

DOES RACIAL DIVERSITY PROMOTE CULTURAL DIVERSITY?:
THE MISSING QUESTION IN *FISHER V. UNIVERSITY OF TEXAS*

by
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In Fisher v. University of Texas, the Supreme Court declined to revisit the constitutionality of race-based admissions policies in higher education. The Court instead remanded the case to the lower court to re-evaluate whether the University's use of race as an admissions factor is necessary to achieve the benefits of student-body diversity. The Court's opinion does, however, reveal an important change in its views about the effect of racial diversity on a student body. The Court no longer acknowledges that racial diversity tends to promote cultural diversity and, indeed, appears to reject any claim that race is associated with culture.

This Essay highlights and critiques the Court's resistance to an association between race and culture, with a focus on black people and Black culture. Part I describes the Court's shift from previously embracing a race-culture association in the context of higher education to its present resistance to such an association. Part II explains and substantiates the association between black people and Black culture, and suggests why such an association seems to be resisted by some observers, including by some black scholars. Part III returns to the legal question of race in higher education admissions, arguing that the Court's failure to acknowledge the relationship between race and culture undermines its ability to recognize the value of racially diverse student bodies and the need of universities to use race to assemble them.

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* Mortimer M. Caplin Professor of Law, University of Virginia School of Law. I benefited tremendously from conversations with colleagues, friends and family, too numerous to name (but you know who you are). I am grateful for the comments I received on an earlier draft from Rick Banks, Justin Driver, Claudrena Harold, Mai-Linh Hong, and Jamal Mazrui. I also received helpful feedback from the University of Virginia Working Group on Racial Inequality. The University of Virginia Law School reference librarians, especially Ben Doherty, provided superb assistance. A special thanks to law students Amy Herrera and Steve Sul for their diligent research assistance and helpful discussions. I welcome any comments at kimfm@virginia.edu.

INTRODUCTION

Assume that two universities have student bodies of comparable academic qualifications and economic backgrounds. The first university admitted its students without regard to race, resulting in a student body with a low percentage of black and Latino students. The second university gave favorable weight to race, resulting in a student body with an appreciably higher percentage of black and Latino students. In what ways do these student bodies likely differ? Do the likely differences include culture?

This question is implicated by *Fisher v. University of Texas*,¹ which involves a constitutional challenge to the University of Texas's favorable consideration of race in admitting black and Latino applicants. The federal trial court and court of appeals upheld the University's race-based admission policy on the ground that it advanced the University's compelling interest in assembling a diverse student body. The Supreme Court remanded the case to the court of appeals, instructing that court to re-evaluate whether the University's use of race as an admissions factor was truly necessary to achieve the benefits of student-body diversity. In its opinion, the Court recounted earlier precedents describing the educational benefits of student-body diversity, but the Court did not cite cultural diversity as one of those benefits. Indeed, it made no mention of culture at all. In contrast, in its argument to the Court, the University claimed several times that cultural diversity in its student body is highly beneficial.² Like the Court, however, the University did not claim that racial diversity contributed to cultural diversity.³ Why not? Do the benefits of a racially diverse student body not include cultural diversity?

I make three claims in this Essay. First, the Court no longer acknowledges that racial diversity tends to increase cultural diversity and, in fact, implicitly denies it. The Court generally holds that race does not predict any meaningful difference among people, criticizing any claim to the contrary as illegitimate stereotyping. The value of a racially diverse student body, in the Court's apparent view, is in demonstrating that race

¹ 133 S. Ct. 2411 (2013).

² Brief for Respondents at 5–6, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3245488 (University seeks “high standard of diversity,” which includes culture); *id.* at 11 (University's goal includes “exposure to differing cultures”).

³ To the contrary, the University cites culture and race as distinct aspects of the diversity it seeks. *Id.* at 5–6 (listing culture as the first of many other diversity factors and concluding the list with race and ethnicity); *id.* at 14 (describing University's interest in an applicant's race “in conjunction with” cultural awareness); *id.* at 25 (identifying race as one among other diversity factors, such as geography, socioeconomic status, and culture). When the University's brief focuses on the effect of race, it claims that racial diversity will demonstrate, first, that there is no minority or majority view, *id.* at 11, and that race is associated with negative experiences, *id.* at 44 (citing *Grutter's* observations about the unfortunate experience of race and inequality in American society, *Grutter v. Bollinger*, 539 U.S. 306, 333, 338 (2003)).

does not in fact matter by revealing that minority students do not all think alike. To the extent the Court acknowledges that race does matter, it accepts only that racial minorities are more likely to have experienced discrimination than whites and that experience gives them a different perspective. While that is no doubt true, the Court's conception of minority experiences is excessively thin—and negative. There is more to being a minority in America than experiencing discrimination, including positive attributes of a cultural nature.

Second, the Court's apparent denial that race is associated with culture is erroneous as an empirical matter. Whether there is a single Black⁴ or Latino culture or several subcultures, and whether and to what extent black and Latino Americans identify with such cultures, are questions of considerable uncertainty. What is implausible to deny, however, is that many black and Latino Americans share within their racial groups experiences of a cultural or ethnic nature that influence their identities, perspectives, and choices in ways not experienced in the same way or to the same extent as members of other racial groups. The same can likely be said of Native American, Asian, and white ethnic communities. To deny or ignore such group differences is to ignore reality.

Third, the failure of the Court (and other legal actors) to recognize racial minority cultures is misguided as a legal matter. The Court should recognize that racial differences are associated with cultural differences in assessing the constitutionality of race-conscious efforts to achieve student-body diversity. Taking seriously the ways in which racial identity corresponds among many racial groups with cultural identity would enhance the ability of universities, courts, and other institutions to accurately assess the value of a racially diverse student body and the need to take account of race to achieve it. If college students benefit in important ways from a culturally diverse environment, then such students should benefit in important ways from a racially diverse environment. Moreover, understanding that race is associated with culture supports the need for a critical mass of minority students on campus to enable their culture to thrive and to enable other students to observe that cultural identities within racial groups vary considerably.

Given the length constraints of this Essay, it focuses only on the cultural diversity created by black students. Also, positing the existence of Black culture is probably more controversial than positing that other racial minorities, such as Latinos and Asians, have identities of a cultural nature.⁵ Recognizing the empirical reality and legal relevance of Black

⁴ I capitalize "Black" when referring to culture, but use lower case "black" and "white" when referring to race. I occasionally use the term "African-American" in the same sense as "Black," and do so simply to use the same term as used in the literature under discussion.

⁵ See Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 HARV. C.R.-C.L. L. REV. 57, 99 (1995) (positing that "white Americans feel considerable ambivalence about the claims of

culture would thus likely justify similar recognition of the cultures of other racial minorities. Nonetheless, the plausibility that an association exists between other racial minorities and culture is left for others to explore.

As to Black culture, my claim is that most black Americans likely share in a Black culture that reflects certain common experiences and identifications, even across class, generation, and geographical distances, while at the same time many of them also identify with one of numerous Black subcultures with their own distinctive cultural traits not necessarily common to other Black subcultures. The cultural or ethnic traits that are common to Black culture, or which belong to Black subcultures, are difficult to identify without over-generalizing or stereotyping. I do not need to identify such traits in detail, however, a matter outside my expertise, and neither do universities or courts. My claim is that cultural differences are associated with racial differences in ways that justify seeking a racially diverse student body, regardless of what exactly those differences entail. Nor is my goal to prove the existence of Black culture or its association with race to the satisfaction of social science standards. My goal is to describe and document the claim with sufficient plausibility to persuade universities and courts to take it as seriously as they take other claims about the social costs and benefits of race-based governmental policies.

I. THE COURT RESISTS AN ASSOCIATION BETWEEN RACE AND CULTURE

The Court in *Fisher* remanded the case back to the court of appeals to re-evaluate whether the University of Texas's use of race as one of many factors in admitting black and Latino students is necessary to achieve the educational benefits of a diverse student body.⁶ The Court's standard requires that the University demonstrate that racial diversity produces "compelling" benefits and that using race to admit students is "necessary" to achieve those benefits.⁷ By "necessary," the Court explained, the University must not be able to achieve similar diversity through "workable race-neutral alternatives"⁸ to giving favorable weight to the race of applicants, such as through the Top Ten Percent plan that the University uses to admit most of its students.⁹

African Americans to a distinct culture, more than they feel with regard to similar claims by, say, Native Americans, Asian Americans, or Latinos").

⁶ *Fisher*, 133 S. Ct. at 2415.

⁷ *See id.* at 2417.

⁸ *Id.* at 2421 (quoting *Grutter*, 539 U.S. at 339).

⁹ The Top Ten Percent Law is codified at TEX. EDUC. CODE ANN. § 51.803 (West 2009). Under the Top Ten Percent plan, every high school student who graduates in the top 10% of their class is guaranteed admission to the University of Texas. Although the plan does not take account of race in its administration, it has the effect, by design, of promoting racial diversity because many high schools are predominantly black or Latino and, therefore, the students in the top 10% of their high school class include substantial numbers of blacks or Latinos. Brief for Petitioner at 8–11, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 1882759. Beginning in 2011, the University capped the number of students admitted through the Top

The Court in *Fisher* began its discussion of diversity by citing two previous Supreme Court cases addressing race-based admissions in higher education: Justice Powell's 1978 opinion in *University of California v. Bakke*, in which Powell explained the educational benefits of racial diversity to a medical school,¹⁰ and *Grutter v. Bollinger*, in which the Court upheld the use of race by the University of Michigan Law School to achieve a diverse student body.¹¹ In *Bakke*, Powell accepted that reserving seats in the student body for blacks, Mexican-Americans, Asians and Native-Americans would contribute to "considerable ethnic diversity" that would advance the medical school's interest in a diversity of "experiences, outlooks, and ideas."¹² Such diversity would enrich the process of intellectual inquiry by promoting the "robust exchange of ideas."¹³ Powell also observed that "a black student can usually bring something that a white person cannot offer."¹⁴ He further suggested, by including a statement by Harvard College as an appendix, that a university, with only a few spaces left:

[M]ight find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power.¹⁵

Ten Percent plan to 75% of each entering freshman class. *Id.* at 8 n.3; see also S.B. 175, ch. 1342, § 7, 2009 TEX. GEN. LAWS 4246; UNIV. OF TEX. OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIV. OF TEX. AT AUSTIN (2010), available at <https://www.utexas.edu/student/admissions/research/HB588-Report13.pdf>. The plaintiff in *Fisher* argues that the Top Ten Percent plan produces sufficient racial diversity to render the individualized use of race for non-top 10% students unnecessary. Brief for Petitioner at 38–42, *Fisher*, 133 S. Ct. 2411 (No. 11-345). The plaintiff further argues that increasing the number of students admitted through the plan, both by raising its recent cap and by intensifying recruitment of top 10% applicants, would further alleviate the need to use race as an admission factor. *Id.* at 42 n.10.

¹⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹¹ 539 U.S. 306.

¹² *Bakke*, 438 U.S. at 314–15.

¹³ *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

¹⁴ *Id.* at 316 (quoting approvingly from the Harvard College Admissions Program, reprinted in *Bakke*, 438 U.S. at 321, 323 (appendix to opinion of Powell, J.)).

¹⁵ Harvard College Admissions Program, *supra* note 14, at 324. In contrast to the quotation documented by the previous footnote, see *supra* note 14, this statement appears in the appendix to Powell's opinion but was not also quoted by Powell in his opinion. Nonetheless, Powell repeatedly referred to Harvard's plan with unqualified approval, so it is fair to treat this appendix statement as supported by Powell's opinion. In fact, the Court in *Gratz* did just that with this same passage from the appendix to Powell's *Bakke* opinion. See *Gratz v. Bollinger*, 539 U.S. 244, 272–73 (2003). The Court in *Grutter* similarly relied on other statements in the appendix which Powell did not himself quote on the assumption that they were incorporated into his opinion. See *Grutter*, 539 U.S. at 335–36.

Although not describing the significance of race in explicitly cultural terms, Powell's opinion posits that race is associated with perspectives, including perspectives directly related to an applicant's racial identity, such as Black Power ideology. In so doing, Powell endorsed, at least implicitly, the proposition that racial difference is associated with cultural difference.¹⁶

Twenty-five years later, the Court in *Grutter* upheld student-body diversity as a sufficiently compelling interest to justify race-based admissions.¹⁷ The Court identified several benefits of a racially diverse student body that qualify, at least in combination, as compelling. They include breaking down stereotypes and improving cross-racial understanding; contributing to intellectual exchange through lively classroom discussion; preparing students for participation in civic life; benefiting institutions that elite universities feed, such as elected office, corporations, and the military; and enhancing the political legitimacy of society by demonstrating that positions of power and privilege are open to all people.¹⁸ Lacking in the Court's discussion in *Grutter*, even implicitly, is that race is associated with culture, that is, that a racially diverse student body is more likely to be a culturally diverse student body. Instead, the Court's discussion of race appears premised on the proposition that race is irrelevant and that the benefits of diversity include demonstrating the irrelevance of race by revealing to other students that race does not predict a different perspective. To the extent that the Court acknowledged an association between race and perspective, it was that race correlates with the experience of discrimination and that the experience of discrimination will tend to affect minority students' perspectives in some way. The Court's discussion of race thus assumes that race predicts nothing or, at most, the negative experience of discrimination.¹⁹ Even the Court's observation that political

¹⁶ Law professor Richard Ford describes Powell's opinion as "silently institutionaliz[ing] an ethnicity model of race that, by its very nature emphasizes the innocent 'fact' of cultural difference over the politically imposed wrongs of status hierarchy. In the ethnicity paradigm, the position of blacks is analogous to that of, say, some Italian-Americans: both have distinctive cultural backgrounds and therefore may contribute a unique perspective to the university environment." RICHARD THOMPSON FORD, *RACIAL CULTURE: A CRITIQUE* 45 (2005).

¹⁷ *Grutter*, 539 U.S. 306.

¹⁸ *Id.* at 330–33.

¹⁹ A skeptic of my interpretation of *Grutter* could correctly point out that the Court never explicitly denies that race is associated with culturally derived perspectives. Demonstrating a negative—that the Court does not even implicitly recognize a race-culture association—is difficult, but here is some guidance to reading *Grutter*. The Court refers explicitly to culture twice. First, it cites corporations' amicus briefs in support of the proposition that "the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints." *Id.* at 330–31. Second, the Court quotes *Plyler v. Doe* for the proposition that education is critical to "sustaining our political and cultural heritage." *Id.* at 331 (quoting *Plyler v. Doe*, 457 U.S. 202, 221 (1982)). Neither statement focuses on the relationship between *race* and culture. The first is a general statement that includes culture as one of several aspects of diversity

legitimacy would be promoted by racially diverse law schools seems premised on race being irrelevant, namely, that access to power should not appear to be impeded by something as irrelevant as race.

In *Fisher*, although the Court cited Powell's *Bakke* opinion and the Court's opinion in *Grutter* with approval,²⁰ its discussion of diversity, like *Grutter*, did not acknowledge an association between race and culture. The only race-related benefits the Court specifically identified were "enhanced classroom dialogue and the lessening of racial isolation and stereotypes."²¹ These are some, though not all, of the benefits the Court identified in *Grutter* and, as in *Grutter*, are consistent with the irrelevance of race. Lost since Powell's opinion in *Bakke* was a recognition that race is associated with more significant differences in outlooks, viewpoints, and perspectives derived from cultural distinctiveness.²²

The trend on the Court toward the position that race is not associated with perspective can also be seen in other contexts. In jury selection cases, for example, the Court initially invalidated selection procedures that excluded blacks from juries on the ground that their exclusion deprived the jury of perspectives that could inform its deliberations.²³ By the 1980s, and especially 1990s, however, the Court changed its rationale for prohibiting race-based jury selection practices, reasoning instead that the problem with excluding jurors on account of race is that the assumption

that global enterprises need, and the second merely refers to the cultural heritage of American society.

The Court's most direct discussion of how race contributes to diversity does not speak in cultural terms, and, to the extent it acknowledges that race is associated with perspective, it posits that race is associated with the experience of discrimination. The Court cites evidence from the district court that, in general, minorities do not have a minority viewpoint, *id.* at 319–20 (Syverud testimony), but that minorities are more likely to have experienced discrimination which, in turn, will likely affect their perspective, *id.* at 319 (Lempert testimony). The Court also emphasizes that the law school did not assume there is a minority perspective, but rather expects that a critical mass of minority students will demonstrate the contrary. *Id.* at 333. The Court then acknowledges that the experience of being a racial minority could affect one's views, but the Court assumes that the experience is negative, defined by living in "a society, like our own, in which race unfortunately still matters." *Id.*; see also *id.* at 338 (describing experiences of minority students as deriving from "our Nation's struggle with racial inequality").

The University's argument in *Fisher* suggests that its reading of *Grutter* is similar to mine. The University cited cultural diversity as a goal distinct from its goal of racial diversity. The University eschewed that minorities have a distinct perspective, and, citing *Grutter*, the only minority experience that the University acknowledged as distinctive was negative. See *supra* notes 2, 3 and accompanying text.

²⁰ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417–18 (2013).

²¹ *Id.* at 2418.

²² Also absent from the Court's discussion of diversity in *Fisher* are the benefits following graduation that *Grutter* identified, such as civic engagement, enhanced functioning of certain institutions, and political legitimacy. See *supra* note 18 and accompanying text.

²³ See, e.g., *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972) (plurality opinion) (explaining the loss of perspective in juries if blacks are systematically excluded).

that race is predictive of juror perspective is irrational and represents “the very stereotype the law condemns.”²⁴ Similarly, in the context of electoral districting, the Court initially recognized that, because minority voters tend to share distinctive views, drawing majority–minority districts protected their interests.²⁵ Then, in the 1990s, the Court began invalidating electoral districts designed to benefit racial minorities. In doing so, however, it did not rely on harm to the political interests of non-minority voters, but rather explained that the problem with creating majority–minority districts is that it indulges in the false and offensive stereotype that minorities, solely because of their race, “think alike, share the same political interests, and will prefer the same candidates at the polls.”²⁶

The one notable exception to the Court’s refusal to recognize or accept an association between race and cultural or other perspective is the 1990 case of *Metro Broadcasting, Inc. v. FCC*.²⁷ The Court upheld, by a five to four majority, the use of race to diversify the population of television and radio broadcasters. The majority accepted that there was a substantial relationship between the race of broadcast licensees and the viewpoint that they would bring to the content of broadcast programming.²⁸ In contrast, the dissenters described the proposition that race was associated with viewpoint as an irrational and demeaning stereotype.²⁹ Although *Metro Broadcasting* has not been completely overruled, its analysis has been rendered largely obsolete by subsequent developments. First, in 1995, after Justice Thomas replaced Justice Thurgood Marshall, the Court overruled the test applied in *Metro Broadcasting*, holding that the Court in *Metro Broadcasting* had improperly applied intermediate rather than strict scrutiny to the federal race-based policy.³⁰ Moreover, the dissenting justices in *Metro Broadcasting* included Justice Kennedy who is widely expected to be the deciding vote in any affirmative action cases in the near future. Finally, it is worth noting that, in 2007, the Court rejected a race-based pupil assignment plan in elementary and high schools

²⁴ *Powers v. Ohio*, 499 U.S. 400, 410 (1991). For a description of the gradual shift of the Court’s position in jury selection cases from a race-predicts-perspective to the opposite, see Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 *YALE L.J.* 93, 100–03 (1996).

²⁵ As the Court explained in *Metro Broadcasting, Inc. v. FCC*, “many of our voting rights cases operate on the assumption that minorities have particular viewpoints and interests worthy of protection.” 497 U.S. 547, 583–84 (1990) (citing *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 159 (1977) (plurality opinion); *Beer v. United States*, 425 U.S. 130, 141 (1976)).

²⁶ *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)) (internal quotation marks omitted).

²⁷ 497 U.S. 547 (1990).

²⁸ *See id.* at 582–83.

²⁹ *See id.* at 618.

³⁰ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

without acknowledging that racially integrating schools could tend to culturally integrate those schools.³¹

Although the Court has not typically referred explicitly to culture, its rejection of an association between race and perspective or belief seems at least implicitly to reject an association between race and culture. One of the defining features of culture is a tendency among its members to share certain distinctive values, beliefs, and perspectives. If the Court denies that race is associated with perspective, therefore, it is seemingly denying that race is associated with culture. At the very least, the Court and litigants arguing before it do not in recent years acknowledge an association between race and culture. The question arises, what, if anything, justifies the Court's aversion to such an association? At least two justifications suggest themselves. First, there may be no significant association between race and culture as an empirical matter. Second, in addition or in the alternative, perhaps the Court is justified in eschewing a race–culture association on normative grounds, either because any such association is irrelevant to the legality of race-based policies or because acknowledging the association may risk harmful consequences that outweigh its putative benefits. The next two Parts consider each of these justifications.

II. BLACK RACE AND BLACK CULTURE

The first section of this Part argues that Black culture and subcultures exist, and that they are positively associated in complicated ways with people who are racially black. The second section explains why some observers seem to resist the notion of Black culture.

A. *The Relationship Between Black Race and Black Culture*

Discussing whether blackness as a race is associated with Black culture requires some working definitions. For race, I mean the biological traits upon which America socially constructs the meaning of race, a meaning that prospective students are likely to use when racially self-identifying on college applications. By racially black, I refer especially to people who appear to have some African ancestry or, though more contestable, people who have some African ancestry with which they identify whether or not that ancestry is apparent.

With respect to culture, there is no consensus among anthropologists or sociologists on an exact definition, but a working definition is that culture refers generally to a range of learned traits shared by a group of people, including internal traits, such as beliefs, perceptions, values and mores, and external aspects of behavior and lifestyle, such as language and other modes of expression, religion, marital and parental

³¹ See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), decided with *Meredith v. Jefferson Cnty. Bd. of Educ.*, 551 U.S. 701 (2007).

practices, educational goals, art, games, food, dress and grooming styles, humor, gestures, and habits. Cultural communities often share a common history and heritage, as well as important institutions, such as houses of worship, schools, social organizations, and civic associations. Ultimately, however, it is not critical to the purpose of this Essay to propose an optimal definition of culture. The issue is whether there is an association between racial blackness and a complex range of subjective and objective traits such that increasing the percentage of black students in a student body will tend to increase the presence of those traits within the student body. The concept of culture is useful for understanding non-biological differences between racial groups.

Cultures often exist within and alongside other cultures with which they interact and mutually influence. A culture that exists within a larger culture is a subculture³² or co-culture.³³ Members of a subculture share certain traits of the subculture with each other but not necessarily with members of another subculture, but members of the two subcultures may share traits with each other that are part of a larger culture within which both subcultures exist. Thus, Irish-Americans in Philadelphia may have some subcultural traits that are not shared with Italian-Americans in Philadelphia, while at the same time sharing some traits with those same Italian-Americans that are common to the larger culture of Philadelphia or Pennsylvania or the East Coast or the United States. Subcultures can also intersect with other subcultures and with more than one larger culture. For example, the Irish of South Philly may share subcultural traits with Italians of South Philly, while sharing other subcultural traits with Boston Irish or with Irish people in Ireland. The United States includes a variety of cultures, including American, which, in turn, includes a great variety of intersecting and cross-cutting subcultures.

Regarding Black or African-American³⁴ culture, substantial consensus among social scientists holds that such a culture exists. Although some social scientists ostensibly disputed the claim in decades past,³⁵ the weight of recent scholarship accepts the existence of Black culture but differs on

³² See DAVID RIESMAN ET AL., *THE LONELY CROWD: A STUDY OF THE CHANGING AMERICAN CHARACTER* 334–36 (1950).

³³ LARRY A. SAMOVAR ET AL., *COMMUNICATION BETWEEN CULTURES* 50 (3d ed. 1998).

³⁴ See *supra* note 4 for an explanation of racial terminology.

³⁵ See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 792 n.71 (stating that “it was long the dominant view that African Americans have no ethnic culture”) (citing E. FRANKLIN FRAZIER, *THE NEGRO IN THE UNITED STATES* 680–81 (rev. ed. 1957); NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROS, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* 53 (1963); 2 GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 928 (5th ed. 1944); ROBERT EZRA PARK, *RACE AND CULTURE* (1950); KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTI-BELLUM SOUTH* vii (1956); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1788–1818 (1989)). As my examination of these sources provided below reveals, however, these sources do not deny that cultural differences exist between blacks and whites.

exactly how to define or identify it.³⁶ Objective indicia of Black culture can be observed every day in black communities³⁷ throughout this country³⁸ and studied through scholarship and media³⁹ accounts of Black culture and its manifestations. The scholarship on Black culture,⁴⁰ the enormity of which attests to the culture's salience,⁴¹ documents a broad range of cultural heritage and traditions, including African-American history,⁴² language,⁴³ worship practices,⁴⁴ music,⁴⁵ art,⁴⁶ cuisine,⁴⁷ hair styles,⁴⁸

³⁶ See LERONE BENNETT, JR., *THE CHALLENGE OF BLACKNESS* (1972); *BLACK LITERATURE & LITERARY THEORY* (Henry Louis Gates, Jr. ed., 1984); JAMES E. BLACKWELL, *THE BLACK COMMUNITY: DIVERSITY AND UNITY* 20 (3d ed. 1991); MICHAEL ERIC DYSON, *REFLECTING BLACK: AFRICAN-AMERICAN CULTURAL CRITICISM* (1993); JANICE E. HALE-BENSON, *BLACK CHILDREN: THEIR ROOTS, CULTURE, AND LEARNING STYLES* (rev. ed. 1986); CHARLES KEIL, *URBAN BLUES* (1966); THOMAS KOCHMAN, *BLACK AND WHITE STYLES IN CONFLICT* (1981); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995); JOYCE A. LADNER, *TOMORROW'S TOMORROW: THE BLACK WOMAN* (1972); ALPHONSO PINKNEY, *BLACK AMERICANS* (1969); JEFF SPINNER, *THE BOUNDARIES OF CITIZENSHIP: RACE, ETHNICITY, AND NATIONALITY IN THE LIBERAL STATE* 114 (1994); CORNEL WEST, *RACE MATTERS* 28 (1993); Tanya E. Coke, *Lady Justice May Be Blind, But Is She a Soul Sister? Race-Neutrality and the Ideal of Representative Juries*, 69 N.Y.U. L. REV. 327, 354 n.147 (1994) (stating that "[t]he notion that African Americans share a distinct culture was once controversial among scholars, but most sociologists and cultural critics today recognize the legitimacy of a unique African-American culture") (citation omitted). For a sampling of legal scholarship supporting the existence of Black culture, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Coke, *supra*; Monica J. Evans, *Stealing Away: Black Women, Outlaw Culture and the Rhetoric of Rights*, 28 HARV. C.R.-C.L. L. REV. 263 (1993); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 67-68 (1991); Hayman, *supra* note 5; Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401 (1993); Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 63 (Kimberlé Crenshaw et al. eds., 1995); Charles J. Ogletree, Jr., *From Brown to Tulsa: Defining Our Own Future*, 47 HOW. L.J. 499 (2004); Patricia J. Williams, Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

³⁷ William T. Hoston, *Black Solidarity and Racial Context: An Exploration of the Role of Black Solidarity in U.S. Cities*, 39 J. BLACK STUD. 719 (2009).

³⁸ JOSEPH A. OPALA, *THE GULLAH: RICE, SLAVERY, AND THE SIERRA LEONE-AMERICAN CONNECTION* (1986).

³⁹ Bishetta D. Merritt, *Charles Burnett: Creator of African American Culture on Film*, 39 J. BLACK STUD. 109 (2008).

⁴⁰ Michael A. Gomez, *Of Du Bois and Diaspora: The Challenge of African American Studies*, 35 J. BLACK STUD. 175 (2004).

⁴¹ The scholarship on all aspects of Black or African-American cultural life is immense. The following footnotes provide a tiny sampling of sources to give the reader a sense of documented subjects. One of the most comprehensive bibliographical sources on African-American culture and history is a six volume encyclopedia by the same name. See *ENCYCLOPEDIA OF AFRICAN-AMERICAN CULTURE AND HISTORY: THE BLACK EXPERIENCE IN THE AMERICAS* (Colin A. Palmer ed., 2d ed. 2006).

⁴² See, e.g., MARY FRANCES BERRY & JOHN W. BLASSINGAME, *LONG MEMORY: THE BLACK EXPERIENCE IN AMERICA* (1982); JOHN HOPE FRANKLIN & EVELYN BROOKS

fashion,⁴⁹ naming practices,⁵⁰ dance,⁵¹ adult and children's literature,⁵² humor,⁵³ sports,⁵⁴ games,⁵⁵ and gestures and other modes of communica-

HIGGINBOTHAM, FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS (9th ed. 2011); HENRY LOUIS GATES, JR. & CORNEL WEST, THE AFRICAN-AMERICAN CENTURY: HOW BLACK AMERICANS HAVE SHAPED OUR COUNTRY (2000).

⁴³ See, e.g., LISA J. GREEN, AFRICAN AMERICAN ENGLISH: A LINGUISTIC INTRODUCTION (2002); JOHN RUSSELL RICKFORD & RUSSELL JOHN RICKFORD, SPOKEN SOUL: THE STORY OF BLACK ENGLISH (2000); Susan A. Phillips, *Crip Walk, Villain Dance, Pueblo Stroll: The Embodiment of Writing in African American Gang Dance*, 82 ANTHROPOLOGICAL Q. 69 (2009); Barbara L. Speicher & Seane M. McMahon, *Some African-American Perspectives on Black English Vernacular*, 21 LANGUAGE SOC'Y 383 (1992).

⁴⁴ See, e.g., MELVA WILSON COSTEN, AFRICAN AMERICAN CHRISTIAN WORSHIP 32, 35–36, 75 (2d ed. 2007) (discussing practices in Black church services, such as “call and response” and “prophetic” speech); Richard J. Powell, *Art History and Black Memory: Toward a “Blues Aesthetic”*, in HISTORY AND MEMORY IN AFRICAN-AMERICAN CULTURE 228, 237 (Geneviève Fabre & Robert O'Meally eds., 1994) (discussing Black worship practices as depicted in African-American art).

⁴⁵ See, e.g., WILLIAM BARLOW, LOOKING UP AT DOWN: THE EMERGENCE OF BLUES CULTURE (1989); GLENN HINSON, FIRE IN MY BONES: TRANSCENDENCE AND THE HOLY SPIRIT IN AFRICAN AMERICAN GOSPEL (2000); BURTON W. PERETTI, THE CREATION OF JAZZ: MUSIC, RACE, AND CULTURE IN URBAN AMERICA (1992); CRAIG WERNER, A CHANGE IS GONNA COME: MUSIC, RACE & THE SOUL OF AMERICA (1999); Joanna Demers, *Sampling the 1970s in Hip-Hop*, 22 POPULAR MUSIC 41 (2003); Mark C. Gridley & Wallace Rave, *Towards Identification of African Traits in Early Jazz*, 12 BLACK PERS. MUSIC 44 (1984); I. Peter Ukpokodu, *African American Males in Dance, Music, Theater, and Film*, 569 ANNALS AM. ACAD. POL. SOC. SCI. 71 (2000).

⁴⁶ See, e.g., BLACKNESS IN COLOR: VISUAL EXPRESSIONS OF THE BLACK ARTS MOVEMENT (1960–PRESENT) (Herbert F. Johnson Museum of Art, Oct. 12–15, 2000); ROMARE BEARDEN & HARRY HENDERSON, A HISTORY OF AFRICAN-AMERICAN ARTISTS: FROM 1792 TO THE PRESENT (1993); Richard J. Powell, *supra* note 44; George C. Wright, *Harlem Renaissance: Art of Black America*, 77 J. AM. HIST. 253 (1990).

⁴⁷ See, e.g., HEIDI HAUGHY CUSICK, SOUL AND SPICE: AFRICAN COOKING IN THE AMERICAS (1995); JOYCE WHITE, SOUL FOOD: RECIPES AND REFLECTIONS FROM AFRICAN-AMERICAN CHURCHES (1998).

⁴⁸ See, e.g., AYANA D. BYRD & LORI L. THARPS, HAIR STORY: UNTANGLING THE ROOTS OF BLACK HAIR IN AMERICA (2001).

⁴⁹ See, e.g., AFRICAN AMERICAN DRESS AND ADORNMENT: A CULTURAL PERSPECTIVE (Barbara M. Starke et al., eds., 1990); SHANE WHITE & GRAHAM WHITE, STYLIN': AFRICAN AMERICAN EXPRESSIVE CULTURE FROM ITS BEGINNINGS TO THE ZOOT SUIT (1998).

⁵⁰ See, e.g., ELZA DINWIDDIE-BOYD, PROUD HERITAGE: 11001 NAMES FOR YOUR AFRICAN-AMERICAN BABY (1994); TERESA NORMAN, THE AFRICAN-AMERICAN BABY NAME BOOK (1998).

⁵¹ See, e.g., LYNNE FAULEY EMERY, BLACK DANCE: FROM 1619 TO TODAY (2d rev. ed. 1988); Thomas F. DeFrantz, *Composite Bodies of Dance: The Repertory of the Alvin Ailey American Dance Theater*, 57 THEATRE J. 659 (2005); Ukpokodu, *supra* note 45; Camille Yarbrough, *Black Dance in America: The Deep Root and the Strong Branch*, BLACK COLLEGIAN, Apr.–May 1981, at 10.

⁵² See, e.g., AFRICAN-AMERICAN POETRY: AN ANTHOLOGY, 1773–1927 (Joan R. Sherman ed., 1997); THE NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE (Henry Louis Gates, Jr. & Nellie Y. McKay eds., 1997); DONNA RAND ET AL., BLACK BOOKS GALORE!: GUIDE TO GREAT AFRICAN AMERICAN CHILDREN'S BOOKS (1998).

tion.⁵⁶ Black culture is reflected, reinforced, and transmitted through institutions such as the family,⁵⁷ church⁵⁸ or mosque,⁵⁹ newspapers and other media,⁶⁰ fraternal organizations and other associations,⁶¹ community centers,⁶² theaters,⁶³ museums,⁶⁴ and schools,⁶⁵ including historically black

⁵³ See, e.g., HOKUM: AN ANTHOLOGY OF AFRICAN-AMERICAN HUMOR (Paul Beatty ed., 2006); LAWRENCE W. LEVINE, BLACK CULTURE AND BLACK CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM (1977) (discussing “black laughter”); MEL WATKINS, ON THE REAL SIDE: A HISTORY OF AFRICAN AMERICAN COMEDY FROM SLAVERY TO CHRIS ROCK (1999); Speicher & McMahon, *supra* note 43, at 400.

⁵⁴ See, e.g., DAVID K. WIGGINS, GLORY BOUND: BLACK ATHLETES IN A WHITE AMERICA (1997); RUSSELL T. WIGGINTON, THE STRANGE CAREER OF THE BLACK ATHLETE: AFRICAN AMERICANS AND SPORTS (2006).

⁵⁵ See, e.g., Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401 (1993) (describing Tonk and Bid Whist, African-American versions of the popular card games Poker and Bridge, respectively).

⁵⁶ See, e.g., Benjamin G. Cooke, *Nonverbal Communication Among Afro-Americans: An Initial Classification*, in RAPPIN’ AND STYLIN’ OUT: COMMUNICATION IN URBAN BLACK AMERICA 32 (Thomas Kochman ed., 1972); Deric M. Greene & Felicia R. Stewart, *African American Students’ Reactions to Benjamin Cooke’s “Nonverbal Communication Among Afro-Americans: An Initial Classification”*, 42 J. BLACK STUD. 389 (2011); Yaw Owusu-Frempong, *Afrocentricity, the Aday Festival of the Akan, African American Festivals, and Intergenerational Communication*, 35 J. BLACK STUD. 730, 735 (2005).

⁵⁷ See, e.g., HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750–1925 (1976); THE BLACK FAMILY: ESSAYS AND STUDIES (Robert Staples ed., 1971); William M. Bannon, Jr. et al., *Cultural Pride Reinforcement as a Dimension of Racial Socialization Protective of Urban African American Child Anxiety*, 90 FAM. SOC’Y 79, 81 (2009).

⁵⁸ See, e.g., DAVID HARVEY, THROUGH THE STORM, THROUGH THE NIGHT: A HISTORY OF AFRICAN AMERICAN CHRISTIANITY (2011); C. ERIC LINCOLN & LAWRENCE H. MAMIYA, THE BLACK CHURCH IN THE AFRICAN AMERICAN EXPERIENCE (1990); Gerardo Marti, *The Religious Racial Integration of African Americans into Diverse Churches*, 49 J. SCI. STUD. RELIGION 201, 202 (2010).

⁵⁹ See, e.g., EDWARD E. CURTIS IV, ISLAM IN BLACK AMERICA: IDENTITY, LIBERATION, AND DIFFERENCE IN AFRICAN-AMERICAN ISLAMIC THOUGHT (2002).

⁶⁰ See, e.g., THE BLACK PRESS: NEW LITERARY AND HISTORICAL ESSAYS (Todd Vogel ed., 2001); ROLAND E. WOLSELEY, THE BLACK PRESS, U.S.A. (1971); Matthew Peeples, *Creating Political Authority: The Role of the Antebellum Black Press in the Political Mobilization and Empowerment of African Americans*, 34 JOURNALISM HIST. 76 (2008); Pepper Miller, *Finally, Black Media and Agencies Unite to Get Their Consumers a Fair Shake*, ADVERTISING AGE (Sept. 12, 2012), <http://adage.com/article/the-big-tent/finally-black-media-agencies-unite-consumers-a-fair-shake/237122/>.

⁶¹ See, e.g., THEDA SKOCPOL ET AL., WHAT A MIGHTY POWER WE CAN BE: AFRICAN AMERICAN FRATERNAL GROUPS AND THE STRUGGLE FOR RACIAL EQUALITY (2006); Joe W. Trotter, *African American Fraternal Associations in American History: An Introduction*, 28 SOC. SCI. HIST. 355 (2004).

⁶² See, e.g., DAVID T. BEITO, FROM MUTUAL AID TO THE WELFARE STATE: FRATERNAL SOCIETIES AND SOCIAL SERVICES, 1890–1967 (2000); Kimberly J. Shinew et al., *An African American Community Recreation Center: Participants’ and Volunteers’ Perceptions of Racism and Racial Identity*, 25 J. PARK & RECREATION ADMIN., Summer 2007, at 84.

⁶³ See, e.g., THE ROOTS OF AFRICAN AMERICAN DRAMA: AN ANTHOLOGY OF EARLY PLAYS, 1858–1938 (Leo Hamalian & James V. Hatch eds., 1991); THE THEATRE OF

colleges and universities.⁶⁶ Cultural traditions are reflected in rituals and special occasions, including weddings,⁶⁷ funerals,⁶⁸ holidays and community festivals,⁶⁹ and in family relationships and interactions between parents, children, and grandparents, and among extended family.⁷⁰ Many black people, especially among those whose American ancestry traces back to slavery, identify with a shared history of subjugation and a heritage of struggling for freedom,⁷¹ and share admiration for black forefathers and mothers who challenged oppression or who, despite that oppression, achieved greatly in a variety of fields and disciplines.⁷²

BLACK AMERICANS: A COLLECTION OF CRITICAL ESSAYS (Ettol Hill ed., 1987); Kimberly Rattley, *Using Playback Theatre to Explore African American Identity*, CENTER FOR PLAYBACK THEATRE (July 1997), available at http://www.playbacktheatre.org/wp-content/uploads/2010/04/Rattley_USIN%E2%80%A6.pdf.

⁶⁴ See, e.g., BLACK CULTURE CENTERS: POLITICS OF SURVIVAL AND IDENTITY 37 (Fred Lee Hord ed., 2005); Joy Ford Austin, *Their Face to the Rising Sun: Trends in the Development of Black Museums*, 60 MUSEUM NEWS, Jan.-Feb. 1982, at 28; Jocelyn Robinson-Hubbuch, *African-American Museums and the National Conversation on American Pluralism and Identity*, 19 PUB. HISTORIAN, Winter 1997, at 29.

⁶⁵ See, e.g., JAMES D. ANDERSON, THE EDUCATION OF BLACKS IN THE SOUTH, 1860–1935 (1988); VANESSA SIDDLE WALKER, THEIR HIGHEST POTENTIAL: AN AFRICAN AMERICAN SCHOOL COMMUNITY IN THE SEGREGATED SOUTH (1996); Seth Mydans, *Black Identity vs. Success and Seeming 'White'*, N.Y. TIMES, Apr. 25, 1990, at B9.

⁶⁶ See, e.g., JULIAN B. ROEBUCK & KOMANDURI S. MURTY, HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: THEIR PLACE IN AMERICAN HIGHER EDUCATION (1993); JUAN WILLIAMS & DWAYNE ASHLEY, I'LL FIND A WAY OR MAKE ONE: A TRIBUTE TO HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (2004); ANITA NAHAL ET AL., DIVERSITY AT HISTORICALLY BLACK COLLEGES AND UNIVERSITIES (HBCUs): A REPORT 6 (2011).

⁶⁷ See, e.g., HARRIETTE COLE, JUMPING THE BROOM: THE AFRICAN-AMERICAN WEDDING PLANNER (2d ed. 2004); FRANCES SMITH FOSTER, 'TIL DEATH OR DISTANCE DO US PART: LOVE AND MARRIAGE IN AFRICAN AMERICA (2010).

⁶⁸ See, e.g., SUZANNE E. SMITH, TO SERVE THE LIVING: FUNERAL DIRECTORS AND THE AFRICAN AMERICAN WAY OF DEATH (2010); THE LAST MILES OF THE WAY: AFRICAN-AMERICAN HOME GOING TRADITIONS, 1890–PRESENT (Elaine Nichols ed., 1989).

⁶⁹ See, e.g., KATHLYN GAY, AFRICAN-AMERICAN HOLIDAYS, FESTIVALS, AND CELEBRATIONS (2007); MAULANA KARENGA, KWANZAA: A CELEBRATION OF FAMILY, COMMUNITY AND CULTURE (1998); *The 25th Annual African-American Heritage Festival*, STAUNTON, VA., <http://www.staunton.va.us/community/african-american-heritage-festival/african-american-heritage-festival>.

⁷⁰ See, e.g., GUTMAN, *supra* note 57; THE BLACK FAMILY, *supra* note 57; Melvin N. Wilson, *Perceived Parental Activity of Mothers, Fathers, and Grandmothers in Three-Generational Black Families*, 12 J. BLACK PSYCHOL. 43 (1986).

⁷¹ See RON EYERMAN, CULTURAL TRAUMA: SLAVERY AND THE FORMATION OF AFRICAN AMERICAN IDENTITY (2001).

⁷² See Robert M. Sellers et al., *Multidimensional Model of Racial Identity: A Reconceptualization of African American Racial Identity*, 2 PERSONALITY & SOC. PSYCHOL. REV. 18, 21 (1998); Beverly J. Vandiver et al., *Cross's Nigrescence Model: From Theory to Scale to Theory*, 29 J. MULTICULTURAL COUNSELING & DEV. 174, 177 (2001).

Although Black culture is common to black communities across the United States (and the Americas, according to some anthropologists),⁷³ it includes a variety of Black subcultures defined by geography or “culture area,” and by other characteristics and experiences, such as religion, age, sex, sexual orientation, class, and geographical location. Young urban black males of South Side Chicago, for example, may share a subculture with each other that is different in many ways from that of older generations in Leimert Park, Los Angeles,⁷⁴ or from the deeply-rooted subcultures of St. Augustine Parish, New Orleans;⁷⁵ Harlem, New York City;⁷⁶ Norfolk, Virginia;⁷⁷ Atlanta, Georgia;⁷⁸ or rural Mississippi.⁷⁹

To what extent do black people in America identify with Black culture? Because culture is learned, not biologically determined, black people vary significantly in how much they identify with Black culture. Some may be deeply acculturated to the subculture of a particular Black community, sharing a significant range of distinctive traits with other members of that community. Many, who may or may not identify with a discrete Black subculture, identify with the larger Black culture developed during slavery and segregation that transcends particular locales and generations. Others, whose families immigrated to the United States more recently, may identify to some degree with both Black American culture and the culture of a different country. Others may not identify with Black culture at all.

Even among racially black people who do not identify with Black culture, a variety of black identities exist. Some may feel a sense of community or solidarity with other black people despite not identifying with Black culture.⁸⁰ This sense of group identification or empathy may tend to lead to similar views on issues that disproportionately affect black people, such as the desirability of civil rights laws or concerns over certain aspects of the criminal justice system. For other black people, the commonality of shared identity with other black people may be limited to identifying as black with certain connotations attached to that status de-

⁷³ See SIDNEY W. MINTZ & RICHARD PRICE, *THE BIRTH OF AFRICAN-AMERICAN CULTURE: AN ANTHROPOLOGICAL PERSPECTIVE* (Beacon Press 1992) (1976) (describing debate among anthropologists over whether the culture of people of African ancestry in North and South America includes cultural traits they retained from when their ancestors lived in Africa).

⁷⁴ See César López, *Lost in Translation: From Calle de los Negros to Nigger Alley to North Los Angeles Street to Place Erasure, Los Angeles, 1855–1951*, 94 S. CAL. Q. 25 (2012).

⁷⁵ See Trushna Parekh, *Of Armed Guards and Kente Cloth: Afro-Creole Catholics and the Battle for St. Augustine Parish in Post-Katrina New Orleans*, 61 AM. Q. 557 (2009).

⁷⁶ See Sarah A. Anderson, “The Place to Go”: *The 135th Street Branch Library and the Harlem Renaissance*, 73 LIBRARY Q. 383 (2003).

⁷⁷ See RUTH A. ROSE, *NORFOLK, VIRGINIA: BLACK AMERICAN SERIES* (Arcadia 2000).

⁷⁸ See Alexa Benson Henderson, *Heman E. Perry and Black Enterprise in Atlanta, 1908–1925*, 61 BUS. HIST. REV. 216 (1987).

⁷⁹ See CHALMERS ARCHER, JR., *GROWING UP BLACK IN RURAL MISSISSIPPI* (1992).

⁸⁰ See Gotanda, *supra* note 36, at 4 (observing that racial identity includes “culture, community, and consciousness”).

rived in part from exposure to American society. Yet others may not view other black people as having anything in common with them simply by virtue of being black. Indeed, black people vary in the extent to which they identify as racially, not just culturally, black. Some may identify strongly as black, whether or not with Black culture, others less so, while still others may not identify as black at all.

Although there is great diversity within Black culture, categorizing it and its subcultures as black is appropriate for two reasons. First, such cultures are significantly and positively associated with black people. Second, the Black subcultures and more general Black culture in which most black Americans participate are causally related to their race. That is not to say culture is biologically determined; it is not. It is to recognize that experiences and social interactions that black Americans often have in response to their race influence their cultural identity development, consciously and not. Nonetheless, although, I submit, the terms culture and subculture properly apply to the identities of many and probably most black Americans, the terms are less important than acknowledging the phenomenon that racially black people in America tend to share experiences and perspectives as black people that are not shared, at least not in the same way or to the same extent, by people of other races.

B. Explaining Resistance to Black Culture

If the evidence of Black culture is as plausible as I have suggested, why has the notion of Black culture been resisted, including by scholars? Some skeptics of Black culture may simply lack awareness. Dean Alexander Aleinikoff's observations two decades ago, although perhaps overbroad, likely have validity for some white people today:

Whites are only dimly aware of how blacks live or what it means to be black in America. Despite attempts to bring African-American history into the classroom, most whites do not understand the role of black slavery in the economic development of the United States, nor are they familiar with major trends in black political and social thought, or even the contributions of Frederick Douglass, W.E.B. Du Bois, and Malcolm X. Absence of knowledge is compounded by physical and social segregation. Blacks and whites rarely get to know each other in neighborhoods, schools, or churches; and interracial friendships remain surprisingly rare. As a result, most of what a white person in America knows about blacks is likely to have been learned from white family, friends, or the white-dominated media.⁸¹

I would add two observations to the foregoing explanation of ignorance of Black culture. First, such ignorance can also exist among black

⁸¹ T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1071-72 (1991) (footnotes omitted). In fact, an August 2013 Reuters poll found that presently 40% of white people only have friends who are white. Lindsay Dunsmuir, *Many Americans Have No Friends of Another Race: Poll*, REUTERS (Aug. 8, 2013), <http://www.reuters.com/article/2013/08/08/us-usa-poll-race-idUSBRE97704320130808>.

people to the extent that some may not live among a Black cultural community, and even some of those who do may not recognize the cultural milieu to which they are accustomed. Second, the ignorance can persist even for non-black people who interact with some black people in public life, such as in the workplace. Much of one's cultural traditions manifest more in personal settings, such as family celebrations, holidays, and worship practices. Furthermore, people from minority cultures will often suppress their cultural differences at work in order to fit in.⁸²

Why scholars on racial matters would fail to perceive Black culture is more difficult to explain. As it turns out, however, much of the scholarship cited as denying the existence of a distinct Black culture does not in fact deny cultural differences between blacks and whites. Unpacking the claims by ostensible skeptics of Black cultural distinctiveness requires elaboration to demonstrate the basis of my contrary interpretation. I will then conclude this section by describing some of the normative objections that some might have to the notion of Black culture.

The most extensive listing I found of sources on the existence of Black culture is provided by law professor Gary Peller, who cites six sources as rejecting Black cultural distinctiveness and twenty sources that accept it. Peller writes:

The idea that African Americans have created a distinct culture that is not reducible to class or Americanism has been a controversial notion in the fields of sociology and anthropology. For example, it was long the dominant view that African Americans have no ethnic culture, but instead "the Negro is only an American and nothing else. He has no values and culture to guard and protect."⁸³

The internal quotation is from *Beyond the Melting Pot* by sociologists Nathan Glazer and Daniel P. Moynihan,⁸⁴ which has also been cited elsewhere for disputing Black culture.⁸⁵ Although Glazer & Moynihan claim that blacks tend not to view themselves as a cultural or ethnic group, the authors assert that, in fact, "'black' defines not a race but a cultural group, in our terms, an ethnicity."⁸⁶ They further explain that, because

⁸² DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN POST-RACIAL AMERICA* (2013) (explaining that many black employees work hard to conduct themselves like white people in order to satisfy employers).

⁸³ Peller, *supra* note 35, at 792 n.71 (quoting GLAZER & MOYNIHAN, *supra* note 35, at 53).

⁸⁴ GLAZER & MOYNIHAN, *supra* note 35, at 53.

⁸⁵ See Coke, *supra* note 36, at 354 n.147 (citing NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROS, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* (2d ed. 1970). Reginald Leamon Robinson, *Dark Secrets: Obedience Training, Rigid Physical Violence, Black Parenting, and Reassessing the Origins of Instability in the Black Family Through a Re-Reading of Fox Butterfield's All God's Children*, 55 *How. L.J.* 393, 433 (2012) (distinguishing blacks from other ethnic groups).

⁸⁶ GLAZER & MOYNIHAN, *supra* note 85, at xxxix.

black people are an ethnic group, preferring to associate with other black people is different from the racial exclusion of blacks by whites:

“Blackness” in this country is not really and simply *blackness*, it is an American Negro cultural style. Blackness would be as unacceptable in this country as whiteness, if it were really only blackness. We can accept it because we recognize in blackness not simply the negative exclusion of white but the positive discrimination designed to strengthen and develop a distinctive group, with a distinctive history, defined interests, and identifiable styles in social life, culture, and politics.⁸⁷

Of the other five works that Peller cites for the proposition that blacks lack a distinct culture, not one claims that blacks are culturally identical to whites and, indeed, they all support the opposite proposition. Peller quotes sociologist Gunnar Myrdal’s seminal work, *An American Dilemma*, for the proposition that “[i]n practically all of its divergences, American Negro culture is not something independent of general American culture. It is a distorted development, or a pathological condition of American culture.”⁸⁸ First of all, on its face, this statement does not deny cultural difference but rather characterizes the difference as pathological. More importantly, the rest of Myrdal’s work comprises a prodigious catalogue of descriptions of aspects of Black life that are culturally distinct from whites, including the family, church, schools, businesses and professional organizations, residential communities, and the “Negro Press.” More pointedly, Myrdal expressly claims that “American Negro culture” is distinct from dominant American culture:

Here the [authors’] interest is in the fact that American Negro culture is somewhat different from the general American culture, that this difference is *generally created* by American conditions even if some of the *specific forms* are African in origin, and that the difference is significant for Negroes and for the relations between Negroes and whites.⁸⁹

....

[W]e shall sometimes be writing about Negro culture traits as though they applied to all Negroes. This is, of course, incorrect, and it angers many Negroes. There is a diversity of behavior patterns among Negroes, perhaps as great as in white American society with all its diverse national backgrounds. . . . We shall try to take account of the diversity, but we feel we are justified in writing of Negro culture traits because *average* Negro behavior differs from *average* white behavior.⁹⁰

⁸⁷ *Id.* at xxxix–xl (emphasis in original).

⁸⁸ Peller, *supra* note 35, at 792 n.71 (quoting MYRDAL, *supra* note 35, at 928) (internal quotation marks omitted).

⁸⁹ MYRDAL, *supra* note 35, at 930 (emphasis in original).

⁹⁰ *Id.* at 956–57 (emphasis in original).

Peller also quotes historian Kenneth Stampp's book, *The Peculiar Institution*, for the statement that "slaves were merely ordinary human beings . . . innately Negroes *are*, after all, only white men with black skins, nothing more, nothing less."⁹¹ First, Stampp's book focuses exclusively on slavery and makes no claim whatsoever about Black American cultural life after its abolition. More importantly, the book does not deny that slaves were culturally different from whites. The quoted language appears on the first page of the preface and merely explains that the author's operating assumption is that black slaves were not biologically different from whites. The book goes on to describe many ways in which slaves developed different lifestyle practices from whites, including mating and parenting practices, holiday celebrations, music, song, dance, and religion.⁹² It is true that Stampp refers to slaves as having lived in a "cultural chaos"⁹³ or "cultural void,"⁹⁴ compared to the master class, an unsurprising result of slave conditions, but he plainly and explicitly identifies aspects of slave life and practices that were distinct from that of whites.

Sociologist E. Franklin Frazier's *The Negro in the United States* probably includes statements most readily understood as denying Black culture. Although Peller does not quote Frazier, he cites pages that include the following passage:

Although the Negro is distinguished from other minorities by his physical characteristics, unlike other racial or cultural minorities the Negro is not distinguished by culture from the dominant group. Having completely lost his ancestral culture, he speaks the same language, practices the same religion, and accepts the same values and political ideals as the dominant group. Consequently, when one speaks of Negro culture in the United States, one can only refer to the folk culture of the rural Southern Negro or the traditional forms of behavior and values which have grown out of the Negro's social and mental isolation. Moreover, many of the elements of Negro culture which have grown out of his peculiar experience in America, such as music, have become a part of the general American culture.⁹⁵

Frazier's denial of Black culture, read in context, is not really a denial that any cultural differences exist between blacks and whites but rather a denial that Black culture is a culture independent from American culture, in contrast to cultures of a different country of origin. As sociologist Peter Rose explains:

⁹¹ Peller, *supra* note 35, at 792 n.71 (quoting STAMPP, *supra* note 35, at vii) (internal quotation marks omitted).

⁹² STAMPP, *supra* note 35, at 322–83.

⁹³ *Id.* at 340.

⁹⁴ *Id.* at 364.

⁹⁵ FRAZIER, *supra* note 35, at 680 (footnote omitted) (cited by Peller, *supra* note 34, at 792 n.71).

[Frazier] assumed, along with many commentators on the Black Experience (both black and white), that to have a culture, a unique culture, one must possess a distinctive language, a unique religion, and a national homeland. As Blauner suggests, this view may be appropriate for what anthropologists would call a holistic culture, complete with the institutions of an integrated social system. To be sure, black Americans did not possess this kind of culture. But they developed their own life styles and sensitivities, often combinations of lower-class and quasi-ethnic characteristics, characteristics not brought from abroad but developed through encounters with racist America.⁹⁶

Also, as the quoted passage from Frazier reveals, Frazier acknowledges differences in the cultural traditions of blacks as compared to whites, but characterizes them as a combination of folk culture and “traditional forms of behaviors and values” developed in response to segregation and oppression.⁹⁷ Elsewhere, moreover, Frazier refers to institutions such as the black church, schools, and fraternal organizations as repositories of “the cultural traditions of the Negro,”⁹⁸ and, despite progress in the economic status of blacks, Frazier observes their continued social and cultural separation from wider American society:

The increase in the size of the Negro middle class has enabled a large proportion of Negroes to conform to American middle class standards of living. This is reflected in their dress, housing, and in other aspects of their living. This also has brought about changes in the orientation of the Negro community to the wider American community. Nevertheless, the Negro community still remains the social world in which the majority of Negroes live. Although Negroes have increasingly adopted middle class standards, they still find in their own institutions, especially churches, and social clubs and other associations embodying cultural interests, the main means of self-expression.⁹⁹

Frazier ultimately anticipates the assimilation of the “Negro community” into the wider “American community,” but concludes that “[t]he complete dissolution of the Negro community appears to be in the distant future despite the fact that there are indications that the Negro is being integrated in certain phases of American society.”¹⁰⁰

The fifth work cited by Peller as denying distinctive Black culture is a collection of papers written in the early twentieth century by sociologist Robert Park, entitled *Race and Culture*.¹⁰¹ Peller does not quote from or

⁹⁶ PETER I. ROSE, *THEY AND WE: RACIAL AND ETHNIC RELATIONS IN THE UNITED STATES* 80 (2d ed. 1974).

⁹⁷ FRAZIER, *supra* note 35, at 680.

⁹⁸ *Id.* at 679.

⁹⁹ *Id.* at 693–94.

¹⁰⁰ *Id.* at 694.

¹⁰¹ Peller, *supra* note 35, at 792 n.71 (citing ROBERT EZRA PARK, *RACE AND CULTURE* (1950)).

cite to any pages in Park's work, and the volume is large and addresses many groups in addition to blacks. Searching for discussions of black people does, however, reveal explicit descriptions of blacks as having culturally distinct traits although, like Frazier, Park does not believe those traits derive from Africa.¹⁰² Park writes, for example, that "in spite of the fact that the Negro brought so little intellectual baggage with him, he has exhibited a rather marked ethnical individuality in the use and interpretation of the cultural materials to which he has had access."¹⁰³ Park also describes "black belt" Negroes as belonging to a "folk culture" in transition between primitive and sophisticated cultures, and identifies other folk cultures, including Mexicans of New Mexico, Indians of Virginia, Mennonites and Pennsylvania Dutch, and the "mountain whites of the Appalachians."¹⁰⁴ Park also distinguishes between the cultures of peasant blacks (who sing "spirituals") and urban blacks (who sing "blues"), while also acknowledging that the two communities are closely related and historically connected.¹⁰⁵

The sixth work cited by Peller for criticizing the notion of Black cultural distinctiveness is *Racial Critiques of Legal Academia* by legal scholar Randall Kennedy.¹⁰⁶ Kennedy's claim is not, however, that there is no Black culture but rather his complaint is that some critical race theorists ascribe to all minority scholars a distinctive minority perspective. Kennedy acknowledges that some minority professors may have had race-related experiences that influence their perspective but denies that all have. Moreover, in other work, Kennedy expressly refers to the "culture of African Americans," which, he claims, has been infected to some degree by homophobia and, in many African American communities, by "conservative Christian teachings" and "Afrocentric dogmas."¹⁰⁷

Published more recently than Peller's article, legal scholar Richard Ford, in his book *Racial Culture*, squarely criticizes universities that claim racial diversity in their student body promotes cultural diversity.¹⁰⁸ But Ford does not deny that race is associated with culture. Indeed, he states, "[t]o be sure most reasonable observers would agree that, in general, blacks are distinguished from non-blacks by some distinctive cultural practices. But those practices vary by region, generation, income, educa-

¹⁰² PARK, *supra* note 101, at 76–77 (describing Negro culture as product of hundreds of years in this country); *id.* at 267 (noting spiritual aspects of Negro culture, such as superstitions and magic, but positing that they emerged from conditions in America, not Africa).

¹⁰³ *Id.* at 269. Interestingly, to the extent Park questions whether the differences in beliefs and practices of black and white people are cultural in nature, his alternative explanation is that such differences are biologically caused. *See id.* at 264–65.

¹⁰⁴ *Id.* at 67–69.

¹⁰⁵ *Id.* at 68–69.

¹⁰⁶ Peller, *supra* note 35, at 792 n.71 (citing Kennedy, *supra* note 35, at 1778–1818).

¹⁰⁷ Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781, 798.

¹⁰⁸ FORD, *supra* note 16.

tion and host of other factors.”¹⁰⁹ Ford also observes, “[g]ranted, there are few black people who don’t exhibit *any* of the traits commonly associated with black culture. But most blacks only exhibit some of them, some of the time and with nuances and subtleties that even the most talented anthropologist could never fully grasp.”¹¹⁰ Ford’s complaint is with the consequences of universities prioritizing the association between race and culture above other reasons for seeking a racially diverse student body. He argues that universities’ race–culture emphasis encourages prospective and current students to define themselves in stereotypical ways, with harmful consequences for their self-confidence and freedom of choice.¹¹¹

Both Kennedy’s and Ford’s observations suggest that acknowledging an association between race and culture could be harmful even when such a relationship exists. One concern is that positing a Black culture might imply that race and culture are inherently connected such that all racially black people necessarily identify with Black culture. A second, related, concern is that acknowledging Black culture risks exaggerating the correlation between race and culture such that, even if culture is not biologically determined, all or virtually all black people can be assumed to identify with it. A third concern is that Black culture is monolithic such that, even if some black people don’t identify with it, those who do have identical cultural identities when, in fact, substantial cultural differences exist across different black communities and people. A fourth concern is that some people may define Black culture by reference to the destructive norms and behaviors in some impoverished, high crime, inner-city ghettos, especially the behaviors of young, urban, racially identified gangs. A fifth concern seems to be that recognizing Black culture would imply that blacks are less culturally American than whites.

These concerns do not contradict the existence of Black culture but rather reflect concerns about how the concept of Black culture may be misunderstood or misused. Race and culture are not inherently connected, not all black people identify with Black culture, and those who do vary greatly in how much and how strongly. Claims to the contrary reflect confusion about the non-biological nature of culture; about the extent to which some black people may not be exposed sufficiently to Black culture to learn it; and about the extent to which Black culture allows for significant variation among its adherents, especially given that Black culture comprises millions of people in thousands of communities defined by complex combinations of socioeconomic circumstances and subcultures.

As to equating Black culture with the destructive norms of black urban gangs, such an ascription is as flawed as defining white culture solely

¹⁰⁹ *Id.* at 72.

¹¹⁰ *Id.* at 73 (emphasis in original).

¹¹¹ *Id.* at 44–48, 53–57.

by reference to white supremacist groups¹¹² or equating Italian-American culture with the mafia.¹¹³ While such criminal organizations probably have a culture and arguably could be described as white or Italian-American subcultures, it would be grossly inaccurate to equate the cultural norms and behaviors of these very small groups with the much larger racial populations of which they are a part and with whom they may share other benign traits, such as language or religion. The same caution about painting an entire ethnic group with the traits of a deviant subgroup applies, of course, to other criminal organizations with racial or ethnic identifications, such as those that identify as Latino,¹¹⁴ Asian,¹¹⁵ tribal Indian,¹¹⁶ Jewish,¹¹⁷ Christian,¹¹⁸ or Muslim.¹¹⁹

Any suggestion that Black culture is less American than other American cultures misunderstands the relationship between American culture and its subcultures. American culture comprises many subcultures, including Black, Chinese-American, Mexican-American, Irish, Jewish, Southern Baptist, Mormon, Texan, New York, and Jersey Shore. These subcultures, although distinctive, are also American and share cultural traits common to American society. Black culture is no less American than the others. Indeed, Black culture is arguably one of the most original and long-standing American subcultures. Much of Black culture developed among people descended from slaves, before the waves of European immigration that gave birth to many white ethnic cultures in the United States. Furthermore, much of larger American culture, including its music, art, and literature, has been shaped by Black culture.

Although these concerns do not contradict the existence of Black culture, they are valid and worth taking seriously. I suspect, moreover, that many well-meaning people of all races resist the notion of Black culture because of such concerns rather than because they believe that no black families or communities have cultural identities related to being black. Perhaps, at least in certain contexts, the best way to minimize the risk of harm from recognizing an association between race and culture is

¹¹² See HOWARD L. BUSHART ET AL., *SOLDIERS OF GOD: WHITE SUPREMACISTS AND THEIR HOLY WAR FOR AMERICA* (1998).

¹¹³ See HUMBERT S. NELLI, *THE BUSINESS OF CRIME: ITALIANS AND SYNDICATE CRIME IN THE UNITED STATES* (1976).

¹¹⁴ TOM DIAZ, *NO BOUNDARIES: TRANSNATIONAL LATINO GANGS AND AMERICAN LAW ENFORCEMENT* (2009).

¹¹⁵ T. J. ENGLISH, *BORN TO KILL: THE RISE AND FALL OF AMERICA'S BLOODIEST ASIAN GANG* (2009).

¹¹⁶ ALINE K. MAJOR & ARLEN EGLEY, JR., OFFICE OF JUV. JUSTICE & DELINQUENCY PREVENTION, *2000 SURVEY OF YOUTH GANGS IN INDIAN COUNTRY* (2002).

¹¹⁷ ROBERT A. ROCKAWAY, *BUT—HE WAS GOOD TO HIS MOTHER: THE LIVES AND CRIMES OF JEWISH GANGSTERS* (1993).

¹¹⁸ ANN BURLEIN, *LIFT HIGH THE CROSS: WHERE WHITE SUPREMACY AND THE CHRISTIAN RIGHT CONVERGE* (2002).

¹¹⁹ JUDY BARSALOU, U.S. INST. OF PEACE, SPECIAL REPORT NO. 89, *ISLAMIC EXTREMISTS: HOW DO THEY MOBILIZE SUPPORT?* (2002).

to deny or ignore its existence. The next Part considers whether the Court, in assessing the benefits of racial diversity in higher education, should do just that.

III. LEGAL IMPLICATIONS OF RACE–CULTURE ASSOCIATION

If an association exists between black racial identity and Black culture, should the Court take it into account in evaluating the constitutionality of the University of Texas's race-based admission policy? Two reasons could justify not doing so, namely, that the race–culture association is not relevant to the legal analysis or because, even if it is, the potential harms of taking account of the association outweigh whatever benefits its consideration might provide. Although I direct my question toward the Court on the assumption it will re-take the *Fisher* case after the court of appeals' analysis on remand, my discussion is also directed to the court of appeals and to the University making arguments before it.

My principal claim is that the Court should take account of the association between race and culture in evaluating the University's use of race to achieve the benefits of a diverse student body. Doing so would benefit the Court's analysis by making it more informed and accurate. That analysis would involve two major questions. First, does the racial diversity that the University seeks in its student body advance a compelling interest? Second, is the University's means of using race as a factor in making individual admissions decisions necessary to advance that interest?

On whether racial diversity advances a compelling interest, the association between black race and culture is relevant and has positive implications for the University's case. It means that increasing the presence of black students would tend to increase the range of cultural identities in the student body. Although one could dispute that cultural diversity is beneficial in some contexts where cultural homogeneity may reduce transaction costs, the positive value of cultural diversity in higher education is highly plausible. A defining feature of culture is that it embodies distinctive beliefs, perspectives, and values, which tend, in turn, to affect how people evaluate issues empirically and morally.¹²⁰ Such influences should enrich intellectual inquiry in an academic setting, an interest Justice Powell recognized in *Bakke* when he prized the "robust exchange of ideas" promoted by bringing together people with a broad range of outlooks and viewpoints.¹²¹ The cultural diversity from racial diversity would also tend to produce the kinds of benefits the Court recognized in *Grutter*, such as breaking down stereotypes and improving cross-racial under-

¹²⁰ See ALI A. MAZRUI, *CULTURAL FORCES IN WORLD POLITICS* 7–8 (1990) (describing fundamental functions of culture, including influencing people's perception, evaluation, communication, and identity).

¹²¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)).

standing.¹²² Admitting black students, most of whom would likely identify to some degree with Black culture, could serve to inform other students of Black culture, its rich heritage, accomplishments, and manifestations. A critical mass of black students would also reveal the extent to which Black cultural identities vary among the students who identify with it. Racial diversity would thus promote cross-cultural, not just cross-racial, understanding. This understanding, moreover, could include that some black students may not identify with Black culture at all, an important lesson for students about the complex and non-essential relationship between race and culture.

Many of the benefits of black student representation mentioned thus far would accrue to all students or even primarily to non-black students. The Court has also approved some benefits that accrue primarily to the minority students themselves. In *Grutter*, for example, the Court recognized the law school's interest in preventing minority students from feeling like spokespersons for their race or experiencing racial isolation, risks that a sufficient critical mass of minority students would help to minimize.¹²³ Recognizing the association between race and Black culture suggests additional benefits for black students. By including a critical mass of students who share a cultural identity, racial diversity can help to reduce a sense of cultural, not just racial, isolation. Moreover, while the diversity of viewpoints among black students revealed by a critical mass would still minimize the risk that any would feel like racial or cultural spokespersons, the University's acknowledgement of Black culture would lend support to those black students who wish to attribute their perspective on a given issue to their cultural background, a background the University expressly values.

Other benefits may be anticipated after students graduate and enter the workforce. Adults who spent several years in a culturally diverse university will likely have gained a greater appreciation and more accurate understanding of the cultural differences associated with other races. Those who become employers or supervisors can draw on that experience. To the extent that some employers discriminate based on employee behavior perceived as too ethnic rather than on the employee's race alone, a greater comfort level among employers with the cultural styles associated with different races may reduce such discrimination and reduce the stress experienced by minority employees of needing to "perform" white.¹²⁴

¹²² *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003).

¹²³ *See id.* at 319.

¹²⁴ *See* Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260–62, 1267–69 (2000) (arguing that organizational "outsiders" like minority and women employees experience discriminatory pressures to behave or "perform" like "insiders," defined for argument within the article as white males); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1172–94 (2004) (arguing that minority employees are discriminated against for failing to "perform" white in appearance and grooming styles).

A more general, societal benefit that could follow from increasing the presence of black and other minority cultures in a student body through racial diversity is—integration. A university campus is the kind of setting in which interactions among students of different races and cultures can promote mutual respect and understanding, thereby decreasing a tendency to interact only with one’s own racial or cultural group on campus or later in life. Moreover, through social interaction, the cultural differences between racial groups can be softened to the extent cultural exchange tends to cause cultures to influence one another in ways that reduce differences between them.

The extent to which the Court would find the foregoing benefits plausible and compelling is, of course, unknown. However, the proposition that cultural diversity, including Black culture, would benefit the education of University of Texas students seems to be the kind of judgment to which the Court would likely defer. In fact, the Court in *Fisher* assumed the appropriateness of deferring to the University’s judgment regarding the benefits of diversity even while it was faulting the lower court for deferring to the University’s judgment that using race as an admissions factor was necessary to achieve those benefits.¹²⁵

If the Court were to accept that the benefits, including cultural diversity, produced by racial diversity are compelling, the next question would be whether the University’s means of using race as a factor in admissions is necessary to achieve those benefits. This question turns on two subsidiary questions. First, is increasing the presence of black students necessary to increase the presence of students who identify with Black culture? If Black cultural diversity in the student body could be equally achieved without increasing the presence of black students, then using race as an admissions factor would seemingly be unnecessary. The second question regarding the means, even assuming increasing the presence of black students is necessary, is whether using race as an admissions factor is necessary to increase the presence of black students? If race-neutral admissions standards, such as diversity essays, socioeconomic status, or graduating in the top 10% of one’s high school class would produce a similar presence of black students who identify with Black culture, then the necessity of using race would be difficult to justify.

Regarding whether black student diversity is necessary to promote Black cultural diversity, we can see the relevance of the association between race and culture. Although Black cultural identity is not biologically determined, it is socially caused in a way that makes the association between black racial identity and culture virtually impossible to replicate without the presence of black people. Although some black people may not identify with Black culture and it is certainly possible that some white people do,¹²⁶ the race–culture overlap makes the meaningful presence of

¹²⁵ *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013).

¹²⁶ Understanding that Black culture is learned, not biologically determined, suggests that white and other not-black people brought up in or otherwise

black students necessary, as a practical matter, to achieve a meaningful presence of Black culture in the student body. Substituting black students with white students, even if the white students have similar socioeconomic backgrounds, would not be the same.

The second question related to the means is whether the use of race in making individual admissions decisions is necessary to achieve Black cultural diversity. Simply recognizing an association between race and culture provides imperfect support for the necessity of using race in admissions decisions. If race-neutral policies, such as the University's Top Ten Percent plan, could create an equal level of black racial diversity,¹²⁷ then the use of race would seemingly be unnecessary to achieve a similar level of Black cultural diversity.

I make a few observations in response, beginning with the Top Ten Percent plan since that is the alternative program most emphasized by the plaintiff in *Fisher* as making the University's use of race unnecessary. First, as the Court recognized in *Grutter*, the Top Ten Percent plan is less individualized and therefore undermines the University's ability to obtain diversity in a broader sense.¹²⁸ Second, the relationship between race and culture discussed in the previous Part suggests that, even if a similar level of black racial diversity could be achieved through race-neutral policies, the range of cultural diversity would not necessarily be the same. Most of the black and Latino students admitted through the Top Ten Percent plan live in communities in which their race predominates. Indeed, one of the rationales, and criticisms, of the Top Ten Percent plan is that it promotes racial diversity by taking advantage of the fact that many school districts in Texas are racially identifiable. The University's use of race at issue in *Fisher*, by contrast, is used to admit black and Latino students outside the top 10% of their class, many of whom live in predominantly white school districts.¹²⁹ A black applicant who grew up in an integrated or predominantly white environment is likely to have a Black cultural identity that differs from the Black cultural identity of a black student who grew up in a predominantly black environment. It may be, for ex-

significantly exposed to Black culture could be acculturated to it. See Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CALIF. L. REV. 887, 950 & n.222 (1996) (observing that "nested within the ethnic categorization of African American are a plethora of people of all races, that is, blacks, mestizos, mulattos, and, surprisingly, whites").

¹²⁷ This assumes that the race-neutral policy will produce a similar level of racial diversity. As some scholars have argued, and as the University claims in *Fisher*, race-neutral policies tend to be less effective at producing racial diversity. See, e.g., *Fisher*, 133 S. Ct. at 2416. If so, then they would be less likely to produce Black cultural diversity.

¹²⁸ See *Grutter*, 539 U.S. at 340 (explaining that percentage-based admissions plans, including that of Texas, are probably an inadequate substitute for taking account of race because "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university").

¹²⁹ See *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (noting the highly segregated nature of Texas high schools).

ample, that the former is less likely to identify strongly with Black culture because her neighbors and classmates are less likely to identify with Black culture. Her cultural experience is also more likely to include family backgrounds with higher education and income than those of predominantly black school districts given that predominantly white school districts are statistically more likely to be well educated and affluent.¹³⁰ That is not to say that the cultural identity of either black student is better than the other, but to suggest that they are likely to differ more than the cultural identity of two black students who both hail from a predominantly black school district. If this is true, then increasing the University's reliance on the Top Ten Percent plan,¹³¹ even if it achieved a similar percentage of black students, would not produce the same degree of Black cultural diversity within the student body. By increasing the degree of variation among black students' cultural identities through the use of race as an admissions factor, the University is likely to gain additional benefits from the presence of black students on campus, such as, for example, by increasing the range of viewpoints that contribute to intellectual exchange and by helping to break down racial stereotypes by demonstrating a greater variety of cultural perspectives among black students.

Another approach the University could take, without taking account of race, would be to rely on economic disadvantage as a favorable admissions factor. First, for reasons discussed previously, relying on economic disadvantage would be inadequate at achieving a meaningful level of Black cultural diversity unless it also achieved a meaningful level of black racial diversity. Second, even if economic disadvantage could be used in a way that produced comparable racial diversity, it is plausible to believe it would suffer from similar problems I identified with the Top Ten Percent plan, namely, it would likely over-select for black students of low socioeconomic status and, therefore, under-select for black students whose Black cultural identity includes the experience of being middle class and of living in a racially integrated community. If the justification for affirmative action is diversity rather than compensating for economic disadvantage,

¹³⁰ Admissions data for the 2008 entering class reveals that students admitted through the individualized process that includes race as a factor are more likely to have attended racially integrated high schools and to come from college educated and socioeconomically advantaged families than are students admitted through the Top Ten Percent plan. See UNIV. OF TEXAS, OFFICE OF ADMISSIONS, STUDENT PROFILE: ADMITTED FRESHMAN CLASS OF 2008, available at <http://www.utexas.edu/student/admissions/research/AdmittedFreshmenProfile-2008.pdf>.

¹³¹ Increasing reliance on the Top Ten Percent plan could be achieved by raising the recent 75% cap on the percentage of the entering freshman class admitted to the University of Texas through this program and/or by intensifying recruitment of those offered admission through the plan to reduce the number of those applicants who choose to matriculate elsewhere. See Brief for Petitioner at 42 n.10, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 1882759. Another option could be to increase the percentage taken from the top of high school graduating classes, for example, to 15%. This would likely increase racial diversity while reducing, possibly to zero, the number of students admitted through a more individualized process.

then reliance on economic status to the exclusion of race may be less effective than permitting race to be used in some cases to admit black applicants who are not economically disadvantaged.

With respect to diversity essays, the question is whether Black cultural diversity could be obtained through questions on applications that ask students to describe their cultural background. This seems like a promising way to identify people with Black cultural identities. It also may, however, have potential drawbacks compared to a process that also allows students to indicate their race on an application. First, if the question merely asks to describe one's cultural background in a general sense, it may fail to select applicants who do identify with Black culture but who prioritize other aspects of their cultural background, such as growing up in a military family or on a farm. These experiences would certainly be useful to an academic environment. Without knowing the race of applicants, however, the University may pass over some of these black applicants if they already admitted students with these backgrounds without realizing that those already admitted were white. A black applicant who lives in a military family or on a farm may have a different cultural identity because of his race than a white applicant whose family has a similar occupation, a difference that would not be recognized if race could not be indicated on an application.

This problem might be ameliorated by the kind of essay suggested by some scholars, namely, one that explicitly asks applicants to identify their racial or ancestral heritage.¹³² Such a question would presumably minimize the risk that someone with a Black cultural heritage would fail to mention it in their essay even if they would prefer to emphasize other aspects of their background. A downside to this approach is that it would overlook black applicants who do not identify with Black culture, are not aware that they do, or, for the kind of normative reasons mentioned previously, do not wish to think of themselves as having a Black cultural identity. A virtue of simply asking people to indicate their race instead of or in addition to expressing their cultural background through an essay is that it is more likely to admit a greater range of black students, including those who would not describe their backgrounds as culturally Black. Demonstrating to students that black people's cultural identities vary significantly, including people who do not identify as culturally Black, would help to break down stereotypes more than an admissions process that over-selects for blacks who do claim a culturally Black identity.

If the arguments set forth in this and the previous Part are persuasive, the Court might still refuse, on normative grounds, to recognize a race-culture association in evaluating the legality of the University's admissions policy. Even if the Court were convinced that Black culture exists, that it is associated with racially black Americans, and that the cultural diversity promoted by the presence of black students on campus is valuable, the Court might have concerns with the University's pursuing such diversity

¹³² See Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 *DENV. U. L. REV.* 807, 828 (2011).

through race-based decision-making. As Richard Ford has argued, the overt use of race to select students presumed to be culturally different may have harmful effects notwithstanding the reality of Black culture. Recall also the concerns mentioned at the conclusion of the previous Part about how people may misuse a race–culture association. Some may essentialize such an association by claiming that, whether from biological or social causes, all black people are culturally Black; others might assume that Black culture is identical for all its members; some might equate Black culture with criminality or oppositional attitudes of certain Black sub-groups; while still others might believe or assert that Black culture, if distinctive, is less American than the cultural identities of whites.

These concerns are legitimate and resonate with the concerns over stereotyping that the Court has expressed when rejecting uses of race premised on difference in perspective, such as in the jury selection and electoral districting cases. How significant these concerns are, whether they can be minimized without rejecting a race–culture association, and whether their potential for harm outweighs the benefits of pursuing cultural diversity through racial diversity are difficult questions that I will not venture to resolve here. I will, however, make two claims.

First, to reiterate my principal claim, resolving these questions is best accomplished candidly. If the Court believes that using race in admissions based on recognizing its association with culture would pose an unacceptable risk of harm, it should say so. Resolving these questions satisfactorily is difficult indeed, but it can best be approached by forthrightly taking account of empirical realities. Strict scrutiny is premised on the undesirability of racial classifications, but it is not intended to ignore racial differences that might justify the use of such classifications. To the contrary, it demands that claims of racial difference be reviewed carefully, taking account of the context in which a racial classification is used. As the Court explained in *Grutter*:

In *Adarand Constructors, Inc. v. Peña*, we made clear that strict scrutiny must take “‘relevant differences’ into account.” Indeed, as we explained, that is its “fundamental purpose.” Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.¹³³

My second claim is that the context of student-body diversity in higher education arguably counsels greater tolerance for acknowledging a race–culture association than the contexts of jury selection and electoral districting. In jury selection, when a litigant strikes a juror based on race, she assumes the person’s race predicts a bias in favor of the other party. Moreover, juries are an institution in which people are expected to put aside their predilections as much as possible, which could be undermined by al-

¹³³ *Grutter*, 539 U.S. at 327 (internal citations omitted).

lowing selection to proceed based on a contrary assumption. In electoral districting, the use of race to draw district lines may, as the Court believes, encourage elected officials to prioritize the interests of a racial constituency. In the academic environment, by contrast, admitting students based on a race–culture association does not mean the university assumes the students will have a bias in any particular direction, only that, in the aggregate, the range of perspectives will be larger albeit in unpredictable ways. Nor are students expected to put aside their predispositions in the way jurors are. To the contrary, those predispositions are expected to contribute to—and be challenged by—the robust exchange of ideas with other students and faculty holding different perspectives. Nor do college students have voting constituencies entitled to be represented equally without regard to race. College students represent themselves.

CONCLUSION

If what I have argued about the association between race and culture is persuasive, or at least plausible, then it behooves the University of Texas and the Court to explicitly acknowledge and take that association seriously. From the University’s perspective, it would strengthen its claim that using race to increase the percentage of black students promotes educational benefits, including but not limited to Black cultural diversity. From the Court’s perspective, it would lead to a more informed evaluation of the University’s policy in a context in which competing interests require careful and candid consideration of empirical and normative claims.

What is at stake is the kind of society America is, what it is striving for, and how to bridge the distance between them. In *Brown v. Board of Education*, the Court recognized the importance of education as the “very foundation of good citizenship” and as “a principal instrument in awakening the child to cultural values.”¹³⁴ Which cultural values? America increasingly comprises many cultures and many such cultures are associated with race. Building a foundation for good citizenship requires awakening students to the full range of American cultures which, in turn, requires exposing students to the full range of American races.

¹³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).