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## HIDDEN IN PLAIN SIGHT: A MORE COMPELLING CASE FOR DIVERSITY

Jonathan P. Feingold\*

### *Abstract*

*For four decades, the diversity rationale has offered a lifeline to affirmative action in higher education. Yet even after forty years, this critical feature of equal protection doctrine remains constitutionally insecure and politically fraught. Legal challenges persist, the Justice Department has launched a new assault on affirmative action, and a rightward shift on the Supreme Court could usher in an era of increased hostility toward the concept of diversity itself. The future of race-conscious admissions may hang in the balance.*

*In this Article, I contend that the diversity rationale's present fragility rests, in part, on its defenders' failure to center diversity's most compelling quality: its ability to promote personal equality within the university. To fill this void, this Article advances the first comprehensive case for diversity rooted in each student's interest in an equal opportunity to enjoy, regardless of race, the full benefits of university membership. This framing is appealing, in part, because it makes salient the present and personal equality harms that students of color suffer when severely under-represented in predominately white institutions. Race-conscious admissions, in turn, emerge as an essential component of institutional efforts to further normative commitments—ranging from racial integration to individual meritocracy—that should resonate with Justices across the ideological spectrum.*

*To support this new framing, I resurrect the Supreme Court's pre-Brown desegregation cases. These decisions reinforce the constitutional infirmity of institutional conditions that compromise a student's ability, because of her race, to access the full benefits of university membership. I then bridge the theory to social science that reveals how environmental cues—including racial demographics—can exact concrete and quantifiable burdens on students from negatively stereotyped groups. Although well-traveled in other domains, this research has only begun to inform legal scholarship.*

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## INTRODUCTION

*[T]he Committee on Admissions is aware that there is some relationship between . . . numbers and providing a reasonable environment for those [black] students admitted.*

– Harvard College Admissions Program (1977)<sup>1</sup>

*I had been trying hard to fit in with the rest of my classmates and to get them to see me as more than just “the Black man in the class.”*

– Marky Keaton, UCLA School of Law (2003)<sup>2</sup>

*[W]orries about belonging and potential are pernicious precisely because they arise from awareness of real social disadvantage before and during college, including . . . awareness of . . . numeric underrepresentation.*

– David S. Yeager et al., Psychologist, UT–Austin (2016)<sup>3</sup>

For four decades, amid a largely successful assault on affirmative action, the “diversity rationale” has offered a lifeline to race-conscious admissions in higher education.<sup>4</sup> For those interested in forty more years, the U.S. Supreme Court’s 2016 decision in *Fisher II*<sup>5</sup> came as a welcome surprise.<sup>6</sup> Following eight years of

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<sup>1</sup> Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978) (Powell, J.) (quoting the Harvard College Admissions Program).

<sup>2</sup> Brief of UCLA School of Law Students of Color as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554405, at \*8 (quoting Marky Keaton’s testimony regarding his experience at UCLA School of Law following the passage of Proposition 209, which effectively ended affirmative action in California) [hereinafter UCLA Law Students Brief].

<sup>3</sup> David S. Yeager et al., *Teaching a Lay Theory Before College Narrows Achievement Gaps at Scale*, 113 (24) PROC. OF THE NAT’L ACAD. OF SCI. E3341, E3347 (2016) (describing the psychological harms that underrepresented students of color often confront in college settings).

<sup>4</sup> See *Bakke*, 438 U.S. at 265; see also Grutter v. Bollinger, 539 U.S. 306, 325 (2003); Fisher v. Univ. of Tex. at Austin (*Fisher I*), 570 U.S. 297, 307 (2013). A university could theoretically justify race-conscious admissions as necessary to remedy specific instances of discrimination attributable to the university. See *Bakke*, 438 U.S. at 307–09; see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 496 (1989). As a practical matter, this argument is rarely available.

<sup>5</sup> Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016).

<sup>6</sup> See Mario L. Barnes et al., *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 271, 283–84 (2015) (“Based on the Court’s opinion in [*Fisher I*] . . . we may not have to wait until 2028 for a new determination on the efficacy of affirmative action.”); see also William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving “Elite” College Students*, 89 CALIF. L. REV. 1055, 1120 (2001) (“[T]he diversity rationale for affirmative action may soon be rejected or curtailed by the Supreme Court.”).

litigation,<sup>7</sup> the Supreme Court upheld the University of Texas's race-conscious admissions program. In so doing, the Supreme Court reaffirmed the diversity rationale's status as settled constitutional doctrine.<sup>8</sup> Within months of the decision, Justice Ginsburg went so far as to predict that the Supreme Court had heard its last case on affirmative action in education.<sup>9</sup>

This pronouncement already appears pre-mature. Litigants continue to attack the diversity rationale's constitutional mooring in cases that appear destined for the Supreme Court;<sup>10</sup> the Justice Department has opened a renewed assault on race-

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<sup>7</sup> Plaintiff Abigail Fisher filed suit on April 7, 2008. See *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 570 U.S. 297 (2013), and *aff'd*, 758 F.3d 633 (5th Cir. 2014).

<sup>8</sup> See Elise C. Boddie, *The Future of Affirmative Action*, 130 HARV. L. REV. F. 38, 39 (2016) (“[*Fisher II*] . . . reinforces the legitimacy of the diversity rationale for affirmative action in higher education and, therefore, underscores a principle of racial inclusion that has otherwise been absent from the Court’s equal protection doctrine.”).

<sup>9</sup> See Adam Liptak, *Ginsburg Has a Few Words About Trump*, N.Y. TIMES, July 10, 2016, at A1 (quoting Justice Ginsburg as stating: “I don’t expect that we’re going to see another affirmative action case . . . at least in education.” (internal quotation marks omitted)).

<sup>10</sup> See STUDENTS FOR FAIR ADMISSIONS, ANNUAL REPORT OF STUDENTS FOR FAIR ADMISSIONS (Aug. 16, 2016), <http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2016/08/2016-08-16-2016-Year-End-Review.pdf> [<https://perma.cc/5UJT-YMGL>] (highlighting the cases brought against Harvard and the University of North Carolina). Both suits contest the premise that student body diversity constitutes a compelling state interest. See Complaint at ¶ 216, *Students for Fair Admissions, Inc. v. UNC*, 319 F.R.D. 490 (M.D.N.C. 2017) (No. 2:14-cv-954), <http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2014/11/SFFA-v.-UNC-Complaint.pdf> [<https://perma.cc/TLK2-5ZDD>]; Complaint at ¶ 494, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176-ADB), <http://samv91khoyt2i553a2t1s05i-wpengine.netdna-ssl.com/wp-content/uploads/2014/11/SFFA-v.-Harvard-Complaint.pdf> [<https://perma.cc/22BR-7YFK>]. In the Harvard litigation, following a three-week trial that culminated on November 2, 2018, the parties made final arguments before the district court on February 13, 2019. See Delano R. Franklin & Samuel W. Zwickel, *Harvard Admissions Trial Will Stretch into 2019 with New Hearing, Filings*, *The Harvard Crimson* (Nov. 15, 2018), <https://www.thecrimson.com/article/2018/11/15/admissions-trial-new-hearing/> [<https://perma.cc/EDD5-A8QY>].

conscious admissions;<sup>11</sup> and, with the recent appointment of Justice Kavanaugh,<sup>12</sup> the Supreme Court now holds five Justices receptive to arguments critical of the diversity rationale and affirmative action more broadly.<sup>13</sup> Should pending litigation reach the Supreme Court, this reconfigured bench raises legitimate questions about the diversity rationale's survival—and by extension, the future of affirmative action in higher education.

Current threats are compounded by the doctrinal insecurity that has followed the diversity rationale since its inception in *Regents of Univ. of Cal. v. Bakke*.<sup>14</sup> Justice Powell, who authored the controlling opinion, embraced student body

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<sup>11</sup> On July 3, 2018, then-U.S. Attorney General Jeff Sessions announced the decision to rescind a 2011 guidance document concerning the “Voluntary Use of Race to Achieve Diversity in Postsecondary Education.” See Press Release, Dep’t of Justice, Attorney General Jeff Sessions Rescinds 24 Guidance Documents (Jul. 3, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents> [<https://perma.cc/556W-XDGF>]. This follows news that the DOJ is investigating Harvard University’s race-conscious admissions program. See Charlie Savage, *Justice Dept. to Take on Affirmative Action in College Admissions*, N.Y. Times (Aug. 1, 2017), <https://nyti.ms/2hm3vmf> [<https://perma.cc/Y7AU-X3WD>] (“The Trump administration is preparing to redirect resources of the Justice Department’s civil rights division toward investigating and suing universities over affirmative action admissions policies deemed to discriminate against white applicants.”); Susan Svrluga & Nick Anderson, *Justice Department Investigating Harvard’s Affirmative Action Policies*, WASH. POST (Nov. 21, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/11/21/justice-department-investigating-harvards-affirmative-action-policies/?utm\\_term=.6400f4b5a606](https://www.washingtonpost.com/news/grade-point/wp/2017/11/21/justice-department-investigating-harvards-affirmative-action-policies/?utm_term=.6400f4b5a606) [<https://perma.cc/7PDB-VNGP>].

<sup>12</sup> Justice Kavanaugh was confirmed to the Supreme Court on October 6, 2018 and takes the seat formerly held by Justice Kennedy. See Clare Foran & Stephen Collinson, *Brett Kavanaugh sworn in as Supreme Court justice*, CNN POLITICS (Oct. 6, 2018), <https://www.cnn.com/2018/10/06/politics/kavanaugh-final-confirmation-vote/index.html>. Justice Kavanaugh has repeatedly expressed skepticism about the legality of affirmative action. See Kadia Tubman, *Kavanaugh’s Views on Affirmative Action Draw Scrutiny*, YAHOO NEWS (Sept. 7, 2018), <https://www.yahoo.com/news/kavanaughs-views-affirmative-action-draw-scrutiny-113120833.html> [<https://perma.cc/B3LL-ZBS3>].

<sup>13</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“Three of the dissenters . . . examined the Law School’s interest in student body diversity on the merits and concluded it was not compelling.”); see also *Fisher II*, 136 S. Ct. 2198, 2220 (Alito, J., dissenting) (“UT says that the program furthers its interest in the educational benefits of diversity, but it has failed to define that interest with any clarity . . . .”); *id.* at 2223 (“These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences.”); Rachel D. Godsil, *Why Race Matters in Physics Class*, 64 UCLA L. REV. DISC. 40, 42 (2016) (discussing Chief Justice Robert’s hostile questioning in *Fisher I*).

<sup>14</sup> 438 U.S. 265, 323 (1978). This fragility is reflected in recent commentary critical of the diversity rationale. See, e.g., Megan McArdle, Opinion, *Drop the Euphemisms Around Affirmative Action*, WASH. POST, July 11, 2018, [https://www.washingtonpost.com/opinions/drop-the-euphemisms-around-affirmative-action/2018/07/11/511bb61e-8482-11e8-9e80-403a221946a7\\_story.html?utm\\_term=.ebd9d8c67568](https://www.washingtonpost.com/opinions/drop-the-euphemisms-around-affirmative-action/2018/07/11/511bb61e-8482-11e8-9e80-403a221946a7_story.html?utm_term=.ebd9d8c67568) [<https://perma.cc/5D3S-4WJM>].

diversity as a vehicle to promote the university's First Amendment interests.<sup>15</sup> This First Amendment framing, even if a “master compromise”<sup>16</sup> that has offered a vital constitutional hook for race-conscious admissions, undersold the case for diversity in ways that continue to impoverish the concept's constitutional foundation and political appeal.<sup>17</sup>

Specifically, Justice Powell elided what may be diversity's most compelling quality: its ability to promote personal equality within the university.<sup>18</sup> More precisely, Justice Powell's First Amendment focus obscured how racial diversity can buffer students of color against the “present and personal”<sup>19</sup> equality harms that

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<sup>15</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–12 (1978) (“[Student body diversity] clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”).

<sup>16</sup> Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1098 (2016) (“Justice Powell offered the nation a master compromise in the concept of ‘diversity’ itself—a framework that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles.” (quoting Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1539 (2004))); see also Paul Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 918 (1983) (“It was his vote, and even more, his singular (in both senses) opinion, that produced what has been called the ‘Solomonic’ result in *Bakke*.”).

<sup>17</sup> Critique and dissatisfaction, from the Left and Right, have followed the diversity rationale since *Bakke*. See, e.g., Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) (“[T]he concept of diversity . . . is a serious distraction in the ongoing efforts to achieve racial justice . . .”); Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 930 (1996) (characterizing diversity as pretext for a project of backward-looking remediation); Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75, 78 (2012); Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 770–71 (1997) (“[Grounding the diversity rationale in the First Amendment] constitutionalizes the power of a privileged educational establishment to determine what learning shall be valued and who shall be taught.”); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 416 n.170, 442 (1998) (“Because academic freedom is a neutral principle favoring no particular substantive end, I do not believe it provides an adequate constitutional basis for the diversity rationale.”); Susan Sturm, *The Architecture of Inclusion: Advancing Workplace Equity in Higher Education*, 29 HARV. J.L. & GENDER 247, 323–24 (2006) (“Diversity sometimes operates as a goal in search of a justification. Its legitimacy and staying power depend upon more [of] a robust articulation of its underlying value.”); see generally Mario L. Barnes, “*The More Things Change . . .*”: *New Moves for Legitimizing Racial Discrimination in a “Post-Race” World*, 100 MINN. L. REV. 2043 (2016) (reviewing critiques from the Left).

<sup>18</sup> See *infra* Part I.A.

<sup>19</sup> *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (“We conclude that the conditions under which this appellant is required to receive his education

derive from severe underrepresentation in predominately white institutions.<sup>20</sup> This elision matters, in part, because it renders invisible a core diversity function that furthers values—ranging from racial integration to individual meritocracy—that should appeal to Justices across the ideological spectrum.<sup>21</sup> Accordingly, when uplifted, this equality framework has the potential to buttress the doctrinal and normative purchase of affirmative action itself.

This Article proceeds in three Parts. Part I offers a re-reading of the Supreme Court’s seminal diversity rationale cases. Although often overlooked, as early as *Bakke*, the Supreme Court linked racial diversity to the substantive experience of students of color. Attention to diversity’s equality function has continued to grow in the years since.<sup>22</sup> Yet even as scholars and jurists excavate the relationship between diversity and personal equality, common accounts of diversity continue to under-describe and doctrinally marginalize the core equality interests at stake—a result that hinders efforts to ease lingering anxieties about the diversity rationale itself.<sup>23</sup>

To fill this analytical void and deepen common portrayals of diversity, Part II introduces the concept of “equal university membership.”<sup>24</sup> This concept embodies

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deprive him of his *personal and present right* to the equal protection of the laws.” (emphasis added)).

<sup>20</sup> Claims of underrepresentation presume—often implicitly—an appropriate numerical baseline. See Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 15–16 (1996). The same applies to diversity, a term that presumes some level of variance within a given population. For a multitude of reasons, the precise level of racial variance necessary to achieve the full benefits of diversity will likely turn, in part, on each university’s local context and history. Nonetheless, across contexts, more variance (as measured by a student body’s racial demographics) will reduce the likelihood that students from negatively stereotyped racial groups suffer unique, identity-contingent harms that their peers never have to face. See generally Nilanjana Dasgupta, *Ingroup Experts and Peers as Social Vaccines Who Inoculate the Self-Concept: The Stereotype Inoculation Model*, 22 PSYCHOL. INQUIRY 231, 237 (2011) (reviewing research on the negative effects of solo status and token representation) [hereinafter *Ingroup Experts*].

<sup>21</sup> See *infra* Part III.

<sup>22</sup> See, e.g., Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1140 (2013). This is reflected, for instance, in the Supreme Court’s increased attention to concepts such as “critical mass” and “racial isolation.” See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 318 (2003).

<sup>23</sup> See generally *supra* note 13.

<sup>24</sup> In this Article, I introduce the concept of equal university membership to fortify the proposition that diversity constitutes a compelling interest that justifies race-conscious admissions. Although beyond the scope of this Article, one might query whether conditions that deprive a student of equal university membership would create a cognizable injury that supports an affirmative discrimination claim. Moreover, my focus on higher education is not meant to circumscribe equal membership concerns to the university context. Assuming such concerns travel to, for instance, the employment context, the diversity rationale’s viability as a defense for affirmative action may indeed transcend higher education. Cf. Russell G. Pearce et al., *Difference Blindness vs. Bias Awareness: Why Law Firms with the Best of Intentions Have Failed to Create Diverse Partnerships*, 83 FORDHAM L. REV. 2407, 2423 (2015).

the proposition that within any university, every student has an interest in enjoying, regardless of race,<sup>25</sup> the full benefits of university membership.<sup>26</sup> All students have an interest in equal university membership. All students are not, however, similarly situated vis-à-vis one another or the institution. For students of color, environmental factors—including the absence of racial diversity—can exact unique, identity-contingent headwinds that have the potential to compromise learning, social and academic engagement, and performance. To concretize the theory, I offer a taxonomy of the principle benefits derivative of university membership. I then draw on student testimonials and empirical scholarship that underscore the same basic insight: numbers matter, in part, because severe underrepresentation can undermine a student’s ability to enjoy the full benefits of university membership.<sup>27</sup>

Part III concludes by detailing the broader doctrinal and political appeal of a diversity rationale that centers the relationship between racial diversity and personal equality within the university. I first invoke the Supreme Court’s pre-*Brown* desegregation decisions to reinforce the constitutional infirmity of institutional conditions that compromise a student’s interest in equal university membership. I then explore how student body diversity, as a driver of personal equality, furthers multiple values that already anchor contemporary equal protection doctrine.

## I. GESTURES TO EQUALITY

### A. Regents of University of California v. Bakke: *Eliding Equality*

The diversity rationale emerged in *Regents of University of California v. Bakke*,<sup>28</sup> a 1978 case involving the UC Davis Medical School’s race-conscious

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<sup>25</sup> In this Article, to promote analytical manageability, I focus on the relationship between *racial* diversity, *racial* identity, and equal university membership. This is in part a function of the particular status race holds within the Supreme Court’s equality jurisprudence. That said, given the complexities inherent to identity, future scholarship that examines the relationship between diversity and equal university membership would benefit from a more intersectional and expansive lens.

<sup>26</sup> As I describe in greater detail below, “equal university membership” has roots in the concept of equal educational opportunity but limits the unit of analysis to a single educational institution. See *infra* Parts II & III.A.

<sup>27</sup> See *infra* Part II.B. This Article explores the related phenomena of social identity threat and stereotype threat. These literatures are distinct from the social science—much from the field of education—that Justice O’Connor highlighted in *Grutter*. See *Grutter*, 539 U.S. at 330 (“In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and ‘better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.’” (citation omitted)). For an overview of the social science presented to justify diversity across *Bakke*, *Grutter*, and *Fisher*, see Kyneshawau Hurd & Victoria C. Plaut, *Diversity Entitlement: Does Diversity-Benefits Ideology Undermine Inclusion?*, 112 Nw. U. L. REV. 1605, 1609 (2018).

<sup>28</sup> 438 U.S. 265 (1978). Eboni S. Nelson has traced the diversity rationale’s origin to *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 642 (1950), and



admissions program. Justice Powell, who authored the controlling opinion, struck down the challenged program.<sup>29</sup> Yet in so doing, he left open the door for race-conscious admissions.<sup>30</sup> Specifically, Justice Powell embraced student body diversity as a constitutionally compelling interest that, under certain circumstances, could justify such policies.<sup>31</sup>

Scholars routinely highlight Justice Powell's First Amendment mooring.<sup>32</sup> This is understandable. Justice Powell expressly championed diversity as a mechanism to further the university's First Amendment interests.<sup>33</sup> Nonetheless, by focusing on Justice Powell's esteem for diversity's "discourse benefits,"<sup>34</sup> common accounts often overlook a separate diversity story embedded within Powell's opinion—one rooted in the relationship between racial diversity and the educational experience of students of color. Even as he lauded academic freedom and the "robust exchange of ideas," Justice Powell did not—perhaps could not—wholly decouple diversity from a university's obligation to ensure that all of its students, irrespective of race, receive an equal education.<sup>35</sup>

To locate this deeper diversity story, one must look below the surface of Justice Powell's opinion to the sources on which he relied.<sup>36</sup> This begins with the Harvard

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*Sweatt v. Painter*, 339 U.S. 629, 635 (1950). See Eboni S. Nelson, *Examining the Costs of Diversity*, 63 U. MIAMI L. REV. 577, 592–93 (2009). Whether one places the diversity rationale's origin in *Bakke* or this earlier caselaw, *Mclaurin* and *Sweatt* offer a valuable anchor for contemporary debates about the constitutional appeal of racially diverse student bodies. See *infra* Part III.A.

<sup>29</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 306–11 (1978).

<sup>30</sup> *Id.*

<sup>31</sup> Justice Powell rejected three alternative rationales: (1) reducing the contemporary underrepresentation of students from historically marginalized groups within the Medical School; (2) countering the effects of societal discrimination; and (3) increasing the number of physicians likely to practice in underserved communities. *Id.*

<sup>32</sup> See, e.g., Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 71 n.26 (2016) (“[T]he diversity rationale in higher education admissions . . . is rooted in First Amendment freedoms.”). For scholarship critical of Powell's First Amendment frame, see *supra* note 17.

<sup>33</sup> *Bakke*, 438 U.S. at 311–12, 313 (“Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas,’ petitioner invokes a countervailing constitutional interest, that of the First Amendment.”).

<sup>34</sup> Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 FORDHAM L. REV. 2301, 2305 (2004) (“What I have called ‘discourse’ benefits are the core ‘educational benefits’ of student body diversity, and they are, unsurprisingly, grounded in ‘the expansive freedoms of speech and thought associated with the university environment.’”).

<sup>35</sup> *Bakke*, 438 U.S. at 313 (internal quotation marks omitted); see also Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. at 765 (“But I believe that this distinction is misconceived. The diversity rationale is inseparable from the purpose of remedying our society's racism.”).

<sup>36</sup> Justice Powell drew upon Princeton and Harvard—institutional elites to which he held at least one personal connection (he received an LLM from Harvard in 1932)—as

College Admissions Plan (“Harvard Plan”),<sup>37</sup> which Justice Powell celebrated as an “illuminating example” of a constitutional admissions policy.<sup>38</sup> According to Justice Powell, the Harvard Plan took “race into account in achieving the educational diversity valued by the First Amendment . . . .”<sup>39</sup> Justice Powell praised the Harvard Plan’s flexibility, which he juxtaposed against the policy at issue in *Bakke*.<sup>40</sup> To reinforce this point, Powell quoted the following passage from the Harvard Plan:

But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that in choosing among thousands of applicants who are not only ‘admissible’ academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.<sup>41</sup>

The bracketed text, which Justice Powell inserted to clarify the reference to “that awareness,” deserves particular attention. Taken out of context, the inserted language suggests that Harvard’s vision of diversity aligned with Justice Powell’s. The problem is, this reading—which flows naturally from Justice Powell’s opinion—obscures a key reason why Harvard embraced diversity. Like Powell, Harvard viewed racial tokenism as a threat to the marketplace of thought required of a great institution.<sup>42</sup> But Harvard also appreciated a separate and distinct threat in

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authoritative voices on the benefits of student body diversity. *See Bakke*, 438 U.S. at 312 n.48; TIMOTHY L. HALL, SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 393 (2001).

<sup>37</sup> After *Bakke*, legal scholars and university administrators viewed the Harvard Plan as a blueprint for a constitutionally compliant race-conscious admissions policy. *See Grutter v. Bollinger*, 539 U.S. 306, 335–38 (2003).

<sup>38</sup> *Bakke*, 438 U.S. at 315–17, 321–24.

<sup>39</sup> *Id.* at 316.

<sup>40</sup> *See id.* at 289, 316. Justice Powell also lauded the Harvard Plan’s expansive view of diversity, which was captured by the view that “[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer,” and “a black student can usually bring something that a white person cannot offer.” *Id.* at 316. Although rarely described as such, these statements reflect the value of *intra*-racial diversity and *inter*-racial diversity respectively. *See Carbado, supra* note 22; Boddie, *supra* note 32.

<sup>41</sup> *Bakke*, 438 U.S. at 316 (brackets in original).

<sup>42</sup> Powell’s discussion of discourse benefits assumes that a well-functioning marketplace of ideas requires some degree of equality—at least as to the balance between majority and minority perspectives. Although undeveloped in his opinion, this insight reflects the inherent relationship between principles traditionally located within the First Amendment and Fourteenth Amendment, respectively. *See Akhil Reed Amar, Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (describing the interpretive technique of “intratextualism”); Cedric Merlin Powell, *Schools, Rhetorical Neutrality, and the Failure of the Colorblind Equal Protection Clause*, 10 RUTGERS RACE & L. REV. 362, 368 (2008)

racial tokenism. Specifically, Harvard expressed concern that severe underrepresentation would uniquely burden black students and, in so doing, undermine their ability to receive an education equal to their white Harvard classmates.<sup>43</sup>

This point is lost in *Bakke*, however, because Justice Powell omitted from his opinion the relevant portion of the Harvard Plan.<sup>44</sup> In the paragraph that immediately preceded the language he quoted, the Harvard Plan stated the following:

Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their *small numbers might also create a sense of isolation* among the black students themselves and thus make it *more difficult for them to develop and achieve their potential*. Consequently, when making its decisions, the Committee on Admissions is aware that there is *some relationship* between numbers and achieving the benefits to be derived from a diverse student body, and *between numbers and providing a reasonable environment for those students admitted*.<sup>45</sup>

As the foregoing reveals, Harvard's vision of diversity transcended the First Amendment, academic freedom, and discourse benefits. Critically, Harvard observed that racial equality within the university was inseparable from, and in fact dependent on, racial diversity within the university.<sup>46</sup> Notwithstanding its centrality within the Harvard Plan, this insight never penetrated Justice Powell's opinion nor his defense of diversity. *Bakke*, in turn, introduced a doctrinal justification for race-conscious admissions that under-sold the benefits of a racially diverse student body.

Beyond the Harvard Plan, Justice Powell missed at least one other opportunity to uplift the relationship between racial diversity and equality.<sup>47</sup> As if preempting an

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(“Indeed, the First and Fourteenth Amendments should be read together to support positive, race-conscious remedial approaches to the eradication of caste (and resegregation).”); Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1520 (1997) (“In this way the value of equality is installed in the heart of a revised account of the First Amendment. The tension between equality and liberty dissolves ‘once we understand that equality need not be seen as an independent value, based solely on the Fourteenth Amendment, but rather that it has First Amendment dimensions.’” (quoting OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 87 (1996))).

<sup>43</sup> See *Bakke*, 438 U.S. at 321–24.

<sup>44</sup> Justice Powell did, however, include the complete text of the Harvard Plan as an appendix to his opinion. See *id.* at 321.

<sup>45</sup> *Id.* at 323 (emphasis added).

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

<sup>47</sup> Although unrelated to his discussion of diversity, Justice Powell did recognize that, under certain conditions, race-conscious admissions may be necessary to promote a more equitable and meritocratic admissions process. See *id.* at 306 n.43 (“Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate:

anticipated critique, Powell argued that diversity's pedagogical benefits transcended the undergraduate context and extended to, for instance, the Medical School at issue in *Bakke*.<sup>48</sup> To underscore this point, Powell invoked *Sweatt v. Painter*,<sup>49</sup> a 1950 Supreme Court decision that struck down a Texas law barring African Americans from the University of Texas Law School ("UT Law"). Powell quoted the following language from *Sweatt*:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.<sup>50</sup>

As with the Harvard plan, when read out of context,<sup>51</sup> this language naturally buttresses Justice Powell's First Amendment rationale: racial diversity constitutes a prerequisite for a robust exchange of ideas. But when read in context, the First Amendment frame gives way to the core equality concerns that permeated *Sweatt*.

*Sweatt* was not a First Amendment case; neither the question presented, the Supreme Court's holding, nor the quoted language principally implicated the law

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fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all."); see also Jonathan Feingold, *Racing Towards Color-blindness: Stereotype Threat and the Myth of Meritocracy*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSP. 231, 266 (2011) (discussing the lack of attention to Justice Powell's observation that, in certain contexts, race-conscious policies might be necessary to promote more equitable and meritocratic admissions) [hereinafter Feingold, *Racing Towards Color-blindness*].

<sup>48</sup> *Bakke*, 438 U.S. at 313–24.

<sup>49</sup> 339 U.S. 629 (1950).

<sup>50</sup> *Bakke*, 438 U.S. at 314 (quoting *Sweatt*, 339 U.S. at 634).

<sup>51</sup> I refer to at least two levels of "context." Narrowly, context refers to the Supreme Court's full opinion in *Sweatt*. Broadly, context refers to the societal realities that informed the Court's reasoning and holding. Justice Vinson, who authored *Sweatt*, recognized that context matters:

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities affor[d]ed him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State, is no answer. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

*Sweatt*, 339 U.S. at 634–35 (internal quotation marks omitted) (citation omitted).

school's (or its students') interest in discourse benefits.<sup>52</sup> To the contrary, *Sweatt* addressed basic equal protection harms caused by de jure racial segregation—specifically, the deprivation of equal educational opportunity.<sup>53</sup> Indeed, the very language Justice Powell quoted arose within the Supreme Court's detailed rebuke of Texas's racially discriminatory law.<sup>54</sup>

Even if masked by Justice Powell's opinion, the Harvard Plan and *Sweatt* speak to each other in important respects. There are, of course, meaningful differences. In *Sweatt*, the threat to equality came from positive law that formally excluded African Americans from UT Law and deprived them of the myriad tangible and intangible benefits derivative a UT Law education. With Harvard, the threat to equality was not formal exclusion. Nonetheless, Harvard recognized that admission to the university was insufficient to guarantee equal educational opportunities therein. Absent racial diversity, those African Americans admitted would suffer race-dependent headwinds that, as a practical matter, would undermine the quality of their education relative to their white peers. Thus, irrespective of the source of harm, the Harvard Plan and *Sweatt* cohere around the basic principle that all students, regardless of race, have an interest in enjoying the full benefits of university membership.

### B. *Grutter v. Bollinger: Approaching "Critical Mass"*

If *Bakke* birthed the diversity rationale, *Grutter v. Bollinger* secured its place within the Supreme Court's affirmative action jurisprudence. *Grutter* involved a challenge to the University of Michigan Law School's ("Law School") admissions policy, which permitted admissions officials to consider applicant race.<sup>55</sup> In a 5-4 decision, the Supreme Court upheld the Law School's policy.<sup>56</sup> Justice O'Connor,

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<sup>52</sup> This is not to say that First Amendment principles were absent from *Sweatt*. Nonetheless, invoking *Sweatt* to advance a siloed First Amendment case for diversity untethers the decision from the equal protection concerns that motivated the Supreme Court's reasoning and conclusions. Also, as discussed in greater detail in Part III, Justice Powell missed an opportunity to link the equality harms that flow from a lack of diversity with the harms associated with de jure segregation.

<sup>53</sup> See *Sweatt*, 339 U.S. at 631–36. Justice Vinson referenced "academic vacuum" not to invoke (the absence of) discourse benefits, but rather to evidence the Texas law's deleterious effects on African Americans. *Id.* at 634. This harm included the lost opportunity to interact and build relationships with whites, who comprised 85 percent of the state population and "most of the lawyers, witnesses, jurors, judges and other officials with whom [Sweatt] will inevitably be dealing when he becomes a member of the Texas Bar." *Id.* Given Sweatt's exclusion from "such a substantial and significant segment of society," the Court could not conclude that the education available to Sweatt was "substantially equal to that which he would [have] receive[d] if admitted to the University of Texas Law School." *Id.*

<sup>54</sup> See *id.* at 631–36; see also *Bakke*, 438 U.S. at 313.

<sup>55</sup> *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

<sup>56</sup> *Id.* at 343.

who authored the majority opinion, adopted Justice Powell's conclusion that student body diversity serves a compelling state interest.<sup>57</sup>

Scholars have debated the degree to which Justice O'Connor transcended Justice Powell's First Amendment mooring.<sup>58</sup> On the one hand, Justice O'Connor embraced a vision of diversity animated by broad democratic values<sup>59</sup> and commitments to societal access, inclusion, and equality.<sup>60</sup> Yet as I discuss below,

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<sup>57</sup> *Id.* at 329 (“Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission . . .”). In dissent, Justice Kennedy also located the diversity rationale within “a tradition, grounded in the First Amendment, of acknowledging a university’s conception of its educational mission.” *Id.* at 387 (Kennedy, J., dissenting).

<sup>58</sup> See *infra* notes 60–61.

<sup>59</sup> See *Grutter*, 539 U.S. at 331–32 (“The United States, as *amicus curiae*, affirms that ‘[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.’ And, ‘[n]owhere is the importance of such openness more acute than in the context of higher education.’” (citation omitted)); *id.* at 331 (“‘[E]ducation . . . is the very foundation of good citizenship.’ For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity.” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954))); see also Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 118 (2003). Justice O'Connor also applauded diversity's ability to promote institutional legitimacy:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.

*Grutter*, 539 U.S. at 332.

<sup>60</sup> See *Grutter*, 539 U.S. at 331–32, 333; *id.* at 338 (“By virtue of our Nation’s struggle with racial inequality, [underrepresented students of color] are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”); see also Carbado, *supra* note 22, at 1143 (identifying eight benefits of diversity captured by Justice O'Connor in *Grutter*); Liu, *supra* note 17, at 416–17 (“The diversity rationale also has a foundation in the Fourteenth Amendment—not in the remedial duties just discussed, but rather in principles of equal protection that express the central democratic values underlying our constitutional order.”); Rich, *supra* note 16, at 1027 (“[*Grutter*] defined that mission, however, somewhat more broadly by placing greater emphasis on the larger social role of public university education, both in the marketplace and in our democracy.”); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 59 (2003) (“Although *Grutter* casts itself as merely endorsing Justice Powell’s opinion in *Bakke*, *Grutter*’s analysis of diversity actually differs quite dramatically from Powell’s.”); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1366 (2011) (“In *Bakke*,

even as Justice O'Connor embraced a comparably broader vision of diversity and marked concerns about racial equality within the university, she ultimately proffered a diversity defense anchored to the discourse benefits Justice Powell had championed in *Bakke*.

In fact, the strongest case for diversity as a driver of personal equality did not come from Justice O'Connor herself. Rather, it arose in the testimony of several Law School administrators who Justice O'Connor invoked to unpack the term "critical mass."<sup>61</sup> The administrators explained that "critical mass" referred to the general threshold of "underrepresented minority students" necessary to "realize the educational benefits of a diverse student body."<sup>62</sup> But as the quoted testimony reflects, the administrators included among these benefits an improved educational environment for students of color.<sup>63</sup> The administrators testified, for instance, that a critical mass "encourages underrepresented minority students to participate in the classroom and not feel isolated."<sup>64</sup> They further explained that a critical mass could mitigate the force of racial stereotypes and foster an environment in which students of color do not feel "like spokespersons for their race."<sup>65</sup>

In many respects, these observations track those embedded within the Harvard Plan—specifically, Harvard's recognition that there is "some relationship between numbers and . . . providing a reasonable environment for those students [of color] admitted."<sup>66</sup> Justice O'Connor did, indeed, quote this very language in her defense of the Law School's goal to attain a critical mass.<sup>67</sup> Worth noting, however, is that Justice O'Connor grounded neither her defense of a critical mass nor her invocation of the Harvard Plan on Harvard's observation that a lack of diversity can burden students of color and thereby compromise their education. To the contrary, Justice O'Connor praised the concept of "critical mass" because it, like the Harvard Plan, permitted a flexible admissions regime in which "each applicant is evaluated as an individual and not in a way that makes an applicant's race or gender the defining feature of his or her application."<sup>68</sup> Thus, in ways not dissimilar to Justice Powell's engagement with the Harvard Plan in *Bakke*, Justice O'Connor marked diversity's

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Justice Powell's justification for diversity focused on the First Amendment and educational concerns; by contrast, Justice O'Connor's restatement in *Grutter* focused on concerns of social cohesion more generally.").

<sup>61</sup> See *Grutter*, 539 U.S. at 318–19.

<sup>62</sup> *Id.* at 318.

<sup>63</sup> *Id.* at 318–19.

<sup>64</sup> *Id.* at 318.

<sup>65</sup> *Id.* at 319, 333 ("[D]iminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.").

<sup>66</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 323 (1978).

<sup>67</sup> *Grutter*, 539 U.S. at 336 ("As the Harvard Plan described by Justice Powell recognized, there is of course some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted." (internal quotation marks omitted)).

<sup>68</sup> *Id.* at 336–37; *id.* at 330 ("Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.").

equality function only to omit this insight from her express defense of diversity as a constitutionally compelling interest.

Professor Stephen Rich recently made a similar observation.<sup>69</sup> He noted that Justice O'Connor "acknowledge[d] Michigan Law School's expressed purposes to use affirmative action to foster minority inclusion and to relieve its minority students' experiences of racial isolation, but nowhere within [her] list of diversity's educational benefits does either purpose appear."<sup>70</sup> This diagnosis is accurate, yet may actually understate the dissonance in Justice O'Connor's opinion. Even within that "list of diversity's educational benefits" are items that Justice O'Connor *could* have framed within a vision of diversity attentive to the relationship between racial diversity and racial equality within the university.

Specifically, Justice O'Connor lauded diversity for its potential to "promote[] cross-racial understanding, help[] to break down racial stereotypes, and enable[] students to better understand persons of different races."<sup>71</sup> These benefits could be understood to serve multiple ends. Consider, for instance, racial stereotypes and cross-racial understanding, two concepts that go hand-in-hand. To the extent racial stereotypes and a lack of cross-racial understanding inform classroom conversations and interpersonal interactions, the impact will not fall evenly on all students. All students may suffer if stereotypes and cross-racial misunderstanding undermine the opportunity to gain a more "enlighten[ed]" understanding of society and become prepared for "an increasingly diverse workforce and society."<sup>72</sup> But beyond stifling classroom conversations, racial stereotypes and cross-racial misunderstanding have the potential to uniquely burden students from negatively stereotyped groups—that is, students of color who may themselves become the targets of such stereotypes and misunderstandings.<sup>73</sup> In turn, lifting stereotypes and promoting cross-racial understanding does more than promote lively discussion. It also fosters a more equitable learning environment by reducing identity-contingent headwinds that students of color may otherwise face in the classroom.

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<sup>69</sup> See Rich, *supra* note 16, at 1035–36.

<sup>70</sup> *Id.*

<sup>71</sup> *Grutter*, 539 U.S. at 330 (internal quotation marks and brackets omitted). These benefits are notable, in part, because they are racially inflected. See Post, *supra* note 60, at 70 ("The account of diversity embraced by *Grutter* does not conceive of race as simply one element in a potentially infinite universe of differences. It instead points to the particular and unique value of racial diversity."). It is unclear if Justice O'Connor would agree that her "diversity rationale" privileged *racial* diversity. In the same opinion that she embraced race-specific benefits, O'Connor applauded the Law School for looking beyond race to "the broad range of qualities and experiences that may be considered valuable contributions to student body diversity." *Grutter*, 539 U.S. at 338.

<sup>72</sup> *Id.* at 330. Cf. Akhil Amar & Neal Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1778 (1996) ("Critics have portrayed diversity as a tool only to help whites understand blacks—or as an exploitative way of adding spice to a white mix. We disagree . . . If a diversity program does not, in practice, allow all students to learn from each other, then the program is not serving the state's interest in diversity—and the school should not use the 'diversity' slogan to show how the program passes constitutional muster.").

<sup>73</sup> See *infra* Part II.B.



Justice O'Connor did not, however, praise the foregoing benefits for their ability to improve the classroom environment for students of color. This is revealed by her explanation that “[t]hese benefits are important and laudable” because they promote classroom discussion that is “livelier, more spirited, and simply more enlightening and interesting.”<sup>74</sup> Thus, even when Justice O'Connor identified benefits that sound in equality, she situated them within a diversity defense that continued to privilege discourse benefits.<sup>75</sup> Accordingly, Justice O'Connor missed an opportunity to advance the First Amendment frame Justice Powell had proffered in *Bakke*.<sup>76</sup> And even if the constitutional inquiry were constrained to the diversity benefits that further the “Law School’s missions,”<sup>77</sup> as Justice O'Connor suggested, it would be hard to explain why that mission requires an educational “atmosphere which is most conducive to speculation, experiment and creation,”<sup>78</sup> but not one in which all students, regardless of race, can enjoy the full benefits of that atmosphere.

### C. Fisher I & Fisher II: *Maintaining the Status Quo*

The *Fisher* litigation, which culminated in 2016 when the Supreme Court upheld the University of Texas’s race-conscious admissions policy, did little to disrupt the diversity rationale embodied by *Grutter*.<sup>79</sup> Justice Kennedy, writing for the majority, reaffirmed *Grutter*’s principal holding that “a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity.”<sup>80</sup> Still, two points are worth noting. First, there was no guarantee that *Grutter* would survive *Fisher*, a reality that raised concern across the country.<sup>81</sup> To the surprise of many, Justice Kennedy—who had dissented in *Grutter* just a decade earlier—provided the decisive vote in *Fisher*.<sup>82</sup>

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<sup>74</sup> *Grutter*, 539 U.S. at 330.

<sup>75</sup> See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 587 (2003).

<sup>76</sup> This also appears to be how other Justices viewed these benefits. See *Grutter*, 539 U.S. at 347 (Scalia, J. dissenting) (framing “cross-racial understanding” as a matter of “good citizenship”).

<sup>77</sup> *Id.* at 333 (majority opinion) (“To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School’s mission, and one that it cannot accomplish with only token numbers of minority students.”).

<sup>78</sup> *Id.* at 363.

<sup>79</sup> *Fisher II*, 136 S. Ct. 2198, 2207–08 (2016).

<sup>80</sup> *Id.*; see also *Fisher I*, 570 U.S. 297, 310 (2013) (“[The *Grutter* Court] endorsed Justice Powell’s conclusion . . . that the attainment of a diversity student body is a constitutionally permissible goal for an institution of higher education.”).

<sup>81</sup> See generally Barnes et al., *supra* note 6.

<sup>82</sup> See Elise C. Boddie, *The Constitutionality of Racially Integrative Purpose*, 38 CARDOZO L. REV. 531, 533 (2016) (“Justice Kennedy surprised many with his majority opinion in *Fisher II* upholding a race-conscious policy in college admissions.”). Unlike the other *Grutter* dissenters, Justice Kennedy did not reject the diversity rationale. In *Grutter* and elsewhere, Justice Kennedy championed diversity while rejecting a rigidly colorblind jurisprudence that would condemn any race-conscious policy. See *id.*; see also Parents

Second, certain limited gestures to equality present in *Grutter* carried through to *Fisher II*. Specifically, Justice Kennedy grounded his support for the University of Texas's admissions policy, in part, on the observation "that minority students admitted under the [race-neutral admissions] regime experienced feelings of loneliness and isolation."<sup>83</sup> Nonetheless, mirroring Justice O'Connor, Justice Kennedy did not leverage this observation into a more holistic and comprehensive defense of diversity tied to the personal equality interests of actual University of Texas students. As such, the Supreme Court's affirmative action jurisprudence remains tethered to a diversity rationale that, at its core, obscures one of diversity's most constitutionally compelling qualities.

## II. EQUAL UNIVERSITY MEMBERSHIP

Part I identified moments in which Supreme Court opinions have marked the relationship between racial diversity and personal equality within the university. Yet as the foregoing reveals, this relationship remains under-theorized and peripheral to the Supreme Court's express defense of diversity as a compelling interest. As a result, the Supreme Court's equal protection jurisprudence continues to understate the full value and function of a racially diverse student body.

To fill the void, this Part takes up what the Supreme Court has yet to do: integrate into the diversity rationale's core logic the basic observation that students of color encounter identity-contingent harms in educational environments that lack racial diversity. To accomplish this, I first explore the principal benefits that flow from university membership. I then draw on student testimony and social science to elucidate how racial disparities can compromise a student's ability, because of her race, to enjoy these distinct but related benefits. This exercise illuminates how racial diversity furthers a university's obligation to ensure that all students, regardless of race, can access and enjoy the full spectrum of university benefits.

Understood in this sense, diversity is compelling precisely because it promotes each student's present and personal interest in "equal university membership." As used herein, this concept builds upon the constitutionally-inflected imperative that all students, irrespective of race, have equal educational opportunities.<sup>84</sup> Concerns

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Involved in *Cnty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring) ("[Although] race should not matter; the reality is that too often it does.").

<sup>83</sup> *Fisher II*, 136 S. Ct. at 2212 (alterations added). This is not the only instance in which Justice Kennedy exhibited concern for racial isolation, or identified diversity as a mechanism to mitigate it. See *Fisher I*, 133 S. Ct. at 2418 ("The attainment of a diverse student body, by contrast, serves values beyond race alone, including enhanced classroom dialogue and the lessening of racial isolation and stereotypes."); *Parents Involved*, 551 U.S. at 787–88 (Kennedy, J., concurring) (rejecting Chief Justice Roberts' "all-too-unyielding insistence that race cannot be a factor when," for instance, school authorities are faced with the "status quo of racial isolation in schools.").

<sup>84</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) ("We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children

about equal educational opportunity are often associated with situations in which a racial group is relegated to inferior educational institutions due to de jure or de facto segregation.<sup>85</sup> This involves an *inter*-institutional analysis: is the educational opportunity at Institution A equal to that at Institution B? The concept of equal university membership trades on this same egalitarian impulse but narrows the unit of analysis to a single institution. The underlying inquiry, therefore, is *intra*-institutional and asks whether all students within Institution A have equal access, regardless of race, to the full benefits that accrue from membership in Institution A.<sup>86</sup> To concretize the stakes of *un*-equal university membership, I now outline the principal benefits of university membership.

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of the minority group of equal educational opportunities? We believe that it does.”). Equal university membership builds on existing theory such as Susan Sturm’s concept of “institutional citizenship.” Sturm, *supra* note 17, at 303 (“[A]ll institutional citizens should be able to realize their potential and participate fully in the life of the institution.” (citation omitted)); *see also* Rich, *supra* note 16, at 1042 (“[Grutter] overlooks tokenism in which minority students are admitted to contribute to the educational environment provided by the university but not necessarily to receive an equal education or to benefit equally from the education that they do receive.”); Jonathan Feingold & Doug Souza, *Measuring the Racial Unevenness of Law School*, 15 BERKELEY J. AFR.-AM. L. & POL’Y 71, 112 (2013) (describing the concept of “racial unevenness”).

<sup>85</sup> *See, e.g.*, Milliken v. Bradley, 418 U.S. 717, 781–82 (1974) (Marshall, J., dissenting) (“In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court held that segregation of children in public schools on the basis of race deprives minority group children of equal educational opportunities and therefore denies them the equal protection of the laws under the Fourteenth Amendment.”); Equal Educational Opportunities Act, 20 U.S.C. § 1702(a)(1) (2012) (“[T]he maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment.”). This is the formulation of equal educational opportunity that the Supreme Court rejected in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that education does not constitute a fundamental right under the Constitution). In recently-filed litigation, fourteen public-school students and parents in Rhode Island have made similar claims that, by providing such inferior education, the “state has failed to fulfill its duties under the U.S. Constitution.” *See* Alia Wong, *The Student Suing for a Constitutional Right to Education*, THE ATLANTIC (Nov. 28, 2018), <https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901/> [<https://perma.cc/3322-EECH>].

<sup>86</sup> The concept of equal university membership recognizes that admission and matriculation do not guarantee equal educational opportunity. In other words, a student’s admission into an elite institution does not, in itself, ensure that student will realize an education therein equal to her peers. *Cf.* Kenneth W. Mack, *The Two Modes of Inclusion*, 129 HARV. L. REV. F. 290, 296 (2016) (“George McLaurin was asking to participate fully in the life of the university. But what exactly would that mean? Would making good on that claim require, as it would in the housing context, a fundamental alteration in the way that the institution operated?”); Rich, *supra* note 16, at 1081 (“[E]ven winners are not *equal* winners if they are not awarded equal opportunities.”); *id.* at 1087 (“[S]ocial status interacts with organizational practices to influence opportunities for individual growth and achievement during and after an initial moment of selection.”).

### A. *The Benefits of University Membership*

The principal benefits of university membership fall into at least three general categories: learning benefits, networking benefits, and signaling benefits.<sup>87</sup> By unpacking these distinct yet related benefits, one can better appreciate the layered and intersecting consequences that flow from institutional conditions which subject certain students to identity-contingent burdens.

#### 1. *Learning Benefits*

Learning is arguably the principal benefit of university membership. It is therefore unsurprising that learning figures prominently in the Supreme Court's equal protection jurisprudence. This is particularly true in cases that have implicated the right to equal educational opportunity, which itself is embedded with concerns about access to learning.

This focus on learning can be seen, for instance, in the Supreme Court's landmark desegregation decision in *Brown v. Board of Education*.<sup>88</sup> To buttress the Court's then-controversial conclusion, Chief Justice Warren described education—that is, learning—as “the very foundation of good citizenship . . . [and] a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.”<sup>89</sup> Even before *Brown*, similar concerns had motivated the Supreme Court's growing condemnation of de jure segregation.<sup>90</sup> Such concerns arose in the context of laws that formally excluded non-Whites from certain schools (as in *Brown*),<sup>91</sup> but also in the context of institutions that imposed segregatory conditions within the university.<sup>92</sup> Irrespective of the specific context, the Supreme Court rebuked

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<sup>87</sup> This list is no doubt non-exhaustive. Nonetheless, my intent is to offer a point of departure that explores the principal benefits of university membership and its relationship to student body diversity.

<sup>88</sup> 347 U.S. at 493 (“In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”).

<sup>89</sup> *Id.*

<sup>90</sup> See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950) (“The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (“The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts.”).

<sup>91</sup> See *Sweatt*, 339 U.S. at 634.

<sup>92</sup> See *McLaurin*, 339 U.S. at 641.

conditions that denied certain students, because of their race, learning opportunities equal to their peers.<sup>93</sup>

Concerns about learning have also been featured in the Supreme Court's embrace of diversity as a constitutionally compelling interest.<sup>94</sup> This includes *Bakke*, when Justice Powell championed diversity and the educational benefits derivative thereof as critical to the university's educational mission.<sup>95</sup> In many ways, Justice Powell's diversity rationale was predicated on the notion that diversity promotes, and may be necessary for, the learning required of a great institution.<sup>96</sup> This sentiment, alive in *Grutter* and *Fisher*, is captured by the Supreme Court's oft-repeated homage to "the *educational* benefits that flow from student body diversity."<sup>97</sup>

More concretely, one can understand learning as the knowledge, skills, and training that a student acquires during her university tenure. As the Supreme Court has noted, learning takes many forms and occurs in a variety of institutional settings, some formal, others informal; some academic, others social.<sup>98</sup> Formal learning includes specific subject matter and is acquired, often, through formal instruction in classroom settings.<sup>99</sup> Physics students, for instance, learn about matter and its motion and behavior through time and space. Economics students, on the other hand, learn about capital, markets, and fiscal policy. Beyond the classroom, learning

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<sup>93</sup> See *supra* notes 90–92 and accompanying text; see also *infra* Part III.A.

<sup>94</sup> *Fisher II*, 136 S. Ct. 2198, 2210 (2016) (“[S]tudent body diversity promotes *learning* outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (emphasis added))).

<sup>95</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312–13 (1978) (“The atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the ‘nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.” (citation omitted)).

<sup>96</sup> See *id.* at 312 n.48 (“[Learning] occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, ‘People do not learn very much when they are surrounded only by the likes of themselves.’”).

<sup>97</sup> *Fisher II*, 136 S. Ct. at 2210 (emphasis added).

<sup>98</sup> See *Bakke*, 438 U.S. at 312–13 n.48 (“[A] great deal of learning occurs informally. . . . In the nature of things, it is hard to know how, and when, and even if, this informal ‘learning through diversity’ actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth.” (citation omitted)).

<sup>99</sup> See *id.*

opportunities arise across varied sites, from dorm rooms and cafeterias, to organizational meetings and extracurricular events.<sup>100</sup>

Learning confers intrinsic and extrinsic benefits.<sup>101</sup> Intrinsically, I refer principally to the innate value of acquiring new knowledge: one gains the ability to see the world in a new, more precise, complicated, troubled, and nuanced way. Extrinsically, the acquisition of new knowledge and skills better positions one to solve a problem, decipher a previously unanswered question, or access higher levels of academic or professional achievement. Beyond the individual, learning enables students to benefit future employers and, ultimately, contribute to society writ large.<sup>102</sup> The Supreme Court has celebrated this dimension of learning in cases that range from *Brown* and *Sweatt*,<sup>103</sup> to *Bakke* and *Grutter*.<sup>104</sup>

This Article is not intended to diminish the normative or doctrinal appeal of institutional efforts—including admissions policies—that promote learning in the university. To the contrary, concerns about *unequal* learning opportunities are rightly featured in *Brown*, which arguably remains the Supreme Court’s most celebrated equal protection opinion. Yet in the context of affirmative action, the Supreme Court has yet to meaningfully link diversity to the goal of *equal* learning opportunities within the university.

Whatever the educational opportunities available within a given university, equal membership concerns exist if, as a function of race, these opportunities do not flow evenly to all students. One can begin to see how such concerns might inform existing equal protection doctrine. Given a university’s compelling interest to promote educational benefits therein (via diversity),<sup>105</sup> one could argue that the university has just as great, if not greater, an interest to ensure that all students,

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<sup>100</sup> *See id.*

<sup>101</sup> Although precise line drawing between what is extrinsic and what is intrinsic presents its own challenges, this dichotomy offers a useful heuristic for appreciating distinct learning benefits. *See generally* Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175, 1183 (2009) (“Something is intrinsically valuable if it is valuable simply in itself, regardless of its relation to anything else that might be valuable. To say that something has intrinsic value is to say that its value or goodness does not depend on external conditions and so is in that sense unconditionally good, or that we always have reason to want it to exist. In contrast, something is extrinsically valuable if its value depends on conditions external to it, such as the condition of being causally related to a particular consequence, or the condition of being regarded as valuable by a particular person.” (citations omitted)).

<sup>102</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (“We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to ‘sustaining our political and cultural heritage’ with a fundamental role in maintaining the fabric of society.” (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982))).

<sup>103</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

<sup>104</sup> *Grutter*, 539 U.S. at 331–32; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 n.48 (1978).

<sup>105</sup> This describes the diversity rationale as it exists under prevailing doctrine. *See generally Grutter v. Bollinger*, 539 U.S. 306 (2003).

regardless of race, can access those benefits. Student body diversity, it turns out, promotes both ends.<sup>106</sup>

## 2. *Networking Benefits*

A second benefit of university membership is “networking,” a term I employ to capture a student’s social engagements and relationship-building within the university.<sup>107</sup> As with learning, concerns about networking surfaced within the Supreme Court’s pre-*Brown* de-segregation jurisprudence. One can understand the Court’s decision in *Sweatt*, for instance, as resting on the inequitable networking opportunities available to African American students excluded from the University of Texas Law School.<sup>108</sup> In a unanimous decision, the Supreme Court specifically cited this deficiency to support its conclusion that the education offered to African Americans was unequal to that available to their white peers.<sup>109</sup>

From the university student’s perspective, networking occurs along at least three primary planes: (1) student to student; (2) student to staff and faculty; (3) student to alumni. Across each plane, networking has the potential to confer short- and long-term benefits. In the short term, meaningful relationships can imbue students with a greater sense of social belonging, which itself can produce positive feedback loops and buffer students against negative recursive processes.<sup>110</sup> An enhanced sense of social belonging, in turn, builds institutional trust and increases a

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<sup>106</sup> See *infra* Part II.B.

<sup>107</sup> See generally Per Davidsson & Benson Honig, *The Role of Social and Human Capital Among Nascent Entrepreneurs*, 18 J. BUS. VENTURING 301, 307 (2003) (“[Social capital is] provided by extended family, community-based, or organizational relationships [and] are theorized to supplement the effects of education, experience and financial capital.”); see also Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL’Y 89, 103 (2009).

<sup>108</sup> See *Sweatt*, 339 U.S. at 634 (“The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.”).

<sup>109</sup> *Id.*

<sup>110</sup> See *infra* Section II.B.2.a; see also Dorainne Green et al., *Relationship Inequalities in Law School at 2* (working paper) (on file with author and Utah Law Review) (reviewing research that found “law students from stigmatized backgrounds (e.g., racial/ethnic minorities) report having weaker social relationships in law school . . . [which] predicted lower sense of belonging[,] . . . reduced satisfaction with their law school experience, and lower grades in law school”).

student's broader social and academic engagement—all of which better position a student to reach her full potential, academic and otherwise, within the university and beyond.<sup>111</sup>

Positive inter-personal relationships offer additional benefits. Relationships with institutional insiders—often in the form of formal or informal mentors—offer access to insider knowledge that can facilitate successful navigation of an institution's social and academic domains.<sup>112</sup> Mentors can also become a place of refuge, particularly for students who might otherwise feel out of place, unwelcome, or under-valued in the university. Often, quality mentor relationships prove critical to one's present and future success.<sup>113</sup> Relationships born within the university can bear future fruit in the form of more advanced academic and professional opportunities down the road.<sup>114</sup> Whether in the form of a letter of reference or an unsolicited notice about a job opening, personal and organizational relationships often prove invaluable long after graduation.<sup>115</sup>

In contexts that include yet transcend higher education, quality networking will be most valuable to students who, relative to their peers, lack preexisting relationships within the subject profession or industry.<sup>116</sup> Given histories of exclusion and contemporary segregation in the United States,<sup>117</sup> this unevenness will often have a racially disparate impact. Accordingly, when institutional conditions

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<sup>111</sup> See *infra* Section II.B.2.a.

<sup>112</sup> On the value of diverse mentoring networks, see Meera E. Deo & Kimberly A. Griffin, *The Social Capital Benefits of Peer-Mentoring Relationships in Law School*, 38 OHIO N.U. L. REV. 305, 313, 330 (2011); see also Leary Davis, *Building Legal Talent: Mentors, Coaches, Preceptors and Gurus in the Legal Profession*, 20 PROF. LAW. 12, 12 (2011) (“These traditional mentoring relationships occur spontaneously and informally. They tend to be long-lasting, based on mutual respect, personal friendship and, more often than not, shared values. Mentors are attracted to protégés because of their personalities and their apparent skill.”).

<sup>113</sup> See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493, 540 (1996).

<sup>114</sup> See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. S95, S100–01 (1988).

<sup>115</sup> See Terry Morehead Dworkin et al., *The Role of Networks, Mentors, and the Law in Overcoming Barriers to Organizational Leadership for Women with Children*, 20 MICH. J. GENDER & L. 83, 103–04 (2013) (“The findings showed ‘that female managers can miss out on global appointments because they lack mentors, role models, sponsorship, or access to appropriate networks—all of which are commonly available to their male counterparts.’” (citation omitted)); see also Bo Han, *Mentoring Policies to Increase Women's Participation in Commercial Science*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 409, 437 (2009) (“Ties with the right people, in the right configuration, may increase an individual's access to organizational influence and career mobility.”).

<sup>116</sup> *Id.*

<sup>117</sup> Christopher Ingraham, *Three Quarters of Whites Don't Have any Non-White Friends*, WASH. POST WONKBLOG (Aug. 25, 2014), [https://www.washingtonpost.com/news/wonk/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends/?utm\\_term=.9e5463614829](https://www.washingtonpost.com/news/wonk/wp/2014/08/25/three-quarters-of-whites-dont-have-any-non-white-friends/?utm_term=.9e5463614829) [<https://perma.cc/D5MX-VD2X>].



hinder the ability of students from historically underrepresented groups to take full advantage of institutional networks, the resulting harm could be two-fold. First, the student suffers personally; she is deprived a resource available to her classmates. Second, to the extent that initial deprivation excludes the student from the relevant market, the institution's failure to provide equal access to networks will itself reinforce and perpetuate (if not exacerbate) historical inequities within the relevant industry or domain.

### 3. *Signaling Benefits*

A third and distinct benefit derived from university membership is “signaling.” Most broadly, the term “signaling” can be understood as the meaning communicated by a given proxy.<sup>118</sup> For purposes of this Article, I am most interested in the meaning communicated by a student's academic record—that is, a student's *academic* signaling. Academic signaling, which bears significant consequences, arguably begins with the institution a student attends.<sup>119</sup> Prospective employers, for instance, often view an applicant's alma mater as a proxy for valued professional characteristics.<sup>120</sup> Students accordingly benefit from (or are disadvantaged by) their school's relative reputation and prestige.

Academic signaling does not, however, end with the university an individual attends. In most cases, academic signaling also turns on a student's academic performance (e.g., grades, awards, or other academic accolades), activities (e.g., intercollegiate athletics or student organizations), and university service (e.g.,

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<sup>118</sup> For a discussion on signaling in employment settings, see Devon W. Carbado & Mitu Gulati, *The Economics of Race and Gender: Conversations at Work*, 79 OR. L. REV. 103, 113 (2000).

<sup>119</sup> Educational entities, from pre-kindergarten through professional schools, represent stops on a track to greater opportunity, power, and privilege. See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives . . . . A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.” (citations omitted)).

<sup>120</sup> Consider, for example, two law students who both graduated with a 3.6 GPA, one from Harvard Law School, the other from a third-tier institution. If the employer knows nothing else about the applicants, it will likely conclude that the student from Harvard (a “prestigious” institution) is more likely to possess the characteristics need to be a successful lawyer. Cf. Feingold & Souza, *supra* note 84, at 95 (noting that prestigious federal appellate court clerkships, along with providing invaluable work experience, provide an additional benefit—access to more coveted prizes and positions—in a way that a less prestigious clerkship (or no clerkship) does not). This example is not meant to treat the use of proxies as uncontestable, but rather to describe their common use.

student government).<sup>121</sup> Each piece of a student's academic record, and the record as a whole, tells a story about the student's personal character and her academic and professional talent and potential.

In most contexts, academic performance will carry greater weight than other portions of the academic record. A student's academic performance, in turn, carries pronounced short and long-term consequences. In the short-term, academic *under-performance*<sup>122</sup> might inaccurately signal (to the student and others) that a student lacks what it takes to succeed in a given domain. This can erode a student's confidence and sense of belonging, confirm doubts about one's "fit," and foster withdrawal or disengagement within the relevant discipline or domain.<sup>123</sup> It may also lead university faculty or staff to encourage the student to explore a different area of study.

Signaling, as a function of academic performance, also impacts future academic and professional opportunities inside the university and beyond.<sup>124</sup> Grades are often viewed as powerful proxies about intellectual ability and potential. Within the university, entry-level classes can function as gateways to more advanced courses and subject matter. Even if a student is otherwise capable, academic under-performance (and the signal it communicates) early in a student's academic career can compromise the student's ability to proceed vertically through a given discipline or area of study.<sup>125</sup> Beyond the university, employers and graduate or professional programs commonly rely on GPA (among other metrics of academic achievement) to gauge academic and professional talent and potential. Succeed—relative to your peers—and increase your chances of advancing. Fail to do so, and your chances accordingly dwindle.

Standard articulations of diversity and its educational benefits rarely account for signaling. This makes sense given that such articulations rarely account for the identify-contingent headwinds that students of color confront when severely underrepresented in predominately white institutions. Academic performance, good

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<sup>121</sup> Irrespective of the student's success therein, a powerful signal comes from the institution itself.

<sup>122</sup> By *under-performance*, I mean that environmental factors undermined the student's ability to perform up to her ability. Had those environmental factors been removed, the student's performance would have improved and offered a more accurate reflection of her existing talent and potential. This notion of under-performance is consistent with, and reflects findings from, the stereotype threat literature. See Walton & Spencer, *infra* note 193, at 1137.

<sup>123</sup> See Yeager et al., *supra* note 3, at E3342.

<sup>124</sup> See Feingold & Souza, *supra* note 84, at 95 ("Beyond signaling talent or merit to future employers, first-semester and first-year grades indicate to students whether law school was the proper choice, the proper fit, and whether 'I belong here.'").

<sup>125</sup> How an institution or student interprets underperformance may trade on socially salient attitudes and stereotypes concerning that student's "fit" in a given domain. See Jonathan P. Feingold & Evelyn R. Carter, *Eyes Wide Open: What Social Science Can Tell Us About the Supreme Court's Use of Social Science*, 112 NW. U. L. REV. 1689, 1707–10 (2018) (describing how an "Elite Student Paradigm" centers whiteness and imagines students of color—particularly Black students—as perpetual university outsiders).

or bad, is presumed to accurately reflect a student's talent and potential.<sup>126</sup> Little attention is paid to the way in which institutional environments—including racial demographics—may uniquely impact students from negatively stereotyped groups, and thereby result in grades that under-state a student's existing ability.<sup>127</sup>

The failure to link diversity with academic performance was hardly inevitable. From *Bakke* through *Fisher II*, Justices sewed their opinions with the insight of university administrators who themselves expressed concern about the race-based harms associated with racial tokenism.<sup>128</sup> If one accepts such observations, it would be odd to conclude that such headwinds never impact academic performance (and, by extension, a student's ability to signal their full talent and potential). To the contrary, in a setting characterized by unequal headwinds, academic performance will likely *under*-signal the actual talent and ability of underrepresented students. Their unburdened peers, in contrast, reap a relative and unearned signaling boost.<sup>129</sup>

Ultimately, some may view signaling as an odd category to include within a taxonomy of university benefits. I do so for two reasons. First, as discussed above, signaling carries tremendous practical consequences. Even if academic performance cannot guarantee future success, many a door are unlikely to open unless one enters a prestigious institution and succeeds therein. Second, as I discuss in greater detail in Part III, signaling warrants attention because it taps into values that continue to inform the Supreme Court's equal protection jurisprudence. For over four decades, the Supreme Court has viewed with skepticism selection processes that compromise an individual's ability to compete for public benefits on the basis of individual merit, regardless of one's race.<sup>130</sup> When institutional conditions exact race-dependent burdens on certain students, those students are deprived of such an opportunity. In other words, when one defends diversity as a mechanism to mitigate harms that contravene basic commitments to individual meritocracy, race-conscious admissions emerge as a tool to promote values that a majority of Supreme Court Justices—including those traditionally hostile to affirmative action—continue to locate at the core of equal protection.<sup>131</sup>

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<sup>126</sup> See Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1109–13 (2009) (discussing the distinction between “minority deficiency” and “test deficiency” theories of underperformance).

<sup>127</sup> See *infra* Section II.B.2.b (discussing findings on stereotype threat).

<sup>128</sup> See *supra* Sections I.A–C.

<sup>129</sup> See Feingold, *Racing Towards Color-blindness*, *supra* note 47; *infra* Section II.B.2.b.

<sup>130</sup> See Jonathan P. Feingold, *Equal Protection Design Defects*, 91 TEMP. L. REV. (forthcoming 2019) (arguing that equal protection doctrine has been designed to further each individual's “right to compete” on the basis of individual “merit,” regardless of a person's race) [hereinafter Feingold, *Equal Protection*].

<sup>131</sup> See *supra* Part III.C.

#### 4. *Intersecting and Interacting Benefits*

This brief overview of learning, networking, and signaling benefits is not meant to be comprehensive of the varied benefits that flow from university membership. Nonetheless, by unpacking these components of university membership, this brief exposition helps to illuminate the discrete and reinforcing harms that may arise when institutional conditions subject certain students to identity-contingent harms. When a student faces racial isolation on campus, or confronts negative stereotypes in the classroom, the impact is not limited to the emotional or physical toll of the experience itself.<sup>132</sup> There is also the threat that the harm compounds by interfering with the student's ability to learn, to engage, and to perform.

But it is not just that learning, networking, or signaling may suffer. These dimensions of university membership are inherently intertwined; conditions that impact one will likely compromise others as well.<sup>133</sup> Consider a scenario in which institutional conditions undermine a student's ability to learn. To the extent learning suffers, that hit will likely impact the student's academic performance. The student's academic performance, in turn, translates into a grade (or grades) that *under-state(s)* that student's actual academic talent and potential. Thus, even though learning and signaling may be analytically distinct, when institutional conditions compromise one, it will often be difficult to quarantine that harm from the other.

I am not suggesting, however, that there is always a direct relationship between learning, networking, and signaling. One could imagine a different scenario in which institutional conditions (e.g., pervasive racial stereotypes) cause a student to academically disengage (e.g., by electing not to speak in class or attend office hours).<sup>134</sup> Due to this academic disengagement, the student's learning (that derived from active participation in the classroom and office hours) would likely suffer. The student may nonetheless excel academically and receive a top grade in the class. Under this scenario, the hit to learning has not compromised the student's academic performance; signaling attributable to that grade is, accordingly, unaffected. In fact,

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<sup>132</sup> See Mary C. Murphy et al., *Cognitive Costs of Contemporary Prejudice*, 16 GROUP PROCESSES & INTERGROUP RELATIONS 560, 564–69 (2012) (discussing results of separate studies that suggest exposure to racial prejudice disrupts racial minorities' cognition).

<sup>133</sup> See Greene et al., *supra* note 110, at 25 (describing the relationship between “stigmatized” law students' relationships in law school, sense of belonging, law school satisfaction, and academic achievement). The Supreme Court appreciates the overlapping relationship between learning and networking. Across multiple contexts, the Supreme Court has emphasized that learning arises, in part, from a student's engagement with those from different backgrounds and experiences. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 n.48 (1978); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950). One could imagine this interdependency as follows (or in the negative): Networking promotes learning (social disengagement undermines learning); learning promotes signaling (failure to learn undermines academic performance which entails negative signaling); signaling promotes learning and networking (poor academic performance reinforces feelings of nonbelonging). Rinse and repeat.

<sup>134</sup> See UCLA Law Students Brief, *supra* note 2, at 19–28 (describing how underrepresentation can create environments that dissuade students from speaking in class).

the student's academic performance may mask what have become silent harms that nonetheless bear independent learning or networking costs.<sup>135</sup> And beyond the individual student, when environmental conditions chill the speech of underrepresented students (or otherwise minority perspectives), classroom discussion suffers—and so does the learning of other students in the class.

To further concretize the relationship between diversity and equal university membership, I now bridge the theory to student testimony and social science. Collectively, the personal accounts and empirical scholarship reinforce the same basic insight: racial diversity matters, in part, because severe underrepresentation can exact race-contingent burdens that undermine a student's ability to access the full benefits of university membership.

### *B. Linking Diversity and Personal Equality*

#### *1. The Student Perspective*

As Part I revealed, university administrators understand that students of color, absent a racially diverse student body, face unique burdens within the university. Administrators are not alone in this assessment. Students also appreciate the potentially deleterious impact of severe underrepresentation. However, unlike university administrators, students and their voices remain largely absent from the Supreme Court's discussion of diversity and its educational benefits. As a result, the Supreme Court continues to overlook some of the individuals best positioned to describe the challenges that befall underrepresented students of color on predominately white campuses.

This omission is not the result of silent students. To the contrary, students have long been on the frontlines to preserve affirmative action and to resist the re-segregation of American institutions. One notable example comes from the UCLA School of Law Students of Color amicus brief submitted in *Grutter*.<sup>136</sup> As the students attested, they were uniquely positioned to “comment on [*Grutter*] because

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<sup>135</sup> See Ingroup Experts, *supra* note 20, at 232 (“[S]ometimes people lack confidence in their ability and withdraw from achievement domains *even when their performance is as good as their peers*. In other words, performance and self-efficacy don't always go hand in hand.”).

<sup>136</sup> See UCLA Law Students Brief, *supra* note 2. This brief was submitted by a coalition of law students and alumni of the University of California school system, including testimonials of students from Boalt Hall, Hastings College of Law, UCLA School of Law, and UC Davis School of Law. *Id.* at \*19–28. In the roughly 15 years since this brief was submitted, UCLA undergraduate and law students have continued to document the deleterious effects of underrepresentation in a post-affirmative action state. See also, e.g., Feingold & Souza, *supra* note 84, at 112–14; RecordtoCapture, 33, YOUTUBE (Feb. 10, 2014), <https://www.youtube.com/watch?v=5y3C5KBcCPI> [<https://perma.cc/6E59-4DG9>]; Sy Stokes, *The Black Bruins [Spoken Word]*, YOUTUBE (Nov. 4, 2013) [https://www.youtube.com/watch?time\\_continue=16&v=BEO3H5BOIFk](https://www.youtube.com/watch?time_continue=16&v=BEO3H5BOIFk) [<https://perma.cc/37RR-7CL6>].

they ha[d] been directly affected by the prohibition against affirmative action in the UC system.”<sup>137</sup> Their amicus brief drew on more than ten declarations and was signed by hundreds of students across four University of California law schools.<sup>138</sup> Through their individual and collective testimony, the students detailed the burdens that law students of color confronted following the passage of Proposition 209, a statewide ballot initiative that effectively banned affirmative action in California.<sup>139</sup>

Notwithstanding the students’ admission to elite UC law schools under a “post-affirmative action” regime, the severe underrepresentation and quasi-segregation they experienced exacted concrete and racially-inflected harms. The following accounts are illustrative:

*The worst thing about not having other Latinos in my classes is that I am expected to be the voice for “my people.” Every time I manage to work up the courage to speak, whatever I say is taken to be the opinion of all Latinos in the United States. I know that I am alone and would not have any allies in my positions and statements. Therefore, I often just sit in class and swallow my thoughts.*

– Rosa Figueroa-Versage, UC Hastings, Class of 2003<sup>140</sup>

*I am one of 13 Black students, and am often the only Black student that my non-Black peers come into contact with on a daily basis . . . . While other students are free to say whatever they like, I am constantly forced to think through and then re-think my comments before speaking to eliminate anything that can be characterized as resulting from my Blackness. This is a hard burden to bear. The only people who can identify with my struggles are my fellow Black students. However, because of our small numbers and the toll that repeated “war stories” can place on them, I often have to shoulder the burden alone.*

–Tiffany Renee Thomas, Boalt Hall, Class of 2005<sup>141</sup>

*One day I was approached in the law school courtyard by a couple of UCLA campus police officers . . . . Apparently, since I’m one of the only Black males walking around this school, this was enough for the officer to say affirmatively that I was the male [another student] had identified . . . . Once the officers realized that I was a law student, they didn’t even bother to ask me any questions about the alleged theft. However, from my perspective, the damage was already done . . . . I had been trying hard to fit in with the rest of my classmates and to get them to see me as more than just “the Black man in the class.” I was so emotionally distraught that I*

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<sup>137</sup> UCLA Law Students Brief, *supra* note 2, at \*1.

<sup>138</sup> *Id.* at \*19–28.

<sup>139</sup> *Id.* at \*2.

<sup>140</sup> *Id.* at \*21.

<sup>141</sup> *Id.* at \*27–28.

*was not even able to go to class that day. It will be a long time before I am ever comfortable in the law school environment again.*

– Marky Keaton, UCLA School of Law, Class of 2003<sup>142</sup>

*Because of the lack of students of color in the classroom . . . the decision to raise my hand and speak out is not one easily made. I choose to speak, but only because the obligation I feel to those who fought before me . . . outweighs my fear of being ridiculed by my peers . . . I suffer through Property class virtually alone as I wait for the professor to mention, just once, where all this “property” that we have so many laws about comes from. When I bring up the fact that the law of adverse possession that focuses on “efficient” use of the land is based on a particular Anglo conception of efficiency, the same concept of efficiency that often served as the colonial justification for forced appropriation of Indian lands, I am faced with a moment of silence and then, moving on . . . My contribution has been effectively devalued and I am silenced for the remainder of the day.*

*The only support network I find is from the few students of color in the first-year class. We share battle stories from the classroom and console one another in our anger and pain at the silence that is imposed on us by virtue of the fact that our numbers are not significant enough to render our issues “important” in the classroom.*

– Angela Mooney-D’arcy, UCLA School of Law, Class of 2004<sup>143</sup>

I do not present this testimony as dispositive proof that students of color suffer race-based harms when universities lack racial diversity. Nonetheless, the accounts offer valuable, personalized insight that should inform contemporary conversations about the relationship between diversity and equality. The foregoing anecdotes illuminate, for instance, the multifaceted toll that students of color experience when severely underrepresented in the classroom. Although each student’s experience was unique, the testimony exposes common themes of racial isolation, racial identity salience, stigma-consciousness, emotional fatigue, and perpetual outsider status.<sup>144</sup> The fact that this testimony comes from elite California law schools in a post-affirmative action context renders the stories particularly relevant for ongoing

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<sup>142</sup> *Id.* at \*24.

<sup>143</sup> *Id.* at \*22.

<sup>144</sup> UCLA Law Students Brief, *supra* note 2, at \*19–28; *see also* Feingold & Souza, *supra* note 84, at 88; Elizabeth Pinel et al., *Getting There Is Only Half the Battle: Stigma Consciousness and Maintaining Diversity in Higher Education*, 61 J. SOC. ISSUES 481, 482 (2005). Beyond adding texture to what can often be an abstract and face-less conversation about diversity, I include these statements to center and uplift the voices of actual students who, following the abolition of affirmative action, faced conditions that compromised an equal university membership. It is also worth noting where the students found refuge: in spaces with other students who understood the toll of severe racial underrepresentation.

litigation that implicates the future of race-conscious admissions nationwide.<sup>145</sup> They also counter lay theories that identify race-conscious admissions as the source of racial stigma or presumptions of non-belonging that students of color face in elite institutions.<sup>146</sup>

Ultimately, these anecdotes occupy one piece of a broader mosaic of evidence concerning the relationship between racial demographics and a university's ability to realize an equal university membership for all students. Another piece of this story, to which I now turn, comes from two related bodies of scholarship which further fortify the case for diversity by empirically anchoring the theory and personal testimony to social science.

## 2. *The Social Science*

Over the past decade, legal scholars have drawn heavily on implicit bias scholarship to disrupt assumptions about discrimination and human behavior embedded in legal doctrine.<sup>147</sup> Aspects of the implicit bias research, particularly that concerning the debiasing potential of intergroup contact and counter-typical exemplars, are relevant to debates about diversity's function as a driver of equality.<sup>148</sup> At the same time, the implicit bias literature offers limited value with respect to the central empirical claim underlying this Article: that severe underrepresentation can exact identity-contingent harms that compromise a student's ability to learn, engage, and perform.<sup>149</sup>

Fortunately, distinct bodies of empirical scholarship speak directly to this claim. I refer specifically to research on the related psychological phenomena of social identity threat and stereotype threat.<sup>150</sup> The social science reveals that irrespective of an institution's egalitarian commitments, when environmental features—including racial demographics—signal that certain students will be

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<sup>145</sup> See *supra* note 10 (identifying existing lawsuits challenging the race-conscious admissions policies at Harvard and UNC-Chapel Hill).

<sup>146</sup> See Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 IND. L.J. 1197, 1199 (2010) (describing a study that found that “[u]nderrepresented minority students in states that *permit* affirmative action encounter far less hostility and internal and external stigma than students in anti-affirmative action states”).

<sup>147</sup> See, e.g., Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1495–97 (2005). An August 27, 2018 Westlaw search for “implicit bias” identified 2,735 law review articles. Searches for “stereotype threat” and “social identity threat” identified 596 article and 52 articles, respectively.

<sup>148</sup> See, e.g., See Nilanjana Dasgupta & Shaki Asgari, *Seeing Is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 649–54 (2004) (observing a decrease of implicit bias against women in a cohort of female students after one year in a single-sex university).

<sup>149</sup> See *infra* Part II.B.2.a–b (discussing the effects of stereotype threat and social identity threat).

<sup>150</sup> See *id.*



devalued or negatively stereotyped because of their race, those students encounter unique, race-based headwinds that can interfere with learning, decrease rates of academic and social engagement, and undermine academic performance.<sup>151</sup>

(a) *Social Identity Threat*

Many students experience social belonging doubts when transitioning to new environments such as college.<sup>152</sup> For students from negatively stereotyped groups, this general concern can be heightened by the particular anxiety that they will be devalued or negatively stereotyped because of their identity.<sup>153</sup> That is, they experience what social psychologists have termed “social identity threat,” which captures the “broad threat that people experience when they believe they may be treated negatively or devalued in a setting simply because of a particular social identity they hold.”<sup>154</sup>

Professor David Yeager and colleagues have explained that “worries about belonging and potential are pernicious precisely because they arise from awareness of real social disadvantage before and during college, including . . . awareness of

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<sup>151</sup> See Ingroup Experts, *supra* note 20, at 232 (“Stereotype threat and social identity threat are known to undermine performance in domains where one’s group is negatively stereotyped and one’s belonging uncertain; over time, weak performance reduces self-confidence in one’s ability (or self-efficacy) and leads individuals to withdraw from the domain.”). This literature does not stand for the proposition, nor am I arguing, that racial diversity can itself eliminate racial unevenness in the university. Still, racial diversity constitutes one piece of a broader constellation of factors that predict whether students of color will face race-dependent burdens within educational environments. See generally Deirdre Bowen, *American Skin: Dispensing with Colorblindness and Critical Mass in Affirmative Action*, 73 PITT. L. REV. 339 (2011) (arguing that numerical representation might be insufficient to reduce racial stigma under a regime of rhetorical colorblindness); Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 330–39 (2015) (reviewing interventions shown to reduce threat). It would be just as shortsighted to claim that individual bad actors are the lone threat to equality. Cf. *Shelby v. Holder*, 570 U.S. 529, 565 (2013) (Ginsburg, J., dissenting) (describing a compilation of legislative records that documented “countless examples of flagrant racial discrimination since the last reauthorization; . . . systematic evidence that intentional racial discrimination in voting remains so serious and widespread in covered jurisdictions that section 5 preclearance is still needed” (internal quotation marks omitted)).

<sup>152</sup> See Greg M. Walton & Geoffrey L. Cohen, *A Brief Social-Belonging Intervention Improves Academic and Health Outcomes of Minority Students*, 331 SCI. 1447, 1448 (2011) (explaining “[d]uring the transition to a new school, students can face frequent social setbacks and feelings of isolation.”).

<sup>153</sup> See Yeager et al., *supra* note 3, at E3347 (noting social identity threat is not limited to individuals from negatively stereotyped racial groups, but has also been shown to impact women and first-generation college students, regardless of race).

<sup>154</sup> Mary C. Murphy et al., *Signaling Threat*, 18 PSCHOL. SCI. 879, 879 (2007).

negative stereotypes and numeric underrepresentation.”<sup>155</sup> These identity-inflected worries can trigger doubts about whether “people like them fully belong,” whether they “will be seen as lacking intelligence,” and whether they “will be a poor cultural fit.”<sup>156</sup> These particularized belonging concerns can “seed harmful inferences for even commonplace challenges . . . such as feelings of loneliness, academic struggles, or critical feedback.”<sup>157</sup> As a result, students can perceive negative—but arguably minor—events as evidence that they do not belong more fundamentally.<sup>158</sup> These inferences, in turn, can “sap motivation and undermine achievement through a cycle that gains strength through its repetition.”<sup>159</sup>

A pernicious cycle results.<sup>160</sup> A negative event confirms anxieties about non-belonging, which can cause even highly motivated and talented students to disengage or withdraw from the relevant domain.<sup>161</sup> Disengagement increases the likelihood of future academic underachievement, which reaffirms doubts about belonging and precipitates further withdrawal and disengagement.<sup>162</sup>

Although pervasive, social identity threat is not an inevitable feature of university life. To the contrary, this psychological threat is environmentally contingent, meaning that its presence and severity turns on situational cues that signal whether an individual’s identity is stigmatized within a particular setting.<sup>163</sup>

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<sup>155</sup> Yeager et al., *supra* note 3, at E3347; *see also* Valeria Purdie-Vaughns et al., *Social Identity Contingencies: How Diversity Cues Signal Threat or Safety for African Americans in Mainstream Institutions*, 94 J. PERS. & SOC. PSYCHOL. 615, 616 (2008) (“People who belong to stigmatized groups may question whether their group is valued in mainstream settings (e.g., workplaces, schools, religious settings), especially in ones in which their group has been historically discriminated against or stereotyped.”).

<sup>156</sup> Yeager et al., *supra* note 3, at E3342 (noting students from nonstereotyped groups—even if they experience general anxiety about entering college—do not confront these particularized anxieties moored to more fundamental identity-contingent doubts about belonging).

<sup>157</sup> *Id.* at E3342. Recall that loneliness and isolation were two concerns that Kennedy explicitly named in *Fisher II*, 136 S. Ct. 2198, 2212 (2016) (“In addition to this broad demographic data, the University put forward evidence that minority students admitted under the Hopwood regime experienced feelings of loneliness and isolation.”).

<sup>158</sup> Yeager et al., *supra* note 3, at E3348.

<sup>159</sup> *Id.* at E3342.

<sup>160</sup> *Id.* at E3342 fig.1.

<sup>161</sup> *See generally* Murphy et al., *supra* note 154, at 880–84 (supporting the proposition that “threatening features of a setting . . . may cause even highly confident, highly domain-identified women to avoid or leave MSE fields”).

<sup>162</sup> *See id.* at 879 (noting many stereotype-threat researchers “have argued that targets’ reduced psychic resources . . . render them vulnerable to deficits in performance when they experience stereotype threat”).

<sup>163</sup> *See id.* at 879–80 (“[W]e contend that a person’s vulnerability to identity threat need not be inherent to him or her. Instead, situational cues may contribute to experiences of social identity threat among groups potentially stereotyped in a setting—even when targets are interested, confident, proven achievers in the relevant domain.”); *see also* Purdie-Vaughns et al., *supra* note 155, at 616 (“[G]roup members draw information from situational cues that hold relevance for the value and the status accorded to their group.”); Ingroup Experts, *supra*

Although at times overt, cues are often subtle. This can extend to an entity's racial or gender demographics.<sup>164</sup> When women or people of color, for example, are visibly under-represented within an institution, this environmental feature can itself signal that group membership negatively implicates an individual's present and future opportunities and success.<sup>165</sup> In contrast, when institutional conditions lift threat, students are freed from this identity-contingent burden and, like their non-stereotyped peers, become positioned to experience positive feedback loops.<sup>166</sup>

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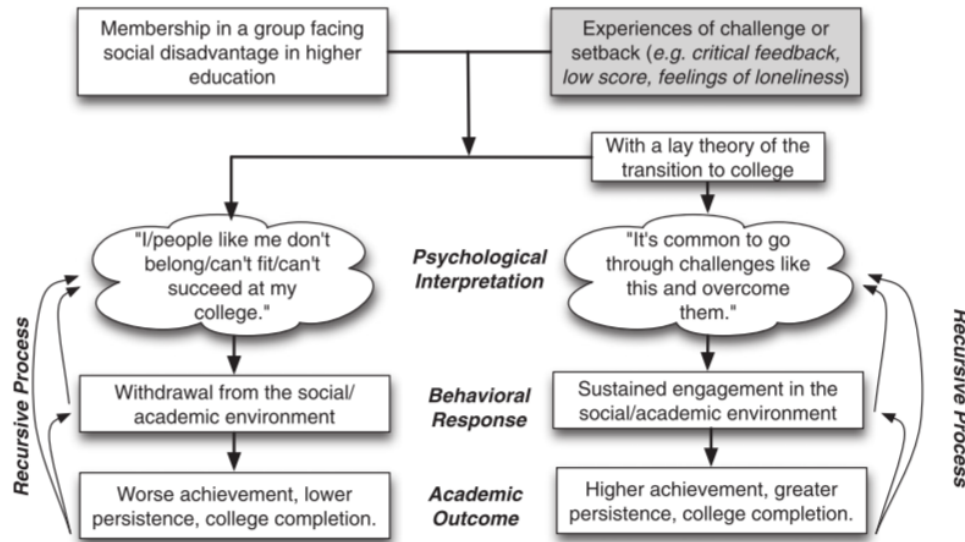
note 20, at 232–33 (“Collectively, these examples suggest that the experience of being a numeric minority in high-stakes achievement environments where stereotypes are in the air may reduce individuals’ self-efficacy or confidence in their own ability, especially in the face of difficulty, even if their actual performance is objectively the same as majority-groups members.”). Institutional ideologies—such as organizational theories of intelligence or commitments to race-conscious or colorblind discourse—also function as situational cues. See, e.g., Evan P. Apfelbaum et al., *Racial Color Blindness: Emergence, Practice, and Implications*, 21 CURRENT DIRECTIONS PSYCHOL. SCI. 205, 206 (2012) (“[A] color-blind ideology not only has the potential to impair smooth interracial interactions but can also facilitate—and be used to justify—racial resentment.”).

<sup>164</sup> See generally Purdie-Vaughns et al., *supra* note 155, 615–18 (describing the ways in which low minority representation cues can lead to minority populations perceiving identity contingencies and distrusting the setting); see also Michael Inzlicht & Talia Ben-Zeev, *A Threatening Intellectual Environment*, 11 PSYCHOL. SCI. 365, 370 (2000) (“The data from the current study support the conclusion that the presence of males constitutes a threatening intellectual environment for females performing a math task, and specifically that women experience a greater deficit in their math performance the more males there are in the environment.”); Michael Inzlicht & Catherine Good, *How Environments Can Threaten Academic Performance, Self-Knowledge, and Sense of Belonging*, in STIGMA AND GROUP INEQUALITY: SOCIAL PSYCHOLOGICAL PERSPECTIVES 3 (Shana Levin & Colette van Laar eds. 2006) (noting different settings where racial and gender demographics cue a threatening environment). Contemporary social identity threat literature builds on prior research that observed the relationship between gender representation and threat. See Elizabeth Chambliss & Christopher Uggen, *Men and Women of Elite Law Firms: Reevaluating Kanter’s Legacy*, 25 LAW & SOC. INQUIRY 41, 43–48 (2000); Rosabeth M. Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 966–67 (1977); Eve Spangler et al., *Token Women: An Empirical Test of Kanter’s Hypothesis*, 84 AM. J. SOC. 160, 162 (1978).

<sup>165</sup> See Katherine T.U. Emerson & Mary C. Murphy, *A Company I Can Trust? Organizational Lay Theories Moderate Stereotype Threat for Women*, 41 (2) PERS. & SOC. PSYCHOL. BULL. 295, 296 (2015) (“[C]ompany settings may contain powerful cues that do not explicitly reference gender stereotypes and differences but nonetheless communicate messages about the value of groups, thereby creating different psychological experiences for stigmatized and nonstigmatized groups.”).

<sup>166</sup> *Id.* at 295 (“[W]hen cues signal that group membership will not impede peoples’ performance or mobility, stereotype threat is tempered.”); see generally Gregory Walton & Geoffrey Cohen, *A Question of Belonging: Race, Social Fit, and Achievement*, 92 J. PERS. & SOC. PSYCHOL. 82, 94 (2007) (discussing intervention shown to decrease belonging uncertainty and increase academic performance in Black college students).

These alternative recursive processes are depicted in the following schematic:<sup>167</sup>



Given the observed relationship between numerical representation and social identity threat, the vicious cycle depicted in the above schematic has the potential to exact a double harm on students of color.<sup>168</sup> To the extent students of color experience social identity threat because an educational environment lacks racial diversity, some students from negatively stereotyped groups are likely to withdraw from those domains. For those students of color who remain in the relevant domain, they must contend with an increasingly homogenous environment that may present increasingly acute levels of threat. This double harm makes it even more incumbent upon the university to ensure that whatever societal realities it inherits, it does not institutionalize conditions that disproportionately burden already underrepresented students of color. There is also a flip side to this double harm. Students from non-stereotyped groups, who never encounter racially-contingent psychological threats, accrue a corresponding and ever-increasing racial preference as their negatively stereotyped peers suffer.<sup>169</sup>

<sup>167</sup> Yeager et al., *supra* note 3, at E3342 fig.1 ("Theoretical model: the process through which lay theories affect disadvantaged students' behavior and academic outcomes across the transition to college.")

<sup>168</sup> See Charles R. Calleros, *Patching Leaks in the Diversity Pipeline to Law School and the Bar*, 43 CAL. W. L. REV. 131, 133–34 (2006); Michael A. Olivas, *Law School Admissions After Grutter: Student Bodies, Pipeline Theory, and the River*, 55 J. LEGAL EDUC. 16, 17 (2005).

<sup>169</sup> See Yeager et al., *supra* note 3, at E3342.

(b) *Stereotype Threat*

Stereotype threat, which has become one of the most widely studied phenomena in social psychology, comprises a particular manifestation of social identity threat.<sup>170</sup> Although relatively foreign to legal scholarship, stereotype threat research has drawn increased attention in the affirmative action context, both in the law reviews and in actual litigation.<sup>171</sup> Most recently, the *Fisher* litigation saw amicus briefs from the nation's leading experts on stereotype threat.<sup>172</sup> The social scientists did not employ the terminology of “equal university membership,” but nonetheless harnessed the stereotype threat research to advance the same basic argument: personal equality harms can arise absent racial diversity.<sup>173</sup> Specifically, the brief emphasized that severe underrepresentation in the classroom can subject students of color to concrete and quantifiable harms in the university.<sup>174</sup>

These harms arise from stereotype threat, which refers to the anxiety that poor performance on a task could confirm a negative stereotype about a group to which a person belongs.<sup>175</sup> This is not a phenomenon of general performance anxiety, but rather the more particularized threat of stereotype confirmation—a threat that has been documented across hundreds of laboratory and real-world studies.<sup>176</sup> When present, stereotype threat can produce distraction and anxiety that “hijack[s] the cognitive systems required for optimal performance, resulting in low test performance.”<sup>177</sup> As Professor Toni Schmader and colleagues explained in a 2008

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<sup>170</sup> See Toni Schmader et al., *An Integrated Process Model of Stereotype Threat Effects on Performance*, 115 PSYCHOL. REV. 336 (2008).

<sup>171</sup> See, e.g., Erman & Walton, *supra* note 151; Feingold, *Racing Towards Colorblindness*, *supra* note 47.

<sup>172</sup> See Brief for Experimental Psychologists as Amici Curiae in Support of Respondents at 23–24, *Fisher v. University of Texas at Austin*, 570 U.S. 297 (2013) (No. 11-345) [hereinafter Experimental Psychologists Brief I]; Brief of Experimental Psychologists as Amici Curiae in Support of Respondents, *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981) [hereinafter Experimental Psychologists Brief II].

<sup>173</sup> See Experimental Psychologists Brief II, *supra* note 172, at \*27–29.

<sup>174</sup> See *id.*

<sup>175</sup> See Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 EDUC. PSYCHOL. 42 (2012). Early stereotype threat research was motivated by a desire to explain why racial and gender achievement gaps persisted even after controlling for wide-ranging factors expected to explain such disparities. See Ronald G. Fryer Jr. & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 REV. ECON. & STAT. 447 (2002) (“Even after controlling for a wide range of covariates including family structure, socioeconomic status, measures of school quality, and neighborhood characteristics, a substantial racial gap in test scores persists.”); Claude M. Steele, *A Threat in the Air*, 6 AM. PSYCHOL. 613, 622 (1997); Claude M. Steele, *Race and the Schooling of Black Americans*, ATLANTIC MONTHLY, Apr. 1992, at 68.

<sup>176</sup> See Logel et al., *supra* note 175, at 42.

<sup>177</sup> STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 6 (Michael Inzlicht & Toni Schmader eds., 2011).

review of the research, “stereotype threat degrades the ability to regulate attention during complex tasks where it is necessary to coordinate information processing online and inhibit thoughts, feelings, and behaviors counterproductive to one’s current goals.”<sup>178</sup> Stereotype threat directly implicates academic environments, in part, because these are the precise areas of cognitive function essential for speeded tasks—such as university exams and standardized tests.

Stereotype threat and racial diversity are linked, in part, because this psychological threat—as with social identity threat—is environmentally contingent.<sup>179</sup> Although pervasive, stereotype threat is neither inevitable nor the result of personal or characterological deficiencies in individual students.<sup>180</sup> To the contrary, stereotype threat occurs when environmental cues signal that certain people may be negatively stereotyped because of an identity they hold.<sup>181</sup> This means that stereotype threat can affect “anyone who contends with a negative intellectual stereotype in a performance setting.”<sup>182</sup> White men, for instance, have been shown to suffer from stereotype threat when performing athletic tasks and when compared to Asian students on difficult math exams.<sup>183</sup>

Irrespective of the individual, several factors must exist for a student to encounter stereotype threat. First, the student must belong to a negatively stereotyped group.<sup>184</sup> In most educational settings, black and brown students (and

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<sup>178</sup> Schmader et al., *supra* note 170, at 340.

<sup>179</sup> See Murphy et al., *supra* note 154, at 884 (“These data demonstrate that rather than being endemic to women, the experience of identity threat is attributable to the situation—its cues and organization.”).

<sup>180</sup> See *id.*

<sup>181</sup> Emerson & Murphy, *supra* note 165, at 296 (“[W]hen cues signal that group membership will not impede peoples’ performance or mobility, stereotype threat is tempered.”).

<sup>182</sup> Logel et al., *supra* note 175; see generally Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Intellectual Test Performance of African Americans*, 69 J. PERS. & SOC. PSYCH. 797 (1995) (describing one of the seminal stereotype threat studies).

<sup>183</sup> See Jeff Stone et al., *Stereotype Threat Effects on Black and White Athletic Performance*, 77 J. PERS. & SOC. PSYCHOL. 1213, 1223 (1999); Joshua Aronson et al., *When White Men Can’t Do Math: Necessary and Sufficient Factors in Stereotype Threat*, 35 J. EXP. SOC. PSYCHOL. 29, 33 (1999).

<sup>184</sup> See Steele & Aronson, *supra* note 182, at 798. This includes, for instance, women in quantitative fields, see, e.g., Linette M. McJunkin, *Effects of Stereotype Threat on Undergraduate Women’s Math Performance: Participant Pool vs. Classroom Situations*, 45 EMPORIA ST. RES. STUD. 27, 30 (2009), African Americans, Latinas/os, and American Indians across academic domains, see, e.g., Joshua Aronson et al., *Reducing the Effects of Stereotype Threat on African American College Students by Shaping Theories of Intelligence*, 38 J. EXP. SOC. PSYCHOL. 113, 124 (2002); Patricia M. Gonzales et al., *The Effects of Stereotype Threat and Double-Minority Status on the Test Performance of Latino Women*, 28 PERS. & SOC. PSYCHOL. BULL. 659, 666 (2002); Jamie Jaramillo et al., *Ethnic Identity, Stereotype Threat, and Perceived Discrimination Among Native American Adolescents*, J. RES. ON ADOLESCENCE 1 (2015), the elderly on memory-related tasks, see, e.g., Becca Levy, *Improving Memory in Old Age Through Implicit Self-Stereotyping*, 71 J. PERS. & SOC. PSYCHOL. 1092, 1100 (1996), and white men playing sports, see, e.g., Jeff

women in certain fields) will face socially salient negative stereotypes about intellectual inferiority. These students, in turn, are uniquely vulnerable to stereotype threat. This is a burden that their non-stereotyped colleagues never confront.

Second, the negative stereotype must be perceived as relevant to the task at hand.<sup>185</sup> Almost all academic tasks, including high stakes exams and standardized tests, are understood to measure intellectual ability. Accordingly, most tasks that students perform in the classroom context implicate stereotypes about the intellectual capabilities of black and brown students.

Third, the performer's relevant social identity must be salient during performance.<sup>186</sup> This final factor links student body diversity and stereotype threat. As noted above, racial demographics function as a powerful cue that can heighten or mitigate the salience of racial identity and associated stereotypes.<sup>187</sup> A student's race is likely to be most salient when she is severely underrepresented in the classroom.<sup>188</sup> Racial diversity, in turn, can decrease the salience of race and thereby buffer students against the negative consequences of stereotype threat.<sup>189</sup>

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Stone, *Battling Doubt by Avoiding Practice: The Effects of Stereotype Threat on Self-Handicapping in White Athletes*, 28 PERS. & SOC. PSYCHOL. BULL. 1667, 1676 (2002).

<sup>185</sup> See Steele & Aronson, *supra* note 182, at 808.

<sup>186</sup> See Murphy et al., *supra* note 154, at 879 (“Race, gender, socioeconomic status, and political and religious affiliations are examples of social identities that people carry with them. Yet the salience of people’s group memberships varies depending on the situational cues in a setting. In fact, previous research has shown that people often see themselves in terms of their social identity that is most stigmatized in the current setting.”); Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80, 80–82 (1999); Steele & Aronson, *supra* note 182, at 808.

<sup>187</sup> See *supra* notes 165–166; see also Denise Sekaquaptewa & Mischa Thompson, *The Differential Effects of Solo Status on Members of High- and Low-Status Groups*, 28 PERS. & SOC. PSYCHOL. BULL. 694, 695 (2002) (“Investigations in person perception have shown that those who are different from the rest of the group (and thus highly salient) attract more attention than nondistinctive group members. . . . [Solo status] disrupted the learning process: Solos had poorer recall of who said what during the group discussion than nonsolos.”); Emerson & Murphy, *supra* note 165, at 298 (describing numerical representation as a “particularly well-documented antecedent of stereotype threat”); Inzlicht & Ben-Zeev, *supra* note 164, at 365 (“This last finding raises the possibility that as females are increasingly outnumbered by males, a situation that is common to many advanced-level quantitative high school classes, university courses, and workplace environments, females may become more aware of their gender.”).

<sup>188</sup> See Catherine Good et al., *Improving Adolescents’ Standardized Test Performance: An Intervention to Reduce the Effects of Stereotype Threat*, 24 J. APPLIED DEV. PSYCHOL. 645, 647 (2003) (“[G]roup composition—the racial or gender mix in a room of test takers—also can trigger stereotype-relevant thoughts, and thus vulnerability to stereotype threat because group composition can make salient one’s social identity and the stereotypes associated with that identity.”).

<sup>189</sup> See Ingroup Experts, *supra* note 20, at 231 (“The demographic composition of achievement settings is often a critical situational cue that activates these stereotypes—who is visible and who is scarce?”).

The following hypothetical, included in the aforementioned *Fisher* amicus brief, illustrates how numerical representation can impact the salience of racial or gender identity:

When A is the only black student taking Medieval Literature, he is likely to feel like, and to be perceived as, “the black kid” in the class. When B is the only woman majoring in Mechanical Engineering, she is likely to feel like, and to be perceived as, not just an Engineering major, but a woman majoring in Engineering. But when there are multiple members of one’s racial or gender group present, a person’s identity is less defined by group membership. Now A is just a student taking Medieval Literature and B is just someone studying Engineering. Stereotype threat diminishes in diverse environments, because group membership tends to become less defining of individual identity.<sup>190</sup>

Stereotype threat tracks social identity threat in two additional respects that warrant note. First, stereotype threat is most likely to impact high-achieving individuals who strongly identify with the relevant domain “and for whom membership in the stereotyped group is central to their self-concept.”<sup>191</sup> Second, stereotype threat is most likely to undermine performance on challenging tasks. The cognitive burdens associated with this threat begin to compromise performance when an individual is pushed to the edge of her ability.<sup>192</sup> As a result, stereotype threat’s impact will predictably increase as students progress vertically through academic domains, passing through more specialized—and often more competitive and challenging—courses, programs, and institutions in which demographic disparities often become increasingly pronounced.<sup>193</sup>

Two meta-analyses add additional context. The first meta-analysis examined group differences in both high and low threat environments from thirty-nine laboratory experiments involving nearly 3,200 participants.<sup>194</sup> The analysis revealed that when stereotype threat is present, measures of academic performance underestimate the true ability and potential of negatively stereotyped students by an average of 0.18 standard deviations.<sup>195</sup> A second meta-analysis included data from nearly 16,000 students across multiple randomized field experiments.<sup>196</sup> Nearly identical to the first meta-analysis, this study concluded that standard measures of

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<sup>190</sup> Experimental Psychologists Brief II, *supra* note 172, at \*28.

<sup>191</sup> Logel et al., *supra* note 175, at 44; *see also* Schmader et al., *supra* note 170, at 339 (“Moreover, studies have shown that individuals experience stereotype threat to the degree that doing well in the domain is personally important to them.”).

<sup>192</sup> *See* Steele & Aronson, *supra* note 182, at 798.

<sup>193</sup> *See* Inzlicht & Ben-Zeev, *supra* note 164, at 365; Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 PSYCHOL. SCI. 1132, 1137 (2009).

<sup>194</sup> Walton & Spencer, *supra* note 193, at 1134.

<sup>195</sup> *Id.* at 1135.

<sup>196</sup> *Id.* at 1137.



merit underestimate the true ability of members of stereotyped groups by 0.17 standard deviations.<sup>197</sup> Overall, the meta-analyses suggest that psychological threat accounts for nearly one fifth of a standard deviation in performance.<sup>198</sup> Translated to the 2,400-point SAT range, this equates to roughly sixty-three points.<sup>199</sup>

At face value, a difference of 0.17 or 0.18 standard deviations (or sixty-three points on a 2,400-point test) might appear trivial. But even if not intuitively substantial, this difference accounts for meaningful portions of observed achievement gaps.<sup>200</sup> Moreover, it reveals the pervasiveness of stereotype threat and its real-world consequences.<sup>201</sup> More importantly, these studies expose the degree to which standard measures of academic merit can systematically under-measure the intellectual ability and potential of students of color.<sup>202</sup> Rather than reflecting actual disparities in talent, preparation, or motivation, a portion of these gaps reflect “pervasive [and identity-contingent] psychological threats in academic environments.”<sup>203</sup> The research, in turn, suggests that a portion of perceived group-based differences across educational settings is often illusory, a consequence of psychological harms that obscure the actual, but “latent,” ability of negatively stereotyped students.<sup>204</sup>

A series of recent interventions highlight the real-world implications of stereotype threat and social identity threat.<sup>205</sup> Anchored to decades of research, the

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> See Experimental Psychologists Brief II, *supra* note 172, at 18; COLL. BD., 2015 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 1 (2015), <https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2015.pdf> [<https://perma.cc/T3GW-JALV>].

<sup>200</sup> Walton & Spencer, *supra* note 193, at 1137 (“The observed effect sizes suggest that the SAT Math test underestimates the math ability of women like those in the present sample by 19 to 21 points, and that the SAT Math and SAT Reading tests underestimate the intellectual ability of African and Hispanic Americans like those in the present sample by a total of 39 to 41 points for each group. Insofar as the overall gender gap on the SAT Math test is 34 points and as the overall Black-White and Hispanic-White gaps on the SAT (combining math and reading) are 199 and 148 points, respectively, these differences are substantial.” (citation omitted)).

<sup>201</sup> *Id.* Moreover, one could imagine students, or their parents, happy to pay high prices for a formula that guaranteed an additional 63 points on the SAT.

<sup>202</sup> Logel et al., *supra* note 175, at 42.

<sup>203</sup> See *id.*

<sup>204</sup> *Id.* (“This phenomenon, termed *latent ability*, suggests that stereotyped students’ prior performances underestimate the full extent of their academic ability—that their ability is in part hidden on these common assessments.”); see also Walton & Spencer, *supra* note 193, at 1137; Schmader et al., *supra* note 170, at 336 (explaining how this research has established the “reliability and generalizability of stereotype threat on performance.” (citation omitted)).

<sup>205</sup> See generally Thomas Dee & Joshua Aronson, *Stereotype Threat in the Real World*, in STEREOTYPE THREAT: THEORY, PROCESS, AND APPLICATION 266–67 (Michael Inzlicht and Toni Schmader, eds.) (2011); David S. Yeager & Gregory M. Walton, *Social-Psychology*

interventions were not intended to equip students with substantive knowledge or superior study skills. To the contrary, they were designed to buffer students against the psychological harms that accompany these identity-contingent psychological threats.<sup>206</sup> The results are noteworthy. Across studies, negatively stereotyped students who received the psychological buffer consistently exhibited statistically significant short- and long-term gains relative to nonstereotyped students in all conditions, and other negatively stereotyped students in control conditions.<sup>207</sup> One intervention, for instance, improved black college students' grades over a three-year period, and in so doing halved the black-white achievement gap.<sup>208</sup> A separate intervention reduced the black-white achievement gap of participants by about forty percent.<sup>209</sup> These effects are not unique, but have been replicated across studies, including those involving women in science and Latino adolescents in middle school.<sup>210</sup>

For universities committed to equal university membership, the social science should invite both concern and hope.<sup>211</sup> On the one hand, evidence suggests that irrespective of an institution's egalitarian aspirations, environmental conditions can saddle students of color with race-based harms that compromise basic commitments to equality.<sup>212</sup> Moreover, the social science suggests that at predominately white institutions in which students of color remain severely underrepresented, it may be prudent to assume that stereotype threat is the default.<sup>213</sup>

On the other hand, successful interventions reveal that institutions need not accept stereotype threat—and its deleterious impact—as an inevitable feature of life in higher education.<sup>214</sup> This is not to say that individual institutions are positioned to

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*Interventions in Education: They're Not Magic*, 81 REV. EDUC. RES. 267, 269–73 (2011) (reviewing interventions and effects).

<sup>206</sup> Yeager & Walton, *supra* note 205, at 268 (targeting various social psychological constructs, including values affirmation, sense of belonging, and organizational theories of intelligence); see Geoffrey L. Cohen et al., *Recursive Processes in Self-Affirmation: Intervening to Close the Minority Achievement Gap*, 324 SCI. 400, 400 (2009); Geoffrey L. Cohen et al., *Reducing the Racial Achievement Gap: A Social-Psychological Intervention*, 313 SCI. 1307, 1307 (2006) [hereinafter Cohen et al., *Social-Psychological Intervention*]; Good et al., *supra* note 188, at 650–51.

<sup>207</sup> See *supra* note 201 (describing stereotype threat interventions).

<sup>208</sup> Walton & Cohen, *supra* note 152, at 1448.

<sup>209</sup> See Cohen et al., *Social-Psychological Intervention*, *supra* note 206, at 1308 (“The average treatment effect for African Americans was 0.30 points, roughly a 40% reduction in the racial achievement gap.”).

<sup>210</sup> See Akira Miyake et al., *Reducing the Gender Achievement Gap in College Science: A Classroom Study*, 330 SCI. 1234, 1235 (2010); David K. Sherman et al., *Deflecting the Trajectory and Changing the Narrative: How Self-Affirmation Affects Academic Performance and Motivation Under Identity Threat*, 97 J. PERS. & SOC. PSYCHOL. 591, 599 (2013).

<sup>211</sup> See *supra* note 205 (reviewing successful interventions).

<sup>212</sup> See Walton & Spencer, *supra* note 193, at 1137.

<sup>213</sup> *Id.*

<sup>214</sup> See *supra* note 205.

mitigate all forces that trigger threat. Recall the relevant elements: (a) a person must belong to a negatively stereotyped group<sup>215</sup>; (b) that stereotype must be perceived as relevant to a task the person is asked to perform<sup>216</sup>; and (c) the person's relevant social identity must be salient at the time of performance.<sup>217</sup>

A single university possesses limited power to impact the first two variables. Even heroic efforts would likely prove insufficient to undo pervasive societal stereotypes.<sup>218</sup> That said, through targeted communications campaigns and careful attention to demographic representation across university faculty and leadership, universities may be able to impact the salience of certain negative stereotypes.<sup>219</sup> Similarly, a university possesses a limited ability to alter the perception that measures of academic merit (for example, final exams or standardized tests) are diagnostic of intellectual ability.<sup>220</sup>

Universities retain comparably more control over the third factor. As revealed by the social science and the student anecdotes, severe underrepresentation is one factor that renders racial identity salient.<sup>221</sup> Universities can translate this insight into affirmative efforts designed to avoid such scenarios. Such efforts would naturally extend to admissions—a site of institutional governance that directly impacts student body diversity. Understood in this way, race-conscious admissions emerge as an essential component of a broader institutional project to ensure that all students, regardless of race, can reach their academic potential and enjoy the full benefits of university membership.<sup>222</sup>

The social science, in turn, reinforces the students' testimony and administrators' observations that racial diversity is needed, in part, to ensure that the university provides a "reasonable environment for those students admitted."<sup>223</sup> In the next and final Part, I discuss the broader doctrinal and normative appeal of a diversity rationale that centers the goal of equal university membership.

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<sup>215</sup> See Steele & Aronson, *supra* note 182.

<sup>216</sup> See *id.*

<sup>217</sup> See *id.*

<sup>218</sup> See generally Kang, *supra* note 147 (reviewing likely sources of implicit stereotypes).

<sup>219</sup> See Dasgupta & Asgari, *supra* note 148, at 649–54 (observing a decrease of implicit bias against women in a cohort of female students after one year in a single-sex university).

<sup>220</sup> Growing evidence suggests that educational institutions can reduce identity-contingent threats by employing pedagogical approaches that promote a "growth mindset" and utilize "wise feedback" when evaluating student performance. See Geoffrey L. Cohen et al., *The Mentor's Dilemma: Providing Critical Feedback Across the Racial Divide*, PERS. & SOC. PSYCHOL. BULL. 1302, 1308 (2012); David S. Yeager et al., *Breaking the Cycle of Mistrust: Wise Interventions to Provide Critical Feedback Across the Racial Divide*, 143 J. EXP. PSYCHOL. 804, 806–07, 811 (2013).

<sup>221</sup> See *supra* notes 187–189 and accompanying text.

<sup>222</sup> See Bowen, *supra* note 152, at 343–45 (suggesting the need to complement racial diversity with color-conscious ideologies, both in admissions and in the classroom).

<sup>223</sup> Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978).

### III. DOCTRINAL PAY-OFF AND POLITICAL PURCHASE

In the preceding two Parts, I have invited a reframing of the diversity rationale that centers the relationship between racial diversity and personal equality within the university. I have argued that standard accounts continue to understate the case for diversity by obscuring its most compelling feature: its ability to mitigate the personal equality harms that students of color face when severely underrepresented on college campuses.<sup>224</sup> This final Part explores the broader appeal of this reframing. To begin, this approach offers a new constitutional anchor for diversity. Even if not immediately apparent, the harms associated with under-representation resemble, in meaningful ways, those derivative of de jure segregation.<sup>225</sup> This insight, in turn, helps to disrupt common critiques of race-conscious admissions by revealing how such policies are vital to promote individual equality in the here and now.

#### A. *A New Constitutional Anchor*

As I have noted throughout, my basic claim is that the Supreme Court continues to undersell the constitutional case for racial diversity. This has occurred, in part, because those Justices who have embraced the diversity rationale have failed to effectively locate diversity and its benefits within the Supreme Court's broader equality jurisprudence. Specifically, multiple pre-*Brown* desegregation cases offer a natural, yet untapped, constitutional anchor for contemporary conversations about diversity and race-conscious admissions. These cases arose in a different era marked by widespread de jure segregation. Nonetheless, they illuminate the constitutional infirmity of institutional conditions that deny certain students, because of their race, the full benefits of university membership. Thus, when tethered to a vision of diversity that centers the goal of equal university membership, this precedent offers a natural constitutional hook for diversity today.<sup>226</sup>

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<sup>224</sup> See *supra* Parts I, II.

<sup>225</sup> See *infra* Section III.A

<sup>226</sup> Before the Supreme Court overturned the "separate but equal" doctrine in *Brown v. Board of Education*, 347 U.S. 483 (1954), its desegregation jurisprudence began to interrogate and unpack the constitutional harms inherent to de jure segregation, often in the domain of education. See *infra* Section III.A.1–2. See also *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349–50 (1938):

The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

### I. *McLaurin v. Oklahoma*

Perhaps the most relevant precedent comes from *McLaurin v. Oklahoma State Regents for Higher Education*,<sup>227</sup> a 1950 decision involving de jure segregation at the University of Oklahoma.<sup>228</sup> George M. McLaurin, the plaintiff, was an African American man who had been barred from the University of Oklahoma Graduate School because of his race.<sup>229</sup> Following multiple lower court victories, McLaurin gained admission to the Graduate School.<sup>230</sup> Yet even after matriculating, McLaurin remained subject to multiple race-based restrictions that triggered his ultimate appeal to the Supreme Court.<sup>231</sup> Chief Justice Vinson, who authored the Supreme Court's unanimous opinion, described McLaurin's plight as follows:

[McLaurin was] assigned to a seat in the classroom in a row specified for colored students; . . . assigned to a table in the library on the main floor; and . . . permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.<sup>232</sup>

To defend its policy, Oklahoma argued that the restrictions were “in form merely nominal,” and therefore did not violate McLaurin's Equal Protection rights.<sup>233</sup> The Supreme Court agreed that, in certain respects, the restrictions were limited:

[McLaurin is permitted to use] the same classroom, library and cafeteria as students of other races; there is no indication that the seats to which he is assigned in these rooms have any disadvantage of location . . . [and h]e may wait in line in the cafeteria and there stand and talk with fellow students, but while he eats he must remain apart.<sup>234</sup>

Nonetheless, the Supreme Court determined that “the conditions under which [McLaurin] is required to receive his education deprive him of his personal and present right to the equal protection of the laws.”<sup>235</sup> According to the Supreme Court,

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<sup>227</sup> 339 U.S. 637 (1950).

<sup>228</sup> *Id.* at 638–39.

<sup>229</sup> *Id.* at 638.

<sup>230</sup> *McLaurin*, 339 U.S. at 638–40. McLaurin was admitted only after substantial litigation compelled Oklahoma to alter policies that had “made it a misdemeanor to maintain or operate, teach or attend a school at which both whites and negroes are enrolled or taught.” *Id.*

<sup>231</sup> *Id.* at 640.

<sup>232</sup> *Id.* at 640. The restrictions evolved over the course of the litigation. *See id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 640–41.

<sup>235</sup> *Id.* at 642.

the restrictions practically and symbolically “handicapped” McLaurin, thereby rendering his education “unequal to that of his classmates.”<sup>236</sup>

Practically, the restrictions “impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.”<sup>237</sup> Symbolically, the restrictions “signif[ied] that the State, in administering the facilities it affords for professional and graduate study, set[] McLaurin apart from the other students.”<sup>238</sup> As characterized by the Supreme Court, the policy marked McLaurin as an institutional outsider, a result that itself carried constitutional implications. The Supreme Court accordingly concluded that the Constitution could not condone conditions traceable to the state that “depriv[ed McLaurin] of the opportunity to secure acceptance by his fellow students on his own merits.”<sup>239</sup>

In striking down the policy, the Supreme Court expressly linked the conditions’ constitutional infirmity to their impact on McLaurin’s opportunity to receive an education equal to that of his white peers.<sup>240</sup> Part of this asymmetry implicated what could be understood as learning and networking benefits—benefits denied to McLaurin but available to his white classmates.<sup>241</sup> This concern with unequal education is understandable, as it tracks the Court’s then-growing unease with the proposition that “separate-but-equal” facilities could safeguard the constitutional guarantee of equal educational opportunity.

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<sup>236</sup> *Id.* at 641. This conclusion is anchored, in part, to the conclusion that segregation deprived McLaurin of benefits that resembled the discourse benefits that formed the basis of Justice Powell’s diversity defense in *Bakke*. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In this sense, *McLaurin* recognized that admission was insufficient to secure the Fourteenth Amendment’s guarantee of educational equality. Even within the university, equal protection concerns arise when institutional conditions uniquely burden certain students on account of race. *McLaurin*, 339 U.S. at 642.

<sup>237</sup> *McLaurin*, 339 U.S. at 641.

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

<sup>239</sup> *Id.* at 641–42.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* The Supreme Court also cautioned that the restrictions would undermine broader societal interests. McLaurin was attending Oklahoma’s flagship graduate program in education. By impairing his training (that is, his ability to *learn*), the restrictions compromised his ability to attain those skills essential to teaching. This impairment, by extension, would exact downstream costs on his future students—recipients of an instructor who had been denied an equal education. See *id.* at 641.

Our society grows increasingly complex, and our need for trained leaders increases correspondingly. . . . Those who will come under his guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained.

Translated to the contemporary context, the Court's concern about unequal conditions within the Graduate School reinforces the normative appeal of a diversity rationale that centers the equal university membership interests of students of color. It is true, of course, that *McLaurin* offers an imperfect analogy to the present context. Policies that segregate students on the basis of race are unlikely to arise in 2019. But even recognizing this distinction, *McLaurin* offers valuable texture to ongoing debates about diversity and the merits of affirmative action. Chief Justice Vinson reminds us that basic equality concerns arise when institutional conditions deprive certain students, because of their race, the full benefits of university membership.<sup>242</sup>

The lack of racial diversity can be understood as one such institutional condition: when severely underrepresented, students of color are likely to confront racially contingent headwinds that their peers never have to face. Understood in this sense, student body racial diversity can be celebrated as one dimension of an institutional project designed to mitigate harms that resemble, in meaningful ways, those caused by Oklahoma's formal policy.<sup>243</sup> Race-conscious admissions, in turn, emerge as a vital tool to prevent such harms and safeguard every student's interest in equal university membership. This framing ultimately invites the following question: To the extent diversity prevents harms that parallel those caused by de jure segregation, how could the pursuit of diversity not constitute a compelling interest for purposes of strict scrutiny?<sup>244</sup>

## 2. Sweatt v. Painter

On the same day the Supreme Court decided *McLaurin*, it also ruled on *Sweatt v. Painter*,<sup>245</sup> which involved a Texas law that barred African Americans from the University of Texas Law School ("UT Law"), the state's flagship law school.<sup>246</sup> Prior to reaching the Supreme Court, a state trial court had held that Texas's educational scheme, which offered legal training to whites only, violated the Equal Protection Clause.<sup>247</sup> The state court continued the case so that Texas could "supply

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<sup>242</sup> *Id.* at 641–42.

<sup>243</sup> *McLaurin*, 339 U.S. at 638 (describing Oklahoma's law which had "made it a misdemeanor to maintain or operate, teach or attend a school at which both whites and Negroes are enrolled or taught."). The Supreme Court has interpreted *Sweatt v. Painter*, 339 U.S. 629 (1950), and *McLaurin*, 339 U.S. 637, to have recognized "the link between equality of opportunity to obtain an education and equality of employment opportunity." Runyon v. McCrary, 427 U.S. 160, 179 n.16 (1976).

<sup>244</sup> At the same time, *Parents Involved* offers a useful reminder that the Supreme Court will not necessarily uphold a race-conscious policy simply because it mitigates harms—such as racial segregation—that led the Supreme Court to strike down explicitly discriminatory policies in *McLaurin*, *Sweatt*, and *Brown*. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 735 (2007).

<sup>245</sup> 339 U.S. 629 (1950).

<sup>246</sup> For background facts, see Otis H. King, *The Legal Sin: The Creation of Texas Southern University, A Place That Never Should Have Been*, 38 T. MARSHALL L. REV. 13, 15–18 (2012).

<sup>247</sup> *Id.* at 631–32.

substantially equal facilities” to African Americans.<sup>248</sup> The State responded by opening an alternate “downtown law school” that African Americans could attend.<sup>249</sup> This alternate school, to which Sweatt was ultimately admitted, became the focus of his appeal to the Supreme Court.<sup>250</sup>

Mirroring *McLaurin*, the Supreme Court unanimously held that the Texas law violated Heman Sweatt’s equal protection rights.<sup>251</sup> Moreover, as in *McLaurin*, the Supreme Court’s driving concerns about educational equality translate to today’s affirmative action debates. To appreciate the connection, one need only look to the Court’s reasoning. In finding for Sweatt, the Supreme Court identified three material areas of inequity between the “downtown law school” and UT Law: (1) tangible resources; (2) intangible qualities; and (3) access to professional networks.

First, the Supreme Court observed that UT Law was “superior” “[i]n terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities.”<sup>252</sup>

Second, and more troubling to the Supreme Court, were UT Law’s superior intangible qualities, which Chief Justice Vinson described as “incapable of objective measure but which make for greatness in a law school.”<sup>253</sup> These qualities included, for example, “reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.”<sup>254</sup>

Lastly, by excluding Sweatt from UT Law, Texas effectively denied Sweatt access to the individual human beings with whom he would inevitably interact as a lawyer.<sup>255</sup> As a student at the “downtown law school,” Sweatt would have been relegated to an institution that “excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar.”<sup>256</sup> This lack of

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<sup>248</sup> *Id.* at 632.

<sup>249</sup> Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 575 (2000) (noting that non-white students could attend the “downtown law school . . .”).

<sup>250</sup> *Sweatt*, 339 U.S. at 632.

<sup>251</sup> *Sweatt*, 339 U.S. at 636.

<sup>252</sup> *Id.* at 633–34. UT Law boasted a staff of sixteen full-time and three part-time professors; had 850 students; maintained a library of over 65,000 volumes; and included a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. *Id.* at 632–33. The “downtown law school,” in contrast, had five full-time faculty; 23 students; a library with 16,500 volumes; and a practice moot court and legal aid association. *Id.* at 633.

<sup>253</sup> *Id.* at 634.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 635–36. The networking disparity is difficult to overstate. Whereas the “downtown law school” had one alumnus admitted to the Texas Bar, UT Law alumnae “occup[ied] the most distinguished positions in the private practices of the law and in the public life of the State.” *Id.* at 633.

<sup>256</sup> *Id.* at 634.



access precluded the Supreme Court from concluding that the alternative law school satisfied Sweatt's right to an equal education under the Constitution.<sup>257</sup>

This catalogue of disparities highlights the layered harms derived from Texas's segregative scheme. The Supreme Court's analysis also highlighted inequities that could be understood in terms of learning, networking, and signaling. In other words, the Supreme Court conceived the constitutional question in terms that made doctrinally relevant—and perhaps dispositive—conditions that compromised Sweatt's ability to realize an equal university membership. As a remedy, the Court ordered UT Law to admit Sweatt so that he could “claim his full constitutional right: legal education equivalent to that offered by the State to students of other races.”<sup>258</sup>

As with *McLaurin*, *Sweatt* comprises an imperfect analogy when translated to the contemporary context. Nonetheless, when read in concert, these decisions offer an historical lens through which one can better appreciate the equal protection implications of institutional conditions that undermine equal university membership. In so doing, it fortifies the constitutional anchor for a diversity rationale predicated on the personal equality interests of actual university students.

### B. More Diversity Benefits

To fully appreciate the doctrinal and normative appeal of a diversity rationale that centers equal university membership, it is helpful to return to Justice Powell's opinion in *Bakke*.<sup>259</sup> In striking down the Medical School's admissions policy, Justice Powell mobilized a critique of affirmative action that has become standard across caselaw and public discourse.<sup>260</sup> At its core, this critique assumes that whatever the benefit, race-conscious admissions confer racial “preferences” and violate the equal protection rights of “innocent third parties.”<sup>261</sup> This premise continues to inform the Supreme Court's hostility to affirmative action and underlies the Supreme Court's erection and maintenance of an equal protection doctrine that subjects all racial classifications—whether invidious or benign—to strict scrutiny.<sup>262</sup>

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<sup>257</sup> *Id.* at 634–35.

<sup>258</sup> *Id.* at 635.

<sup>259</sup> *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>260</sup> *Id.* at 307–10, 319–20. Evidence that this has become standard across caselaw and public discourse is shown by the fact that this opinion has been cited over 1,000 times (on LexisNexis). Further, several articles discuss and reiterate the opinion. *See, e.g.*, Saverio Cereste, *Minority Inclusion Without Race-Based Affirmative Action: An Embodiment of Justice Powell's Vision*, 18 N.Y.L. SCH. J. HUM. RTS. 205 (2002); Emanuel Margolis, *Latching on to Affirmative Action*, 77 CONN. B.J. 1 (2003).

<sup>261</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 324 (2003). Scholars have persuasively challenged the “innocent third parties” frame. *See, e.g.*, Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 91–97 (1986).

<sup>262</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”).

Scholars have critiqued the view that racial classifications necessarily exact equality harms and confer corresponding racial preferences.<sup>263</sup> Many of these critiques are compelling and deserve greater attention in scholarly and public discourse.<sup>264</sup> Nonetheless, for the limited purposes of this Article, I accept the proposition that race-conscious admissions do, in fact, inflict equality harms on applicants from “disfavored groups.” I do this not to concede such claims,<sup>265</sup> but rather to illustrate that even if one begins from this contestable point of departure, student body diversity—as a mechanism to promote personal equality within the university—remains constitutionally compelling.

The standard diversity rationale, which Justice Powell mobilized in *Bakke*, effectively reduces the constitutional inquiry to a cost-benefit analysis. On one side of the scale are equality harms ostensibly suffered by white applicants; on the other side are educational benefits—that is, discourse benefits—that the university attains from a diverse student body. Albeit reductionist and stylized, one could depict this cost-benefit analysis as follows:

<i>the cost:</i>	<i>equality harms suffered by whites</i>
	v.
<i>the benefit:</i>	<i>diversity benefits to the university</i>

As noted above, the premise that race-conscious admissions confer undeserved “preferences” on students of color and subject white applicants to cognizable injury rests on contestable normative and empirical assumptions.<sup>266</sup> Yet even if one accepts this premise, the foregoing balancing test misrepresents the full breath of personal

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<sup>263</sup> See, e.g., Devon W. Carbado et al., *Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 174, 176 (2016); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 24 (1994) (“Moreover, many of the criteria that are unquestioningly taken to be important impartial indicators of people’s competencies, merit, and potential, such as test scores, not only fail to be precise measurements of these qualities, but systematically stigmatize these individuals within institutions in which these tests function as important criteria of admission.”).

<sup>264</sup> For multiple reasons, including some noted by Justice Powell, racial classifications—or otherwise attending to an applicant’s race—may be necessary to ameliorate racial inequality steeped in the status quo. See *Bakke*, 438 U.S. at 306 n.43.

<sup>265</sup> I have contested such claims elsewhere. See, e.g., Feingold, *Racing Towards Color-blindness*, *supra* note 47 (arguing that race-consciousness is often necessary to move closer to ideals such as racial neutrality and “meritocracy”).

<sup>266</sup> See *supra* note 263 and accompanying text; see also See Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590 (2017) (discussing the fallacy that affirmative action confers a “Black bonus” and commensurate “Asian penalty”); Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002) (describing the “the common yet mistaken notion that when white applicants . . . fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action”).

equality interests implicated by university admissions. Specifically, it omits the equal university membership harms that students of color suffer absent a racially diverse student body. When this third variable enters the equation, the cost-benefit analysis reappears as follows:

<i>the cost:</i>	<i>equality harms suffered by whites</i>
	v.
<i>the benefit:</i>	<i>diversity benefits to the university</i>
	<b>and</b>
	<i>equal university membership for all</i>

One could argue that the foregoing depiction is not wholly foreign to the caselaw. The Supreme Court has, at times, marked the relationship between diversity and personal equality.<sup>267</sup> Nonetheless, as discussed in Part I, these moments have not translated into a constitutional doctrine that locates diversity's value in its ability to mitigate the race-based harms that students of color suffer absent racial diversity.<sup>268</sup> Even when present, equal university membership concerns have remained under-theorized and under-privileged within the Supreme Court's constitutional analysis. Reflecting this omission, legal and lay discourse continue to default to a framework that fails to capture the full stakes of university admissions and the constitutional implications thereof. As a result, we continue to situate conversations about diversity within a cost-benefit analysis that obscures one of diversity's most compelling functions.

This function is, of course, diversity's ability to promote personal equality within the university. When this function is elevated within the analysis, it becomes more difficult to deny that, at a minimum, race-conscious admissions involve dueling personal equality harms. Some might contend that even accepting this descriptive account, the equality harms that befall "disfavored" applicants should always prevail over those that befall admitted (but underrepresented) students of color. I take up such arguments more directly in the final section. For now, my goal is to mark that standard accounts of diversity are, at best, incomplete, as they elide a key equality harm implicated by university admissions. As a result, standard diversity debates fail to engage a critical benefit of race-conscious admissions.

In this sense, a framework that makes salient the relationship between student body diversity and equal university membership reveals *more* benefits of diversity. But this is not just a matter of quantity; it is also a matter of quality—in the sense of revealing *better* benefits of diversity. For one, an equal university membership frame reunites the diversity rationale with the Fourteenth Amendment's substantive commitments to equality. This occurs, in part, by situating the diversity rationale within historical commitments to remove barriers that hindered students of color from realizing equal educational opportunities. But the qualitative benefits run deeper. As I discuss in the next and final section, this re-framing offers a path to

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<sup>267</sup> See *supra* Part I.

<sup>268</sup> *Id.*

soften hostility to affirmative action more broadly. Specifically, by centering diversity's function as a driver of personal equality in the present, universities can champion race-conscious admissions as a tool to safeguard basic normative commitments that underlie the Supreme Court's contemporary equal protection jurisprudence.

### C. *Better Diversity Benefits*

Given pending litigation and a shifting Supreme Court, the future of race-conscious admissions remains tenuous.<sup>269</sup> The appointment of Justice Kavanaugh, who constitutes a fifth Justice openly hostile to affirmative action, may render the most compelling case for diversity insufficient to withstand a future challenge.<sup>270</sup> Nonetheless, rediscovering diversity as a mechanism to promote personal equality should soften lingering anxiety about the diversity rationale's normative foundation and strengthen its doctrinal purchase. This is possible, in part, because concerns about equal university membership track the values and principles that have informed the Supreme Court's equal protection jurisprudence—including concerns articulated by the Supreme Court's conservative Justices—since *Bakke*.

#### 1. *The "Right to Compete"*

Over four decades of equal protection doctrine have embraced a vision of constitutional equality that privileges individual rights over group rights<sup>271</sup> and equal opportunity over equal outcome.<sup>272</sup> This vision has translated into the constitutional mandate that the state allocate public goods—such as employment or admission—

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<sup>269</sup> See *supra* note 11 and accompanying text.

<sup>270</sup> See *id.*

<sup>271</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)) (explaining that the Fourteenth Amendment “protect[s] *persons*, not *groups*”); *Adarand*, 515 U.S. at 239 (Scalia, J., concurring) (“Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual . . . .”); see also *Primus*, *supra* note 75, at 560–61 (“[T]he rhetoric and the doctrine of *Grutter*—and of *Gratz*—are committed to individualism as the dominant understanding of equal protection.”).

<sup>272</sup> By divorcing the Equal Protection Clause from group-based outcomes, the Supreme Court is able to frame outcome-oriented policies as contrary to the ethos of constitutional equality. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730 (2007). (“Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality throughout American society, contrary to our repeated recognition that at the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.” (internal quotation marks, citation, and brackets omitted)).

on the basis of individual “merit,” irrespective of a person’s race.<sup>273</sup> According to the Supreme Court, when race intrudes upon otherwise “neutral” decision making processes, it deprives the individual of her constitutional right to an equal opportunity to compete.<sup>274</sup>

This vision of equality, which I refer to in related scholarship as the “right to compete,”<sup>275</sup> can be seen in Justice Powell’s treatment of race-conscious admissions in *Bakke*. In response to his liberal colleagues, Powell remarked that the “denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner’s special admissions program.”<sup>276</sup> He further stated that “[o]ne should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.”<sup>277</sup> Both statements reflect a vision of constitutional equality that privileges the right of individuals to compete for public benefits on the basis of their talent and potential, irrespective of race. Justice Powell understood the Medical School’s admissions policy to infringe upon this right.<sup>278</sup>

As noted above, Justice Powell’s view of affirmative action and its corresponding harms has long informed the Supreme Court’s skepticism of race-conscious admissions, which are seen as “racial preferences” that deprive “innocent” whites of their constitutional right to compete.<sup>279</sup> Scholars have lodged compelling

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<sup>273</sup> See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (condemning the Medical School for its “disregard of individual rights as guaranteed by the Fourteenth Amendment”); see also Erman & Walton, *supra* note 151, at 352, 359 (“Merit stalks equal protection jurisprudence. It is a shadow interest, treated as compelling but as yet undeclared. . . . The Court is often protective of standardized tests and grades, which it views as generally open, competitive, and relatively accurate predictors of subsequent performance.”).

<sup>274</sup> See *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); see also *Grutter*, 539 U.S. at 337 (“The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (“The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their ‘personal rights’ to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking [sic].”).

<sup>275</sup> For a more comprehensive analysis of this “right to compete,” see generally Feingold, *Equal Protection*, *supra* note 130 (discussing the evolution and entrenchment of a “right to compete” within contemporary equal protection doctrine).

<sup>276</sup> *Bakke*, 438 U.S. at 318 & n.52.

<sup>277</sup> *Id.* at 294 n.34.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 307 (“We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”); see generally John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric against Affirmative Action*, 79 IOWA L. REV. 313 (1994) (reviewing common arguments against affirmative action).

critiques that challenge these portrayals.<sup>280</sup> My aim here, however, is different. Rather than contest prevailing frames, my claim is that diversity should be compelling to Justices across the political spectrum, in part, because it promotes the values that permeated Justice Powell's *Bakke* decision and continue to inform prevailing equal protection doctrine.

To begin, the concept of equal university membership captures an equality interest that attaches to each individual university student. This is not a story about remedying amorphous societal discrimination, accounting for histories of unequal treatment, or ensuring equal group-based outcomes. Notwithstanding their arguable appeal, the Supreme Court has rejected these goals as sufficient to constitute a compelling interest.<sup>281</sup> A diversity rationale designed to foster equality within the university is different. By focusing on a personal and present equality interest, it aligns with judicial pronouncements that privilege individualistic visions of equality and presentist conceptions of discrimination.<sup>282</sup>

Moreover, when institutional environments subject certain students to race-dependent headwinds, these conditions compromise related commitments to racial neutrality and individual meritocracy.<sup>283</sup> Absent diversity, innocent students from negatively stereotyped groups, for no fault of their own, suffer race-based harms that undermine their ability to enjoy fundamental aspects of university membership—spanning learning, networking, and signaling.<sup>284</sup> The students' unburdened peers, in turn, reap unearned benefits that are tied to their race.<sup>285</sup>

When translated to the Supreme Court's equal protection parlance, these race-based burdens can be understood as institutional conditions that undermine certain students' right to compete within the university.<sup>286</sup> For those committed to this vision of constitutional equality, environments that impose race-specific harms should be troubling. This deviation from normative commitments to racial neutrality and

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<sup>280</sup> See generally Luke Charles Harris & Uma Narayan, *Affirmative Action as Equalizing Opportunity: Challenging the Myth of Preferential Treatment*, 16 NAT'L BLACK L.J. 127 (1998) (interrogating the contention that affirmative action deviates from commitments to neutrality and meritocracy); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (offering a rebuke of the colorblind constitutionalism that informs the prevailing vision of constitutional equality).

<sup>281</sup> See *Bakke*, 438 U.S. at 307–09.

<sup>282</sup> See *supra* notes 268–272.

<sup>283</sup> See Erman & Walton, *supra* note 151, at 350–61.

<sup>284</sup> See *supra* Part II.B.

<sup>285</sup> See *supra* Part II.B.

<sup>286</sup> See *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 505–06 (“The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.”); see also *Byers v. City of Albuquerque*, 150 F.3d 1271, 1276 (10th Cir. 1998) (“These cases all stand for the proposition that when a plaintiff is denied the opportunity to compete on an equal basis because of that plaintiff's race or gender, the denial of the opportunity to compete on equal footing constitutes an injury in fact for standing purposes.”).

individual meritocracy should invite remediation. It accordingly appears a modest step to suggest that the government has a compelling interest to structure educational environments that mitigate such harms. Race-conscious admissions are no panacea. But as the anecdotes and social science in Part II reflect, such policies offer a vital piece of broader efforts to safeguard each student's right to compete within the university, irrespective of her race.

## 2. *Racial Stigma and Social Cohesion*

An equal university membership frame also has the potential to disrupt lay theories about racial stigma and social cohesion that continue to inform the Supreme Court's affirmative action jurisprudence.<sup>287</sup> Since *Bakke*, multiple Justices have critiqued race-conscious admissions on the grounds that such policies stigmatize their intended beneficiaries and trigger racial resentment in others.<sup>288</sup> The Supreme Court has suggested, for instance, that “[u]nless [race-conscious practices] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”<sup>289</sup>

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<sup>287</sup> See Siegel, *supra* note 60, at 1295. For a broader discussion of stigma within the Supreme Court's equality jurisprudence, see Kenneth Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248–49 (1983); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 349–355 (1987); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803 (2004) (“If one has been stigmatized, he or she exists outside the polity, on the margins, in some way. This is what it means to be stigmatized. That is to say, racial stigma deprives stigmatized individuals of the acceptance and the other tools they need to participate as whole, functioning members of society.”); see also Feingold, *Equal Protection*, *supra* note 130, at 3–7 (detailing the lay theories about stigma and racial resentment that have traveled through the Court's Equal Protection jurisprudence).

<sup>288</sup> *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003); see also *Croson*, 488 U.S. at 493 (“Classifications based on race carry a danger of stigmatic harm[,]” because “[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (“All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious.”).

<sup>289</sup> *Croson*, 488 U.S. at 493 (plurality opinion) (“Classifications based on race carry a danger of stigmatic harm.”); see also *Parents Involved in Comty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 790 (2007) (Kennedy, J. concurring) (contesting the dissent's claim that the “racial classifications used here cause no hurt or anger of the type the Constitution prevents.”); *Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (“This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed ‘otherwise unqualified,’ or it did

Although pervasive, the Supreme Court has rarely, if ever, grounded these concerns to empirical evidence that links racial classifications to these perceived harms. To the contrary, they appear to rest on judicial “instincts” and lay theories about human behavior.<sup>290</sup> Scholars have begun to interrogate the empirical validity of such claims.<sup>291</sup> As referenced in Part II, existing social science suggests that the Supreme Court may have the wrong target: for students within the university, the more likely driver of racial stigma—and to some degree racial resentment—is the absence of racial diversity, not the use of a race-conscious admissions plan.<sup>292</sup>

The law students’ testimony, discussed in Part II above, reinforces this point.<sup>293</sup> Recall that their experience occurred in a post-affirmative action—that is, “colorblind”—California.<sup>294</sup> Nonetheless, their severe under-representation facilitated a heightened sense of stigma and racial identity salience. Accordingly, to the extent the Supreme Court is concerned about racial stigma (felt by students of

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not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.”).

<sup>290</sup> For purposes of this Article, my primary interest is to mark that multiple Justices have staked out the position that equal protection jurisprudence should attend to these normative concerns. Often, the Court will simply state something akin to the view that racial classifications “threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility.” *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *see also* *United Jewish Org. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173–74 (1977) (“Furthermore, even preferential treatment may act to stigmatize its recipient groups, for although intended to correct systemic or institutional inequities, such policy may imply to some the recipients inferiority and especial need for protection.”). I do not mean to suggest that Justices should always avoid judgments rooted in personal intuition or experience. My narrower claim is that such judgments should be made transparently, and that all empirical claims—whether they support or contradict a Justice’s viewpoint—should be held to the same standard of proof. Yet as the case law bears out, this often is not the case. *See generally* Feingold & Carter, *supra* note 125 (exploring the Supreme Court’s inconsistent relationship with empirical evidence of discrimination).

<sup>291</sup> *See* Bowen, *supra* note 147, at 1199.

<sup>292</sup> *See id.*; *supra* Section II.B.2. Race-conscious admissions might also be necessary to mitigate dignitary harms that arise under colorblind admissions regimes. *See* Boddie, *supra* note 32, at 78 (describing the stigmatic harm colorblind policies exact on individuals who identify by race). Additionally, expressly pursuing diversity as a means to promote equality within the institution is likely to reduce the potential for diversity initiatives themselves to produce stigmatic harms by, for example, marking students of color as perpetual institutional outsiders. *See, e.g.*, Thierry Devos & Mazharin Banaji, *American = White?*, 88 J. PERS. & SOC. PSYCHOL. 447, 463–64 (2005); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155 (2013) (“But problems with racial capitalism arise when white individuals and predominantly white institutions seek and achieve racial diversity without examining their motives and practices. . . . This superficial view of diversity consequently leads white individuals and predominantly white institutions to treat nonwhiteness as a prized commodity rather than as a cherished and personal manifestation of identity.”).

<sup>293</sup> *See supra* Section II.B.1.

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



color) and social cohesion, race-conscious admissions may function more as the cure, not a cause.

### 3. *A Broader Appeal*

In addition to the foregoing, reframing diversity as a driver of personal equality responds to anxieties that racial diversity is pedagogically relevant only in limited subject matters or disciplines.<sup>295</sup> Chief Justice Roberts, for instance, need not worry that racial diversity's benefits are confined to classes where "the subject matter is racially or ethnically salient."<sup>296</sup> To the contrary, because equal university membership transcends any single dimension of university life, racial diversity matters whether the forum is a nineteenth-century British history class, an introductory physics class,<sup>297</sup> or an orientation workshop on student organizations and government.

For purposes of minimizing harms associated with severe under-representation, racial diversity may be more important in certain contexts than others. As a buffer to stereotype threat and social identity threat, racial diversity will likely prove more critical in disciplines and domains in which negative stereotypes hold a stronger historical significance and contemporary salience.<sup>298</sup> Nonetheless, when diversity's function is tethered to each student's personal equality interests, diversity's value travels across subject matters; regardless of the setting, student body diversity "would create an environment in which all students can perform to their capacity through the reduction of stereotypes, racial anxiety, and racial isolation."<sup>299</sup>

Lastly, valuing the link between racial diversity and equality does not come at the expense of other diversity benefits.<sup>300</sup> To the contrary, as referenced throughout,

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<sup>295</sup> See Lawrence III, *supra* note 17, at 774 ("[W]hen the First Amendment justification for diversity—academic conversation—is separated from the substantive content of that conversation—learning about the social reality of racism—it is not apparent why race should be a factor in deciding who should participate in that conversation. 'What does the color of an individual's skin matter in a discussion of quantum physics?' is the paradigm rhetorical question posed by affirmative action's opponents.").

<sup>296</sup> Godsil, *supra* note 13, at 42 (revisiting a line of questioning from oral argument in *Fisher I* when Chief Justice Roberts asked, among other things, "What—what unique—what unique perspective does a minority student bring to a physics class?").

<sup>297</sup> An open letter to the Supreme Court from the Equity & Inclusion in Physics & Astronomy group captures this perspective. See AN OPEN LETTER TO SCOTUS FROM PROFESSIONAL PHYSICISTS (Dec. 14, 2015), <http://eblur.github.io/scotus>. [<https://perma.cc/6T2R-MGPJ>].

<sup>298</sup> See *supra* Section II.B.2.

<sup>299</sup> Godsil, *supra* note 13, at 62–63.

<sup>300</sup> At times, constitutional analysis requires the Supreme Court to balance competing interests. Antidiscrimination law, for instance, can be understood as a schema designed to ensure equality (for some) at the expense of individual liberty (of others). See Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 595–96 (2001) ("The tension between freedom of association and antidiscrimination laws is inherently difficult. Freedom of association is unquestionably a

equal university membership will often function as a condition precedent for other diversity benefits that already feature within the Supreme Court's equal protection jurisprudence. Justice Powell's exposition of "discourse benefits" offers an illustrative example. To attain a robust marketplace of ideas, a university must admit individuals with different experiences and viewpoints. But it must also foster an educational environment in which all voices will speak and be heard. As the social science and law student anecdotes reveal, the burdens associated with racial tokenism can compromise social and academic engagement and chill classroom participation. When this occurs, the individual student's experience suffers, but so does that of her peers. Racial diversity can warm that chill, and in so doing, nurture an educational environment that safeguards the equality interests of all while facilitating a classroom climate that is "livelier, more spirited, and simply more enlightening and interesting."<sup>301</sup>

#### CONCLUSION

*Fisher II* reaffirmed that public universities may, consistent with the Constitution, employ narrowly tailored race-conscious admissions policies designed to promote student body diversity.<sup>302</sup> Nonetheless, *Fisher II* did little to secure the diversity rationale's doctrinal future.<sup>303</sup> Legal challenges persist, the Supreme Court has shifted to the right, and renewed debates about race-conscious admissions reveal public uncertainty concerning the merits of diversity. The future of affirmative action in higher education arguably hangs in the balance.

For those interested in fortifying the diversity rationale, one piece of this project requires uplifting the link between racial diversity and the present and personal equality interests of actual university students. Even as it has traveled across caselaw, this relationship remains absent from the core assumptions that structure ongoing debates about diversity and its constitutional foundation. As a result, the diversity rationale remains disconnected from its most compelling quality and susceptible to otherwise avoidable legal and political critique. By elevating a vision of diversity predicated on personal equality within the university, diversity's defenders can disrupt these critiques and, in so doing, buttress the constitutional case for race-conscious admissions in higher education and, potentially, beyond.

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fundamental right, and one of its core aspects is the right of a group to choose who is in and who is out. However, antidiscrimination laws seek to keep people from being excluded based on invidious characteristics such as race, gender, religion, disability, and sexual orientation.").

<sup>301</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). This example reflects the insight that First Amendment principles are intertwined with basic equality commitments; *see also supra* note 42.

<sup>302</sup> *See generally Fisher II*, 136 S. Ct. 2198 (2016).

<sup>303</sup> *Id.*