UCLA LAW REVIEW

Intraracial Diversity

Devon W. Carbado

ABSTRACT

Once again, the U.S. Supreme Court will determine the constitutionality of affirmative action. Once again, the focus will be on the diversity rationale for the policy. And, once again, the discussion will likely center on whether the admissions regime of a particular school (this time, the University of Texas) can take steps to ensure that it admits a certain number—or to put the point more doctrinally, a critical mass—of students from a particular racial group, such as African Americans. Framing diversity in terms of group representation assumes that when admissions officials administer affirmative action programs, their racial decisionmaking stops at the level of the racial group. Under this view, admissions officials are simply interested in whether they have a critical mass of African Americans as a group. The racial interests of these officials, however, might be narrower than that. Especially at elite colleges and universities, admissions officials are also likely employing an intraracial diversity frame. Here, the concern is not simply whether there is a critical mass of African Americans as a group. The concern is also whether the school has admitted particular "types" of African Americans. For example, a school might screen its application pool for African Americans who are likely to promote racial cooperation and understanding. Alternatively, the school might be interested in African Americans who can facilitate the robust exchange of ideas. The point is that admissions officials can realize their commitment to diversity by choosing African Americans at least in part based on their perceived racial "types" and not simply based on their racial group membership. This Article demonstrates precisely how they can do so, describes the incentive system this creates for applicants to work their identity in the application process to signal that they are the right racial "types," and explains how the phenomenon of intraracial diversity is implicated in the *Fisher v. University of Texas* litigation.

AUTHOR

Devon W. Carbado is a Professor of Law at UCLA School of Law.

For comments on or conversations about this Article, I thank Khaled Beydoun, Paul Butler, Kimberlé Crenshaw, Scott Cummings, Ingrid Eagly, Robert Goldstein, Laura Gómez, Lani Guinier, Cheryl Harris, Jerry Kang, Jasleen Kohli, Nancy Polikoff, Daria Roithmayr, Joanna Schwartz, Jonathan Varat, Adam Winkler, Bill Wood, and Noah Zatz. A shorter version of this Article will appear as a chapter called "Acting Diverse" in my coauthored book with Mitu Gulati, *Acting White? Rethinking Race in "Post-Racial" America.* I am especially grateful to Mitu Gulati, without whose support and input I would not have written this Article.

TABLE OF CONTENTS

INTRODUCTION

Once again, the U.S. Supreme Court will determine the constitutionality of affirmative action.[1] Once again, the focus will be on the diversity rationale for the policy. Once again, few will seriously question what a university's commitment to diversity means.[2] And, once again, the discussion will likely center on whether the admissions regime of a particular school (this time, the University of Texas) can take steps to ensure that it admits a certain number—or to put the point more doctrinally, a critical mass—of students from a particular racial group, such as African Americans.[3] If past is prologue, the affirmative action case the Supreme Court will decide this term, *Fisher v. University of Texas*,[4] will not generate a robust discussion about what goals diversity admissions are supposed to serve, and scholars, policy makers, and lawyers likely will continue to conceptualize diversity with reference to the overall representation of African Americans within a particular college or university.[5]

1. *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012); *see also* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan admissions policy of awarding points to underrepresented racial or ethnic minorities); Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the University of Michigan Law School admissions policy seeking diversity); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (rejecting University of California at Davis's admissions program of setting aside seats for nonwhite students).
2. In part, this is because diversity is an elusive concept. *See, e.g.*, Patrick S. Shin, *Diversity v. Colorblindness*, 2009 BYU L. REV. 1175, 1179–82 (acknowledging that diversity has varied meanings and "'[r]acial diversity' is a context-dependent and normatively loaded term" (footnotes omitted)).
3. I focus on African Americans because they are the paradigmatic group around which debates about affirmative action are framed.
4. *Fisher*, 631 F.3d 213.
5. Certainly this is happening with respect to the *Fisher* litigation. *Id.* at 243 ("When the decision was made to reintroduce race-conscious admissions in 2004, underrepresented minorities made up 21.4% of the incoming class (4.5% African-American and 16.9% Hispanic)."); *see* Transcript of Oral Argument at 25–26, *Fisher*, No. 11-345 (U.S. Oct. 10, 2012), *available at* http://supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf (outlining Justice Breyer's discussion of the representation of African Americans before and after *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996)); *id.* at 38 (transcribing Garre's discussion of the representation of African Americans in certain classes); *id.* at 39 (detailing Chief Justice Roberts's question, "What is the critical mass of African Americans and Hispanics at the University that you are working toward?"); *id.* at 40–42 (stating Justice Ginsburg's query of why the "number of minority members admitted as a result of the 10 percent solution" was not enough). None of foregoing is surprising in that both the *Fisher* plaintiffs and the University of Texas (UT) framed their critical mass inquiry in terms of the representation of underrepresented groups as a whole or with reference to the representation of particular student of color populations. *Fisher*, 631 F.3d at 244 (describing plaintiffs' argument "that minority enrollment at UT now exceeds the level it had reached in the mid-1990s"); *id.* at 226, 236–37 (noting that the University of Texas argued that it was proper to consider whether some minority groups were underrepresented).

This group demographic framing of diversity assumes that when admissions officials administer affirmative action programs, their racial decisionmaking stops at the level of racial group representation. That is, in ascertaining whether they have a critical mass of African Americans,[6] admissions officers are in effect asking themselves only one question: How many black students have we admitted? Their racial analysis is exhausted by an inquiry about the rough numerical representation of blacks as a group.[7] To describe admissions decisionmaking in this way is not to suggest that admissions officers are utilizing quotas.[8] Rather, the point is simply to note that they are implementing their commitment to diversity by adopting an interracial diversity framework.[9] Under this framework, the critical diversity concern is the representation of Africans Americans as a group as compared interracially to the representation of other races (usually whites and sometimes Asian Americans) as a group.[10]

6. Critical mass emerges for the first time in affirmative action case law in the *Grutter* and *Gratz* litigation. *Gratz*, 539 U.S. at 281 (Thomas, J., concurring); *Grutter*, 539 U.S. at 335–36 ("The Law School's goal of attaining a critical mass of underrepresented minority students does not transform its program into a quota."). Some argue that the term is indeterminate and provides rhetorical cover for quota-like admissions regimes. *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting) ("Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."); *id.* at 389 (Kennedy, J., dissenting) ("[T]he concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."); *see also* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 CARDOZO L. REV. 97 (2007) (addressing arguments on both sides of the issue). There is little doubt that the U.S. Supreme Court will focus on this concept in its adjudication of the University of Texas's affirmative action plan.

7. *See supra* note 3.

8. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315–20 (1978) ("The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end."); *see also Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system . . . ."); City of Richmond v. J. A. Croson Co., 488 U.S. 469, 499 (1989); Johnson v. Transp. Agency, 480 U.S. 616, 638 (1987); Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1253 (11th Cir. 2001) ("[A] university may not establish a quota system for members of certain racial groups . . . .").

9. Indeed, the interracial frame often is centered on a dichotomy between underrepresented students and students who are not underrepresented. *See Grutter*, 539 U.S. at 336 (focusing on the percentage enrollment of African Americans, Latinos, and Native Americans).

10. Sometimes scholars and policy makers frame the inquiry in terms of whether African Americans in the school approximate their representation in the general population. *See supra* notes 5–7 and accompanying text. This, too, is an interracial frame in that the benchmark for the analysis—African American representation in the population—is determined with reference to the representation of other racial groups. But the interracial framing of diversity need not reference general population demographics. Presumably, notwithstanding that roughly 2 percent of Utah's population is African American, few would argue that 2 percent of African Americans at the University of Utah would constitute a critical mass.

There is reason to believe that this is not the only frame admissions officials employ when they administer their affirmative action programs. Especially at elite colleges and universities, admissions officials are also likely employing an intraracial diversity frame.[11] Here, the concern is not simply whether there is a critical mass of African Americans as a group. The concern is also whether the school has admitted particular "types" of African Americans.[12] For example, a school might screen its application pool for African Americans who are likely to promote racial cooperation and understanding. Alternatively, the school might be interested in African Americans who can facilitate the robust exchange of ideas. The point is that admissions officials can realize their commitment to diversity by choosing African Americans at least in part based on their perceived racial "types" and not simply based on their racial group membership.[13]

Motivating the theory of racial types is the notion that all of us—at least implicitly[14]—racially judge others not only on whether we perceive them to be members of a cognizable group but also on how closely we perceive them to be associated with that group.[15] This point is largely uncontroversial with respect to gender. Few would quarrel with the claim that we judge individuals based not only on whether we think they are men or women but also on how closely we perceive them to be associated with those categories. For example, we differentiate between masculine women and feminine women. Indeed, there is an entire body of antidiscrimination

11. As I explain more fully in Part II, elite colleges and universities are likely to have intraracially diverse admissions pools precisely because these schools are highly desired.

12. Roughly, racial types fall into one of two categories—those who are racially salient and those who are racially understated. Racially salient African Americans have a "hard" racial identity in the sense that their race matters to them and is a fundamental part of their sense of self (or so a decisionmaker might believe); racially understated African Americans have a soft racial identity in the sense that their race does not matter to them and is incidental to their sense of self (or so a decisionmaker might believe). *See* Devon W. Carbado, Discrimination on the Basis of Racial Orientation (Mar. 10, 2013) (unpublished manuscript) (on file with author) (distinguishing between racially salient and racially understated blacks and linking these conceptions of identity to discourses about color consciousness and colorblindness, respectively). *See generally* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000) [hereinafter Carbado & Gulati, *Working Identity*] (discussing the problem of racial salience in the context of the workplace); Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757 (2003) [hereinafter Carbado & Gulati, *The Law and Economics*] (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes et al. eds., 2002)).

13. Carbado, *supra* note 12.

14. There is now a fairly robust literature in law highlighting the ways in which implicit biases can affect a range of legal decisionmaking. *See, e.g.*, Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

15. For a discussion of this dynamic in the employment discrimination context, see Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701 (2001), and Carbado & Gulati, *The Law and Economics*, *supra* note 12.

law regulating the circumstances under which we can do so.[16] A similar point can be made about sexual orientation. We judge people based not only on whether we think they are gays or lesbians but also on how closely we perceive them to be associated with those categories.[17] For example, we differentiate between "straight acting" gay men and gay men whom we perceive to be stereotypically gay.[18]

An intragroup differentiation dynamic is at play with race as well. Crudely, and with respect to African Americans, we judge them based not only on whether we think they are black but also on how stereotypically black, or how race-consciously black, we perceive them to be. Before I elaborate on how this phenomenon can play itself out in the context of admissions, a few examples outside

16. Much of this law builds on *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). In *Price Waterhouse*, the plaintiff filed a suit claiming Price Waterhouse violated Title VII of the Civil Rights Act by refusing to promote her for partnership. *Id.* at 231–32. While the plaintiff was well qualified for partnership, several partners reacted negatively to her aggressive and "macho" personality, particularly because she was a woman. *Id.* at 234–35. She was even told by her supervisor that to improve her chances for making partner, she needed to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985)) (internal quotation marks omitted). The Supreme Court remanded the case and held that when a plaintiff in a Title VII case proves that gender played a motivating part in an employment decision, the defendant can only avoid liability by proving by a preponderance of the evidence that it would have made the same decision regardless of gender. *Id.* at 258; *see also* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994) (discussing the use of community norm standards under Title VII to allow for the continued subordination of women who are subject to gender role stereotypes); Mary Anne C. Case, *Disaggregating Gender From Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (arguing for the disaggregation of gender and sex to better recognize the discrimination based on gender rather than sex, particularly in the instance of effeminate men); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 3 (1995) (advocating for the adoption of a behavioral or performative conception of sex rather than a biological definition of sexual identity and sex discrimination); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379 (2008) (discussing the implications of the social contact hypothesis in the workplace, where an employer can demand that people of color and women cover their racial and gender identity to conform to the behavior and appearance of white males).

17. DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA (2013); KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS (2006) (employing the theory of covering to discuss how gays and lesbians diminish the salience of their sexual orientation); *see also* Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1335–45 (2011); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER L.J. 65, 84 (1997).

18. This explains the extent to which people critique some gay men for "flaunting" their sexual orientation. *See* HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS: VIOLENCE AND DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER STUDENTS IN U.S. SCHOOLS 3 (2001) (noting some school officials criticized for not responding to anti-gay bullying "blame the students being abused of provoking the attacks because they 'flaunt' their identity").

of that domain might be helpful. Each illustrates how people commonly distinguish along intraracial lines.

Example 1. Imagine that a white police officer observes two black men walking by a department store in the middle of the afternoon. The men are not together. Both are twentysomething. Moreover, they are roughly the same height and have roughly the same complexion. One is dressed in a suit; the other is wearing baggy jeans and a hoodie. Assume that the officer, like most of us, harbors implicit bias linking blacks to criminality.[19] Also assume that the officer can only stop one of these men. The officer is likely to stop the black man wearing the baggy jeans and hoodie. This decision would be based, at least in part, on an intraracial distinction: While both men are black, the man dressed in a suit is less racially salient and more racially palatable. The officer could believe that, as between the two, the black man wearing the baggy jeans is more likely to engage in shoplifting because he appears to be *more* stereotypically black and thus *more* likely to be a criminal.[20]

The Trayvon Martin case at least marginally implicates the preceding example. George Zimmerman shot and killed the seventeen-year-old black male, allegedly in self-defense. The story quickly became headline news. Trayvon was

19. *See, e.g.*, Kang, *supra* note 14, at 1491–92; Kang et al., *supra* note 14, at 1150–51.

20. One could take the position that the distinction between the two men is one of class, not race. To demonstrate this point we could change the identities of the men from black to white, and then ask: Wouldn't a police officer be more suspicious of a white man dressed in a pair of baggy jeans and an oversized t-shirt than he would of a white man dressed in a suit? If the answer is yes, isn't the difference between the men one of class, not race, as it is between the two black men in the preceding hypothetical? Of course, class and professional identity are also at play in both of the above scenarios (assuming that baggy jeans and an oversized t-shirt are signifiers of class). But so is race. With respect to the two white men, for example, the officer could believe that the one dressed in the baggy jeans and white t-shirt is acting black. To the extent that this is the case, the officer might attribute racial stereotypes that apply to black men to the white man. The officer's thinking could be that a white person who acts black likely manifests other perceived attributes of blackness, including, but not limited to, criminality. Second, because stereotypes about criminality typically do not apply to white men, likely the officer would not perceive either of the white men as criminally suspect; both black men are vulnerable to being so stereotyped. This helps to explain the recent incident where six black students on a senior field trip with 200 other students from Washington University at St. Louis were denied entry to a Chicago nightclub because they were wearing baggy clothes, while similarly dressed white students were allowed entrance. The fact that class or professional identity might help to explain why a policeman would stop a black man dressed in baggy jeans and a t-shirt instead of a black man dressed in a suit does not mean that race is not implicated. In fact, if the police officer's perception of the man in the baggy clothing is that he is low-income, this would contribute to the man's racial saliency as black, since people have both implicit and explicit bias about the class status of black people. This raises questions about where class or professional identity ends and race begins. But, for now, our aim is to make a minimalist point: Racial bias can explain why, in the above example, the white officer pursued the black man dressed in baggy jeans and a t-shirt over the black man wearing a suit.

wearing a hoodie at the time and some attributed his death to that fact.[21] According to Geraldo Rivera, for example, the hoodie was "as much responsible for Trayvon Martin's death as George Zimmerman was."[22] From Rivera's perspective, in effect, the hoodie took away Trayvon's innocence and turned him into a "bad" black. "Trayvon Martin, God bless him, an innocent kid, a wonderful kid, a box of Skittles in his hands. He didn't deserve to die," Rivera commented.[23] "But I bet you money, if he didn't have that hoodie on, that nutty neighborhood watch guy wouldn't have responded in that violent and aggressive way."[24] For Rivera, the lesson from all of this is clear: "[P]arents of black and Latino youngsters particularly [should] not . . . let their children go out wearing hoodies. . . . People look at you [in a hoodie], and what's the instant identification? What's the instant association? . . . [S]omeone stickin' up a 7-Eleven[,] . . . a mugging on a surveillance camera."[25] Concern about these associations has caused Rivera to instruct his own "particularly dark-skinned" son not to wear hoodies.[26]

Example 2. Assume that a firm interviews Theresa and Lauren for the same job. In terms of facial features and skin tone, both are "equally black"; however, the employer *perceives* Theresa to be Afrocentric and Lauren to be assimilationist, in part because of dress and appearance choices. Lauren relaxes her hair and wears a blue skirt suit and a white blouse to the interview. Theresa's hair is dreaded, and she wears a black trousers suit with a kente cloth blouse and scarf. While both hires would further the firm's interest in diversity in the sense of increasing the representation of black women at the firm, the two women are different in terms of their racial salience. The employer could believe that whereas Lauren's racial difference is only skin deep, Theresa's is more fundamental. If the employer uses racial salience as a proxy for whether a prospective employee will exhibit negative stereotypes about race, it is likely to hire Lauren and not Theresa.

Example 3. Prospective black employees are very much aware that firms might practice this form of intraracial distinction that favors palatable racial identi-

21. Matt Gutman & Lauren Efron, *Trayvon Martin Case: Timeline of Events*, ABC NEWS (May 8, 2012, 4:55 PM), http://abcnews.go.com/blogs/headlines/2012/05/trayvon-martin-case-timeline-of-events/.

22. Katherine Fung, *Geraldo Rivera: Trayvon Martin's 'Hoodie Is as Much Responsible for [His] Death as George Zimmerman*,' HUFFINGTON POST (Mar. 25, 2012, 2:51 AM), http://www.huffingtonpost.com/2012/03/23/geraldo-rivera-trayvon-martin-hoodie_n_1375080.html (remarks of Geraldo Rivera).

23. Ann Oldenburg, *Geraldo Rivera Blames Hoodie for Trayvon Martin's Death*, USA TODAY (Mar. 25, 2012, 9:07 AM), http://content.usatoday.com/communities/entertainment/post/2012/03/geraldo-rivera-blames-hoodie-for-trayvon-martins-death/1#.UPsZJB1EFNn.

24. *Id.*

25. *Id.*

26. *Id.*

ties. Consider how Johnny R. Williams navigated this concern upon entering the job market after completing his MBA degree from the University of Chicago Booth School of Business. After having no success finding a job initially, Williams embarked on a set of strategies to increase his market appeal. One of those strategies involved removing all references to race from his résumé. "His membership, for instance, in the African-American business students association? Deleted."[27] According to the *New York Times*, Williams's logic was that "[i]f they're going to [reject] me, I'd like to at least get in the door first."[28] As such, one might read Williams's account as an effort simply to avoid being marked as black altogether. But a more subtle dynamic may be at work. Roughly a week after running Williams's story, the *New York Times* published another article, "'Whitening' the Resume."[29] The article focused specifically on résumé-whitening strategies African Americans employ to minimize the salience of their blackness. These strategies are not solely about passing in the sense of presenting oneself as white in order to escape the burdens and disadvantages of being black. They are also about presenting oneself as racially palatable. As the article notes, "Activism in black organizations, even majoring in African-American studies can be signals to employers"—signals that suggest that one is too black.[30] Eliminating those explicit racial markers is one way of "calming down on the blackness," as Yvonne Orr describes it.[31] Orr had worked for fifteen years in fundraising for nonprofits and was looking for work in Chicago. To enhance her chances of landing a job, she "removed her bachelor's degree from Hampton University, a historically black college, leaving just her master's degree from Spertus Institute, a Jewish school. She also deleted a position she once held at an African-American nonprofit organization and rearranged her references so the first people listed were not black."[32] In adjusting her résumé along these lines, Orr was following her mother's advice. Despite having been a member of the Black Panther Party in the 1960s, Orr's mother instructed Orr that she did not need to "shout out, 'I'm black'" on her résumé.[33] In effect, Orr's mother was offering her advice on how to make herself more racially palatable to her prospective employers.

This brings us back to the admissions context. Each of the above examples helps to flag the diversity issue this Article explores—namely, that if average citi-

27. Michael Luo, *In Job Hunt, Even a College Degree Can't Close the Racial Gap*, N.Y. TIMES, Dec. 1, 2009, at A1.
28. *Id.* (internal quotation marks omitted).
29. Michael Luo, *'Whitening' the Résumé*, N.Y. TIMES, Dec. 6, 2009, at WK3.
30. *Id.*
31. *Id.* (internal quotation marks omitted).
32. *Id.*
33. *Id.*

zens and employers regularly distinguish along intraracial lines, admissions officials are likely to do the same: achieving diversity by choosing African Americans at least in part based on their racial types and not simply based on whether they are African Americans. Admissions officers can implement these intraracial selections in a number of different ways. An officer with a fixed preference for particular racial types may prefer, for example, African Americans whose racial identities are racially salient over those whose are not. Not all intraracial preferences, however, need to be fixed in that way. Whether the admissions officer prefers racially salient African Americans could turn on the precise diversity benefit she seeks to advance. If that officer wants black students who will facilitate racial cooperation and understanding, for example, that preferred diversity benefit increases the likelihood that the officer will admit blacks whose racial identities are not salient. If, on the other hand, an officer wants black students who will make the environment more racially conscious, she will likely admit black students whose racial identities are salient.

The current legal regime seems to give admissions officers carte blanche in deciding how to realize their commitment to diversity. So long as they do not employ quotas or other racially based point systems,[34] they can make up the racial body of the class as their hearts and minds desire. More specifically, these officials have the discretion to decide which diversity benefits to promote, which racial criteria to employ as a proxy for those benefits, and which racial types to admit. None of this is strictly scrutinized because none of this has been expressly named as an institutional practice.[35] To the extent that they occur, intraracial selections take place free from public view and accountability, with relatively little information, administrative difficulty, or engagement on the part of scholars.[36]

34. *See* Gratz v. Bollinger, 539 U.S. 244 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

35. I do not mean to imply here that intraracial preferences in admissions should be strictly scrutinized in the doctrinal sense. Indeed, as I have argued elsewhere, race-conscious remediation, including but not limited to affirmative action, should not trigger strict scrutiny at all. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

36. An important exception is Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463 (2012); the Article argues, among other things, that differences within group diversity provides a compelling justification for affirmative action. I discuss this article more fully in Part IV. Elise Boddie, then Acting Litigation Director of the NAACP Legal Defense Fund, Inc., also authored an opinion piece highlighting the importance of intraracial diversity. Elise Boddie, *Commentary on* Fisher*: The Importance of Diversity Within Diversity*, SCOTUSblog (Oct. 11, 2012, 10:50 AM), http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity. To the extent that scholars have engaged the topic of intraracial diversity, they have framed the issue in terms of either black ethnicity or class. Thus, for example, in an opinion piece in the *New York Times*, Lani Guinier observed that many top U.S. universities were pursuing black racial diversity primarily by admitting first-generation immigrants of African and Caribbean West Indian descent. Lani Guinier, Op-

For more than a decade, Mitu Gulati and I have been highlighting the problem of intraracial selections in the context of employment.[37] That effort is now part of a broader literature exploring various dimensions of this problem.[38] Like in

Ed., *Our Preference for the Privileged*, BOS. GLOBE, July 9, 2004, at A13; *see also* Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES, June 24, 2004, http://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html. More recently, Kevin Brown and Jeannine Bell have made similar observations, exploring whether African Americans who trace their ancestry to American slavery are disadvantaged in admissions processes vis-à-vis other blacks. Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229 (2008). For data on the topic, see Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243 (2007). Finally, Angela Onwuachi-Willig has explored a version of this problem in the context of a discussion about legacy black admissions. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007). My argument is that the problem of intraracial selections is likely broader than university officials preferring African or West Indian black ethnicity over American black ethnicity and broader than admissions teams admitting class privileged blacks over working class or poor blacks.

37. Devon W. Carbado & Mitu Gulati, *Conversations at Work*, 79 OR. L. REV. 103 (2000); Carbado & Gulati, *supra* note 15; Carbado & Gulati, *The Law and Economics*, *supra* note 12; Carbado & Gulati, *Working Identity*, *supra* note 12. We were certainly not the first to think about intraracial dynamics in the context of law. *See* Barbara J. Flagg, *"Was Blind, but Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/masking the Self While Un/braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185 (1994).

38. For instance, there is now substantial literature that engages some aspect of the intraracial differences and racial performance in the context of the workplace. *See, e.g.*, Taunya Lovell Banks, *Colorism: A Darker Shade of Pale*, 47 UCLA L. REV. 1705 (2000) (arguing that colorism, skin tone discrimination against dark-skinned blacks by light-skinned blacks, constitutes a form of race-based discrimination, particularly in the context of employment); Sumi Cho, *"Unwise," "Untimely," and "Extreme": Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change*, 39 U.C. DAVIS L. REV. 805 (2006) (arguing that the collegiality rationale in employment discrimination reveals the operation of contemporary discrimination through neutral language); Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623 (2005) (arguing for the expansion of antidiscrimination discourse to include work culture as a source of employment discrimination); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283; Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless nor Unreasonable*, 69 ALB. L. REV. 299 (2005) (employing the concept of intersectionality to argue that when people negotiate multiple identity performance demands they are in a uniquely restricted situation, a catch-22 or double bind); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004) (criticizing current Title VII doctrine for failing to recognize claims based on racial identity performance in the workplace); Laura Morgan Roberts & Darryl D. Roberts, *Testing the Limits of Antidiscrimination Law: The Business, Legal, and Ethical Ramifications of Cultural Profiling at Work*, 14 DUKE J. GENDER L. & POL'Y 369 (2007) (introducing the concept of "cultural profiling" in the context of the workplace); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (arguing that outsiders and insiders tend to perceive allegations of discrimination through different frameworks, including in the workplace); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (discussing

the employment context, intraracial selections in the domain of admissions likely will turn on the racial types that institutions find palatable. My hope is that this Article begins a robust conversation about intraracial selections in the context of admissions.

As the point of departure for this engagement, Part I describes the legal parameters of affirmative action, since that is the policy mechanism through which most colleges and universities effectuate their commitment to diversity. The doctrinal exegesis is decidedly summary. My main aim is to carefully unpack the different conceptions of diversity that underwrite Justice O'Connor's opinion in *Grutter*. By and large, scholars have oversimplified her diversity analysis, so much so that we continue to think of diversity with respect to its capacity to facilitate the robust exchange of ideas. Part I's analysis extracts eight distinct diversity benefits from Justice O'Connor's opinion, a crucial disaggregation for the following four reasons.

First, judges, scholars, and policymakers continue to invoke diversity as a normative good without articulating precisely what benefits diversity delivers. This contributes to the confusion about whether diversity is a means to an end or an end in and of itself.[39] Second, affirmative action is likely to become more, not less, controversial over the coming years. The sites for contestations will include the courts,[40] legislation,[41] ballot initiatives,[42] and institutional policymak-

---

the shortfalls of employment discrimination in addressing the more subtle and complex forms of workplace inequality that result from patterns of interaction, informal norms, networking, mentoring, and evaluation); Kenji Yoshino, *Covering*, 111 YALE L.J. 769 (2002); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365 (2006).

39. Justice Thomas, in *Grutter*, honed in on this particular problem. Grutter v. Bollinger, 539 U.S. 306, 354–55 (2003) (Thomas, J., concurring in part and concurring in the judgment).

40. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007); Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012) (challenging the constitutionality of California constitutional provision as a violation of equal protection by causing the unfair exclusion of minority groups from higher education); Fisher v. Univ. of Texas at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012); Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 652 F.3d 607, 610 (6th Cir. 2011) (holding that the Michigan Civil Rights Initiative (Proposal 2) Amendment "unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities," violating the Equal Protection Clause), *superseded on reh'g en banc*, 701 F.3d 466 (6th Cir. 2012), *cert. granted*, Schuette v. Coal. to Defend Affirmative Action, No. 12-682, 2013 WL 1187585 (U.S. Mar. 25, 2013); H.B. Rowe Co. v. Tippett, 615 F.3d 233 (4th Cir. 2010) (upholding North Carolina Minority and Women's Business Enterprise program because it was narrowly tailored to achieve state's compelling interest in remedying discrimination against African American and Native American subcontractors).

41. For example, Tennessee Senate Bill 8, proposed in December, 2012, would have eliminated affirmative action plans at the state's higher education institutions. S.B. 0008, 108th Gen. Assemb., Reg. Sess. (Tenn. 2012). The Bill failed in committee. *Id.*

42. ARIZ. CONST. art. 2, § 36 (codifying Proposition 107) (prohibiting discrimination and preferential treatment based on race or ethnicity "in the operation of public employment, public education or public contracting"); CAL. CONST. art. 1, § 31 (codifying Proposition 209) (prohibiting state

ing.[43] Being clear about the potential benefits of diversity is thus all the more important. Third, setting out the eight diversity benefits reveals that the diversity rationale for affirmative action is not necessarily in tension with remedial justifica- justifications for the policy. Finally, framing diversity in terms of the number of concrete benefits sets the conceptual ground on which I will develop the arguments about intraracial diversity. To the extent that affirmative action potentially yields distinct diversity benefits, admissions officials can intraracially select African American students in light of their ability to deliver the specific diversity benefits a school seeks to promote.

Part II demonstrates how schools can select candidates intraracially to realize the diversity benefits specific to their respective institutional interests. Concretely, admissions officials can screen an applicant's written materials—résumés, personal statements, supplementary essays, letters of recommendation—to ascertain the degree to which that applicant is racially salient. Part II creates application profiles to illustrate how seemingly mundane parts of an applicant's file can become racially evidentiary. More than that, this Part shows how different applicants become more or less racially attractive depending on whether their racial types, as determined by admissions officers, converge with the specific diversity benefits that officers seek to advance.

---

government institutions from considering an individual's race, sex, or ethnicity); MICH. CONST. art. I, § 26 (codifying Ballot Proposal 06-2) (prohibiting any agent of the state from discriminating against, or giving preferential treatment to, anyone on the basis of race, sex, color, ethnicity, or national origin); NEB. CONST. art. I, § 30 (codifying Initiative Measure No. 424) (prohibiting the state from discriminating or granting preference to individuals on the basis of race); WASH. REV. CODE ANN. § 49.60.400 (West 2010) (codifying Initiative Measure No. 200) (prohibiting racial and gender preferences by state and local government); Ariz. Civil Rights Initiative, Proposition 104 (2008) (disqualified from ballot) (proposing constitutional amendment to prohibit the state from discriminating against or granting preferential treatment on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, education or contracting); Cal. Proposition 54, Racial Privacy Initiative (2003) (unenacted) (proposing constitutional amendment to restrict state and local governments in California from collecting or using information on a person's race, ethnicity, color, or national origin for the purpose of public education, contracting, employment, and other governmental operations); Colo. Civil Rights Initiative, Amendment 46 (2008) (unenacted) (proposing constitutional amendment to prohibit discrimination or preferential treatment by the state in public employment, education, and contracting); Okla. Anti-affirmative Action Initiative (2008) (withdrawn by proponents).

43. In 1995, before the passage of Proposition 209, the University of California Board of Regents adopted two resolutions, SP-1 and SP-2, that changed the university's admissions, hiring, and contracting practices. *See Regents Meeting, May 16*, OFF. PRESIDENT NEWS ROOM, http://www.ucop.edu/news/access/qasp12.htm (last visited Apr. 19, 2013). SP-1 eliminated consideration of race and gender in the student admissions process. *Id.* SP-2 eliminated race and gender as considerations in the university's hiring and contracting practices, except where such action would result in the loss of government funds. *Id.*

Part III describes the incentives applicants have to respond to the possibility that admissions officials are intraracially selecting students based on racial types. I illustrate the subtle but significant ways in which applicants can "blacken" or "whiten" their applications in relation to their sense of the specific racial types an institution might want to admit. I situate this discussion in the context of a more general claim about working identity that Mitu Gulati and I have developed elsewhere—namely, that people of color literally work their identities to shape the social meanings others attribute to them.[44] Part III demonstrates how this working identity phenomenon plays itself out in the context of admissions.

Part IV explores the doctrinal implications of the argument. The goal is to tackle a question that scholars have largely ignored: How would intraracial diversity fare under a strict scrutiny analysis? As I show, both the compelling state interest and the narrow tailoring analyses cut in two directions.

Part V demonstrates how intraracial diversity is implicated in the *Fisher v. Texas* litigation. It argues that because neither the University of Texas nor the pro–affirmative action amicus briefs sufficiently engaged the intraracial diversity phenomenon, they limited both the doctrinal and normative terms on which the policy was defended.

I. EIGHT BENEFITS OF DIVERSITY

The legal basis for pursuing diversity in education harkens back to Justice Powell's opinion in *Regents of University of California v. Bakke*.[45] In that case, the Court determined the constitutionality of the University of California at Davis School of Medicine's affirmative action plan under the Equal Protection Clause of the U.S. Constitution.[46] To determine whether a particular governmental decision violates equal protection, the Court applies different standards of review.[47]

44. *See generally* Carbado & Gulati, *Working Identity*, *supra* note 12; *see also* CARBADO & GULATI, *supra* note 17.

45. 438 U.S. 265, 269–324 (1978).

46. U.S. CONST. amend. XIV, § 1.

47. The Court has explicitly stated three standards of review in determining the constitutionality of a policy under the Equal Protection Clause: strict scrutiny, intermediate scrutiny, and rational basis review. R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 228 (2002). Strict scrutiny requires a narrowly tailored policy that furthers a compelling governmental interest. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (applying strict scrutiny to racial classifications). Intermediate scrutiny requires that a law be substantially related to an important governmental purpose. Romer v. Evans, 517 U.S. 620 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985); Craig v. Boren, 429 U.S. 190, 199–204 (1976) (applying intermediate scrutiny to classifications based on gender). Under rational basis review, a law will be upheld if it is rationally related to a legitimate

Race based classifications receive the highest level of scrutiny. Concluding that U.C. Davis's affirmative action plan was a race based classification, Justice Powell required the medical school to demonstrate that there was a compelling interest for its plan and that the school did not overly rely on race in implementing the policy. Although Justice Powell concluded that the affirmative action plan was unconstitutional because the school employed quotas, he suggested that the "attainment of a diverse student body" constituted a compelling interest that could justify the consideration of race as a positive decisionmaking factor.[48] In everyday language, U.C. Davis had a good reason for putting in place its affirmative action policy, but utilized a bad mechanism for implementing it: a quota mechanism that relied too crudely on race.

But what did Powell mean by diversity and what constitutes a good mechanism? While Powell did not articulate a definitive definition of diversity, he explained that the value of diversity in a student body was largely derivative of the "'discourse' benefits"[49] that could be expected from placing individuals with different social and cultural perspectives together in a shared educational environment.[50] Presumably, this meant that admissions plans that pursued a racially diverse student body in order to achieve discourse benefits would be constitutionally permissible. But what mechanisms were permissible? If quotas were bad, then what was

governmental purpose and does not impose irrational burdens on individuals. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 309 (1993) (applying rational basis review to commercial distinctions). However, these three standards of review are not determinate. Courts have applied varying degrees of these standards based on the context of the classification. *See* United States v. Virginia, 518 U.S. 515, 555–56 (1996) (stating that intermediate scrutiny requires that the state establish an "exceedingly persuasive justification" for gender classifications); Korematsu v. United States, 323 U.S. 214, 223–24 (1944) (invoking the rhetoric of strict scrutiny but actually applying a more deferential standard to the government); *see also* Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court From the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 358 (1999) (noting that there are two different types of rational basis review cases, "one deferential and one heightened, operating as if in parallel universes with no connection between them"). Scholars have argued that these different standards of review are merely ex post justifications for conclusions rather than substantial analytical guideposts. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1322–23 (2007); *see also* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (arguing that the current tiers of scrutiny are inconsistently applied by the Supreme Court and proposing a new unitary standard of review); Roger Craig Green, Note, *Interest Definition in Equal Protection: A Study of Judicial Technique*, 108 YALE L.J. 439, 441 (1998) (discussing the techniques of "generality manipulation" and "excluded-interest rules" in the determination of governmental interests and how these techniques undermine judicial scrutiny (internal quotation marks omitted)).

48. *Bakke*, 438 U.S. at 311–19.

49. Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 FORDHAM L. REV. 2301, 2302 (2004); *see id.* ("There are benefits to students, the university, and society arising from the discourse and interactions *all* students will have on a racially diverse academic campus.").

50. PETER H. SCHUCK, DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE 164–65 (2003).

good? Powell's answer seemed to be individualized review—that is, admissions officials must evaluate each candidate as an individual, and not as part of a group.[51]

Roughly twenty-five years later, in a pair of cases, *Grutter v. Bollinger*[52] and *Gratz v. Bollinger*,[53] the Supreme Court revisited the question of whether diversity could be a legitimate basis on which colleges and universities implement affirmative action programs. Writing for a majority of the Court, Justice O'Connor answered that question in the affirmative, stating that the pursuit of diversity advanced compelling governmental interests. According to O'Connor:

> [T]he [University of Michigan] Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."[54]

O'Connor also observed that the law school's policy "reaffirm[s] the Law School's longstanding commitment to . . . 'racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented . . . in meaningful numbers.'"[55] Finally, O'Connor endorsed the law school's argument that it was important to admit a "'critical mass' of [underrepresented] minority students . . . to 'ensur[e] their ability to make unique contributions to the character of the Law School.'"[56]

My reading of O'Connor's opinion suggests that the pursuit of diversity might achieve eight values, including Justice Powell's discourse benefits. Each of those values helps justify O'Connor's conclusion that diversity can be a compelling justification for affirmative action.

- Diversity to promote speech and the robust exchange of ideas[57]
- Diversity to effectuate the inclusion of underrepresented students[58]

51. *Bakke*, 438 U.S. at 318; *see also* Gratz v. Bollinger, 539 U.S. 244, 271 (2003) ("Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual . . . .").
52. 539 U.S. 306 (2003).
53. 539 U.S. 244 (2003).
54. *Grutter*, 539 U.S. at 330 (third alteration in original) (citation omitted).
55. *Id.* at 316. Clear rules take away that discretion.
56. *Id.* (alterations in original) (quoting case brief).
57. *Id.* at 329–30.
58. *Id.* at 316 ("The policy does, however, reaffirm the Law School's longstanding commitment to . . . the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans.").

- Diversity to change the character of the school[59]
- Diversity to disrupt and negate racial stereotypes[60]
- Diversity to facilitate racial cooperation and understanding[61]
- Diversity to create pathways to leadership[62]
- Diversity to ensure democratic legitimacy[63]
- Diversity to prevent racial isolation and alienation[64]

In suggesting that diversity might advance any of the foregoing values, O'Connor expanded on Powell's rationale for why diversity is a goal that educational institutions are permitted to pursue. Significantly, the foregoing diversity benefits are relevant not only vis-à-vis what happens in the classroom. They are relevant with respect to student life across different domains of the university, including the range of extracurricular activities in which students engage.

While Justice O'Connor expanded Justice Powell's conception of diversity, she made clear that admissions officers did not have a blank check with respect to the techniques they could employ to pursue diversity. At the same time, nor would the Court second-guess a university's articulation of the benefits it sought to achieve.[65] The caveat, as in *Bakke*, was that whichever of the eight diversity bene-

59. *Id.* ("By enrolling a 'critical mass' of [underrepresented] minority students, the Law School seeks to 'ensur[e] their ability to make unique contributions to the character of the Law School.'" (alterations in original) (quoting case brief) (internal quotation marks omitted)).

60. *Id.* at 330.

61. *Id.* ("[T]he Law School's admissions policy promotes 'cross-racial understanding,' . . . and 'enables [students] to better understand persons of different races.'" (second alteration in original)).

62. *Id.* at 332 ("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.").

63. *Id.*

64. *Id.* at 332–33.

65. *Id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally proscribed limits."). However, scholars have argued that Justice O'Connor's suggestion that the courts should defer to universities regarding their academic decisions effectively waters down the strict scrutiny standard. *See* Annalisa Jabaily, *Color Me Colorblind: Deference, Discretion, and Voice in Higher Education After* Grutter, 17 CORNELL J.L. & PUB. POL'Y 515, 527 (2008) (arguing that *Grutter*'s "strict scrutiny with deference" standard is a new level of review because it shifts power from courts to administrators).

fits the university endeavored to realize, the mechanism it employed to do so had to entail an individualized analysis of the admissions candidates.[66]

The question now is: How are admissions officers likely to implement their admissions policies against the backdrop of the affirmative action case law I have described? While I do not offer an empirical answer, Part III sketches out plausible possibilities.

II. INTRARACIAL SCREENING

Imagine that a university's general counsel, seeking to ensure that the school's diversity policy for admissions survives constitutional challenge, issues the following two instructions to an admissions team: "First, when you consider race as a factor in determining whether to admit a particular student, the analysis must be individualized. In other words, a precise plus value cannot be put on the value of, say, a candidate's race. Instead, the analysis has to be a multifactor subjective analysis.[67] Second, in performing the individualized and subjective analysis, your employment of race should be narrowly tailored to achieve one or more of the specific diversity goals outlined above."

The foregoing two instructions, likely typical of university efforts to work within the bounds of *Grutter* and *Bakke*, can lead admissions officers to make intraracial distinctions that neither Powell nor O'Connor might have contemplated. To appreciate what these intraracial distinctions might look like, assume that the admissions officer is screening applicants based on whether they will provide one of the benefits of diversity that the Court mentioned in *Grutter*. Assume further that the admissions officer is screening based solely on the paper record that the applicant submits. While committees make most admissions decisions, also assume that there will be no group-based conversations about which candidates to admit. This will frame our hypothetical around a single decisionmaker—because an entering class is typically constituted by multiple individual decisions. For simplicity, this part limits the discussion to four of the eight types of diversity

66. *Grutter*, 539 U.S. at 334 ("As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." (citations omitted)).

67. In *Gratz*, the companion case to *Grutter*, the Court declared the University of Michigan's undergraduate admissions plan unconstitutional because it assigned specific points to applicants depending on their membership in particular racial groups. Gratz v. Bollinger, 539 U.S. 244, 271–72 (2003).

benefits that Justice O'Connor mentions in *Grutter*—countering racial stereotypes, enhancing racial cooperation, combating underrepresentation and facilitating inclusion, and promoting speech and the robust exchange of ideas. In effect, in positing that the admissions officer can choose which diversity benefit she wishes to pursue, the assumption is that that person has considerable discretion. Part of that discretion includes making comparative racial assessments about the diversity benefits particular individuals might deliver. Assume now that the admissions officer is performing that comparative analysis with respect to three black female applicants: Kimberly, Tanisha, and Rachel. I have gendered the hypothetical in this way because these days there are likely to be more black women in undergraduate and graduate admissions pools than black men.[68] The exploration below details the variety of ways in which a university can employ the paper record to distinguish interracially among Kimberly, Tanisha, and Rachel, under the assumptions and conditions I have set out above.

A. Intraracial Screening the Application

A preliminary exploration of the paper record of each candidate is necessary to understand how universities may interracially select among them. Kimberly grew up in the inner city and attended a predominantly black high school. She was parented by a single mother who works as a nurse. In high school, Kimberly founded and was a member of the Sisters Reading Group, a book club for young African American women, and led an organized effort at the school to hire more black teachers. Her personal statement states that she is interested in double majoring in ethnic studies and women's studies and eventually becoming a community organizer.

Tanisha also grew up in the inner city but was bused to a school in the suburbs. Her father is a policeman and her mother is a stay-at-home mom. Her extracurricular activities include tennis and the Student Club for the Environment. Tanisha is interested in environmental justice, with a particular focus on clean air policy.

Finally, Rachel grew up in a predominantly white neighborhood and attended an elite private high school. Her parents are professionals—her mother is a lawyer and her father is a dentist. She was on the lacrosse and ski teams in high school. She also is a first-generation American; both of her parents immigrated to the United States from the Caribbean to attend university. According to Rachel's

68. *See* Marjorie Valbrun, *Black Males Missing From College Campuses*, AM.'S WIRE, http://americaswire.org/drupal7/?q=content/black-males-missing-college-campuses (last visited Apr. 19, 2013).

personal statement, she is interested in becoming a corporate lawyer in London or New York.

Below I argue that each of these candidates will look more or less attractive depending on the justification for pursuing diversity that the admissions officer utilizes. At the same time, I make clear that different admissions officers will reach different conclusions with respect to whether a particular candidate advances a particular diversity benefit. I begin by discussing how an admissions officer might evaluate the ability of each candidate to negate racial stereotypes.

1. Negating Stereotypes

Diversity of a student body might help disrupt negative stereotypes about race.[69] Imagine that our admissions committee believes that interracial interac-

69. On the persistence of negative racial stereotypes in society, see Betty Watson Burston et al., *Drug Use and African Americans: Myth Versus Reality*, 40 J. ALCOHOL & DRUG EDUC. 19 (1995) (analyzing commonly held myths, stereotypes, and misconceptions regarding the nature and extent of drug use in the black community and the implications that believing these myths has for treatment, intervention, and public policy); Jerry Kang et al., *Are Ideal Litigators White? Measuring the Myth of Colorblindness*, 7 J. EMPIRICAL LEGAL STUD. 886 (2010) (finding that explicit stereotypes that the ideal litigator was white predicted worse evaluation of the Asian American litigator while implicit stereotypes predicted preferential evaluation of the white litigator); Monica H. Lin et al., *Stereotype Content Model Explains Prejudice for an Envied Outgroup: Scale of Anti-Asian American Stereotypes*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 34 (2005) (discussing how the perception of Asian Americans as having low sociability results in the rejection of Asian Americans); S. Christian Wheeler et al., *Think Unto Others: The Self-Destructive Impact of Negative Racial Stereotypes*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 173 (2001); Jamelle Bouie, *Race, Millennials and Reverse Discrimination*, NATION (Apr. 26, 2012, 2:05 PM), http://www.thenation.com/blog/167590/race-millennials-and-reverse-discrimination ("Discrimination against minorities takes many forms, and most are easy to identify. There's the overt bigotry of day-to-day life, the subtle discrimination of laws and institutions (the arrest rate for black men, the predatory lending aimed at minority communities) and the miasma of racist ideas that flow through our culture and sit in our subconscious, ready to act."); David J. Leonard, *White Denial and a Culture of Stereotypes*, HUFFINGTON POST (Aug. 30, 2012, 9:25 AM), http://www. huffingtonpost.com/dr-david-j-leonard/white-denial-and-a-cultur_b_1817557.html (discussing the prevalence of racial stereotypes and the negative implications of those stereotypes); Tim Wise, *(Proto)Typical White Denial: Reflections on Racism and Uncomfortable Realities*, TIMWISE.ORG (Apr. 2, 2008), http://www.timwise.org/2008/04/prototypical-white-denial-reflections-on-racism-and-uncomfortable-realities. Studies have also shown the consequences of the existence of negative racial stereotypes, particularly the influence on individual performance. *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008); Margaret Shih et al., *Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance*, 10 PSYCHOL. SCI. 80 (1999); Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613 (1997) (discussing the concept of stereotype threat, the threat that others' judgments or their own actions will negatively stereotype them in a particular domain, and how research shows that stereotype threat dramatically depresses the standardized test performance of women and African Americans); Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped*

tions in the academic environment have the potential to alter white students' preexisting negative perceptions of black intellectual capacity. White students who previously might have had little interaction with blacks will now be able to see that their black student counterparts are no different than they are. Conversely, the absence of black students does little to disrupt, and perhaps entrenches, existing stereotypes about black intellectual inferiority: They are not present at this university because they are not smart enough to get in.[70]

All three of the students could perform this stereotype disconfirmation function. But they might not do so to the same extent. Based on the instructions she received from the university's general counsel, the admissions officer knows that she has to perform an individualized consideration of each applicant and decide which of them is the strongest diversity candidate, assuming that all other factors are the same (such as high school grades and references). That is, each candidate passes some threshold in terms of the traditional indicia of merit. The question is whether one is more competitive in light of the negating stereotype diversity benefits she can deliver.

Based on the admissions committee's marching orders from the university's general counsel, it could decide that, because Kimberly has an interest in majoring in ethnic studies and women's studies and few white students major in those areas, she would have limited interactions with white students and thus would have few opportunities to negate racial stereotypes. The committee might also reach a similar conclusion with respect to Tanisha—that her background and interests indicate that she would spend her time primarily interacting with other black students.

The committee might also view Kimberly as the least attractive candidate to negate racial stereotypes, because she confirms certain stereotypes of blackness (overly committed to racial politics and community organization). The same, albeit to a lesser extent, could be said for Tanisha because she grew up in the inner city. For the committee, Rachel, the first generation immigrant who plays lacrosse and skis, might be the ideal candidate to disrupt traditional notions of blackness.

Students, 20 PSYCHOL. SCI. 1132 (2009) (providing a meta-analysis of research on stereotype threat and performance).

70. This rearticulates the "social contact" hypothesis about racial interaction—namely, that to the extent that racial groups have meaningful contact with each other, they are less likely to view each other in stereotypical terms. Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1101 (2006); *see also* Green, *supra* note 16 (discussing the implications of the social contact hypothesis in the workplace); Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1160–79 (2000) (examining whether cyberspace will increase social contact between the races); Thomas F. Pettigrew & Linda R. Tropp, *A Meta-analytic Test of Intergroup Contact Theory*, 90 J. PERSONALITY & SOC. PSYCHOL. 751 (2006) (presenting a meta-analysis which finds that intergroup contact typically reduces intergroup prejudice).

The admissions officer's decisionmaking could become even more granular if she decides to take seriously press accounts of the research in social psychology on debiasing.[71] A key feature of this research focuses on the characteristics that make a person a good debiasing agent. In order to serve as a debiasing agent, one has to be perceived as belonging to the group to which the bias or stereotype attaches and as exhibiting a counterstereotypical identity—an identity that runs counter to the stereotype that generally applies to people with her group characteristic. The underlying theory is that debiasing agents can shift people's stereotypic defaults about race. University officials can use the pursuit of diversity to accomplish that goal. It is not obvious which candidate would make the best debiasing agent. Rachel is black, but she is of West Indian descent. Would her interactions with white students change their perspectives of African Americans? To some extent, blacks of Caribbean descent are treated differently than blacks who trace their ancestry to American slavery.[72] This different treatment is based

71. *See, e.g.*, 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 (2004) (concluding that stereotypes about women held by women can be undermined if they inhabit local environments in which women frequently occupy counterstereotypic leadership roles (in other words, debiasing agents)); Nilanjana Dasgupta & Anthony G. Greenwald, *On the Malleability of Automatic Attitudes: Combating Automatic Prejudice With Images of Admired and Disliked Individuals*, 81 J. PERSONALITY & SOC. PSYCHOL. 800 (2001); Kang & Banaji, *supra* note 70, at 1108–15 (proposing employers hire certain individuals because they function as "debiasing agents," whose countertypical and counterattitudinal behavior decreases implicit biases of individuals around them); Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001); *see also* Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435 (2008) (arguing that when hiring debiasing agents, attention should also be given to discrimination at the relational level in the day-to-day interactions between members of different groups, rather than a focus on the individual decisionmaking level).

72. *See* Leonard M. Baynes, *Who Is Black Enough for You? The Stories of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 108 (1996) ("Caribbean Blacks have the dual identity of being from the Caribbean and also being Black. . . . Some Caribbean Blacks try to maintain their dual identities, but this duality may not last long. They may try to maintain their distinctiveness in an effort to distance themselves from the negative stereotypes that Whites may have of African-Americans." (footnote omitted)); Onwuachi-Willig, *supra* note 36, at 1167 (stating that blacks of British Caribbean descent tend to possess advantages over legacy blacks in the admissions process due to higher education and incomes); Mary C. Waters, *Ethnic and Racial Identities of Second-Generation Black Immigrants in New York City*, 28 INT'L MIGRATION REV. 795, 806–09 (finding that some Caribbean blacks in New York found that there was an advantage in being foreign-born black when dealing with white Americans). This disparate treatment helps to explain historical tensions between African Americans and blacks of Caribbean descent. *See* Lolita K. Buckner Inniss, *Tricky Magic*: *Blacks as Immigrants and the Paradox of Foreignness*, 49 DEPAUL L. REV. 85, 123–24 (1999) ("It is clear that American blacks who were the descendants of slaves and later West Indian immigrants developed an animosity for each other. The fact that both groups had race in common did little to eliminate the competition that developed surrounding jobs, housing, and other valuable benefits. This discord was exacerbated by the sense

on the view that Caribbean blacks are not "really" black or that, unlike African Americans, they are not "negatively" black. This limits the ability of people of Caribbean descent to stand in for African Americans. Thus, whether Rachel could serve as a debiasing agent vis-à-vis stereotypes of African Americans might turn on the salience of her Caribbean background. If it is not generally known that her parents are Caribbean immigrants and she does not conspicuously identify as a Caribbean, she is in a better position to perform debiasing work than if her Caribbean identity were salient. An admissions official who takes the general counsel's instructions to heart might decide that it needs to investigate in detail the nature of Rachel's Caribbean heritage before determining whether she would be a good candidate for negating stereotypes.

The officer's interest in the debiasing research would have implications for Kimberly and Tanisha as well. This is because research suggests that likeable African Americans are probably better debiasing agents than unlikeable ones.[73] Thus, while images of Martin Luther King, an admired figure, might debias people with respect to their assumptions about blacks, images of Malcolm X, a much more controversial figure, might not.[74] If the admissions officer is taken with this research, then she might decide to do a comparative analysis of the candidates' relative likeability.

Of course, it is hard to say precisely what any particular admissions officer will decide. My point is to demonstrate the indeterminacy of the choices any admissions officer is likely to make, and to reinforce the prominent role that intraracial distinctions can play in selection decisions. I reiterate this point below, drawing on three other diversity objectives to do so.

2. Promoting a Racially Cooperative Citizenry

Diversity might also facilitate the formation of a racially cooperative society. Universities are crucibles in which social identities are shaped.[75] The admissions

within both groups that each was superior to the other. If West Indians looked down on American blacks, American blacks returned the favor, often belittling West Indians with epithets such as 'monkey chasers' and 'Black Jews.'" (footnotes omitted)).

73. Kang & Banaji, *supra* note 70, at 1105–06.

74. *Id.*

75. CHARLES W. ANDERSON, PRESCRIBING THE LIFE OF THE MIND: AN ESSAY ON THE PURPOSE OF THE UNIVERSITY, THE AIMS OF LIBERAL EDUCATION, THE COMPETENCE OF CITIZENS, AND THE CULTIVATION OF PRACTICAL REASON 4 (1993) (arguing that universities are sites to instruct "about our ideas of the purpose of a human enterprise and about the practices we institute to achieve them"); Patricia Gurin et al., *The Benefits of Diversity in Education for Democratic Citizenship*, 60 J. SOC. ISSUES 17, 19 (2004) (suggesting that universities are places where students learn to "participate in a heterogeneous and complex society"); Patrick T. Terenzini

committee might conclude that students perform in society the same racial interactions they learn and rehearse in school. Thus, admitting underrepresented students in a way that encourages students to model healthy racial interactions may be an important admissions consideration.

At first blush, it might seem that Kimberly, Tanisha, and Rachel equally advance this function of diversity. But some admissions officials might reason that Kimberly is likely to be something of a racial separatist—or a race and gender separatist—given her association with a black women's reading group. An admissions officer might also conclude that Kimberly probably would not be as good at socializing across the color line as Tanisha and Rachel, both of whom attended predominantly white schools and presumably have had some white friends. Under this view, Tanisha and Rachel's experience with integration suggest that they would facilitate rather than undermine social integration at the school and this, over the long run, would lead to integration benefits in society more generally. On the other hand, a different admissions officer might decide that the maximal cooperative benefits will be realized if they force white students to learn to work with black students like Kimberly, rather than her less racially salient competitors, Tanisha and Rachel.

The admissions officer could also engage the issue of racial cooperation through the prism of colorblindness, which is, roughly, the view that race does not and should not matter.[76] The notion would be that the students who are most likely to facilitate cooperation are the ones most likely to subscribe to colorblindness. Under this frame, the admissions officer might decide that, among the three students, Rachel is the most likely to advance the colorblindness goal. She has no expressed interest in racial group association. Plus, she lived in a predominantly white neighborhood and attended a predominantly white high school. The admissions officer could conclude that, among the three, Rachel is the most likely to say something like, "I don't think of myself in racial terms. Race doesn't really matter to me." Tanisha and Kimberly are unlikely to articulate their relationship to race in that colorblind register.

A different admissions officer, however, might worry about a candidate being unduly colorblind, particularly if that committee believes that the average black person is likely to evidence at least a moderate amount racial consciousness. This officer might be looking for an applicant who would express a relatively

et al., *Racial and Ethnic Diversity in the Classroom: Does It Promote Student Learning?*, 72 J. HIGHER EDUC. 509 (2001) (finding that the racial and ethnic composition of a classroom may be related to the development of students' problem solving and group skills).

76. For a classic articulation of how colorblindness figures in American law, see Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1 (1991).

weak commitment to colorblindness. The worry here might be that a student with a relatively strong commitment to colorblindness might not be credibly black. The admissions officer might believe that because a student with a soft commitment to colorblindness would neither deny that race still matters nor completely elide racial consciousness, such a student would be credibly black and thus could facilitate racial cooperation. The officer could believe, moreover, that at least some existing black students could perceive admitted black students who are too colorblind as "sell outs" and conclude that white students who associate with such students are only interested in interacting with black students who disidentify with or disassociate from other blacks. This would result in racial distrust and animosity, not racial cooperation and understanding.

The scenario above suggests that an admissions officer motivated to facilitate racial cooperation would not necessarily seek to do so by admitting black students with a weak commitment to their racial identity and racial community more generally. Instead, that officer might seek out applicants for whom race is one factor among many in their sense of self, which would correspond to the requirements of *Grutter* and *Gratz* that race should be only one factor among many in deciding which students to admit. Such a person might articulate her sense of racial identity this way: "I don't think of myself exclusively or primarily in racial terms; race is just one part of who I am." Tanisha and Rachel are more likely than Kimberly to express their relationship to race in that way.

3. Inclusion and Underrepresentation

The idea that racial diversity facilitates inclusion is straightforward; institutions that are committed to diversity are more likely to include more people of color within their ranks than those that are not. If the admissions officer is motivated by this diversity benefit, one could argue that it could not meaningfully distinguish among Tanisha, Rachel, or Kimberly. Each would affect the racial demographics of the school in the sense of increasing the number of black students included in the school's entering class. And each would enable the university to say that it is combating the underrepresentation of black students.

The admissions officer, however, could ask whether, because Rachel is of Caribbean descent and does not trace her ancestry to American slavery, she should not be considered a prospect for this inclusion/underrepresentation diversity benefit.[77] On the other hand, the admissions officer could conclude that what mat-

77. There has been a heated debate on this topic for some years now. *See, e.g.*, REUEL R. ROGERS, AFRO-CARIBBEAN IMMIGRANTS AND THE POLITICS OF INCORPORATION: ETHNICITY, EXCEPTION, OR EXIT 78 (2006); Cara Anna, *Among Black Students, Many Immigrants*, WASH.

ters is whether the person is black, without any regard to nationality or ancestry, because the inclusion/underrepresentation justification for pursuing diversity is not about compensating a group for past wrongs. Recall that Justice Powell explicitly rejected the historical discrimination justification for affirmative action.[78] Under this view, each of the candidates—Kimberly, Tanisha or Rachel—would advance the inclusion/underrepresentation benefit.

4. Robust Speech

The robust exchange of ideas justification for diversity is perhaps the dominant contemporary justification generally given for affirmative action, presumably because it harkens back to Justice Powell's conceptualization of diversity in *Bakke* and therefore has an air of foundational legitimacy.[79] There are three dimensions to this diversity benefit, each of which could separately motivate an admissions officer's choices.

First, an admissions officer could believe that black students are more likely than other students to engage in or facilitate a discussion of certain topics, such as issues relating to civil rights and race more generally. To conclude this much would not be to say that black students would take a particular perspective on race or civil rights. The point would be that, because of black peoples' experiences with race, discussion on the topic is more likely with a black presence in the classroom than without it.[80]

If the admissions officer is operating under this conception of diversity, she may well prefer Kimberly, whose file already indicates that she is likely to bring up race in her courses—even if she is one of a few black students in the classroom. A different admissions officer might worry that Kimberly would not necessarily feel comfortable speaking up in an integrated setting precisely because her robust exchange of ideas has occurred in predominantly black educational contexts. Such an officer might prefer Tanisha, who grew up in the inner city but had an integrated high school experience. It is unlikely that an admissions officer would pick Rachel over the other two candidates for this diversity benefit; instead, an admis-

POST, Apr. 30, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/04/30/AR2007043000106.html; *see also* sources cited *supra* note 36.

78. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307–09 (1978).

79. *Id.* at 312–13.

80. Scholars have commented about the relationship between speech and one's racial and gender identity. Charles R. Calleros, *In the Spirit of Regina Austin's Contextual Analysis: Exploring Racial Context in Legal Method, Writing Assignments and Scholarship*, 34 J. MARSHALL L. REV. 281, 291–93 (2000); Shouping Hu & George D. Kuh, *Diversity Experiences and College Student Learning and Personal Development*, 44 J.C. STUDENT DEV. 320, 327 (2003).

sions officer might predict that Rachel would be the least likely to bring up race in the classroom given her upbringing and express interests.

A second dimension of the diversity benefit derives from the notion that people with particular identities hold particular views. In *Grutter*, Justice O'Connor specifically disavowed that she was motivated by this vision of diversity. She noted approvingly that,

> The Law School does not premise its need for critical mass on "any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." 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.[81]

Under O'Connor's admonishment that the institution is not supposed to assume that candidates hold particular views because of their race, perhaps the institution is supposed to look for the candidate who is least likely to produce the "black perspective." On this view, Rachel might be the favored candidate out of the three.

A third diversity benefit that an admissions officer could consider relates to the degree to which the candidates "look" and/or "talk" black. If, for example, Rachel "looks white" (in terms of physical features and skin color) and "talks white" (in terms of accent), the admissions officer could conclude that Kimberly and Tanisha would be in a better position to deliver any of the diversity benefits that derive from the perception that a black person is speaking in a predominantly white university context. Those pieces of information might be more discernible if the admissions officer were to conduct candidate interviews, an aspect of admissions this Article does not engage.

To summarize, admissions officers generally have discretion in deciding both which diversity benefits to pursue and which applicants are most likely to deliver those benefits. Individualized review does little to constrain this discretion; individualized review enables it. Under individualized review, admissions officials have significant leeway to make intraracial choices among and between students within the same racial group to decide which ones are likely to perform the diversity benefits the school seeks to promote. As the examples above illustrate, these decisions are likely to vary depending on the context. I discuss the implication of this later. Before doing so, I outline exactly why these intraracial admissions decisions might concern us.

81. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) (citation omitted).

B. Why We Should Care About Intraracial Screening

One might agree with everything I have said thus far and still wonder how it could cause any alarm. After all, institutions necessarily must make some intraracial choices. Admissions teams must select some black applicants over others, just as they must select some female students over others. While not a problem per se, how these intraracial selections are made presents issues about which we should think critically and carefully. There is virtually no discussion of the extent to which intraracial selections of the sort I have described might be occurring. As a consequence, there is virtually no analysis of whether these choices are normatively desirable and constitutionally permissible. To appreciate what might be at stake, consider the following concerns that one might raise about intraracial screening.

First, in the context of promoting diversity, admissions officials are quite possibly using racial criteria to select among and between different black applicants. In effect, anonymous admissions committees are making decisions about whether a candidate is adequately diverse (or worse, adequately black). If one takes seriously the notion of race as a social construction, then these committees are, every day, socially constructing race—creating a class constituted by black people who embody their blackness in a particular way. Given the importance of race in our society, one could argue that it is troubling that we know little about one of the primary sites in which bureaucrats construct race.

Second, the current regime is opaque. We have no idea which conception of diversity underwrites a university's admissions processes. Nor do we know the criteria a given university employs to select students to advance whatever diversity values it promotes. This ambiguity might worry many of us. From a social policy perspective, if we do not know what criteria are being used or what goal is being advanced, how do we know whether the system is working? Presumably, admissions programs that consider race will continue to face legal challenges. Their survival could turn on how much we know about whether schools experience the diversity values their admissions regimes seek to promote.

A different aspect of the opaqueness problem is that the prospective students have no idea whether a particular university is motivated by a discourse benefits conception of diversity or a negating negative racial stereotypes conception. The absence of transparency means that black applicants and other students of color know that they are expected to deliver some diversity benefit, but have little sense of what that benefit might be.

Third, the selection processes that admissions officers employ function like minitrials in which admissions officers, behind closed doors, are weighing racial

evidence (such as school activities, career interests, personal statements, and community upbringing) and judging racial character (including whether the applicant has a race-conscious or colorblind orientation). Admissions committees rarely disclose what specific goals they are pursuing when they seek to construct a diverse class of students. Plausibly, decisions are being made about whether candidates are adequately diverse or not, but the candidates never have an opportunity to defend themselves, challenge the interpretations of the evidence, or submit more evidence. The committees pursue diversity as they see fit, off the radar screen of policymakers, scholars, and judges alike.

Fourth, intraracial selections likely trade on biases and stereotypes. At the very least, admissions officials could be engaging in fuzzy diversity decisionmaking with respect to a suspect category—race—that university officials, among other decisionmakers, historically have employed perniciously. Are clear rules the answer? If so, it is hard to know what clear rules to utilize in this context. For example, a clear decision rule that places an objective weight on the value of having a black candidate might make it more difficult for officials to practice intraracial distinctions. But that would take us right back to the point system that the *Gratz* court expressly rejected.

None of this is to say that intraracial selecting in the context of admissions is per se bad. Indeed, as I explain in Part IV, intraracial selections in the context of affirmative admissions might help to shore up the affirmative action admissions. The point, then, is that we need to ascertain whether and to what extent intraracial selections are actually taking place and ask ourselves whether, on balance, such decisionmaking is normatively desirable.

III. WORKING IDENTITY: THE APPLICANT'S PERSPECTIVE

Thus far, I have assumed that applicants do not know about or are indifferent to the intraracial screens admissions officers are likely to employ. But this need not be the case, and likely is not. I have spent a fair amount of time talking to students interested in applying to law school. Indeed, for the past fifteen years, as part of a Law Fellows Program at UCLA, I have taught a mock class to prospective law students. My sense from engaging these students is that they are keen to know how university officials will consider their diverse backgrounds. Because universities generally are not forthcoming with respect to the particular diversity benefits they seek to promote, students have to guess (or accept the advice of admissions counselors) as to how to present their diversity in their applications.

Some students will think that institutions want students of color who are racially distinct, such as those who have participated in race specific organizations

and extracurricular activities. Other students will think that the more they tone down their racial identity in the application, the more attractive they are in terms of diversity. All of this is to say, there is an incentive for students to work their identity in the application process (particularly vis-à-vis their personal statements) to signal that they are the kind of diversity student the university wants. A student of Trinidadian descent, for example, might highlight that background in the hope that an admissions official will assume that he is a "good" black—a black who is likely to fit into a predominantly white school and not trigger stereotypes about blackness. Alternatively, that very same student might worry that highlighting his Trinidadian background could render him less authentically black from the perspective of an admissions official and thus not a good candidate for advancing that school's preferred diversity benefit. He may choose instead, then, to emphasize the fact that he lives in Inglewood, a predominantly working class African American neighborhood south of the city of Los Angeles. In short, whether a black applicant plays up the Caribbean background or his upbringing in Inglewood, there is an incentive for him to cloak himself in the characteristics that he thinks best mimic the diversity goals he believes an admissions committee wants to instantiate.

In a prior work, Mitu Gulati and I describe making identity decisions of the foregoing sort as "working identity."[82] People work, or shape, their identities to avoid discrimination (for example, by not appearing "too" black) or to enhance their chances of receiving some opportunity (for example, by appearing racially palatable). Erving Goffman recognized this dynamic in his classic work, *The Presentation of Self in Everyday Life*,[83] and Nobel Prize–winning economist George A. Akerlof and his colleague Rachel Kranton have discussed a version of this problem as well.[84] Yet, the extent to which this presentation of self or working identity phenomenon is playing itself out in the context of admissions has virtually escaped the attention of scholars. This is particularly curious given that the cottage industry that exists to assist students applying to colleges and universities focuses much

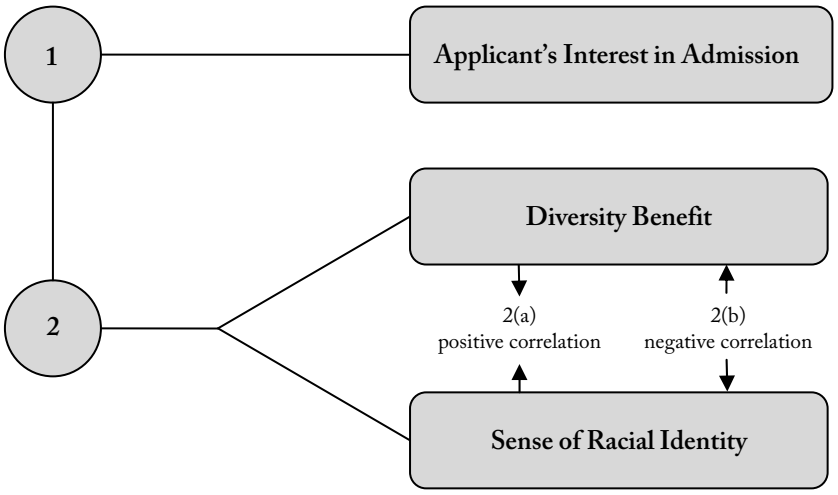
82. Carbado & Gulati, *Working Identity*, *supra* note 12, at 1263–65; *see also* CARBADO & GULATI, *supra* note 17.

83. ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

84. George A. Akerlof & Rachel E. Kranton, *Economics and Identity*, 115 Q.J. ECON. 715 (2000) [hereinafter Akerlof & Kranton, *Economics and Identity*]; George A. Akerlof & Rachel E. Kranton, *Identity and the Economics of Organizations*, 19 J. ECON. PERSP. 9 (2005) [hereinafter Akerlof & Kranton, *Identity and the Economics of Organizations*]. Akerlof and Kranton make clear that people make choices about how to manage their identities, that these choices are significant, and that how individuals exercise them is a function of the particular situation in which they find themselves and the particular goal or utility they seek to realize. *See* Akerlof & Kranton, *Economics and Identity*, *supra*, at 717; Akerlof & Kranton, *Identity and the Economics of Organizations*, *supra*, at 12.

of its attention on the applicant's personal statement.[85] The personal statement is an important site on which the applicant can construct her identity—as a person who has overcome difficulties, as a dedicated and caring parent, as a professional athlete or musician, or as a person who is (or is not) racially invested.[86] There is an incentive for applicants to structure their personal statements to align with the particular diversity benefits they believe their target colleges or universities seek to advance. The diagram below captures the factors at play in this incentive system.

Figure 1. The Racial Diversity Incentive System



85. *See, e.g.*, 50 SUCCESSFUL HARVARD APPLICATION ESSAYS: WHAT WORKED FOR THEM CAN HELP YOU GET INTO THE COLLEGE OF YOUR CHOICE (3d ed. 2010); HARRY BAULD, ON WRITING THE COLLEGE APPLICATION ESSAY: THE KEY TO ACCEPTANCE AT THE COLLEGE OF YOUR CHOICE (2012); ALAN GELB, CONQUERING THE COLLEGE ADMISSIONS ESSAY IN 10 STEPS: CRAFTING A WINNING PERSONAL STATEMENT (2008); *The Personal Statement*, ESSAYPLUS.COM, http://www.essayplus.com/Personal_Statement.htm (last visited Apr. 19, 2013) (describing how to write a good essay and offering their services to help edit). This can also be seen with law school admissions. *See, e.g.*, PAUL BODINE, GREAT PERSONAL STATEMENTS FOR LAW SCHOOL (2006); ESSAYS THAT WORKED FOR LAW SCHOOLS: 40 ESSAYS FROM SUCCESSFUL APPLICATIONS TO THE NATION'S TOP LAW SCHOOLS (Boykin Curry & Emily Angel Baer eds., The Random House Publ'g Grp. 2003); ERIC OWENS, LAW SCHOOL ESSAYS THAT MADE A DIFFERENCE (5th ed. 2012); *Writing the Statement of Purpose*, PRINCETON REV., http://www.princetonreview.com/grad/statement-of-purpose.aspx (last visited Apr. 19, 2013).

86. *See* Carbado & Harris, *supra* note 35 (discussing the role the personal statement can play in the application process).

The admissions racial incentive system is constituted by: (1) the applicant's interest in gaining admission, (2) the diversity interest the university seeks to advance, and (3) the applicant's interest in preserving her sense of racial identity in the application process. Point 1 represents the applicant's interest in gaining admission. The stronger this interest, the stronger the incentive for the student to employ her application to signal that she exhibits the diversity benefit she believes the school wants to realize.

Point 2 posits two possible relationships that might exist between the diversity benefit the applicant believes the school wants to advance and the applicant's interest in preserving her sense of racial identity. First, as reflected in Point 2(a), the relationship might be a positive one. Here, the applicant's assumption is that her sense of racial identity aligns with the diversity interest the school seeks to promote. For example, the applicant might think of herself as a "but-for" African American; but for the fact that she is phenotypically African American, she does not otherwise identify as an African American. She perceives that the university is screening its applicants for blacks who subscribe to colorblindness—in other words, blacks who are not racially conscious. Under this scenario, there is a positive correlation between the applicant's sense of racial self and the applicant's sense of the diversity benefit in which the school is interested. Thus, the applicant would not have to work her identity very hard at all.

As Point 2(b) illustrates, however, there could be a negative relationship between the applicant's sense of racial self and the diversity benefit. When this is the case, the applicant's assumption is that her sense of racial identity is at odds with the diversity benefit the school wants to realize. Other things being equal, the pressure to compromise one's sense of racial identity is stronger at Point 2(b); the stronger the applicant's interest in admission, the stronger the incentive for the applicant to compromise her identity at Point 2(b). Further, the stronger the applicant's sense of racial self, the more difficult and costly it will be for her to effectuate that compromise.

Working one's identity in the application process to respond to this incentive system is not cost free. For one thing, an applicant could make the wrong assumption about what diversity benefit a school seeks to realize from its nonwhite applicants. That is to say, an applicant could present herself as racially conscious when the school is mostly interested in racially colorblind students. With universities being opaque regarding their diversity goals, such an outcome is likely. For another, students might feel pressured to compromise their sense of racial identity in order to comply with what they perceive to be a particular racial demand on the part of the university that they manifest their race to comport with a specific diversity benefit. Racially conscious applicants might feel pressured to pass as racially col-

orblind applicants—and vice versa. I do not want to overstate these costs. I present them here simply to create a complete picture of the incentives that diversity admissions create for applicants to work their identities.

IV. STRICTLY SCRUTINIZING INTRARACIAL DIVERSITY

What, if anything, should the law do about intraracial diversity admissions? Or, to put the question more precisely, assuming that intraracial diversity admissions triggers strict scrutiny, what does that strict scrutiny analysis of the practice look like? In answering this question, this Part reveals how the *Fisher* litigation is implicated in the assorted set of challenges intraracial diversity presents. As a predicate to that engagement, it first offers a description of how an admissions officer might implement her commitment to intraracial diversity. Because the strict scrutiny framework is structured around both a "means" and not just an "ends" analysis,[87] setting forth the precise way in which the admissions officer seeks to realize her commitment to diversity is important.

A. Implementing Intraracial Diversity

To implement her commitment to intraracial diversity, the admissions officer first reads each file—of both whites and nonwhites—with an eye toward the diversity benefit the applicant is likely to deliver. She does so with reference to a form that lists the eight diversity benefits.

Assume that as the admissions officer reads each file, she scores each individual on a scale of one to ten on whether the applicant delivers a particular diversity benefit.[88] She also assigns an overall diversity score based on the sum total of the particular diversity benefits scores. This puts the admissions officer in the position to consider an applicant's diversity score in relationship to other aspects of the applicant's file (including standardized test scores, letters of recommendation, extracurricular activities, other non-racial diversity attributes, and grade point average (GPA)). In this way, racial diversity is just one factor among others that the admissions officer employs to determine which students to admit. Significantly, throughout this process, the admissions officer studiously avoids assigning points simply based on the applicant's race. To repeat: she allocates points based solely

87. Grutter v. Bollinger, 539 U.S. 306, 333 (2003) ("Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still 'constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'" (alterations in original) (quoting Shaw v. Hunt, 517 U.S. 899, 908 (1996))).

88. Of course, a university could take a much more gestalt approach.

on the racial diversity benefits each applicant can deliver. Against the backdrop of the foregoing assumptions, there are several implementation routes the admissions officer could take.

First, the officer could decide that she wants diversity candidates who advance a particular diversity benefit—the negation of negative racial stereotypes, let's say. Here, the admissions officer is interested in students who could serve as good debiasing agents.[89] If that is the case, the admissions officer can screen her applicants with respect to their potential for negating racial stereotypes and assign each applicant a score. Under this approach, African Americans with a high diversity score are likely to be admitted over those with lower scores, other things being equal. Alternatively, the admissions officer could sort students in terms of those who score a perfect ten on a particular diversity benefit and have a minimum overall diversity score of, say, fifty. Still a third approach would be for the admissions officer to privilege students with the highest overall diversity scores. Finally, the admissions officer might seek to admit the highest scoring applicants across diversity benefits with or without reference to their overall diversity scores.

The foregoing approaches do not exhaust the possibilities. They simply describe a range of implementation agendas. The question now becomes: Would these agendas survive strict scrutiny's compelling state interest and narrow tailoring analyses?

B. The Compelling State Interest Test

On one view, the fact that *Grutter* explicitly holds that diversity is a compelling state interest for affirmative action means that the pursuit of intraracial diversity satisfies the compelling state interest standard. Vinay Harpalani would put the point even more strongly. He argues that *Grutter* explicitly posits intraracial diversity as a compelling state interest for affirmative action. Harpalani reasons that "[a]ccording to the *Grutter* majority, the goal of a race-conscious admissions policy should be to produce a critical mass with a 'variety of viewpoints among minority students.'"[90] He goes on to cite *Grutter* for the following proposition: "'[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no minority viewpoint' but rather a variety of viewpoints among minority students."[91]

89. *See* Kang & Banaji, *supra* note 70; *see also* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 501–03 (2010) (discussing how debiasing the classroom is a long-term prevention strategy to decrease implicit racial biases).

90. Harpalani, *supra* note 36, at 477 (quoting *Grutter*, 539 U.S. at 320).

91. *Id.* (alteration in original) (quoting *Grutter*, 539 U.S. at 319–20) (internal quotation marks omitted).

All of this leads Vinay to conclude "that a race-conscious policy can aim not only to increase minority representation overall, but also to increase diversity within racial groups."[92]

While I do not read *Grutter* in precisely the way Vinay does, he is right to suggest that intraracial diversity can function as a compelling state interest for affirmative action admissions. Indeed, one might argue that, to the extent that one unpacks the diversity rationale into the eight benefits I describe in Part I, the pursuit of intraracial diversity becomes all the more compelling.

Consider this point with respect to the robust exchange of ideas diversity benefit. The greater the intraracial diversity, the greater the range of racial experiences. The greater the range of racial experiences, the greater the range of ideas. This is the sense in which intraracial diversity can render the robust exchange of ideas rationale for affirmative action even more compelling.

Think now about negating negative racial stereotypes, another diversity benefit. At bottom, stereotypes are about group-based assumptions. Latinos are lazy;[93] blacks are intellectually inferior;[94] Asian Americans are quiet.[95] The more intraracially diverse a university, the more diverse interactions students are likely to have with people from the same racial group. The more intraracially diverse interactions students have, the more likely those students are to repudiate or at least question their racial assumptions. As Harpalani notes, "[o]ne common stereotype of Black and Latina/o students is that all students from these groups come from poor, inner-city backgrounds."[96] If the University of Texas targeted "Black and

92. *Id.* at 466–67.

93. *See* Andrew W. Bribriesco, *Latino/a Plaintiffs and the Intersection of Stereotypes, Unconscious Bias, Race-Neutral Policies, and Personal Injury*, 13 J. GENDER, RACE & JUST. 373, 381 (2010); Devon W. Carbado & Mitu Gulati, *Interactions at Work: Remembering David Charny*, 17 HARV. BLACKLETTER L.J. 13,18 (2001); Andrés L. Carrillo, *The Costs of Success: Mexican American Identity Performance Within Culturally Coded Classrooms and Educational Achievement*, 18 S. CAL. REV. L. & SOC. JUST. 641, 662 (2009); R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 830 (2004).

94. *See* Richard Delgado, *Rodrigo's Riposte: The Mismatch Theory of Law School Admissions*, 57 SYRACUSE L. REV. 637, 652 (2007); Barbara J. Flagg, *In Defense of Race Proportionality*, 69 OHIO ST. L.J. 1285, 1288–89 (2008); Tanya Katerí Hernández, *Hate Speech and the Language of Racism in Latin America: A Lens for Reconsidering Global Hate Speech Restrictions and Legislation Models*, 32 U. PA. J. INT'L L. 805, 816 (2011); Peter Wade, *Afro-Latin Studies: Reflections on the Field*, 1 LATIN AM. & CARIBBEAN ETHNIC STUD. 105, 107–09 (2006).

95. *See* Harvey Gee, *Weighing Prosecutorial Power and Discretion: Fixing the Imbalance*, 44 VAL. U. L. REV. 379, 386 (2010) (reviewing ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2008)); Su Sun Bai, Comment, *Affirmative Pursuit of Political Equality for Asian Pacific Americans: Reclaiming the Voting Rights Act*, 139 U. PA. L. REV. 731, 745 (1991); *see also* Christopher Shea, *Victim of Success?: Are Asian-American Students Discriminated Against in College Admissions?*, BOS. GLOBE, Nov. 26, 2006, http://www.boston.com/news/education/higher/articles/2006/11/26/victim_of_success.

96. Harpalani, *supra* note 36, at 513.

Latina/o students from predominantly White schools in more affluent districts," that could facilitate the school's ability "to break down . . . racial stereotype[s]."[97] The broader point is that with universities pursuing intraracial diversity to negate racial stereotypes, we can identify another sense in which the pursuit of intraracial diversity might be compelling.

The foregoing examples are predicated on an implementation strategy that focuses on students who deliver different diversity benefits. The thinking is that the cumulative effect of such an approach would strengthen the effect of any particular diversity benefit. Concretely, admitting four different African American students because they are likely to, respectively, ameliorate racial isolation, redress underrepresentation, prevent racial alienation, and enhance racial cooperation and understanding, could have the combined effect of negating negative racial stereotyping or facilitating the robust exchange of ideas. This combined effect, which is less likely to occur under a traditional affirmative action regime, is more compelling than simply admitting students without regard to their intraracial diversity payoff.

But what if a school takes a more targeted approach to intraracial diversity? Assume that the admissions officer is only interested in students who will negate negative racial stereotypes and screens applications with that implementation goal in mind. Assume also that the school pursues this particular diversity benefit based on what it perceives to be a specific racial climate at the school. The school has had a number of negative racial episodes over the past two years, including the circulation of a flyer—that included stereotyped images of African Americans—that invited students to a "Compton Cookout" party.[98] Assume that, against the backdrop of these racialized events, the school urged all of its students to take the Race Implicit Association Test (IAT) and the results reveal that students at that campus have higher stereotype bias against African Americans than is the average.[99] One could argue that pursuing this more targeted diversity benefit is compelling because it is linked to the specific needs of that school. If a particular school perceives that it is vulnerable to particular racial problems, it makes

97. *Id.*

98. Students at the University of California, San Diego hosted a ghetto themed "Compton Cookout" party, encouraging invitees to wear chains and cheap clothes, and to speak very loudly; the invitation also suggested that female invitees be "ghetto chicks." *See* Larry Gordon, *UC San Diego Condemns Student Party Mocking Black History Month*, L.A. TIMES, Feb. 18, 2010, http://articles.latimes.com/2010/feb/18/local/la-me-ucsd18-2010feb18; *UCSD Frat Denies Involvement in 'Ghetto-Themed' Party*, ABC10 NEWS (Feb. 17, 2010), http://www.10news.com/news/22588063/detail.html.

99. For discussion of the scoring, interpretation, and reliability of IAT, see *Implicit Association Test (IAT)*, http://projectimplicit.net/nosek/iat (last visited Apr. 20, 2013).

sense—is compelling—for that school to hone in on the diversity benefit that is most likely to address them.[100]

There are, of course, arguments on the other side. Once a university moves in the direction of intraracial diversity, it is paying more attention to race than it otherwise would. This is at odds with the idea that our society should be colorblind.[101] Intraracial diversity, the argument would go, is more inconsistent with colorblindness than the standard way in which diversity initiatives are framed. As such, the pursuit of intraracial diversity is likely to exacerbate, rather than ameliorate, racial animosity and antagonism and compound rather than undermine negative racial stereotyping.[102] The pursuit of intraracial diversity, the argument might continue, sends a strong signal that race matters and promotes racial paternalism.[103] The foregoing criticisms should be familiar. Scholars, policymakers, and judges regularly mobilize them against affirmative action. The point is that each of those claims can be redeployed here to argue that universities do not have a compelling state interest in pursuing intraracial diversity.

C. Narrow Tailoring

The more difficult issue is whether the pursuit of intraracial diversity can survive strict scrutiny's narrow tailoring requirement. While there is no talismanic test for whether a particular affirmative action plan satisfies narrow tailoring, courts typically explore whether the plan (1) subjects each file to individualized review, (2) unduly burdens or harms any particular racial group, (3) could achieve its ends by adopting race neutral means, (4) utilizes quotas, (5) has an end point and/or includes periodic assessments as to whether the program remains necessary, and (6) is structured around a tight fit between the ends of the program and its means.[104] I discuss each of these factors in turn.

100. And, presumably, the Supreme Court would defer to a school's sense of which diversity benefit makes the most sense for that school. Grutter v. Bollinger, 539 U.S. 306, 328 (2003); Jabaily, *supra* note 65; *see also* Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 LOY. U. CHI. L.J. 21, 22 (2004) ("[I]n *Grutter v. Bollinger*, the Supreme Court applied a more relaxed version of strict scrutiny . . . ."); Patrick M. Garry, *How Strictly Scrutinized?: Examining the Educational Benefits the Court Relied Upon in* Grutter, 35 PEPP. L. REV. 649, 649–50 (2008).

101. *See, e.g.*, *Grutter*, 539 U.S. at 326; Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). For critiques of colorblindness, see Carbado & Harris, *supra* note 35, Gotanda, *supra* note 76, at 1148, and Kang & Lane, *supra* note 89.

102. *See Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting); *Adarand Constructors, Inc.*, 515 U.S. at 229; *see also* Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011) (arguing that Justice Kennedy's racial jurisprudence is informed by concerns about balkanization).

103. *Adarand Constructors, Inc.*, 515 U.S. at 240–41 (Thomas, J., concurring).

104. *Grutter*, 539 U.S. at 334–42; City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

1. Individualized Review

Both *Bakke* and *Grutter* make clear that a hallmark of narrow tailoring is individualized review.[105] The pursuit of intraracial diversity via the process set out above is consistent with individualized review for three reasons. First, every file is individually read against the backdrop of the diversity benefits the university seeks to realize. No file is left behind. The admissions officer reads each file to ascertain which, if any, diversity benefit a particular applicant delivers. Second, no applicant automatically receives diversity points based simply on being a member of a particular racial group.[106] Third, the admissions process is not structured around quotas. These three factors—the individual consideration of each applicant, the fact that no applicant receives points based solely on her race, and the nonutilization of quotas—are precisely the ones courts employ to determine whether an admissions regime is consistent with the command of individualized review.[107]

2. Undue Burden

Whether an admissions process unduly burdens any particular racial group is another question courts ask themselves vis-à-vis whether that process is narrowly tailored.[108] As a general matter, this inquiry is framed with reference to whites. That is, the question typically is whether the mechanism the university utilizes to realize its interest in diversity unduly burdens whites.[109] There is little basis to argue that the pursuit of intraracial diversity burdens whites more than the pursuit of interracial diversity. Indeed, one could argue that intraracial diversity initiatives invite admissions officials to think of whites, and not just students of color, in terms of their intraracial diversity. A school could, for example, screen white applicants with respect to whether they are likely to facilitate racial cooperation or understanding and/or are likely to negate negative racial stereotypes about students of color. Under this view, rather than unduly burdening whites,

105. *Grutter*, 539 U.S. at 336–39; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317–18 (1978).
106. Compare this approach with the one taken in *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003), declaring the University of Michigan's undergraduate affirmative plan unconstitutional because of what the Court described as a "point system" that assigned points to individuals depending on their racial identity.
107. *See Grutter*, 539 U.S. at 336–39.
108. *Id.* at 341.
109. *See* Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1255 (11th Cir. 2001) (stating, with regards to the question of undue burden, that the University of Georgia's affirmative action policy had "real consequences for white applicants").

the pursuit of intraracial diversity provides another factor that can weigh positively in favor of at least some whites.

But what if we frame the undue burden inquiry with reference to African Americans, not whites? Does the pursuit of intraracial diversity impose undue burdens on them? Richard Sander has argued that affirmative action programs as a general matter impose burdens on African Americans by "mismatching" them to institutions in which they do not belong.[110] His argument, roughly, is that affirmative action artificially lifts black students from a lower position in the university hierarchy (a place that better matches their GPAs and standardized test scores) to a higher position (a place at which these indicators are poorly matched). The end result is that black students underperform. This underperformance burdens them not only in school but in the employment arena as well.[111]

Many scholars have contested Sander's argument and the empirical grounds on which it rests.[112] Moreover, thus far, his claims have not had doctrinal traction,[113] though that could likely change given the extent to which arguments about mismatch figure in a number of the amici briefs. But quite apart from whether his specific arguments stick is whether his reframing of the undue burden inquiry to focus on the beneficiaries of affirmative action could have currency with respect to intraracial diversity. The burden here would not be the alleged burden of academic underperformance and its employment market effects. Instead, the burden would be the representative costs of delivering the diversity benefits the school seeks to advance. As the diversity screens admissions officers employ become more particularized, the expectation that students work their identities to deliver the benefits those screens are designed to identify increases. This burden of repre-

110. *See* Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) [hereinafter Sander, *Systemic Analysis*]; *see also* Richard H. Sander, *Measuring Mismatch: A Response to Ho*, 114 YALE L.J. 2005 (2005) [hereinafter Sander, *Measuring Mismatch*].

111. Sander, *Systemic Analysis*, *supra* note 110, at 478–79.

112. David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005); *see also* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005).

113. This could change since several amicus curiae briefs reference Sander's work in *Fisher v. University of Texas at Austin*, 631 F.3d 213, 224 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012). *See* Brief of the National Education Ass'n et al. as Amici Curiae in Support of Respondents at 32, Fisher v. Univ. of Tex. at Austin, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3540398, at *32 ("Several of the *amici* supporting the Petitioner argue that a new body of empirical research—in particular, Richard Sander's work purporting to show a 'mismatch' effect from race-conscious admission policies—critically undermines the diversity rationale this Court accepted in upholding the University of Michigan Law School's admission policy in *Grutter*.").

sentation, the claim might continue, is at least as troublesome as the representational costs of having one or a few African Americans within a particular university setting.[114] In this respect, there is at least a colorable argument one can make to suggest that the pursuit of intraracial diversity presents undue burden problems.[115]

3. Race Neutral Alternatives

The requirement that affirmative action programs consider race neutral alternatives would not interfere with a school's interest in pursuing intraracial diversity because it is hard to imagine a race-neutral mechanism that could effectively screen applicants with respect to the specific diversity benefits those applicants might produce. If, as a general matter, race-neutral mechanisms have proven a poor substitute for race-conscious affirmative action programs,[116] there is little reason to think that such mechanisms would work any better in the intraracial diversity context. In fact, these mechanisms are likely to be even more ineffectual, since intraracial diversity inquiries are necessarily more racially granular and targeted than the standard way in which a university might implement its commitment to diversity.

4. The Utilization of Quotas

There is no reason, a priori, why a school's decision to pursue intraracial diversity would result in the utilization of quotas. Nevertheless, intraracial diversity initiatives do raise quota-like concerns. First, to the extent that an intraracial diversity plan is structured around the idea of a critical mass, critics might perceive it as a quota. But that criticism, without more, would not have much bite, since

114. *See* DERRICK BELL, SILENT COVENANTS: *BROWN v. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 152 (2004); Addis, *supra* note 6, at 117; Walter R. Allen & Daniel Solórzano, *Affirmative Action, Educational Equity and Campus Racial Climate: A Case Study of the University of Michigan Law School*, 12 BERKELEY LA RAZA L.J. 237, 249 (2001); Meera E. Deo et al., *Struggles & Support: Diversity in U.S. Law Schools*, 23 NAT'L BLACK L.J. 71 (2010); Roger W. Reinsch et al., *Applying Indices Post-*Grutter *to Monitor Progress Toward Attaining a Diverse Student Body*, 7 NW. J.L. & SOC. POL'Y 372, 384–86 (2012).

115. There are responses to this concern. Students admitted under an intraracial diversity program might not experience a representational burden of the sort described in the text. After all, the university would have selected these students precisely because their activities, interests, and ambitions converged with the institution's diversity goals. The school would expect the intraracial diversity benefits to organically flow from the student's presence on campus—not to require the student to work their identity any more than usual. Thus, there is no special burden being imposed on the student.

116. Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452 (1997); Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1894–97 (1996).

the Supreme Court has made clear that universities can strive to admit a critical mass of underrepresented students. True, the *Fisher* case could change that, as the justices' engagement of the issue of critical mass during oral arguments made clear.[117] But for the moment, there is nothing per se wrong in a university structuring its affirmative action program around the idea of critical mass. The question is, at what level of analysis may a school pay attention to, or invoke a concern about, critical mass? Three levels are relevant here.

Level one focuses the critical mass inquiry on the total number of underrepresented students. Typically, this will mean focusing especially, but not exclusively, on black and Latina/o students. Level two narrows the frame to a particular racial group. From this view, the question might be: Do we have a critical mass of African Americans? Level three restricts the frame even further to ask, is there a critical mass of African American students who will negate negative racial stereotypes? *Grutter* is clear that schools may pursue critical mass at the first level,[118] is ambiguous about level two, and at best only implicitly engages level three, the level at which intraracial screening could take place.[119]

5. Periodic Review

Nothing about the pursuit of intraracial diversity prevents a school from periodically assessing its ongoing need for factoring intraracial diversity into its admissions regime. The requirement of periodic assessment, then, is unlikely to be a basis upon which an intraracial diversity initiative is deemed unconstitutional.

6. Means/Ends Fit

A strong argument can be made that the pursuit of intraracial diversity ensures a close fit between the means of affirmative action and the ends. To understand why this is so, consider the dominant way in which affirmative action is defended. Discourses about affirmative action tend to frame diversity as the end (it is *the* compelling state interest for affirmative action) and affirmative action

117. *See* Transcript of Oral Argument, *supra* note 5.

118. Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

119. This issue was salient in the context of oral arguments. Justice Alito specifically asked the University of Texas's counsel whether the university had "a critical mass as to all the subgroups that fall within this enormous group of Asian Americans." Transcript of Oral Argument, *supra* note 5, at 52. Prior to that question, Justice Alito had asked, "Well, in terms of diversity, how do you justify lumping together all Asian Americans? Do you think—do you have a critical mass of Filipino Americans? . . . Cambodian Americans . . . ?" *Id.* at 52.

itself as the means.[120] But there are submeans that matter here as well. These are the more specific mechanisms through which affirmative action policies are implemented, such as quotas (which we know are unconstitutional mechanisms) and individualized and holistic review (which we know are constitutional mechanisms). The picture becomes slightly more complex when we disaggregate diversity into the eight diversity benefits I described earlier. If these eight diversity benefits are the real ends in the sense of doing significant normative or doctrinal work justifying affirmative action, then there is a broader gap between the means and the ends than appears at first blush. To put this point another way, it is one thing to say that affirmative action produces the ends of diversity (that claim is easy to sustain); it is another thing to say that affirmative action produces the diversity benefits (that claim is more difficult to establish). This, in a way, is one of Justice Thomas's concerns in his dissent in *Grutter*. He queries whether the ends of affirmative action are diversity itself or the more specific diversity benefits.[121] His point, in part, is that if the ends are the diversity benefits, then affirmative action becomes more difficult to defend.

The pursuit of intraracial diversity is less vulnerable to Justice Thomas's critique. This is because under intraracial diversity there is a tighter fit between the means and the ends. An officer who is implementing an intraracial diversity affirmative action policy asks herself very specific questions about whether particular applicants are likely to help the school realize particular diversity gains. The admissions officer could certainly be wrong in her judgments. And one can always raise questions about whether universities should be required to demonstrate empirically that their intraracial screening processes actually yield the diversity benefits they are structured to deliver.[122] The point is that to the extent that an

120. *See Grutter*, 539 U.S. at 328.

121. *Id.* at 354–55 (Thomas, J., dissenting).

122. Common research standards dictate that in research projects that involve human subjects, or individually identifiable information about them, care must be taken that the subjects are not harmed by the disclosure of private information. *See, e.g.*, *Human Subject Regulations Decision Charts*, U.S. DEP'T HEALTH & HUM. SERVICES (Sept. 24, 2004), http://www.hhs.gov/ohrp/policy/checklists/decisioncharts.html. While not all inquiries involving race-based student data may involve such concerns, it is likely that universities consider it important to guard admissions data from inappropriate outside use.

For example, much of UT Austin's admissions data would, at least potentially, be individually identifiable if UT Austin provided more detailed information. In UT Austin's 2008 dataset on student parental income and education levels disaggregated by race, there are only two entries for students not automatically admitted via the Ten Percent Law and for whose parents reported "No High School" as their highest education level. If more information on such students were available—such as where they went to school—researchers (or others with less than innocent purposes) might be able to trace these students individually and use their information inappropriately.

admissions officer is admitting students in terms of their ability to contribute to specific diversity benefits, it is harder to make the argument that there is a problem in terms of the fit between the means and the ends.

D. Is the Pursuit of Intraracial Diversity Selection Constitutional?

The discussion in this Part suggests that an admissions approach that takes intraracial diversity seriously is likely to satisfy the compelling state interest prong of the strict scrutiny regime, but with respect to the narrow tailoring prong, the answer is less clear cut. On the one hand, the means/end nexus is strong. On the other hand, one can raise questions about whether the pursuit of intraracial diversity raises quota-like concerns and/or instantiates an admissions process in which race is simply doing too much work. Note the tension implicit in all of this—the very reason intraracial diversity might be an effective means of realizing specific diversity benefits (because the racial consciousness is both granular and targeted) is the same reason it might fail a narrow tailoring analysis (because it is paying close attention to race).

Unfortunately, no case has squarely taken up the issue of intraracial diversity and admissions. Yet, there is a case that reveals how intraracial diversity concerns can lurk behind a traditional affirmative action program—*Fisher v. University of Texas at Austin*, the case the Supreme Court is poised to decide this term. There has been quite a bit of fuss about this case, very little of which has marked the ways in which *Fisher* implicates intraracial diversity. Part V changes that. It highlights the subtle but significant ways in which *Fisher* raises concerns about intraracial diversity.

V. INTRARACIAL DIVERSITY AND *FISHER V. TEXAS*

Fisher v. Texas is a case about intraracial diversity. Yet, the parties to the litigation, and the amici briefs, only marginally engaged this issue. This is not to say that they completely elided intraracial diversity concerns, but their discussion of

The more specific the information provided, the more likely it becomes that individual students can be identified.

The guarded nature of UT Austin's decisions to publicize its admissions data is almost forced upon the school by the small number of minority students admitted to UT Austin—the very issue that the school's race-conscious admissions program is meant to alleviate. For example, the number of black students admitted outside of the Ten Percent Law has varied between 118 and 262 students per year between 2002 and 2009. So long as this number does not rise significantly, UT Austin is forced to make its admissions data public in only a limited way. Grotesquely, this makes it more difficult to provide arguments in support of the university's race-conscious programs that are not only theoretically sound but also empirically grounded.

the issue was minimal. This Part more fully explores how intraracial diversity is implicated in *Fisher*. First, I highlight the arguments the parties and amici made about intraracial diversity. As you will see, none of these arguments is fully developed. I then provide a more robust account of the extent to which intraracial diversity is at play in the litigation. In doing so, I show how an intraracial understanding of *Fisher* can strengthen the argument that the University of Texas's (UT's) admissions policy is constitutional. I begin by discussing the formal doctrinal question the *Fisher* case presents.

A. The Litigation Backdrop

The crux of the issue in *Fisher* is whether UT can utilize both Texas's Ten Percent Law—which guarantees the top 10 percent of Texas public high school seniors admission to any Texas state university[123]—and traditional race-conscious affirmative action as a part of its admissions regime. The Texas legislature passed the Ten Percent Law in response to *Hopwood v. Texas*,[124] a 1996 Fifth Circuit opinion that declared affirmative action unconstitutional in the state of Texas.[125] The effect of this ruling was a significant decline in the number of entering African American and Latina/o freshmen.[126] At least in part, the Ten Percent Law was an effort to correct this. That is to say, while "[t]he Top Ten Percent Law did not by its terms admit students on the basis of race, . . . underrepresented minorities were its announced target and their admission a large, if not primary purpose."[127]

In 2003, *Grutter* eliminated the *Hopwood* constraint on affirmative action admissions in the state of Texas. The question for UT was whether, consistent with *Grutter*, the school could structure its admissions policy around both the Ten Percent Law and traditional affirmative action. The university pursued this question by studying whether the Ten Percent Law was admitting a critical mass of underrepresented students. The studies answered that question in the negative,[128] and UT added a race-conscious affirmative action component to its formally race-neutral admissions plan.[129] Abigail Fisher and Rachel Michalewicz filed suit challenging this plan. Both were denied admission to UT's entering

123. TEX. EDUC. CODE ANN. § 51.803 (West 2006 & West Supp. 2012).
124. 78 F.3d 932 (5th Cir. 1996).
125. The court specifically held that diversity was not a compelling state interest for affirmative action. *Id.* at 944.
126. *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 224 (5th Cir. 2011) (discussing the decline), *cert. granted*, 132 S. Ct. 1536 (2012).
127. *Id.*
128. *Id.* at 225 (discussing the studies).
129. UT's affirmative action plan was structured around holistic review. *See id.* at 227–28.

class of Fall 2008.[130] Their chief argument was that the Ten Percent Law was an adequate race-neutral means to achieve racial diversity at UT.[131] Thus, the race-conscious piece of UT's admission policy is unnecessary, and therefore fails a strict scrutiny constitutional analysis.

Fisher and Michalewicz's argument invokes both the compelling state interest prong of the strict scrutiny framework and the narrow tailoring analysis. With respect to the compelling state interest inquiry, their argument is that there is no compelling reason for UT to utilize race-conscious affirmative action when a viable race-neutral alternative is available. To the extent that UT has a race-neutral means of realizing diversity at its disposal, its utilization of a race-conscious mechanism is not narrowly tailored.

Whether or not one finds the foregoing claims persuasive, they have considerably less force when *Fisher* is framed in intraracial terms. This might explain why Elise Bodie, then Acting Litigation Director of the NAACP Legal Defense Fund, Inc., authored an opinion piece stressing the importance of intraracial diversity to the *Fisher* litigation.[132] Unfortunately, neither the parties to the litigation nor the amici spent much time highlighting the intraracial dimensions of the case, though they certainly flagged the issue. Below I describe how they did so. I then offer a more substantive account of how intraracial diversity is implicated in the case.

B. Intraracial Diversity in the *Fisher* Briefs

The Asian American Legal Defense and Education Fund submitted an amicus curiae brief to rebut arguments that race-conscious admissions policies harm Asian Americans.[133] It focuses on how intraracial diversity can improve diversity among Asian Americans by considering "economic and educational inequities faced by students from certain subgroups."[134] The National Women's Law Center's amicus brief also articulates an intraracial diversity concern. It argues that "[The Top Ten Percent Plan] will inevitably obscure the fact that, because of the dramatic effect of stereotypes, minority applicants are often clustered in partic-

130. *Id.* at 217.
131. *Id.* at 238–39.
132. Boddie, *supra* note 36.
133. Brief of the Asian American Legal Defense & Education Fund et al. as Amici Curiae in Support of Respondents, Fisher v. Univ. of Tex. At Austin, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3308203.
134. *Id.* at 25. The brief devotes roughly three pages to the concept of intraracial diversity. *Id.* at 25–27.

ular areas of study and specific career paths."[135] The brief urges that a focus on intraracial diversity would ensure that the school's minority students do not participate only in certain areas of study. A similar argument is made in the amicus brief of the Lawyers' Committee for Civil Rights Under Law.[136]

The amicus brief submitted by Heman Sweatt's family is unique in that it offers a few examples of how intraracial diversity functions in a race-conscious admissions program.[137] For example, the brief argues that UT's policy is narrowly tailored to achieve diversity because there is no other way for UT to "consider the likely contribution to be made by the son of a Cuban father and Costa Rican mother, compared with a more typical top-ten-percent graduate of Harlandale High[, a high school with 98% Latino representation]."[138]

Fortune-100 and Other Leading American Businesses also weighed in,[139] arguing that "a focus solely on numbers is problematic when the numbers in question treat *all* underrepresented minorities as one undifferentiated group, rather than distinct individuals with different experiences and perspectives."[140] The brief goes on to quote Justice O'Connor's statement in *Gratz* that individualized consideration should take into account "diversity within and among all racial and ethnic groups."[141] The Brennan Center for Justice advanced a similar argument, contending that a system of individualized, race-conscious review "permits the consideration of diversity within racial groups" to "account for the differences between people of the same race."[142]

Two additional amicus briefs highlighted the importance of intraracial diversity. According to the amicus brief for the National Association of Basketball

135. Brief of National Women's Law Center et al. as Amici Curiae in Support of Respondents at 29, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3418602, at *29. Intraracial diversity occupies two pages in this brief. *Id.* at 29–30.

136. Brief of the Lawyers' Committee for Civil Rights Under Law et al. as Amici Curiae in Support of Respondents at 12, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3527856, at *12. It devotes one paragraph to intraracial diversity. *Id.*

137. Brief of the Family of Heman Sweatt as Amicus Curiae in Support of Respondents at 37, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3578589, at *37.

138. *Id.* The amicus brief for the family of Heman Sweatt is also unique in its relatively robust discussion of intraracial diversity: the subject occupies three pages in its brief. *Id.* at 36–38.

139. Brief for Fortune-100 and Other Leading American Businesses as Amici Curiae in Support of Respondents, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3418831.

140. *Id.* at 16.

141. *Id.* (quoting Gratz v. Bollinger, 539 U.S. 244, 277 (2003) (O'Connor, J., concurring) (internal quotation marks omitted)). The businesses' amicus brief considers intraracial diversity for one paragraph. *Id.*

142. Brief of the Brennan Center for Justice at NYU School of Law & the League of Women Voters of the United States as Amici Curiae in Support of Respondents at 33, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3596967, at *33. This quotation is the brief's sole mention of intraracial diversity. *Id.*

Coaches states, "It is not enough to simply have diversity as measured by a numerically high grouping of minority students— for campus diversity to have its full intended benefits, the university must ensure that there is diversity *within* racial groups."[143] The brief contends that diversity itself is not the end goal of a race-conscious admissions policy; rather, it is a diversity of talent, perspective, and experience—even within a single racial group—that a race-conscious admissions policy like UT's seeks to capture.[144]

And the Black Student Alliance at UT Austin submitted an amicus brief arguing that UT should be permitted to "take into account whether its campus and classrooms are meaningfully representative of the rich diversity *within* and *among* underrepresented minority groups."[145]

The foregoing reveals that claims about intraracial diversity did find expression in the *Fisher* litigation. But in each brief, the intraracial diversity concern figures more as a gesture than a sustained argument. Below I reveal how one might mobilize intraracial diversity to strengthen the university's argument that its affirmative action plan is constitutional.

C. A More Robust Account of Intraracial Diversity and the *Fisher* Litigation

Recall the eight diversity benefits I discussed in Part I. Assume that racial cooperation and understanding is one of the diversity benefits UT seeks to promote. UT could have argued that relying on only the Ten Percent Law would fail to accomplish the university's intraracial diversity goals because the Ten Percent Law works as a racial diversity mechanism only by trading on the existence of racially segregated neighborhoods and schools.[146] Thus, ironically, the success of the Ten Percent Law in promoting racial diversity at UT is predicated on extant racial segregation, a notion completely at odds with the diversity benefit UT seeks to promote. More fundamentally, UT could also argue that students who grow up in racially segregated neighborhoods and attend racially segregated schools might

143. Brief for National Ass'n of Basketball Coaches et al. as Amici Curiae in Support of Respondents at 22–23, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3527854,at *22–23.

144. The brief devotes eight lines to intraracial diversity. *Id.*

145. Brief of the Black Student Alliance at the University of Texas at Austin et al. as Amici Curiae in Support of Respondents at 16, *Fisher*, No. 11-345 (U.S. Aug. 13, 2012), 2012 WL 3418847, at *16. The brief devotes 13 lines to intraracial diversity. *Id.*

146. Indeed, this was one of the criticisms of the measure when it was initially proposed. NICHOLAS WEBSTER, KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, ANALYSIS OF THE TEXAS TEN PERCENT PLAN 5 (2007), http://www.gis.kirwaninstitute.org/reports/2007/08_2007_DemMerit_AnalysisofTXTenPercent.pdf.

not be the best diversity candidates to facilitate racial cooperation and understanding because they will have had little or no exposure to whites or other nonblacks.[147]

This is where race-conscious affirmative action comes in, UT might argue. It permits the school to admit African American students who attended integrated and predominantly white schools. Because these students would likely have interacted with white students, UT could believe that they would be better candidates for realizing the university's interest in facilitating racial cooperation and understanding than the students who attended racially segregated schools. UT may well be wrong in this respect, but it is a view that the university could hold in "good faith."[148]

In advancing the above position, UT could insist that the school is striking the right balance. It could argue that, notwithstanding its concerns about the Ten Percent Law's reliance on racial segregation, UT admits most of its African American and Latina/o students via that mechanism because it is formally race-neutral.[149] It employs race-conscious affirmative action at the margins to diversify its African American diversity. In other words, because the Ten Percent Law admits African Americans who are more racially monolithic than is ideal, UT could argue that it employs affirmative action to increase intraracial diversity among African Americans. Doing so, the school might maintain, increases UT's ability to realize the benefits of diversity.

Consider this point with respect to another diversity benefit: stereotype negation. The university could believe that white students will perceive the black students who are admitted under the Ten Percent Law as racially salient—that is, as students who attended the black schools and/or lived in the black neighborhoods. More colorfully, white students could perceive these students as "really" black and attribute a range of negative racial stereotypes to them. Alternatively, the university might believe that white students will experience these African American admittees as overly racially conscious and thus racially uncomfortable to be around. None of the foregoing dynamics are helpful in terms of negating nega-

147. Note how this frames the burden of delivering the diversity benefit on students of color. This is precisely why lots of scholars contest the utilization of the diversity rationale. Perry Bacon Jr., *How Much Diversity Do You Want From Me?*, TIME, July 7, 2003, http://www.time.com/time/magazine/article/0,9171,1005166,00.html; Rosemary Salomone, *The Power of Language in the Classroom*, NEA HIGHER EDUC. J., Winter 2004, at 9, http://hin.nea.org/assets/img/PubThoughtAndAction/TAA_04Win_02.pdf; *see also* Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. (forthcoming 2013). My aim in this Article is to work with the doctrinal constraints that currently exist.

148. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

149. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 227 (5th Cir. 2011) ("Top ten percent applicants are guaranteed admission to the University, and the vast majority of freshmen are selected in this way, without a confessed consideration of race.").

tive racial stereotypes. Indeed, all of them, in one way or another, activate racial stereotypes.

Finally, consider now the robust exchange of ideas. UT could believe that in order to realize this diversity benefit, African American students need to be dispersed across the university, not clustered in particular programs, and that race-conscious affirmative action would help to effectuate that dispersal. UT's view could be based on the fact that "[w]hile the [Ten Percent] Law may have contributed to an increase in overall minority enrollment, those minority students remain clustered in certain programs."[150] Race-conscious affirmative action would, as it were, decluster them and in so doing facilitate the robust exchange of ideas across multiple curricular settings within the university.

Significantly, one could apply something like the preceding analysis to the other diversity benefits as well. The fundamental inquiry would be the same: whether admitting African American students outside of the Ten Percent Law enhances UT's ability to realize those particular diversity benefits. As should be already apparent, this inquiry is not about critical mass in a group representation sense. It is about whether UT can maximize its yield of diversity benefits by taking intraracial diversity into account and about whether the Ten Percent Law limits the school's ability to do so. Because neither UT nor the pro–affirmative action amicus briefs fully developed this line of argument, they missed an important basis upon which they could have defended UT's admissions policy. More than that, they permitted the issue to be negatively framed by Justices on the Court who are opposed to or skeptical of affirmative action. Consider the following exchanges during oral argument:

> Mr. Garre: . . . And I don't think it's been seriously disputed in this—this case to this point that, although the percentage plan certainly helps with minority admissions, by and large, the—the minorities who are admitted tend to come from segregated, racially-identifiable schools.
>
> Justice Alito: Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before.
>
> The top 10 percent plan admits lots of African Americans—lots of Hispanics and a fair number of African Americans. But you say, well, it's—it's faulty because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds. And you specifically have the example of the child of successful professionals in Dallas.

150. *Id.* at 240.

> Now, that's your—that's your argument? If you . . . have an applicant whose parents are—let's say they're—one of them is a partner in your law firm in Texas, another one is . . . another corporate lawyer. They have income that puts them in the top 1 percent of earners in the country, and they have—parents both have graduate degrees.
>
> They deserve a leg-up against, let's say, an Asian or a white applicant whose parents are absolutely average in terms of education and income?
>
> Mr. Garre: No, Your Honor. . . .
>
> Justice Alito: Well, how can the answer to that question be no, because being an African American or being a Hispanic is a plus factor.
>
> Mr. Garre: Because, Your Honor, our point is, is that we want minorities from different backgrounds. We go out of our way to recruit minorities from disadvantaged backgrounds.
>
> Justice Kennedy: So what you're saying is that what counts is race above all?
>
> . . . .
>
> Justice Kennedy: You want underprivileged of a certain race and privileged of a certain race. So that's race.[151]

There are three significant problems with the way in which the university's counsel responded to Justices Alito's and Kennedy's questions about intraracial diversity. First, Mr. Garre acquiesces in the notion that students outside of the Ten Percent Law are necessarily going to be more privileged than students who are admitted by the Law. Surely, that will not always be the case, though there is reason to believe that, on average, the claim is likely true.[152] Second, even assuming that there is a difference in socioeconomic class between the African Amer-

151. Transcript of Oral Argument, *supra* note 5, at 43–45.

152. For example, based on a dataset that disaggregates admitted student demographic information by race for the freshman class entering in the Fall of 2008, UT Austin seems to admit black students from backgrounds with wealthier and more–highly educated parents through the *Grutter*-type process than it does through the Ten Percent Plan. Approximately 37 percent of black *Grutter*-type admits came from households with parental income over $80,000, compared to only 25 percent such students among Ten Percent Plan admits. Similarly, 51 percent of black *Grutter*-type admits came from households with parental income over $60,000, compared to only 37 percent of such Ten Percent Plan admits. As to highest parental education status, 73 percent of black *Grutter*-type admits reported a parent with at least a bachelor's degree, while only 59 percent of Ten Percent Plan admits did so. 36 percent of black *Grutter*-type admits reported a parent with a graduate degree, while only 26 percent of Ten Percent admits did the same. The same kinds of differences in parental income and education between *Grutter*-type admits and Ten Percent Plan admits can be found in the Hispanic student population, in which these differences are actually even more pronounced.

ican students admitted under the Ten Percent Law and the other African American admitted students, framing this as an example of the school preferring privileged African Americans over others obscures the fact that it is integrated experiences—and not class privilege—that Texas is conceivably after here. That is to say, the school is not simply interested in having privileged African Americans as a representative group enrolled at UT. It is interested in having students who can, for example, facilitate racial cooperation and understanding. UT could reasonably conclude that students with integrated educational experiences are going to be better at that than students with racially monolithic experiences. That a school's interest in admitting students who can deliver the racial cooperation diversity benefit might have a disparate impact in terms of benefitting class-privileged African Americans should not without more be a problem, particularly because the Supreme Court has repeatedly said, albeit in a slightly different context, that disparate impact does not, without more, create an equal protection problem.[153] Mr. Garre might have pressed these points more forcefully.

Third, Mr. Garre does not challenge Justice Alito's framing "the whole purpose of affirmative action" as an effort to "to help students who come from underprivileged backgrounds." That is not the constitutional ground on which affirmative action is defended.[154] Mr. Garre should have reminded Justice Alito that UT is interested in realizing the educational benefits of diversity. That is the purpose of its affirmative action program, and intraracial diversity enhances the school's ability to do so.[155]

153. Washington v. Davis, 426 U.S. 229 (1976).

154. Nor is it the only normative terms upon which the policy is defended. *See* Carbado & Harris, *supra* note 35, at 1147–50 (arguing that not formally taking race into account in the context of admissions creates racial preferences for those who choose to suppress their racial identity); Kimberlé W. Crenshaw, *"Framing Affirmative Action,"* 105 MICH. L. REV. FIRST IMPRESSIONS 123 (2007), http://www.michiganlawreview.org/assets/fi/105/crenshaw.pdf; 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 (1994) (framing affirmative action as an antipreferences initiative); Kang & Banaji, *supra* note 70, at 1065–66 (arguing that affirmative action helps to correct for a range of biases that are present in admissions processes).

155. Nor should Mr. Garre have indulged Justice Alito's hypothetical about whether parents who are "in the top 1 percent of earners in the country" should have "a leg-up against, let's say, an Asian or a white applicant whose parents are absolutely average in terms of education and income." Transcript of Oral Argument, *supra* note 5, at 44. The question bootstraps a general critique of affirmative action onto the specific question of whether UT's admissions process passes constitutional muster. Mr. Garre could simply have responded that the question Justice Alito raised was not before the Court in the sense that it was not the constitutionality of affirmative action per se that was being challenge but the particular admissions regime that UT utilized.

Justice Alito also pressed the Solicitor General, Donald Verrilli, on the issue of whether it was permissible for UT to prefer Latinas/os and African Americans from privileged backgrounds. Verrilli did a better job challenging this framing:

> Justice Alito: Does the United States agree with Mr. Garre that African American and Hispanic applicants from privileged backgrounds deserve a preference?
>
> General Verrilli: I understand that differently, Justice Alito. Here's how we understand what is going on with respect to the admissions process in the University of Texas, and I am going to address it directly. I just think it needs a bit of context to do so.
>
> The top 10 percent plan certainly does produce some ethnic diversity. Significant numbers get in. The problem is the university can't control that diversity in the same way it can with respect to the 25 percent of the class that is admitted through the holistic process.
>
> So my understanding of what the university here is looking to do, and what universities generally are looking to do in this circumstance, is not to grant a preference for privilege, but to make individualized decisions about applicants who will directly further the educational mission. For example, they will look for individuals who will play against racial stereotypes just by what they bring: The African American fencer; the Hispanic who has—who has mastered classical Greek.[156]

Solicitor General Verrilli's response to Justice Alito highlights how the University of Texas might have made intraracial diversity a more central concern in the litigation. Instead, intraracial diversity occurs almost as an afterthought. This allowed Justices Alito and Kennedy in particular to frame the issue in terms of whether UT was employing the non–Top Ten Percent Law component of its admissions process to admit privileged African Americans, a framing that taps into a more general criticism of affirmative action—namely, that the policy only benefits class-privileged blacks. Had UT linked its intraracial diversity interest to the eight benefits I set out in Part I, it could have more forcefully defended its policy with respect to both the compelling state interest and narrow tailoring prongs of the strict scrutiny analysis.

CONCLUSION

When a school says it is committed to diversity, few stop to ask precisely what that actually means. Consequently, the standard discussion about diversity admissions centers on whether a particular school admits enough black students or

156. *Id.* at 60–61.

other students of color. Rarely is there a discussion of what goal the diversity selections are supposed to serve. Making matters worse, the Supreme Court has offered no guidance on how institutions should prioritize the various diversity benefits. Indeed, according to Justice O'Connor in *Grutter*, a university's "educational judgment that such diversity is essential to its educational mission is one to which we defer."[157] So long as admissions officials review each admissions file individually, do not create separate admissions tracks for different racial groups, and eschew the utilization of quotas, they are largely free to implement diversity as they see fit. Deference to expert decisionmakers is often rational. But should we not have a better sense of what is going on behind the closed door of admissions? Do we want to be racially blind to the intraracial lines admissions officials potentially can draw? Should we try to learn a little bit more about the impact of their decisions vis-à-vis the diversity benefits those decisions are designed to advance?

The current system in effect gives admissions officers carte blanche in deciding which diversity benefits they seek to promote, which racial criteria to employ as a proxy for those benefits, and which candidates to admit. Moreover, they can make these intraracial distinctions free from public view and accountability with relatively little information and relatively little administrative difficulty. Admissions officials are largely free to construct race, and the racial body of the class, as their hearts and minds desire.

We need to put the issue of intraracial diversity more squarely on the table. Doing so would broaden the terms on which diversity is typically discussed. Some of my colleagues worry that what I am proposing gives ammunition to those who are hostile to diversity. That might well be true. But supporters of affirmative action too often find themselves reacting to conservative framings of various forms of racial remediation. This explains why the current defense of affirmative action acquiesces in the view of affirmative action as a racial preference that must be justified. That reactive defense has its origins in *Bakke*, a case that was, in some significant ways, a loss, notwithstanding that the case permits the utilization of affirmative action. In *Bakke*, the University of California, Davis articulated a number of justifications for affirmative action: (1) to combat societal discrimination, (2) to facilitate the delivery of medical services to underserved communities, (3) to ameliorate the underrepresentation of students of color in medical school, and (4) to enhance the diversity of the school.[158] Justice Powell rejected the first three justifications, leaving diversity as the sole basis on which a university could defend its affirmative action policy. Moreover, Justice Powell rejected the argument that in-

157. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).
158. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 305–06 (1978).

termediate scrutiny was the appropriate level of review for affirmative action, insisting that strict scrutiny was required. The application of strict scrutiny to affirmative action solidified the idea of the policy as preferential treatment or reverse discrimination that requires a high level of justification.

After *Bakke*, one had to defend affirmative action through a strict scrutiny framework and use the diversity rationale to do so. This is the sense in which *Bakke* was a loss. The case produced a very cramped space—doctrinally and normatively—to support affirmative action. Because of this, one can query whether *Bakke* is another civil rights instance of "winning backwards."[159]

To avoid winning the intraracial diversity debate backwards or losing it altogether, proponents of affirmative action need to openly discuss whether and to what extent university officials might be engaged in the practice and think hard about the terms on which the pursuit of intraracial diversity should be defended (or not). The failure to do so will result in opponents of affirmative action defining the issue, which would once again put proponents of affirmative action in the position of defending the policy reactively.

159. Nancy D. Polikoff, *The New "Illegitimacy": Winning Backward in the Protection of the Children of Lesbian Couples*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 721, 722 (2012) ("Winning backward is a victory whose legal basis sets back a goal greater than the immediate outcome.").