had been stripped nearly bare.”).
34 Plessy v. Ferguson, 163 U.S. 537 (1896).
vitality given its initial fragility.” 35 He pointed to the fact that every lower court since 1978 – save the Fifth Circuit in *Hopwood v. Texas* – followed the opinion with the Supreme Court reaffirming it on three separate occasions. 36 The federal judiciary embraced Powell’s opinion – Kende observed – because it forged a “pragmatic compromise.” 37 Moreover, the opinion engendered reliance among “[h]undreds of educational institutions [and] workplaces . . . [that] have adopted programs modeled on the opinion.” 38 In addition, “many institutions without formal affirmative action plans,” Kende wrote, “take race into account as a factor in admission, hiring, and promotions decisions – sometimes as tiebreakers, sometimes more.” 39

There is no consensus, however, on what traits a decision must possess to receive this unique status. Professor Sinclair contends that this status includes those rare cases that would require no less than a revolutionary “change in [the] socio-legal culture” to justify reconsideration. 40 Professor Kende would possibly expand the definition to include those decisions that have engendered “substantial and longstanding societal reliance” as well. 41 This Article does not take a position in this debate. That said, the super-precedent debate is helpful in understanding the stark opinions that exist within the larger debate on the degree of deference stare decisis should receive in our legal system.

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36 Id.
37 Id.
38 Id.
39 Id.
40 Sinclair, *supra* note 22, at 400.
41 Kende, *supra* note 35, at 16A.
One side believes that there are cases, like *Marbury*, that are categorically off limits. Others believe that each decision is binding until there are special reasons to overturn it. In addition to these schools of thought, there are originalists – such as Professor Randy Barnett – that oppose giving any decision super precedent status, because they doubt that the concept can be defined with any principled neutrality. This position is not extreme. However, Barnett’s views on stare decisis raise eyebrows.

As a ‘fearless originalist,’ Barnett would reverse any precedent, which “adopts an interpretation that contradicts the original meaning of the [Constitution’s] text,” because to follow non-originalist decisions would make the Court's interpretation of the text superior to the Constitution itself. The Court unilaterally amends the Constitution, Barnett argues, through the doctrine

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42 Gerhardt, *supra* note 17, at 1208.


45 Professor Barrett is in good company. Justice Thomas shares his propensity to jettison precedent that he perceives as contrary to the Constitution’s originial meaning. In *MacDonald v. Chicago*, 561 U.S. 742, 942-943 (2010), he articulated his reasons for rejecting continued adherence to the doctrine of substantive due process:

I cannot accept a theory of constitutional interpretation that rests on such tenuous footing. This Court's substantive due process framework fails to account for both the text of the Fourteenth Amendment and the history that led to its adoption, filling that gap with a jurisprudence devoid of a guiding principle. I believe the original meaning of the Fourteenth Amendment offers a superior alternative, and that a return to that meaning would allow this Court to enforce the rights the Fourteenth Amendment is designed to protect with greater clarity and predictability than the substantive due process framework has so far managed.

46 Barrett, *supra* note 44, at 1233; Id. (“[O]riginalists like Mike Paulsen, Gary Lawson, and myself - call us ‘fearless originalists,’ perhaps because we will never personally have to fear Senate confirmation hearings - reject the doctrine of stare decisis in the following sense: if a prior decision of the Supreme Court is in conflict with the original meaning of the text of the Constitution, it is the Constitution and not precedent that binds present and future Justices.”).
of stare decisis. Barnett’s objection to the Court enforcing non-originalist interpretations of the Constitution is not the primary impetus for his dismissal of stare decisis. It stems from his mistrust of non-originalists.

He questions their commitment to landmark cases, such as *U.S. v. Lopez* and *U.S. v. Morrison*, which purported to follow the Constitution’s original meaning. “These are cases that many law professors would like to see reversed,” Barnett wrote, “and it seems that the four dissenting Justices in those cases are still reluctant to consider themselves bound by them.” Originalism should not disarm itself in the ideological war, he asserts, when the other side refuses to back down in the standoff: “[P]erhaps no one really adheres to anything like a robust doctrine of precedent, so originalists who rejected the doctrine would hardly be unique in this regard.” Put differently, what is good for the non-originalist goose is better for the originalist gander.

Barnett’s position is relevant. He would take initially fragile decisions, like *Bakke*, and strip them of any “presumption of validity.” Such decisions would be treated as “bursting” bubbles so long as the decision is contrary to the Constitution’s original meaning. Barnett’s suspicions about non-originalism appear to be based more on assumption rather than on any empirical evidence. Perhaps, he is projecting onto non-originalists to deflect from his propensity to reject decisions he dislikes.

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47 Id. at 1233.
49 Id.
50 Id. at 260-261.
52 Solum, *supra* note 18, at 187.
Regardless, one fact is clear: the majority of originalists do not share his view on stare decisis. As Justice Scalia wrote, “almost every originalist would adulterate [their legal philosophy] with the doctrine of stare decisis—so that *Marbury v. Madison* would stand even if Professor Raoul Berger should demonstrate unassailably that it got the meaning of the Constitution wrong.”

Nevertheless, Barnett’s position on stare decisis does shed light onto the extreme positions taken in the affirmative action debate. Both sides believe that their respective philosophy trumps *Bakke*. As previously noted, race-conscious ideologues desire to relax judicial scrutiny in this area, so reviewing courts defer to state actors in their quest to pursue social justice. Purists want to reverse *Bakke* lock, stock, and barrel and replace it with a purely colorblind reading of the Constitution.

Because race ideologues, like Justices Thomas and Ginsburg, do not give Powell’s opinion weight in affirmative action jurisprudence, I will prove that the opinion carries sufficient purchase in the First Amendment canon to control judicial scrutiny over race-conscious admission programs. In that opinion,

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54 *Adarand*, 515 U.S. at 243 (Steven, J., dissenting):

The Court's concept of ‘consistency’ [in judicial standards] assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to ‘govern impartially . . .’

55 *Fisher*, 133 S. Ct. at 2422 (Thomas, J., dissenting).
Powell held that colleges and universities acquired a compelling state interest in student body diversity arising from the Court’s Free Speech, not Equal Protection, doctrine.

Following the Court’s decisions in *Sweezy v. New Hampshire* and *Keyishian v. Board of Regents*, Powell recognized that these institutions are afforded academic freedom, which included the freedom to select whom is admitted in order to provide its students with a “robust exchange of ideas” on their respective campuses. 56 Race could be considered in composing these student bodies to achieve their free speech interests under the First Amendment.57 Justice Powell held, however, that Equal Protection doctrine governed how much weight colleges could give race in the admissions process.58 Provided that an admission plan employs race as a single factor in evaluating applicants, the plan survives scrutiny.

Professor Horwitz doubted whether a university’s interest in academic freedom was essential to the free speech cases Powell relied upon to establish a college’s interest in campus diversity; admittedly, those decisions did not expressly link academic freedom to race-conscious admission programs. 59 As Justice Thomas argued: “I doubt that when Justice Frankfurter spoke of governmental intrusions into the independence of universities, he was thinking of

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57 *Bakke*, 438 U.S. at 311-312.
58 Id. at 315.
59 Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. Rev. 461, 492 (2005) ( “The only case suggesting that a university should enjoy autonomy in its admissions decisions, *Sweezy*, clearly was grounded in the search for truth and no other value. Indeed, to the extent the *Sweezy* concurrence tracks the Declaration in hewing to the search-for-truth justification, it was unlikely to offer much support for diversity-oriented admissions policies, let alone race-conscious admissions.”).
the Constitution’s ban on racial discrimination.” 60 Colorblind purists contend that the decision blurred the doctrinal lines between free speech and equal protection in order to surpass the Constitution’s prohibition against racial discrimination. In so doing, the Court has left society – they argue – vulnerable to heightened racial anxiety by developing an attitude of entitlement among some minorities and stigmatizing others as unqualified. 61 Moreover, such activity, as the argument goes, provokes resentment among those who feel injured by racial preferences. 62 In this vein, Powell’s opinion is not only offbeat, but it should be deleted from the doctrinal playlist altogether.

This Article contends that Justice Powell’s opinion does not represent a marked, and unworkable, departure from our free speech cases to justify reconsideration; the opinion easily fits within free speech jurisprudence and that any perceived doctrinal or logical flaws are minimized by the fact that the opinion is limited only to the college admissions context. I submit that narrowing Justice Powell’s opinion to the college and university context is a more practical, and prudentially sound, alternative than the drastic action of overturning precedent, which would “disrupt precedent-based expectations.” 63 This conclusion provides the basis for this Article’s central thesis.

Stare decisis embedded Justice Powell’s opinion as the lynch pin in affirmative action law. Race ideologues want to change Bakke, however, when the Court reconsiders the constitutionality of Texas’ admission programs in

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60 Grutter, 539 U.S. at 355 (Thomas, J., dissenting).
61 Id. at 373.
62 Id.
63 See Richard Re, Narrowing Precedent in the Supreme Court, 114 Colum. L. Rev. 1861, 1877-1878 (2012).
Fisher II. The Court cannot reverse or alter the decision, unless its revisionists prove that it no longer advances stare decisis principles in the review of challenged admission policies. It is a burden they cannot bear for two reasons.

First, stare decisis doctrine elevated the opinion’s stature in constitutional law, because it has engendered widespread institutional reliance from both public and private colleges. These institutions make diversity, including a commitment to admit racial minorities, an integral part of their educational mission. The piece de resistance of this commitment to diversity is reflected in the bureaucratic structure of these colleges and universities, which include a potpourri of initiatives, programs, and offices, that are organized around the diversity principle. Reversal would thus cause widespread disruption at these institutions that consult the opinion for guidance in how to organize their respective student bodies. Second, overturning Bakke will subvert the democratic process by withdrawing from public consideration proposals that are aimed at improving our nation’s racial health through our nation’s universities. New methods crafted to solve persistent racial problems are urgently needed.

This Article concludes by identifying some options for society to consider in the current public debate over affirmative action. Today, two extreme viewpoints now dominate discourse on the issue. This is exemplified in the debate over state ballot initiatives that would ban, among other things, all race-conscious admission programs at state colleges. I argue that the current state of affairs presents the public with a Hobson’s choice: vote “yes” on the referendum and eliminate race-conscious government activity and deprive students of the
educational benefits that may arise from campus diversity. Or, citizens can vote “no” on the question and permit race-oriented programming that will deny applicants the guarantee of racial equality. Both choices are woefully inadequate in providing the nation with solutions that can address persistent, and complex, racial problems.

Our nation is in desperate need of innovative solutions that will encourage meaningful, interracial exchanges. While this country ratified and enacted a series of constitutional and statutory reforms that formally guaranteed racial inclusion in the public sphere, Americans mainly live in a “paradox” where they tolerate “chronic [levels of] hypersegregation” that characterize nearly every facet of their private lives. 64 As another scholar and myself observed elsewhere, “[r]ace is pervasive in private decisions regarding housing, schooling, employment, marriage, and social interactions . . . .” 65 The nation’s leading universities are not immune from this social pandemic, as reflected in reported bias incidents on campuses and self-segregation among students who voluntarily segregate themselves along ethnic lines. 66 Theorists on both extremes do not provide solutions that are empirically proven to improve racial health on campuses.

This Article presents data showing that race conscious activity does not exacerbate racial resentment, as colorblind purists contend in affirmative action

66 Id. at 1076-1081.
cases. Nor does the evidence support the claim that strict race neutrality is the cure that remedies our racial ailments. I provide statistics that show that non-affirmative action campuses experience, as many hate crimes as campuses that maintain affirmative action programs. While campuses are designed to encourage intellectual exchanges between students from diverse backgrounds, ethnicity remains a source for interracial hostility regardless of whether a school has race-conscious policies or not. The country needs to go back to the drawing board on race, beginning with college campuses where students are trained to become leaders in a diverse world.  

Because this country is socially and psychologically burdened with the past effects of institutionalized discrimination, I argue that the public should be permitted to consider all constitutional options designed to improve racial health rather than be limited to the Hobson’s choice offered by ideologues. In sum, the Court, like Casey Kasem on America’s Top 40, should *replay that tune* in Powell’s opinion and encourage administrators to follow *Bakke* in finding “new and fairer ways” to improve racial health on college campuses while maintaining close adherence to Powell’s demand that race-conscious admission programs are modeled to comply with strict scrutiny rules.  


I examine Justice Powell’s opinion on the merits. If a reviewing court concludes that a precedent is correct on the merits, then it will simply reaffirm...

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67 *Grutter*, 539 U.S. at 332 (“[U]niversities . . . represent the training ground for a large number of our Nation's leaders.”).

68 *Id.* at 393 (Kennedy, J., dissenting).
the decision and follow it without consulting stare decisis. Therefore, I examine if 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. Then I entertain substantive criticisms leveled against Bakke.

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 Powell’s opinion shows that his reasoning is not a radical departure from Free Speech principles.

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

1. Sweezy v. New Hampshire

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. He also wrote an article, where he predicted that socialistic movements would overthrow capitalist governments like the United States. The state attorney general summoned Sweezy, pursuant to the New Hampshire Subversive Activities Act, to answer questions concerning his lectures, his...

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69 Kozel, supra note 20, at 417 n. 27, (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.”)).

70 Sweezy, 354 U.S. at 242.
political ideology, and his membership in the Communist and Progressive Parties. 71 That Act barred “subversive persons” from public employment, including at state universities, and outlawed “subversive organizations” from operating within the state. 72

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. 73 Sweezy answered most of the government’s questions and volunteered information but refused to answer questions about the content of his lectures and his knowledge about the Progressive Party. 74 As a consequence, the Court imprisoned Sweezy. 75

In Sweezy, the plurality struck down the Act, because it violated Sweezy’s Fourteenth Amendment due process rights. Additionally, the Court found that the Act infringed upon broader protections afforded to Sweezy under the Free Speech Clause. 76 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. 77 Such broad discretion, the Court concluded, empowered the attorney general to gather information that the legislature would not need to identify subversive activity and thus enabled the attorney general “to screen the

71 Id. at 236.
72 Id.
73 Id. at 238.
74 Id. at 243.
75 Id. at 245.
76 Id. at 254.
77 Id. at 253.
citizenry of New Hampshire to bring to light anyone who fits into the expansive definitions.” But the Act did not deny only due process protection. The legislative investigation burdened the academic freedom and political expression exercised by scholars and political activists as well.

In a brief discussion, the Court reasoned that an investigation, which scrutinized an individual’s beliefs and associations, could stifle the exchange of information critical to expression in a democratic society. 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. Colleges and universities, like the University of New Hampshire, are places where students develop skills that better prepares them for democratic participation. 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.”

While the plurality employed the Due Process Clause to invalidate the Act, the opinion offered new insight into the Free Speech Clause’s reach into academic activity as a First Amendment concern. Justice Frankfurter elaborated on this subject in greater detail in his concurring opinion.

78 Id. at 253.
79 Id.
80 Id. at 250.
81 Id.
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. In that opinion, Justice Frankfurter contended that 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.” 82 To him, academic freedom had substance when members of the academic community possessed political autonomy from government intrusion in order to maintain the free exchange of ideas that is imperative to that community’s mission:

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. 83

To this end, the freedom for institutions of higher learning to speculate in these disciplines required that their respective institutional operations remain free from government interference. Quoting from South African scholars, he 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

82 Id. at 262 (Frankfurter, J., concurring).
83 Id. at 261-262.
grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.\textsuperscript{84}

Justice Frankfurter held 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, including his wife. \textsuperscript{85} The plurality, along with Justice Frankfurter, held that academic freedom was protected under the Constitution and state laws that compel academics to disclose their political ideology, so the government may scrutinize them for sedition, violates that right. \textsuperscript{86} Ten years later, the Court would be presented with state regulations aimed at barring persons affiliated with certain groups and activities from gaining employment at colleges.

2. \textit{Keyishian v. Board of Regents}

Similar to the statute challenged in \textit{Sweezy}, \textit{Keyishian} reviewed the constitutionality of New York’s Feinberg law, which, in relevant part, directed the State Board of Regents to compile a list of “subversive” organizations, “defined as organizations which advocate the doctrine of overthrow of government by force, violence, or any unlawful means.” \textsuperscript{87} Members of these organizations could be disqualified from public employment as a result of the law. \textsuperscript{88}

\begin{itemize}
\item \textsuperscript{84} Id. at 263.
\item \textsuperscript{85} Id. at 265-266.
\item \textsuperscript{86} Id. at 267.
\item \textsuperscript{87} Keyishian, 385 U.S. at 594.
\item \textsuperscript{88} Id.
\end{itemize}
Under the law, the Board identified the Communist Party as a subversive organization and demanded that all employees sign a certificate affirming that they were not Communists as a pre-condition to employment.\textsuperscript{89} Five faculty and staff members at the University of Buffalo refused to sign the certificate; as a consequence, the university dismissed employees or threatened to terminate their employment.\textsuperscript{90}

In \textit{Keyishian}, Justice Brennan held that the statute permitted education elites to suppress academic and political freedoms in and outside the classroom.\textsuperscript{91} He concluded that the statutory language stating that “any person who advocates the overthrow of government by force” was unconstitutionally vague.\textsuperscript{92} Justice Brennan pointed to other provisions, such as § 105, which 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.”\textsuperscript{93} That section also required that an employee be dismissed if they were 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’”\textsuperscript{94}

Given the vagueness of these provisions, Justice Brennan found them vulnerable to “sweeping and improper application” and thus could “prohibit the

\textsuperscript{89} \textit{Id.} at 595-596.
\textsuperscript{90} \textit{Id.} at 596.
\textsuperscript{91} \textit{Id.} at 600-601.
\textsuperscript{92} \textit{Id.}
\textsuperscript{93} \textit{Id.} at 601.
\textsuperscript{94} \textit{Id.} at 600.
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.” 95 He offered a parade of horribles to illustrate the point. A
“teacher who carrie[d] a copy of the Communist Manifesto on a public street”
would be committing “criminal anarchy,” he suggested.96 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.97 The statute’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 . . . .” 98

Feinberg Law not only restricted the scholarship of individual instructors,
but it also chilled “academic freedom” which he found to be a “special concern
of the First Amendment, which does not tolerate laws that cast a pall of
orthodoxy over the classroom.” 99 Here, Justice Brennan pointed to intellectual
exchanges within the classroom as integral to that freedom which provides a
“marketplace of ideas” to students.100 Because the statute restricted the range of
subjects that could be 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

95 Id. at 600-601.
96 Id. at 601.
97 Id.
98 Id.
99 Id. at 603.
100 Id.
discovers truth ‘out of a multitude of tongues’ [rather] than through any kind of authoritative selection.” 101 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. 102

With Sweezy and Keyishian identifying academic freedom as a liberty interest under the First Amendment, the Court struck down far-reaching laws that restricted intellectual exchange in the classroom.

Both cases endorse academic freedom at college and universities, because these institutions train citizens and future leaders in developing truth-finding skills that are essential to democratic participation. 103 However, Keyishian took the reasoning behind academic freedom a step further. He 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 laws that interfered with such exchanges infringed upon academic freedom. Justice Brennan’s observations along with Sweezy provided the doctrinal basis for the diversity doctrine 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 with four justices affirming the program’s

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101 Id.
102 Id.
103 Id.
constitutionality. As explained before, those Justices based their conclusion on the theory that government officials should be given deference when employing racial classifications aimed at ameliorating the perceived effects of past discrimination against racial minorities. \(^{104}\) “Government may take race into account when it acts not to demean or insult any racial group,” Justice Brennan wrote, “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.” \(^{105}\) But four other Justices invalidated the program wholesale. They argued that the program violated Title VI of the Civil Rights Act of 1964, which forbade any program, which received federal funds from excluding any person on the basis of race. \(^{106}\) 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. \(^{107}\)

**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. \(^{108}\) That program reserved 16 out of 100 seats for minority applicants and did not evaluate them against candidates in the regular admissions

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\(^{104}\) *Bakke*, 438 U.S. at 327 (Brennan, J., concurring in part and dissenting in part).

\(^{105}\) Id. at 325.

\(^{106}\) Id. at 412-413 (Stevens, J., concurring in part and dissenting in part).

\(^{107}\) Kende, *supra* note 35, at 19A, fn. 32.

\(^{108}\) *Bakke*, 438 U.S. at 274.
process. 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.  

Applying strict scrutiny review, Justice Powell examined if the medical school possessed a compelling state interest to justify its race-conscious admission policy. 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. Justice Powell’s discussion took an unusual turn, however. 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. Consistent with the reasoning articulated in Sweezy and Keyishian, Justice Powell found that colleges possessed a unique role in our First Amendment traditions, which made academic freedom a special concern of that amendment.

Seizing upon Justice Frankfurter’s “four freedoms” in Sweezy, Justice Powell used academic freedom to choose whom to admit as the basis to identify the admissions process as the means colleges employ to achieve their First Amendment interests. He took a step further in the Court’s academic freedom doctrine by identifying the process upon which colleges’ select students (i.e., admission programs) as the method to provide a market place of ideas for its

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109 Id. at 275.
110 Id. at 290; Id. at 294-295.
111 Id. at 307.
112 Id. at 310.
113 Id. at 313.
Justice Powell reasoned that diversity-oriented programs – that take into account an array of personal traits to holistically evaluate an individual applicant for admission – are used to compose classroom environments that are conducive for students to engage in speculation, experimentation and creation on campus. Race, he concluded, could be used as an ingredient in campus diversity.

The implementation of such programs must be placed under close judicial surveillance, however; any use of race, Justice Powell explained, is narrowly tailored if the category 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.” Here, diversity strikes its first note as the crescendo in the Court’s development of academic freedom, which is played in Equal Protection overtones in Powell’s opinion.

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 must today 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.

The next section explores salient criticisms of Justice Powell’s opinion and places them under three main categories. Part I. B lays out three arguments

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114 Id. at 317.  
115 Id.  
116 Id.  
117 Id. at 314.  
118 Id.
against *Bakke*. Part I. C responds to these criticisms. I conclude that Bakke is not clearly erroneous to necessitate reconsideration of the Court’s entire affirmative action jurisprudence, because the decision fits within the First Amendment canon.

B. A Critical Look at Justice Powell’s Opinion on the Merits

1. Textual and Historical Criticisms

One potent criticism of 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, it 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,” both opinions claimed, “No one should underestimate the vital role in a democracy that is played by those who guide and train our youth.”119 Yet, the missing note in this score is evidence that explains *why* the freedom is regarded as an “essentiality,” that is, a fundamental ingredient in the exercise of political rights.

Professor Horwitz suggested that Justice Powell’s focus on this language missed the point entirely. The fact that the Courts spilled little ink on this matter – he suggests – shows that it did not intend for it to be taken seriously. *Bakke’s* brief analysis on these opinions, to develop an interest in student body diversity as a related interest to academic freedom, overlooked the fact that the holdings in

119 *Sweezy*, 354 U.S. at 250; *Keyishian*, 385 U.S. at 603.
those decisions did not rest on that doctrine at all.  

Horwitz argues – entirely unessential to the holdings. The Court invalidated those laws, because they were vague and enabled education elites to suppress core political speech. Discussion on academic freedom was, therefore, incidental to those cases.

2. Is Academic Freedom a Workable Concept?

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. First, the doctrine does not identify who or what it protects. There is language in these decisions that indicate that the doctrine safeguards individuals like teachers or students. But institutions, like colleges and universities, could exercise the right based on a broader reading of those cases. Judges are thus left to wonder if they can adjudicate claims asserted only by individuals or by institutions. Perhaps the doctrine reaches both classes of claimants? That question is not fully answered.

Secondly, the cases do not precisely describe the scope of the freedom it identifies. The cases do not draw clear lines that define areas where the doctrine does and does not apply. This leaves reviewing courts with no cohesive theory to explain the doctrine’s role in the Court’s overall free speech doctrine. It is crucial for constitutional theories to be clearly definable, for it

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120 Horwitz, supra note 59, at 488.
121 Id. at 487.
122 Id.
123 Id. at 487.
124 Id. at 485.
125 Id.
gives direction to judges on how to monitor government action designed to suppress fundamental rights and to therefore expose infringements upon them. No unified theory is offered in academic freedom cases, however.

While *Sweezy*, *Keyishian*, and *Bakke* all recognized that academic freedom provided a truth-finding function in preparing students for democratic participation, *Keyishian* and *Bakke* identified two other functions that are essential for the meaningful exercise of that right.  

*Keyishian* found that the classroom dynamic provided a “multitude of tongues” or the “robust exchange of ideas” that aided students in their quest for truth. *Bakke* concluded that *Keyishian* provided the basis for another interest that facilitated intellectual exchanges in the classroom, that is, campus diversity.

The problem here is that *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, that a broad reading of academic freedom reaches admission programs.

3. Does Academic Freedom Extend to Admissions Programs?

Assuming, for argument’s sake, that academic freedom is a legitimate liberty interest, the doctrine does not reach *Bakke*. As previously explained, *Sweezy* and *Keyishian* involved laws that filtered out university faculty and staff based upon their political viewpoint. Justice Frankfurter’s concurring opinion in

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126 *Id.* at 489.
127 *Id.*
Sweezy, devoted a considerable amount of analysis to the “extensive questioning” and the “exhaustive scope” of the inquiry into Sweezy’s political beliefs. 128 Bakke, on the other hand, did not involve any direct regulation of speech uttered in the classroom.129 Rather, Bakke involved race-conscious programs that trigger the suspect classification canon that emanates from Equal Protection jurisprudence.130

That canon, it can be argued, is entirely unrelated to the facts in Sweezy or Keyishian. These cases did not discuss admission programs, let alone the use of race in admission decisions. 131 Powell’s opinion thus pulled the academic freedom doctrine beyond its context. 132 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. 133

C. Bakke Revisited: A Closer Look at the Merits

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

    Academic Freedom as an Implied Right

    Although academic freedom is not explicitly mentioned in the Constitution, the Court has announced other canons that recognize unspecified

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128 Sweezy, 354 U.S. at 257.
129 Bakke, 488 U.S. at 273-276.
130 Id. at 287-288.
131 Horwitz, supra note 59, at 492 n. 158.
132 Id. at 492.
133 Id. at 493.
rights that arise from the Bill of Rights. The Constitution affords citizens autonomy from government regulation into an array of areas.\textsuperscript{134} In keeping with this tradition, the Court has developed doctrines under the First Amendment that identify non-textual rights so that citizens may explore the full range of human expression.\textsuperscript{135} The Free Speech doctrine is a prime example. The right of speech does more than forbid government from censoring verbal communication or from screening manuscripts before publication. The First Amendment is not only concerned with protecting political activities, such as a protester shouting


\textsuperscript{135} The Free Speech Clause reaches beyond the right to speak but it also protects a range of human expression and communication. In \textit{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 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.

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 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.
through a megaphone on a soapbox or an activist passing out pamphlets in the town square. Rather, the freedom of speech, much like the metaphor used in real estate ownership in property law, has a “bundle of sticks,” or rights, that are integral to the exercise of political expression. 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.

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. The Court found that disclosure of such a list rendered its members vulnerable to social and economic reprisal and thus restricted its members’ freedom of association that protects an individual’s exercise of speech while they are engaged in collective political action: “Effective 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.”

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. U. S.*:

> 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

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competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. \textsuperscript{138}

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

In Judge Robert Bork’s, \textit{Neutral Principles and Some First Amendment Problems}, he concluded that the First Amendment did not cover scientific, educational, commercial or literary expression because the amendment only protected “explicitly political speech . . . .” \textsuperscript{139} But even under this narrow reading of the amendment, Judge Bork found that the “discovery and spread of political truth” merited judicial protection because it is an essential function of political speech, which includes “speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda.” \textsuperscript{140} Both narrow and expansive readings of the amendment can be reconciled with \textit{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 Free Speech Clause. \textsuperscript{141}

Admittedly, \textit{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

\textsuperscript{138} \textit{Abrams v. U.S.}, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
\textsuperscript{139} 47 IND. L.J. 1, 28 (1971).
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{See Bakke}, 438 U.S. at 313.
may be admitted to study on campus, which 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 the 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.” 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.” Though Powell might have extended the principle of academic freedom further than the context of its foundational cases seem to justify, 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.

The First Amendment and Racial Problems

Though Bakke may not cause disruption in Free Speech jurisprudence, many believe its reasoning creates Equal Protection problems. Powell’s holding – they contend – made race-conscious programs into hybrid cases that

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142 Sweezy, 354 U.S. at 263; Keyishian, 385 U.S. at 603.
144 Unmuting the Volume, supra note 65, at 1054-1055.
145 Grutter, 539 U.S. at 355 (Thomas, J., dissenting).
present doctrinal tensions between concerns for academic freedom pulling on one end and guarantees against racial discrimination pulling on the other.\textsuperscript{146} Yet this tension between race and First Amendment principles is not a novel legal phenomenon, as illustrated in \textit{R.A.V. v. City of St. Paul} and \textit{Virginia v. Black}.\textsuperscript{147}

In \textit{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…”\textsuperscript{148} 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, but it “impose[s] special prohibitions on those speakers who express views on disfavored subjects.”\textsuperscript{149} In this case, the ordinance prohibited displays containing “odious racial epithets” but permitted placards that expressed fighting words “on the basis of political affiliation, union membership, or homosexuality.”\textsuperscript{150} Justice Scalia concluded that “fighting words” legislation can not be content-based, because the state would “license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules.”\textsuperscript{151} Although racial epithets maybe offensive, and even endanger interracial harmony, \textit{R.A.V.} made it abundantly clear that government may not address the effects of hate speech by restricting expression.

\begin{footnotesize}
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\item \textsuperscript{146} \textit{Id.}
\item \textsuperscript{147} 505 U.S. 377 (1992); 538 U.S. 343 (2003).
\item \textsuperscript{148} \textit{R.A.V.}, 505 U.S. at 380.
\item \textsuperscript{149} \textit{Id.} at 391.
\item \textsuperscript{150} \textit{Id.}
\item \textsuperscript{151} \textit{Id.} at 392.
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In *Virginia v. Black*, state action designed to address the effects of hate speech again conflicted with the First Amendment. In that case, the Court struck down a provision in a statute that made the act of 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. Though cross burning possessed a long-history as a symbol of race-based violence, the First Amendment did not give states flexibility to ban conduct that may express an ideology that maybe intended to inflame “anger or resentment.” The First Amendment and anti-hate speech laws do conflict. But the Court is not neutral between them.

*R.A.V.* and *Black* illustrate competing interests between legislation designed to combat the socially disruptive effects of racial hate speech and the individual’s right to free expression; in both cases, the Court sided with speech, although the Justices had concerns that hate speech presented risks to social tranquility. “It may be true that a cross burning, even at a political rally, arouses a sense of anger or hatred among the vast majority of citizens who see a burning cross,” Justice O’Connor wrote in *Black*, “but this sense of anger or hatred is not sufficient to ban all cross burnings.” Affirmative action jurisprudence, much like *R.A.V.* and *Black*, place more of a constitutional premium on intellectual exchanges facilitated by diversity programs than on the perceived benefits that could arise from precluding racial preferences in admission programs.

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152 *Black*, 538 U.S. at 364.
153 *Id.* at 366.
154 *Id.*
College elites cannot, however, use racial categories carte blanche.\textsuperscript{155} As explained earlier, Powell held that affirmative action programs be reviewed under strict scrutiny.\textsuperscript{156} \textit{Fisher} addressed concerns that administrators can manipulate racial classifications to implement de facto quota systems or regimes that achieve racial balancing.\textsuperscript{157} That decision clarified strict scrutiny rules.

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. “[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.”\textsuperscript{158} The standard does not afford colleges “deference” or assume “good faith” on the part of administrators when they implement racial preferences.\textsuperscript{159} 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.”\textsuperscript{160} Thus, reviewing courts must examine whether an admissions plan achieves the educational benefits that flow from diversity.\textsuperscript{161}

This is not to say that Powell read Equal Protection doctrine pristinely. Powell consulted case law outside the doctrine to identify a compelling interest

\textsuperscript{155} \textit{Bakke}, 438 U.S. at 306.
\textsuperscript{156} Id. at 299.
\textsuperscript{157} See \textit{Grutter}, 539 U.S. at 379 (Rehnquist, C.J., dissenting).
\textsuperscript{158} \textit{Fisher}, 133 U.S. at 2420.
\textsuperscript{159} Id. at 2419-2420.
\textsuperscript{160} Id. at 2421.
\textsuperscript{161} Id.
in campus diversity. The decision, though, has not produced a dynamic effect, which produces or compounds logical errors in subsequent decisions. This point will be explained more in the next section. I shall just say now that there is little confusion among institutional stakeholders about what Bakke demands. Powell made it clear that colleges must prove that race-based plans are necessary to achieve their educational goals. 162 What more, 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. In Parents Involved in Community Schools v. Seattle, for instance, 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.” 163 “[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.”164 Narrowing Bakke to its facts serves prudential goals, because it maintains protection against racial discrimination under the strict scrutiny doctrine. That is achieved while avoiding the “resulting whiplash [that] would generate substantial reliance costs” if the Court overturned the decision. 165 Notwithstanding Bakke’s limited reach

162 Bakke, 438 U.S. at 306.  
163 Parents Involved, 551 U.S. at 725.  
164 Id. at 724.  
165 See Re, supra note at 63, at 1876.
and fit within broader free speech principles, I address concerns that academic freedom is practically unworkable.


The second argument against academic freedom is that it is an unworkable doctrine, because the cases do not specify who holds the right or what subjects it covers. As Professor Horwitz observed, this perceived lack of specificity prompts a litany of unanswered questions that would confound judicial review. Critics say that the Court did not provide adequate guidance in how to apply a doctrine, which the Court 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.  

But a fair reading of those opinions show that the right is not as vague as Professor Horwitz may believe. Although those decisions discuss the collective benefits the doctrine provides to learning communities and to the nation, the right covered activities performed by individuals like “teachers,” “students,” or, more generally, “intellectual leaders.”  

Most notably, these rights are activated when they are exercised in the college setting.

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166 Horwitz, supra note 59, at 483.
167 Id.
168 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
Borrowing from Fourth Amendment terminology, academic freedoms are triggered when a person engages in certain activities that take place in a “constitutionally protected area.” So the liberty interest ripens when a professor, teaching assistant, or a student engages in the myriad of intellectual activities, such as research, writing, or debate, that are related to their status as a member of that academic community.

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. Like a citizen’s home is a “constitutionally protected area” under the Fourth Amendment, the college and university campus is a protected space under the First Amendment where an array of academic activities are protected from government intrusion. See Kyllo v. U.S., 533 U.S. 27, 34 (2001).

169 Kyllo, 533 U.S. at 34.

170 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, 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.

171 Hobby Lobby, 134 S.Ct. at 2768. Admittedly, Citizens United and Hobby Lobby does 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 that 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.
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. Sweezy and Keyishian arose from direct government regulation of political speech in the classroom and thus such laws constitute paradigm infringements of that right. However, the Court did not craft the doctrine to be limited only to the facts in those cases. Justice Frankfurter found that academic freedom means more than being free from government suppression of political viewpoints. Instead, it broadly protects other related liberties, such as the right of a college to “select whom may be admitted to study . . . .” ¹⁷² His opinion implicitly recognized that admission programs, the process that colleges employ to select potential students, serve a crucial role in a college’s effort to maintain an environment where students may engage in the discovery of truth.¹⁷³

Keyishian, though, provides the reasoning which threads Sweezy’s concern for truth and Bakke’s diversity rationale together in the free speech doctrine. There, Keyishian reasoned that the discovery of truth is facilitated through the robust exchange of ideas, which is a unique feature of the college environment.¹⁷⁴ Recognizing student body 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.

¹⁷² Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring).
¹⁷³ Id.
¹⁷⁴ Keyishian, 385 U.S. at 603.
II. Should the Court Replay the Tune or Push the Delete Button? Bakke, Stare Decisis, and Racial Diversity as an Embedded Principle in Affirmative Action Jurisprudence.

A. Stare Decisis Doctrine: Replaying the Tune

As the prior section shows, Bakke’s reasoning is not so defective as to require reconsideration. An in-depth examination on the merits – I dare repeating – was necessary since the correctness of any given precedent is rolled into the stare decisis analysis. But such an inquiry is by no means dispositive. “The question [on] whether a precedent is correct on the merits is exogenous,” Professor Kozel explained, “from whether the precedent should be reaffirmed on grounds of stare decisis irrespective of its rightness or wrongness.” The Court recognizes that the consequences for reversing precedent are far reaching; it can potentially disrupt settled expectations by stakeholders in a given case as well as undo entire regulatory regimes implemented by institutions to comply with a decision. Therefore, the Court does not easily dispense with precedent. “We have long recognized that departures from precedent,” Chief Justice Roberts wrote, “are inappropriate in the absence of a special justification.”

In Casey, the joint opinion explained the criteria the Court employs to identify those circumstances that would justify reversal. Since those factors have already been discussed, I will not repeat them here; rather, I will proceed to apply them to Justice Powell’s opinion. Two of those factors are not in serious contention here. That is, those factors that inquire into whether the precedent is a

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175 Kozel, supra note 20, at 417 n. 26.
176 Id.
177 Citizens United, 558 U.S. at 377 (Roberts, C.J., concurring).
doctrinal relic that subsequent cases have abandoned and whether circumstances have changed to rob the precedent of continued application.\textsuperscript{178}

First of all, Justice Powell’s opinion is in no way a relic of an abandoned doctrine. As mentioned before, the Court followed the opinion to resolve Equal Protection questions relating to admission programs in three subsequent cases.\textsuperscript{179} Bakke stands as the fulcrum in affirmative action jurisprudence, because the rule announced by Justice Powell serves as the touchstone of constitutional analysis in the area.\textsuperscript{180} Secondly, circumstances have not changed to render the decision irrelevant to modern admission plans. Across the country, colleges still follow Bakke in how they craft race-conscious programs. The primary focus of this section, therefore, will be on the reliance and workability factors.

B. Reliance: Bakke and the Diversity Bureaucracy.

Calculating reliance costs is crucial in stare decisis analysis.\textsuperscript{181} When considering reliance interests, the Court weighs the respective costs that would be incurred upon those persons and institutions that have “settled expectations” that would be uprooted if the Court overturned precedent.\textsuperscript{182} In prior cases, reliance weighed heavily in its decision to reaffirm precedents that received

\textsuperscript{178} Casey, 505 U.S. at 855.
\textsuperscript{179} Grutter, 539 U.S. at 325 (“[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, 539 U.S. at 271 (“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.”); Fisher, 133 S.Ct. at 2417 (“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].”).
\textsuperscript{180} Id.
\textsuperscript{181} Casey, 505 U.S. at 855-856.
\textsuperscript{182} Kozel, supra note 20, at 446.
scathing criticism for perceived departures from the Constitution’s original meaning or from historical practice. 183 Stare decisis protects Bakke from reversal, 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. An extensive review of mission 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. 184 Please review Appendix A, which

183 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. U.S., 530 U.S. 428 (2000), Chief Justice Rehnquist rejected the claim that Miranda warnings were not constitutionally required under the Fifth Amendment, finding that Miranda had 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.

184 Before I explain the information provided in Appendix A, I want to express my gratitude to Richard A. Plowden for his contribution. 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 27 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 reveal 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.”
provides a survey of university mission statements that underscore this point. These statements document a profound commitment to diversity.

1. 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.’” 185 Brown University, a leading ivy-league institution, stated in no uncertain terms that “[d]iversity is at the foundation of [our] academic enterprise.” 186 Similarly, Louisiana State University made clear that “[d]iversity is fundamental to [its] mission.” 187 University mission statements also announce the means or principles that will be pursued to achieve diversity.

For example, LSU administrators and faculty found that in order to achieve diversity “it must make ‘[c]ultural inclusion [the] highest priority.’” 188 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 re-examine their own positions [because] diversity decrease negative stereotypes and biases, and create awareness of

185 Grutter, 539 U.S. at 330.
188 Id.
inequalities and discrimination . . .” 189 Graduate programs, ranging from law colleges to medical schools and to engineering programs, also adopt diversity statements and, in the process, reinforce the institutional commitment to diversity. 190 191

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

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189 Many voices, one future, an inclusive Princeton, http://inclusive.princeton.edu/about/why; another example is the University of Minnesota, which in its strategic framework alluded 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.” THE UNIVERSITY OF MINNESOTA’S EQUITY AND DIVERSITY VISION FRAMEWORK, VISION IMPLEMENTATION SUMMARY, available at, https://diversity.umn.edu/sites/default/files/U%20of%20MN%2C%20Equity%20and%20Diversity%20Vision%20Framework.pdf.

190 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 13 colleges and schools have also adopted mission statements. Mizzou Diversity, About Diversity at Mizzou, http://diversity.missouri.edu/about/mission-vision.php. 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.


191 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: http://medicine.osu.edu/students/diversity/ourdiversityvision/pages/index.aspx.
and qualified programs abroad.” 192 The commitment to 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, 45% 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. 193 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. 194 It appears that colleges are careful to craft programs that are, at least facially, Bakke compliant.

But colleges have now extended their commitment to ethnic diversity beyond the admissions process. As a high ranking administrator at Vanderbilt

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


194 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.
University stated, “We 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.”

To this end, universities employ, in the words of Cornell University, “novel approaches” to “improve campus culture and . . . demographic composition.”

Colleges no longer hope for diverse applicant pools. They now search for candidates that will enhance student body diversity.

2. Student Recruitment and Retention Programs

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

195 Douglas Christiansen, Vice Provost for University Enrollment Affairs and Dean of Admissions and Financial Aid, said: “We 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.” Diversity, http://admissions.vanderbilt.edu/life/diversity.php.

196 Cornell University, Diversity & Inclusion: Commitment to Inclusion, http://diversity.cornell.edu/commitment-to-inclusion: “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.”

Schools launch outreach and recruitment efforts across the nation, particularly the most prestigious institutions.  

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. The program organizes “on-campus and overnight visits, in addition to special information sessions and tours.” 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.” Some institutions believe that it can diversify campus demographics by assisting high school students prepare for standardized testing.

198 Id. at 27-28.
199 See Welcome to Educational Equity: Fostering Diversity and Inclusion at Penn State, http://equity.psu.edu/about:

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.

201 Id.
202 Id.
203 Columbia Undergraduate Admissions, Multicultural Recruitment Committee, https://undergrad.admissions.columbia.edu/learn/studentlife/diversity/mrc. 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.” Id.
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 5 days as they stay in residence halls and become acquainted with the opportunities the school has to offer them.  

Carnegie-Mellon University, as another example, provides a rigorous six-week summer academy for students considering careers in math, science, or engineering to build their “academic and personal skills” in preparing high school juniors and seniors for admission into selective colleges. Other institutions take its recruitment effort to the next level by establishing a physical presence in the communities it wishes to target.

The University of Michigan in Ann Arbor, for instance, established the Detroit Center in the city 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. Michigan’s Detroit Center is certainly 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. 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

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204 University of Arkansas, ACT Academy 2015, http://events.r20.constantcontact.com/register/event?oeidk=a07eaeerz0fd88b8c2f&llr=wehqt5nb
206 Detroit Center, http://detroitcenter.umich.edu/about.
207 Id.
partnerships” with colleges and universities that “encourage healthcare careers among diverse, underrepresented, underserved, socioeconomically challenged populations.” 208 The academy also exposes aspiring medical students to “health care through simulations, lectures, workshops, research and community service.” 209

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.” 210 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. 211

Universities have also institutionalized their retention plans in the form of special advising offices that are usually placed under the auspice of its multicultural office. For instance, the Office of Pluralism and Leadership at Dartmouth College 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. 212 These issues may pertain to social

209 Id.
210 Yale University: Cultural Connections, http://culturalconnections.yalecollege.yale.edu/
211 Id.
adjustment, financial aid, and even bias incidents on campus. 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 . . . .” Bridge programs aim to increase success rates among minority students by making them aware of the resources available to them. Colleges are not only concerned with

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.

Id. 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.

APS Physics Bridge Programs: Program Goals, http://www.apsbridgeprogram.org/about/goals.cfm. 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.” Id. 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.” APS Physics Bridge Programs: Bridge Sites, http://www.apsbridgeprogram.org/institutions/bridge/. 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. 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 Programs, Minority Engineering Program, https://www.udayton.edu/engineering/diversity/minority_engineering.php.

The Graduate School, University of Georgia, Pathways Programs: Gateway to Graduate School Bridge Program, http://grad.uga.edu/index.php/current-students/recruitment-diversity/programs-workshops/summer-bridge-program/:

The Summer Bridge program allows new incoming graduate students from historically underrepresented backgrounds to begin their graduate education at
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.

3. Diversity-Oriented Hiring Practices

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. These institutions have concluded that special efforts are required to attract minority academics, because there continues to be an underrepresentation of minority professors on their faculties.

There is a sense among administrators that minority faculty members face unique challenges and that such experiences can make a positive contribution to scholarship in a variety of disciplines.

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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 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.

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 http://www.med.upenn.edu/inclusion-and-diversity/faculty.html

See Harvard University, Office of the Senior Vice Provost, Faculty Development & Diversity, http://www.faculty.harvard.edu/diversity (“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.”).

Id.: There continues to be underrepresentation of U.S. ethnic and racial minorities in [the Harvard faculty], including African Americans, Hispanic/Latinos, Native Americans.
Skeptics could claim that administrators aim to achieve the right racial balance or mix on their faculties in order to promote the image of an elite institution. Many universities, however, do more than pay attention to the racial mix of their faculties. They also focus on the caliber of its instructors as well as the quality of teaching in the classroom. Colleges implement extensive plans to integrate diversity principles into the pedagogical methods of its instructors that attempt to materialize the claimed educational benefits that arise from classroom diversity.

One leading Big Ten College, 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. These techniques are aimed to facilitate the open exchange of ideas that are at the heart of the university’s mission. “Inclusive classrooms are classrooms in which instructors and students work together,” the Center for Research on Learning and Teaching explains.

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.

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, 539 U.S. at 355 (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, 557 U.S. at 596 (Alito, J., concurring).

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. Bakke, 438 U.S. at 323-324; Grutter, 539 U.S. at 336. 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.” Unmuting the Volume, supra note 65, at 1085; See Gratz, 539 U.S. at 284.

Teaching at the University of Michigan explained, “to create and sustain an environment in which everyone feels safe, supported, and encouraged to express her or his views and concerns.” To achieve this goal, instructors are encouraged, among other things, 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. More generally, instructors are told to employ techniques that insulate their teaching style from personal biases.

These biases create, the center claims, an atmosphere where troublesome “assumptions” burden student-teacher interaction, such as believing minority students are experts on their race or that white students are not interested or cannot provide insightful opinions on race. Free exchange between students is thus inhibited. As this section has shown, Bakke has 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 the decision. Diversity, in which race plays an important role, serves as an organizing principle which guides how universities compose their learning communities, construct their identities, and achieve their educational goals. Bakke has lead to the creation of the modern

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222 Center on Research on Learning and Teaching: Creating Inclusive College Classrooms, http://www.crlt.umich.edu/gsis/p3_1.
223 Id.
224 Id.
“diversity bureaucracy” at college campuses. 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.

225 Some commentators use the phrase “diversity bureaucracy” as a pejorative to criticize the millions of dollars spent each year by states on employees and administrators to operate multicultural offices; critics view these expenditures as wasteful. Heather MacDonald, Millions Wasted Chasing Phantom Racism, Sexism, Homophobia, ORANGE COUNTY REGISTER, Apr. 28, 2013, at H (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-racialpreferences/2011/11/29/gIQAbuPEO_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 cognization in constitutional law. It is strong evidence of how diversity has become engrained in the admission process and culture at college campuses. The constitutional significance of the “diversity bureaucracy” is explained in detail in the following footnote.

226 The wisdom behind the expenditures allocated to the diversity enterprise at college campuses is not legally relevant. But the existence of these bureaucratic systems factor heavily in any stare decisis calculus. Bakke inspired college administrators to implement intricate plans and allocate resources to organize state educational institutions around the diversity principle. Colleges across the nation hire employees and volunteers to staff major offices and committees to pursue diversity as an institutional mission. See Duke Cheston, UNC’S Diversity Bureaucracy, A Pope Center Survey Reveals that Diversity Offices in the UNC system took Few Hits in the Recent Recession, Jul. 29, 2012, http://www.popecenter.org/commentaries/article.html?id=2719 (reporting that the University of North Carolina system spends over $ 4 million annually on employee salaries to operate its “diversity bureaucracy.”) In this way, Bakke’s legacy is similar to landmark decisions like West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) and U.S. v. Carolene Prod’s., 304 U.S. 144 (1938). Those decisions buried Lochner’s economic substantive due process doctrine and gave Congress permission to expand the administrative state in the Post-New Deal Era. Similar to the impact Parrish and Carolene Products had on the growth of the Executive Branch, Bakke permitted colleges to implement administrative regimes devoted to maintain campus diversity with an emphasis on maintaining a meaningful representation of racial minorities.
While diversity officials facilitate some of these functions, many activities are products of grassroots efforts organized by student groups. 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.

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

This is doctrinally important since Fisher reaffirmed that strict scrutiny requires that lower courts must search into whether these educational benefits

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228 Id.
229 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. Unmating the Volume, supra note 65, 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.
manifest in practice, because “the mere recitation of a ‘benign’ or legitimate purpose for a racial classification is entitled to little or no weight.”

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.”

*Bakke* allowed experimentation with race in achieving educational benefits, but with clear guidelines to avoid impermissible usages of racial classifications. Part II C will explain 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.

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

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

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230 *Fisher*, 133 S. Ct. at 2421.

231 Auburn University, Office of Diversity and Multicultural Affairs, https://cws.auburn.edu/diversity/about.aspx; (“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. Diversity Operations Committee, http://diversity.tamu.edu/Diversity-Operations-Committee; *See also* University of Kentucky, Office for Institutional Diversity, http://www.uky.edu/Diversity/about.html (“[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.”).
discretion, providing parties with information to reasonably predict the trajectory of jurisprudence. 232 “A persistent goal in constitutional law,” one scholar wrote, “is to yield predictable results, to increase society's justified expectations . . . .”233 Precedent that establishes unworkable rules, on the other hand, spark years of litigation due in part to arbitrary line drawing that produce inconsistent results from case to case.234 Such decisions often result in intense debate among Justices and leave “[p]ersuasive criticism” in their wake. 235 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. 236 In Lynch v. Donnelly and County of Allegheny v. ACLU, the Court clarified the test lower courts must use to identify Establishment Clause violations.237 Those decisions instructed courts to strike down practices that it found as “endorsements” of religion if it made non-adherents feel like political “outsiders” and adherents feel like “insiders” or “favored members of the political community.” 238

234 Vieth v. Jubeiner, 541 U.S. 267 (2004) (reversing Davis v. Bandemer – 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 Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).
236 Lemon, 403 U.S. at 612.
237 Allegheny, 492 U.S. at 625 (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.’”).
However, the Court conceded that “endorsement,” as a doctrinal principle, was not “self-defining.” Justice O’Connor explained that review in this area involved “case-specific examinations” that required judges to consider the “unique circumstances” of each matter. Similar to tort law, reviewing courts engage in subjective-based reasoning to apply the endorsement test. 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.

The endorsement test made the doctrinal waters murkier, provoking more questions than answers. Some of these questions include the following: would this reasonable 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. Some Justices argue that reasonable person or observer standards offer no concrete way to define this fictional character in any consistent way, producing intolerable uncertainties that afford “a broad range of judicial choice . . . .”

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239 Allegheny, 492 U.S. at 593.
240 Id. at 623.
241 Id. at 631 (O’Connor, J., concurring) (“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.”); McCreary v. ACLU, 545 U.S. 844, 862 (2005) (“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.”).
In Allegheny, Justice Kennedy criticized the endorsement test as “flawed in its fundamentals and unworkable in practice.” 244 Justice Thomas assailed Lemon as “incapable of consistent application.” 245 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.” 246 “Inquiries into [legislative] motives or purposes,” Chief Justice Warren warned, “are a hazardous matter.” 247 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. 248 249

As a matter of fact, Justices complain that such inquiries provide little or no clear guidance on what specific pieces of history should be afforded more weight over others. 250 251 The point of this discussion on Lemon is not to prove that the test is unworkable and should be reconsidered by the Court. Lemon is

244 Allegheny, 492 U.S. at 669 (concurring in part and dissenting in part).
245 Van Orden, 545 U.S.  at 694 (Thomas, J, concurring).
248 Aguillard, 482 U.S. at 637-638 (Scalia, J., dissenting). In a thought-provoking dissent, Justice Scalia posited a litany of questions to illustrate the lack of guidance that arise 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.

249 McCreary, 545 U.S. at 863 (“Savvy officials [can] disguise[] their religious intent so cleverly that the objective observer just misses it.”).
250 Aguillard, 482 U.S. at 636 -637 (Scalia, dissenting); Blackman, supra note 233, at 407-409.
251 Bakke, 438 U.S. at 315.
discussed here to highlight Bakke’s strengths. Bakke does not have the same prudential problems as heavily criticized decisions.

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. 252 Thus, colleges cannot employ admission programs that make race the decisive factor in evaluating an applicant. 253 Justice Powell’s “race-only-as-one-factor” rule gives courts an unambiguous mandate to follow as they examine those programs that claim to be Bakke compliant but in reality make race the dominant category.

In Gratz, for example, the Court invalidated, 7 to 2, an undergraduate admissions program that allocated points to applicants based upon specified categories under a point system. Under that regime, 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 20 points or “one-fifth of the points needed to guarantee admission . . . .” 254 The Court found that the automatic distribution of 20 points to minority applicants prevented the sort of individualized assessment needed to determine if a particular applicant could contribute to campus diversity. In doing so, the mechanical allocation of 20

252 Id. at 316-317.
253 Gratz, 539 U.S. at 270.
points to an applicant solely on the basis of race made the factor decisive for “virtually every minimally qualified underrepresented minority applicant.”\textsuperscript{255}

The approach adopted in \textit{Gratz} demonstrates that \textit{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.\textsuperscript{256} \textit{Gratz’s} reasoning mirrors \textit{Bakke} in some ways. There, Justice Powell pointed to the expressed terms of the admissions program at the medical school, which reserved 16 out of 100 seats for minority applicants, to conclude that the program violated the Equal Protection Clause.\textsuperscript{257} Both \textit{Bakke} and \textit{Gratz} reveal that, at a minimum, courts can 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. \textit{Bakke’s} treatment of the narrow tailoring prong of strict scrutiny appears easy enough for courts to apply.\textsuperscript{258} \textsuperscript{259}

\textsuperscript{255}Id. at 272.  
\textsuperscript{256}Blackman, \textit{supra} note 233, at 363-364:

[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 . . . .

\textsuperscript{257}\textit{Bakke}, 438 U.S. at 275.  
\textsuperscript{258}But courts have disagreed on how to apply \textit{Bakke} in difficult cases. \textit{Compare Grutter v. Bollinger}, 137 F. Supp. 2d. 821, 851 (2001) (ruling that the Law School’s pursuit of a critical mass of underrepresented minorities was “indistinguishable from a straight quota system” and
In addition, affirmative action jurisprudence warns stakeholders on the kinds of programs that would set off constitutional red flags. As previously explained, *Gratz* held that programs that mechanically allocate points or numeric value to race can insulate applicants from competition against other applicants, making race decisive in the process.\(^{260}\) The analysis does not end here necessarily. In difficult cases, like *Grutter*, courts may examine evidence that is thus unconstitutional), and *Grutter v. Bollinger*, 288 F.3d 732, 747-748 (2002) (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 334-335. 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 335-336. 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. *Unmuting the Volume, supra* note 65, 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 288-289. 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.

\(^{259}\) Even if Justice O’Connor is correct that minimum goals for minority enrollment complies with *Bakke*, it does not mean that the evidence in *Grutter* exonerated administrators from the accusation that the admissions program, in practice, implemented a quota system. In a forceful dissent, Chief Justice Rehnquist pointed to admissions data from over a five-year period to prove that “[s]tripped of its ‘critical mass’ veil, [the program was ] . . . a naked effort to achieve racial balancing.” *Grutter*, 539 U.S. at 379 (Rehnquist, J., dissenting). He found a “tight correlation” between the percentage of admitted applicants who were members of underrepresented minorities and the percentage of persons in the law school’s applicant pool who were members of those groups. *Id.* at 385. These statistics revealed, according to the Chief Justice, “a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups.” *Id.* at 386. Justice O’Connor disagreed with his statistical analysis, because the number of minority students who decided to enroll in the school “substantially” differed from the number of members of those groups represented in the applicant pool. *Grutter*, 539 U.S. at 336. Despite the vigorous disagreement among the Justices on this point, it does not devalue the utility of *Bakke* in examining race-conscious programs. Current affirmative action jurisprudence still affords to courts and to stakeholders signposts to follow.

\(^{260}\) *Gratz*, 539 U.S. at 273-274.
beyond the four corners of the admission policy, as strict scrutiny review contemplates.  

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.” 262 Fisher reaffirmed basic precepts in the strict scrutiny canon. There, he 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.” 263 To that end, courts explore whether other race-neutral alternatives would produce the university’s interest. 264 If such alternatives exist, “then the university may not consider race.” 265 In future cases, courts may also employ admissions data to filter out impermissible motives. 266 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. 267

Bakke engendered reliance among stakeholders and provided workable principles to control affirmative action cases. Clearly 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

261 See Grutter, 539 U.S. at 379 (Rehnquist, C.J., dissenting) (arguing that admissions data from the Law School proved that the admissions program intended to achieve racial balancing).
263 Fisher, 133 S.Ct. at 2420.
264 Id.
265 Id.
266 Grutter, 539 U.S. at 379 (Rehnquist, C.J., dissenting).
267 Fisher, 133 S.Ct. at 2421.
of race relations in the wake of racial anxiety. 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. They argue that racial classifications present social dangers to our democracy and affirmative action jurisprudence should serve as a bulwark against it. This argument is worthy of response. The next section shows how a purely colorblind approach hinders this nation’s ability to raise above racial problems.

III. Why Following Bakke Strengthens 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 illegalize race-conscious activity within the states. I explain how statewide bans short-circuit the political process, which can provide the public with innovative ideas designed to improve race relations. I recognize, however,

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269 See Patterson, supra note 13.

270 Fisher, 133 S. Ct at 2422 (Thomas, J., concurring).
that moral outrage at color-conscious government activity is not totally without merit. Indeed, American history teaches us to be highly suspicious of government motives when it treats its citizens differently on the basis of race. 271

Both federal and state governments used race to establish a social order designed to subjugate racial minority groups. A white propertied aristocracy in the South invested its fortunes to protect its interest in race slavery; in the Jim Crow era, it regenerated through a system of color-conscious apartheid that deprived African-Americans of their fundamental rights. 272 273 However, the instant eradication of racial 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. 274 While the nation has made remarkable progress in race-relations through de jure desegregation, through the enactment of federal civil rights legislation, and through the election of its first person of color to the presidency, racial hostility

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271 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.”)

272 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).


[White supremacists recognized Plessy’s separate but equal doctrine] as a license to manipulate, 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.

274 Patterson, supra note 13.
remains pervasive. The post-Civil Rights Era has had sporadic episodes of racial violence.

The 1960’s 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. That tragedy sparked ethnic violence in nearly 110 cities. Regrettably, the modern era has experienced its share of unrest when racial animosities violently erupt in local communities, large or small, when an event triggers deeply held resentments. These events include the acquittal of four white police officers who were video-taped beating an unarmed black motorist, the planned march by a white supremacist group against claimed black gang activity, or the conviction of a white transit cop of a lesser charge in the shooting of an unarmed black man. 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 teen sparked multiple days of civil unrest when a grand jury decided to not indict the officer.

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The riot resulted in looters burning at least 25 buildings in the city’s business district. 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. 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. Worse still, a cottage industry of radio hosts, television personalities, and even politicians now specialize in manufacturing ethnic conflict by injecting divisive

279 Id.
281 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 Yee 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/giuliani-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 72 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!

speech into political discourse. This dynamic is not limited to any political ideology or party.  282

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 a full menu of speakers, from across the political spectrum, who weigh into certain controversies as an occasion to engage in “identity politics.”  283 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 range from a double-murder trial of a former football player to an arrest of a black professor from Harvard by a white police officer to three white, lacrosse players from Duke University accused of raping a black


283 Simon, supra note 33, at 136.
escort and a tragic shooting of an unarmed black teen by a Latino neighborhood watchmen. 284 285 286 287 These events inspire people of goodwill to question how this nation can receive relief from persistent racial bitterness. People of goodwill 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. 288 Total government neutrality with respect to race – they conclude – is the best antidote to remedy the lingering effects of slavery and discrimination. 289 A purely colorblind approach, these theorists contend, “ensures that policy deliberations are not infected with either racial stereotyping or racial politics.” 290 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.’” 291 In order to achieve racial harmony, colorblind purists propose that the federal and state constitutions should prohibit government decision-makers from considering

288 Adarand, 515 U.S. at 241 (Thomas, J., concurring).
289 Parents Involved, 551 U.S. at 747.
290 Unmuting the Volume, supra note 65, at 1050.
291 Simon, supra note 33, at 136.
race as a basis for dispensing benefits or privileges. The movement toward strict racial neutrality has gained popularity in the country, with some surveys showing the public strongly opposed to racial preferences.

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. 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.

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292 Grutter, 539 U.S. at 357 (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.”).


295 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 U.S. 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 who feel harmed by programs that favor minorities. 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
Examine the statistics provided in Appendix B, which support this conclusion. Racially inspired hate crime statistics reported in California by the Federal Bureau of Investigation generally and on its college campuses specifically illustrate the point.

In 1996, California voters approved the nation’s first statewide ban on government institutions, like colleges, from considering race in its decision-making processes. In 2012, 48.3% of hate crimes reported in the United States were racially motivated and approximately nine percent of those incidents occurred on a school or college campus.\textsuperscript{296} California fared somewhat worse than the national average. In that same year, 56.8% of all hate crimes in California were motivated by race with over 10% of those cases occurring in schools or college campuses.\textsuperscript{297} The statistics in California, as well as the findings presented in Appendix B, suggest that the claimed benefits from a strictly colorblind approach are dubious and that the moral outrage against race conscious activity is without much empirical support. Moral outrage alone is not enough to combat racism. Colleges must be empowered to address race directly, because racism still burdens the social climate on campuses.

College campuses in states that ban affirmative action, much like other colleges across the country, experience racial incidents that arrest public


attention and contribute to the verbal lexicon on race, unearth 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 dress and create online posts that use so-called African-American vernacular, or Ebonics, to parody “black culture.”

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. When this conduct becomes the subject of public scrutiny, college administrators are expected to respond to the immediate controversy, formulating strategies that can identify root causes and implement solutions to address them.

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 that finds that the claimed educational benefits that arise from student body diversity are inhibited by a social phenomenon where students segregate themselves along racial lines. In this environment, racial tensions are easily heightened because racial groups are alienated from one another outside the classroom. While studies suggest that black students perform better academically when they live with black roommates or participant 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.

Alienation, not always familiarity, breeds contempt. Self-segregation leads to “polarization among racial groups.” 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

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301 Unmuting the Volume, supra note 65, at 1076-1081 (identifying university-sponsored programs or activities that encourage students to voluntarily self-segregate along racial lines with respect to social interactions and housing choices); Michael Bocian, Housing on College Campuses: Self-Segregation, Integration, and Other Alternatives 4-5 A COMMUNITARIAN REPORT (1997) (explaining that those who advance an integrationist model towards campus life believe that programs that encourage racial separatism have the “negative consequence of tribalizing society” and “amplifies racial divisions and tension.”); 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 interactions 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).


303 See Bocian, supra note 301, at 5 (citing to integrationist theorists who contend that self-segregation creates “‘racial 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).

304 Id. at 5.
interactions outside the classroom, lack the social skills needed to solve racial problems. 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. 305 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.” 306 Racial isolation does not only limit opportunities for 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. 307 Social pockets on campus characterized by race can be intellectually restrictive, particularly for minorities. The free expression and exploration of ideas, which is the hallmark of higher education, can be a potentially rare experience for minority students. Because minority participation takes place in small and insular communities on campus, conversations occur in an echo chamber where groupthink is internally policed. 308 “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

306 Id. at 5.
307 Bocian, supra note 301, at 5.
308 Unmuting the Volume, supra note 65, at 1079 n. 392.
if they dare stray from group orthodoxy.”  

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. 

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. 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,” like breaking down racial stereotypes and creating an environment that provides the opportunity for

309 Id. at 1080.
310 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 a MSNBC commentator labeled an African-American politician as a race traitor for supporting a political party, which is not supported by the majority of black Americans. Toure: Arthur Davis is like ‘Judas in a Suit’, Aug. 20, 2012, http://video.msnbc.msn.com/thecycle/48728988/#48728988. (disparaging former Democratic Congressman Artur 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.”).
311 Grutter, 539 U.S. at 393 (Kennedy, J., dissenting).
‘livelier, more spirited’ classroom discussion when campus demographics reflect ‘the greatest possible variety of backgrounds.’ 312 Since Fisher 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. These institutions may consider some of the following race-conscious or race-neutral proposals developed by scholars designed to increase campus diversity:

• **Student-Led Race-Conscious Admission Programs and Diversity-Oriented Learning Communities:** colleges may establish “an experimental residential college, created to establish learning communities and set pedagogical goals around racial awareness . . .” 313 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.” 314 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. 315 “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.” 316 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. 317

• **Race-Conscious Financial Aid Programs:** an offer of admission into a college or university may not be enough to induce a student

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312 *Id.* at 330.
313 *Unmuting the Volume, supra* note 65, at 1081.
314 *Id.* at 1084.
315 *Id.*
316 *Id.* at 1087.
317 *See Id.*
with “diversity-enhancing characteristics” to enroll; \textsuperscript{318} therefore, “[t]he further inducement of financial aid based on the applicant's value may be both necessary and desirable.”\textsuperscript{319} To remain Bakke complaint, 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.”\textsuperscript{320} 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, “In this way, achieving . . . [meaningful minority representation] is as much a factor of financial aid as it is a factor of admission.”\textsuperscript{321}

- **Diversity-Oriented Scholarships**: Universities have implemented race or diversity-conscious scholarship programs that follow Bakke as well. For instance, Vanderbilt University has the Chancellor’s Scholarship, which identifies applicants with a “deep-seated commitment to diversity and social justice.”\textsuperscript{322} Scholarship recipients are 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.”\textsuperscript{323}

- **Diversity-Conscious Certification Programs**: 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.\textsuperscript{324} Such programs can serve as

\textsuperscript{319} *Id.* at 525.
\textsuperscript{320} *Id.* at 526-527.
\textsuperscript{321} *Id.* at 528.
\textsuperscript{322} Vanderbilt University, Merit Scholarship Opportunities: Chancellor’s Scholars, http://www.vanderbilt.edu/scholarships/chancellor.php.
\textsuperscript{323} *Id.*
\textsuperscript{324} See generally MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, EARN YOUR UNDERGRADUATE AND LAW DEGREE IN SIX YEAR: 3 + 3 LEGAL EDUCATION ADMISSION PROGRAM, https://www.law.msu.edu/admissions/GVSULEAPoliSci.pdf. Graduate schools,
pipelines for underrepresented minorities to attain admission into elite universities, particularly if the program partners with schools with majority-minority student bodies.

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.  

Nor should the Court afford state actors 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.\textsuperscript{326} 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.

\footnotesize{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); Gregg v. Georgia, 428 U.S. 153 (1976) (holding that states can impose death penalty provided it afforded certain procedural guarantees); 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); 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.”). If the people can 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. Schuette, though, does not conflict with Bakke. In Schuette, 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.” Schuette, 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.  

\textsuperscript{326} Fisher, 133 S.Ct. at 2422 (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); 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.”).}
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 dream of racial tranquility is on the line.  

In recent years, some have opted to voice heated rhetoric over the radio waves or television shows, to engage in angry protests, or, worse still, to riot in the streets. *Bakke* provides the way forward for current, and later generations, to discover new ways to encourage interracial dialogue that will combat stereotypes and the bigoted ideologies that support them.

The judiciary must exercise restraint, however. Judicial restraint reinforces stare decisis principles and ensures that judges allow democratic institutions to develop solutions to address problems that they are better suited to resolve. Race is such a problem in the area of higher education. Justice Powell recognized that colleges and universities occupy a special niche in the nation’s First Amendment traditions, which grant these institutions an interest in diversity; administrators are permitted to consider an array of factors, including race, to compose learning communities that will produce the exchange of ideas on campus. It does not matter that Justice Powell’s opinion was correct on the merits. The opinion is now firmly entrenched in both Free Speech and Equal Protection doctrines.

The decision engendered institutional reliance among the nation’s leading colleges. States invest millions of dollars each year to operate diversity

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bureaucracies that implement programs designed to maintain diversity. Student groups cultivate a culture in which they organize events to foster social cohesion among minority students. Diversity is now integral to the educational mission and identity of colleges and universities, reversing the decision would cause 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. The costs of reversing *Bakke* outweigh the benefits. The opinion has proven workable over the last 40 years. It offers clear guidance to lower courts in how to identify practices that make race the predominant factor when considering applicants for admission. Nevertheless, colorblind purists and race-conscious ideologues aim to change affirmative action jurisprudence, although they have not made a case against *Bakke* on stare decisis grounds.

The Court must resist the temptation to constitutionalize its preferred theory on race. Colorblind purists would disregard well-established and workable doctrine, though. Whenever the Court jettisoned basic legal principles to implement its race theory on society, it has led to disastrous results. Our country’s history of race slavery, race apartheid, and race based exclusion for claimed military necessity are regrettable reminders.\(^{328}\) \(^{329}\) \(^{330}\) Those decisions

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\(^{328}\) *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding that blacks are not U.S. citizens), *rev’d*, U.S. CONST. amend. XIV, §1 (1868) (“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.”).


\(^{330}\) *Korematsu v. U.S.*, 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).
show that when the Court weighs into the political thicket it exacerbates ideological disagreements. “[B]y foreclosing all democratic outlet for the deep passions this issue arouses,” Justice Scalia wrote in *Casey*, “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.” 

I strongly agree; however, I wish that those Justices who preach from the pulpit of judicial restraint on cultural issues, like abortion or gay rights, would practice what they preach on race.  

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331 *Casey*, 505 U.S. at 1002 (Scalia, J., dissenting).

332 *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.”).


When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins -- and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn. How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: ‘assurance of the employer's willingness’ to hire homosexuals . . . This law-school view of what ‘prejudices’ must be stamped out may be contrasted with the more plebeian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws, and which took the pains to exclude them specifically from the Americans with Disabilities Act of 1990. (citations omitted).


[T]he Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. [Criminalizing private, consensual homosexual intimacy] is well within the range of traditional democratic action, and [the States'] hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change. It is indeed true that “later generations can see that laws once thought necessary and proper in fact serve only to oppress,” and when that happens, later generations can
Race-conscious admission programs are deeply rooted in the Court’s affirmative action jurisprudence. Bakke is entitled to deference under the doctrine of stare decisis. A national 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 elites. The Court should, therefore, replay its doctrinal symphony in this area. It will encourage society to sit at the “table of brotherhood” and strike the cord of racial harmony.

334 See King, supra note 327.
## Appendix A

<table>
<thead>
<tr>
<th>University</th>
<th>Mission Statement</th>
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<tbody>
<tr>
<td>Indiana University</td>
<td>“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.”³³⁵</td>
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<tr>
<td>University of Illinois Urbana-Champaign</td>
<td>“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”³³⁶</td>
</tr>
<tr>
<td>University of Maryland</td>
<td>“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”³³⁷</td>
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<tr>
<td>University of Nebraska</td>
<td>Core Values: “Diversity of ideas and people”³³⁸</td>
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<tr>
<td>Mississippi State University</td>
<td>“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.”³³⁹</td>
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<tr>
<td>University of Tennessee</td>
<td>“But diversity means more than race and ethnicity; it’s about moving beyond just tolerance to a place of</td>
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³³⁸ University of Nebraska Lincoln Core Values, http://www.unl.edu/aboutunl/roleandmission.shtml.
³³⁹ Mississippi State University Diversity Statement, http://www.oidi.msstate.edu/diversity/.
understanding. Approaching differences in political views, religion, gender identity, values, age, abilities, and sexual orientation with an open mind helps get us there.”  

<table>
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<tr>
<th>University of Iowa</th>
<th>“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.”</th>
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<tr>
<td>Harvard University</td>
<td>“Mission is advancing inclusion, diversity and equal opportunity”</td>
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<tr>
<td>Purdue University</td>
<td>“Diversity Achieving it within our faculty, staff, and student body is one of Purdue Engineering's foremost initiatives.”</td>
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<tr>
<td>Dartmouth University</td>
<td>“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.”</td>
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<tr>
<td>Princeton University</td>
<td>&quot;Having a diversity of perspectives is crucial for excelling in our mission of teaching and research.”</td>
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<tr>
<td>Cornell University</td>
<td>“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—this keeps us at the</td>
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<td>University</td>
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<tr>
<td>Columbia University</td>
<td>“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.”</td>
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<tr>
<td>Brown University</td>
<td>“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.”</td>
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<tr>
<td>Yale University</td>
<td>“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.”</td>
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<tr>
<td>University of Pennsylvania</td>
<td>“Understanding and appreciating diversity is fundamental to success in today’s world and one of Penn’s most important priorities.”</td>
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<tr>
<td>Auburn University</td>
<td>“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.”</td>
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<td>University of Georgia</td>
<td>“The mission of the Office of Institutional Diversity (OID) is to lead a focused institutional effort to evaluate existing programs and develop new...”</td>
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<th>Institution</th>
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<tr>
<td>Louisiana State University</td>
<td>“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.”</td>
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<tr>
<td>University of Arkansas</td>
<td>“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.”</td>
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<tr>
<td>University of Florida</td>
<td>“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.”</td>
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<tr>
<td>Texas A&amp;M University</td>
<td>“To fulfill its multiple missions as an institution of higher learning, Texas A&amp;M encourages a climate that values and nurtures collegiality, diversity, pluralism and the uniqueness of the individual within our state, nation and world.”</td>
</tr>
<tr>
<td>Vanderbilt University</td>
<td>&quot;Vanderbilt is about striving for excellence. Diversity of backgrounds,</td>
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<th>University</th>
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<tr>
<td>University of South Carolina</td>
<td>“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.”</td>
</tr>
<tr>
<td>University of Mississippi</td>
<td>“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.”</td>
</tr>
<tr>
<td>University of Kentucky</td>
<td>“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.”</td>
</tr>
<tr>
<td>University of Missouri</td>
<td>“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 collaborative partnerships,</td>
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358 University of South Carolina Diversity Statement, https://sc.edu/eop/diversity.pdf.
leadership, expertise, and resources to further MU's strategic goals.”\textsuperscript{361}

\textsuperscript{361} University of Missouri Diversity Statement, http://diversity.missouri.edu/about/mission-vision.php.
APPENDIX B

DO COLLEGE CAMPUSES THAT BAN RACE CONSCIOUS AFFIRMATIVE ACTION PROGRAMS HAVE BETTER RACIAL CLIMATES THAN CAMPUSES WITH RACE-CONSCIOUS ADMISSION PROGRAMS?

I. 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. At least five Justices adopt a race-neutral approach to interpreting the Equal Protection Clause. But there are at least two, or maybe four, Justices who would dispense with Bakke entirely and apply a strictly colorblind approach to evaluating admission policies. 362 The genesis of the colorblind constitution theory can be traced to the lone dissenting opinion in Plessy v. Ferguson where Justice Harlan declared that: “Our Constitution is color-blind and neither knows nor tolerates classes among citizens.” 363 The theory is informed by an exegetical analysis of the Fourteenth Amendment. 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,” he wrote, “are likely to

362 See supra note at 33.
363 Plessy, 163 U.S. at 559 (Harlan, J., dissenting).
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.” 364 Such a view is echoed by Philosophy Professor Carl Cohen of the University of Michigan, who remarked in regards 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 you did hear from time to time in the old days.” 365 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 1996.366

Colorblind purists now have eight states where their theory on race relations has been adopted as law. 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

364 Bakke, 438 U.S. at 295 n. 34 (Powell, J., concurring).
there is a significant difference in racial tensions between campuses that implement race-based admission programs from campuses that ban them.\textsuperscript{367}

Measuring racial prejudice is a challenging task for 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.\textsuperscript{368}

\textbf{II. 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 of Postsecondary Education of the Department of Education.\textsuperscript{369} 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. Since certain criminal reports were processed by campus security, which is supervised by the university instead of the government, the reported

\textsuperscript{368} Rebecca Stotzer and Emily Hossellman, \textit{Hate Crime on Campus: Racial/Ethnic Diversity and Campus Safety}, 27 \textit{JOURNAL OF INTERPERSONAL VIOLENCE} 644, 648 (2011), available at 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 ethnoviolence’” are the clearest depiction of the “relationships between groups in the community and the level of tension between those groups.” \textit{Id.}
numbers differ from those reported in the FBI Uniform Crime Report. 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.  

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. 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.”

370 See charts below on pages 104-105.
371 See generally U.S. Dep’t of Educ., Office of Post Secondary Educ., The Campus Safety and Security Data Analysis Cutting Tools, Glossary of Terms, http://ope.ed.gov/security/glossaryPopup.aspx (follow “O” hyperlink) (hereinafter “Glossary of Terms”). 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 “is 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).

372 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 AND TRAINING GUIDE FOR HATE CRIME DATA COLLECTION
Let us now turn to 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 format in that year. 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. Beginning in 2009 until 2013, we then totaled all racially motivated crimes from the available data for hate crimes occurring "on campus", in "on-campus student housing facilities", in "noncampus" locations, and on "public property".  


P r i o r  t o  2 0 0 9 ,  t h e  D e p a r t m e n t  d i d  n o t  s e p a r a t e l y  r e c o g n i z e  s i m p l e  a s s a u l t ,  l a r c e n y , 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.

U.S. Dep’t of Educ., Office of Post Secondary Educ., The Campus Safety and Security Data Analysis Cutting Tools, Download data for a group of campuses, http://ope.ed.gov/security/GetDownloadSelectedData.aspx (follow “Institution State or Outlying Area” field; then follow “Type of Institution” field)

The department classified racially motivated hate crimes in the following categories (as indicated on the downloaded excell sheet) “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 supra note 372.

See generally Glossary of Terms, supra note at 371, http://ope.ed.gov/security/glossaryPopup.aspx (follow “O” hyperlink) (hereinafter “Glossary of Terms”). 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 “is 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).
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. 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). 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.

The Appendix organizes the metric in charts, so that the data is provided in a reader-friendly format.

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377 See chart below on pages 104-105. 378 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. Please consult the charts on page x that present the average number of hate crimes per 10,000 students for states that allow affirmative action and those that do not. 379 See U.S. Dep’t of Educ., Office of Post Secondary Educ., The Campus Safety and Security Data Analysis Cutting Tools, Download data for a group of campuses, http://ope.ed.gov/security/GetDownloadSelectedData.aspx (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 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 IV 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. 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.

we then totaled the enrollments for each public-4 year institution to attain the student population 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 U.S. Dep’t of Educ., Office of Post Secondary Educ., The Campus Safety and Security Data Analysis Cutting Tools, Download data for a group of campuses, http://ope.ed.gov/security/GetAggregatedData.aspx.
### III. FINDINGS

#### States that Ban Affirmative Action

<table>
<thead>
<tr>
<th>State</th>
<th>Average Hate Crimes Per Year 2009-2013</th>
<th>Student Population</th>
<th>Average Number of Hate Crimes Per 10,000 Students Per Year</th>
</tr>
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<tbody>
<tr>
<td>Arizona</td>
<td>3.4</td>
<td>135,141</td>
<td>0.251589081</td>
</tr>
<tr>
<td>California</td>
<td>49.4</td>
<td>6,778,966</td>
<td>0.072872471</td>
</tr>
<tr>
<td>Florida</td>
<td>6.2</td>
<td>637,797</td>
<td>0.097209614</td>
</tr>
<tr>
<td>Michigan</td>
<td>9.6</td>
<td>305,454</td>
<td>0.314286276</td>
</tr>
<tr>
<td>Nebraska</td>
<td>2.4</td>
<td>59,389</td>
<td>0.40411524</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>2.8</td>
<td>28,056</td>
<td>0.998003992</td>
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<tr>
<td>Oklahoma</td>
<td>3</td>
<td>102,796</td>
<td>0.291840149</td>
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<tr>
<td>Washington</td>
<td>4.8</td>
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<tr>
<td>Total</td>
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<td>8,227,494</td>
<td>0.099179653</td>
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#### States that Allow Affirmative Action

<table>
<thead>
<tr>
<th>State</th>
<th>Average Number of Hate Crimes Per Year 2009-2013</th>
<th>Student Population</th>
<th>Number of Hate Crimes per 10,000 Students Per Year</th>
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</thead>
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<td>Alabama</td>
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<tr>
<td>Alaska</td>
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<td>0.221990366</td>
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<td>Arkansas</td>
<td>1.2</td>
<td>97,705</td>
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<td>Colorado</td>
<td>6.2</td>
<td>173,441</td>
<td>0.357470264</td>
</tr>
<tr>
<td>Connecticut</td>
<td>4.2</td>
<td>65,039</td>
<td>0.645766386</td>
</tr>
<tr>
<td>Delaware</td>
<td>0</td>
<td>26,502</td>
<td>0</td>
</tr>
<tr>
<td>Georgia</td>
<td>3.2</td>
<td>308,650</td>
<td>0.103677304</td>
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<tr>
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<td>Indiana</td>
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<td>Iowa</td>
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<td>Kansas</td>
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<td>Kentucky</td>
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<td>Maine</td>
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<tr>
<td>States</td>
<td>%</td>
<td>Students</td>
<td>Hate Crimes</td>
</tr>
<tr>
<td>---------------</td>
<td>-------</td>
<td>----------</td>
<td>-------------</td>
</tr>
<tr>
<td>Maryland</td>
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<tr>
<td>Massachusetts</td>
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<td>0.193717108</td>
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<tr>
<td>Minnesota</td>
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<td>136,044</td>
<td>0.86736644</td>
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<tr>
<td>Mississippi</td>
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<td>79,708</td>
<td>0</td>
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<tr>
<td>Missouri</td>
<td>4.4</td>
<td>149,329</td>
<td>0.294651407</td>
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<tr>
<td>Montana</td>
<td>0.6</td>
<td>39,145</td>
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<td>Nevada</td>
<td>0.8</td>
<td>91,334</td>
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</tr>
<tr>
<td>New Hampshire</td>
<td>1.6</td>
<td>28,056</td>
<td>0.570287995</td>
</tr>
<tr>
<td>New Jersey</td>
<td>16.6</td>
<td>192,214</td>
<td>0.863620756</td>
</tr>
<tr>
<td>New Mexico</td>
<td>1</td>
<td>64,647</td>
<td>0.154686219</td>
</tr>
<tr>
<td>New York</td>
<td>27.6</td>
<td>356,939</td>
<td>0.773241366</td>
</tr>
<tr>
<td>North Carolina</td>
<td>2.8</td>
<td>220,120</td>
<td>0.127203344</td>
</tr>
<tr>
<td>North Dakota</td>
<td>7.2</td>
<td>41,729</td>
<td>1.725418774</td>
</tr>
<tr>
<td>Ohio</td>
<td>0</td>
<td>282,518</td>
<td>0</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>0.8</td>
<td>102,796</td>
<td>0.07782404</td>
</tr>
<tr>
<td>Oregon</td>
<td>1.6</td>
<td>105,140</td>
<td>0.152178048</td>
</tr>
<tr>
<td>Pennsylvania</td>
<td>20.4</td>
<td>270,915</td>
<td>0.75300371</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>3</td>
<td>25,087</td>
<td>1.195838482</td>
</tr>
<tr>
<td>South Carolina</td>
<td>3.6</td>
<td>107,733</td>
<td>1.195838482</td>
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<td>South Dakota</td>
<td>4.2</td>
<td>38,027</td>
<td>1.104478397</td>
</tr>
<tr>
<td>Tennessee</td>
<td>3</td>
<td>139,579</td>
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<tr>
<td>Texas</td>
<td>5</td>
<td>567,626</td>
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<tr>
<td>Utah</td>
<td>0.4</td>
<td>148,417</td>
<td>0.026951091</td>
</tr>
<tr>
<td>Vermont</td>
<td>0.4</td>
<td>19,652</td>
<td>0.203541624</td>
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<tr>
<td>Virginia</td>
<td>3.4</td>
<td>215,370</td>
<td>0.157867855</td>
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<tr>
<td>West Virginia</td>
<td>10.4</td>
<td>70,303</td>
<td>1.479310982</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>15.8</td>
<td>180,618</td>
<td>0.874774386</td>
</tr>
<tr>
<td>Wyoming</td>
<td>0</td>
<td>12,778</td>
<td>0</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>213.8</strong></td>
<td><strong>5,792,580</strong></td>
<td><strong>0.099179653</strong></td>
</tr>
</tbody>
</table>

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.
IV. 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. That year 7.1% of the student population was African American. In 2014, the university reported that only 4% of the student body was black. 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. In 2006, 8.8% of freshman class was black; the percentage of black freshman at State fell to 7.5% in 2013.

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. While scholars disagree over whether the presence of racial minorities in significant numbers catalyzes or reduces racial tensions on college

381 Stotzer and Hossellman, supra note 68.
campuses, that discussion may not fully explain why non-affirmative action campuses have slightly less hate crimes.\textsuperscript{383} 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. 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**

<table>
<thead>
<tr>
<th>State</th>
<th>Average Hate Crimes Per Year 2009-2013</th>
<th>Student Population</th>
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<td>Nebraska</td>
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</tr>
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<td>New Hampshire</td>
<td>2.8</td>
<td>28,056</td>
<td>0.998003992</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>3</td>
<td>102,796</td>
<td>0.291840149</td>
</tr>
<tr>
<td>Washington</td>
<td>4.8</td>
<td>179,895</td>
<td>0.266822313</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>28.2</strong></td>
<td><strong>1,448,528</strong></td>
<td><strong>0.194680393</strong></td>
</tr>
</tbody>
</table>

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.

\textsuperscript{383} See Stotzer and Hossellman, supra note 368, at 647-650; 654-657 (explaining the competing viewpoints on the effects that diversity has on racially motivated hate crimes on college campuses).
action campuses, when California is taken out of the calculus, affirmative action campuses have only 1.90 times more hate crimes than non-affirmative action campuses.

V. 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.  

With California factored into the equation, a non-affirmative action university with an undergraduate program of approximately 20,000 students can

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384 From 2009-2013, California campuses experience 0.072872471 hate crimes per 10,000 students while other non-affirmative action campuses in other states experienced 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 charts on States that Ban Affirmative Action and on States that Ban Affirmative Action without California.
expect to experience a hate crime roughly once every five years over a twenty year period. 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. 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

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385 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 only produce student populations with only a few thousand students. Facts About Brown, http://www.brown.edu/about/facts (citing that Brown University had 6264 undergraduates in 2014); Yale “Factsheet”, 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. About Florida State,https://www.fsu.edu/about/students.html (reporting that approximately 31,000 undergraduate students were enrolled at the university in 2010); Indiana University, 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. M Office of the Registrar, 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); University Facts: Cornell by the Numbers, https://www.cornell.edu/about/facts.cfm (reporting that Cornell had 14,393 undergraduate students); Auburn University: Enrollment Statistics, http://bulletin.auburn.edu /generalinformation/enrollmentstatistics/#all (25,912 undergraduate students at Auburn in Fall 2014); we chose 20,000 as the most typical size for a fairly, large undergraduate population.

386 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 20 year time 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 x 2 x 20 = 3.96. See chart on States that Ban Affirmative Action. In practical terms, on average non-affirmative action campuses have a hate crime one every five years during a 20 year time period.

387 Using the formula explained in supra note 386, we found the average number of hate crimes per 10,000 students on affirmative action campuses in a 20 year timeframe: 0.369092874 x 2 x 20 = 14.76. See chart on States that Allow Affirmative Action.
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.  

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. 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.

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

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388 As indicated in supra note 386, non-affirmative action campuses experience 3.96 hate crimes over a 20 year period or roughly one hate crime every five years. When California is not factored into the calculation, non-affirmative action campuses experience 7.797 or about 8 hate crimes during period. These campuses thus experience at least one every two and a half years. See Chart that Ban Affirmative Action without California.

389 See supra notes 387. 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.

390 Grutter, 539 U.S. at 330 (citing to research that found that campus diversity creates vibrant classroom interaction among students and improves overall racial health); Stotzer and Hossellman, supra note 368, at 654.
the victim, but also to members of the broader community.” 391 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.” 392 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. 393 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. 394 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,

392 Id. at 1890.
393 Id. at 1874-1875.
the assertion that racial preferences increases ethnic resentment appears to be based more on heated, moral objections than research. 395 Because purely colorblind approaches to 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.

395 The claim that affirmative action causes many citizens to feel wronged by racial preferences has some merit. 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 based solely on their own conduct. U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States.”); Id. at art. I, § 10, cl. 1 (No State shall . . . grant any Title of Nobility.”); Id. at art. IV, § 4 (The United States shall guarantee to every State in this Union a Republican Form of Government.”); Id. at art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); Id. at art. III, § 3, cl. 2 (“[N]o Attainder of Treason shall work Corruption of Blood.”); See Adarand, 515 U.S. at 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.