



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

---

Volume 100 | Number 3

Article 4

---

3-1-2022

## The Unbearable Emptiness of Formalism: Autonomy, Equality, and the Future of Affirmative Action

Rachel F. Moran  
moran@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

---

### Recommended Citation

Rachel F. Moran, *The Unbearable Emptiness of Formalism: Autonomy, Equality, and the Future of Affirmative Action*, 100 N.C. L. REV. 785 (2022).

Available at: <https://scholarship.law.unc.edu/nclr/vol100/iss3/4>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

## THE UNBEARABLE EMPTINESS OF FORMALISM: AUTONOMY, EQUALITY, AND THE FUTURE OF AFFIRMATIVE ACTION\*

RACHEL F. MORAN\*\*

*Debates over affirmative action in higher education generally focus on equality interests under the Fourteenth Amendment but ignore liberty interests under the First Amendment. That tendency persists, even though the academic freedom to enroll a diverse student body has allowed colleges and universities to defend race-conscious admissions programs against legal challenges for decades. Today, the rise of formalism in judicial interpretation poses new perils for these programs. Justice Powell's seminal decision in Regents of the University of California v. Bakke was a pragmatic compromise that used diversity to temper the polarized debate over equality that sharply divided the Court. In contrast to Justice Powell's emphasis on the unique nature of higher education, formalist approaches rely on the plain meaning of a statute or constitutional provision. Shorn of context and values, textual interpretation leaves the Justices susceptible to risks of false equivalencies and missed analogies. False equivalencies treat categories as the same when they are in fact different, while missed analogies treat categories as different when they are the same.*

*Both dangers can infect affirmative action jurisprudence. Under the First Amendment, the Justices have failed to recognize the importance of both sectarian organizations and institutions of higher education in preserving the conditions for robust discourse. As a result, the Court has grown increasingly deferential to religious freedom but more skeptical of the autonomy of colleges and universities to weigh race in admissions. That missed analogy in turn is compounded by a false equivalency, one that inheres in formal colorblindness. Under the Fourteenth Amendment, the Justices have treated all considerations of race as similarly pernicious, equating acts that discriminate against*

---

\* © 2022 Rachel F. Moran.

\*\* Distinguished Professor of Law, UC Irvine School of Law. I would like to thank Professors John Boger and Theodore Shaw as well as the *North Carolina Law Review* for inviting me to participate in this symposium. I dedicate this Article to the memory of the late Walter Dellinger, who moderated our panel with his usual elegance and wit. I also appreciate helpful comments that I received from Jonathan Glater and Mark Yudof on an earlier draft. I benefited significantly from a faculty workshop at Texas A&M University School of Law as well as generous comments and suggestions shared afterwards by Michael Green, Luz Herrera, Brian N. Larson, Angela Morrison, Guillermo Garcia Sanchez, and Nancy Welsh. I also received insightful feedback from Lauren Boone and other members of the *Law Review's* editorial team. Finally, I am grateful to my research assistant Mengyuan Xiao and to law librarian Matthew Flyntz for their excellent assistance in gathering materials for this Article.

*historically underrepresented groups with those that seek to include them. Taken together, declining deference for colleges and universities and an entrenched commitment to a colorblind Constitution could spell the end for affirmative action. Despite these failings of formalism, however, I will show that these programs can still survive exacting judicial scrutiny.*

INTRODUCTION .....	786
I. <i>BAKKE'S LAW: THE FIRST AMENDMENT MEETS EQUAL PROTECTION</i> .....	789
A. <i>Bakke and the Origins of the Diversity Rationale</i> .....	790
B. <i>Post-Bakke Decisions and the Development of the Diversity Rationale</i> .....	794
II. THE UNBEARABLE EMPTINESS OF FORMALISM AND THE PROBLEMS POSED FOR THE FIRST AND FOURTEENTH AMENDMENTS .....	798
A. <i>Formalism's Failings: False Equivalencies and Missed Analogies</i> .....	798
B. <i>A Closer Look at Formalism's Failings in First Amendment Jurisprudence</i> .....	801
1. The Danger of False Equivalencies.....	804
2. The Danger of Missed Analogies.....	808
C. <i>A Closer Look at Formalism's Failings in Equal Protection Jurisprudence</i> .....	815
1. The Danger of False Equivalencies.....	816
2. The Danger of Missed Analogies.....	820
III. FORMALISM AND THE FUTURE OF AFFIRMATIVE ACTION ...	825
CONCLUSION .....	830

## INTRODUCTION

In the public imagination, the U.S. Supreme Court's decisions about affirmative action in higher education are all about racial equality.<sup>1</sup> As a result, the debate naturally focuses on the propriety of the Court's commitment to colorblind government decision-making under the Fourteenth Amendment.<sup>2</sup>

1. Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. 2569, 2571, 2598–99, 2602–08 (2019).

2. This debate has persisted unabated for decades. See, e.g., David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 99–100, 114–15 (arguing that colorblindness is unattainable because race is a relevant characteristic); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 316–24 (1994) (critiquing colorblindness as an evasion of “racial history and the current racial disparities in society”); Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 123, 125–27 (2006) (criticizing the ideology of colorblindness as thwarting goals of promoting access and equality).

The critiques come from two directions. For some, the Justices have strayed from their principles by permitting race to be one factor in a holistic admissions process based on a nebulous conception of diversity.<sup>3</sup> For others, the Justices have fallen short because they restrict the use of affirmative action to combat ongoing racial subordination, instead relying on the far less convincing notion of promoting diversity.<sup>4</sup> Whatever the ideological perspective, then, the emphasis is on the central importance of equal treatment, and diversity is either a thinly camouflaged or watered-down rationale.

Given these preoccupations, it should come as no surprise that commentators have largely neglected diversity's roots in a First Amendment concept of academic freedom.<sup>5</sup> Even so, that liberty interest has kept race-based decision-making intact in colleges and universities, even as the Court struck down affirmative action in government employment, licensing, and contracting.<sup>6</sup> For that reason alone, the principle of academic freedom deserves more attention than it has received. Recent jurisprudential developments reinforce the urgency of evaluating this liberty interest with care. The Justices have been steadily bolstering the institutional autonomy of other corporate actors, particularly with respect to religious liberties.<sup>7</sup> Yet, there has been little consideration of whether this muscular approach to the First Amendment has implications for affirmative action in higher education. That inattention is especially unfortunate because the Free Exercise Clause is increasingly being used as a shield against enforcement of nondiscrimination mandates.

To remedy that neglect, this Article explores how affirmative action in higher education came to be framed as a dispute over institutional autonomy as well as equality, how the rise of formalism in judicial interpretation poses new challenges to that framework, and how the constitutionality of these programs can nonetheless be preserved. In Part I, I look at how the Court transformed a dispute over the role of race and equal protection in higher education into a case

3. *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2220, 2222–24 (2016) (Alito, J., dissenting).

4. See, e.g., Adalberto Aguirre, Jr. & Ruben Martinez, *The Diversity Rationale in Higher Education: An Overview of the Contemporary Legal Context*, 30 SOC. JUST. 138, 149 (2003) (“Remedying the effects of past discrimination is the nexus for discussing diversity and affirmative action initiatives in higher education.”); Theodore R. Johnson, *How Conservatives Turned the ‘Color-Blind Constitution’ Against Racial Progress*, ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/color-blind-constitution/602221/> [<https://perma.cc/DBM2-723M> (dark archive)].

5. Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461, 464–66 (2005) [hereinafter Horwitz, *Grutter’s First Amendment*].

6. Moran, *supra* note 1, at 2571, 2608–09.

7. See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). See generally Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79, 115–24 (2009) [hereinafter Horwitz, *Churches as First Amendment Institutions*] (arguing that churches should enjoy substantial autonomy in a separate sphere of sovereignty).

about academic freedom and the First Amendment. As I will show, the Court was fully cognizant that this jurisprudential move had implications for other areas of the law, most notably corporate free speech rights.<sup>8</sup> In fact, the embrace of institutional autonomy was deliberate, permitting affirmative action programs to survive while bolstering liberty claims by other organizations. Ever since, the programs' legitimacy has turned on deference to academic administrators' freedom to enroll a diverse student body, even if they must consider race to do so. That pragmatic compromise between liberty and equality interests lies at the heart of the Court's affirmative action jurisprudence.

In Part II, I turn to the powerful challenges that the rise of formalism poses to this diversity framework. Constitutional law scholar Cass R. Sunstein has already predicted that the Court's formalist approach will sound the death knell for race-conscious admissions programs. He believes that because the Justices increasingly "emphasize[] the text, not the intentions" when evaluating nondiscrimination provisions, "affirmative action programs are doomed, because they plainly discriminate because of race."<sup>9</sup> In response to this gloomy forecast, I carefully analyze formalism's implications for institutional autonomy under the First Amendment and racial equality under the Fourteenth Amendment. As I demonstrate, in both doctrinal areas, the Court has had jurisprudential blind spots that arise when the Justices rely on narrow factual analogies and ignore the values that animate core constitutional protections. In some instances, the Court has used false equivalencies that treat categories as the same when they are in truth different. The most commonplace example is a refusal to distinguish between the racial subordination of non-Whites and reverse discrimination against Whites. In other cases, the Court has missed analogies by treating categories as different when they actually are the same. The most prominent instance is the Court's increasing skepticism of academic autonomy and growing deference to religious organizations, even when both play a critical part in advancing the expression and exchange of ideas.

In Part III, after exploring formalism's failings under the First and Fourteenth Amendments, I consider how scholars and advocates can use this analysis to preserve affirmative action in higher education. For example, the Court has been increasingly willing to challenge the pedagogical expertise of colleges and universities, a stance that contrasts markedly with the highly deferential treatment that religious organizations receive.<sup>10</sup> It is essential to

---

8. Moran, *supra* note 1, at 2591–94.

9. Cass R. Sunstein, *Gorsuch Paves Way for End of Affirmative Action*, BLOOMBERG NEWS (June 17, 2020), <https://news.bloomberglaw.com/us-law-week/opinion-gorsuch-paves-way-for-end-of-affirmative-action-cass-sunstein> [<https://perma.cc/PP7H-8X4R> (dark archive)].

10. Compare *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 297–99 (2013), with *Hobby Lobby Stores, Inc.*, 573 U.S. at 683–85 (demonstrating the Court's deferential treatment of religious organizations).

identify this as a missed analogy that diminishes claims to self-determination in higher education, particularly when it comes to race, diversity, and the learning process. At the same time, the danger to affirmative action is heightened because in cases bolstering the autonomy of religious organizations, the Court has made clear that racial discrimination is *sui generis* and highly invidious, triggering the most searching scrutiny.<sup>11</sup> Indeed, racial discrimination is so pernicious that even religious liberty claims typically cannot overcome the need to eradicate it. Those decisions make it more likely that the consideration of race in higher education will be deemed a wrong that academic freedom, a comparatively weaker autonomy claim, cannot countermand. That result will be justified by a false equivalency, one that treats programs designed to level the playing field as fungible with actions designed to exclude racial minorities. If the failings of formalism are left unaddressed, this approach to judicial interpretation could deliver a double whammy: the missed analogy that weakens academic freedom will combine with the false equivalency of racial classifications to deal a fatal blow to affirmative action. However, this outcome is not inevitable. As I explain, the Court has long recognized distinctions between invidious uses of race to exclude students from a college program and pedagogical uses to diversify the student body. Those invidious uses of race resemble the discrimination that the Court has gone out of its way to condemn in religious liberty cases. So long as academic freedom remains a constitutionally protected interest, however, there is no reason to strike down affirmative action as a pedagogical strategy simply because the Court is revisiting the right of religious institutions to discriminate.

#### I. *BAKKE'S LAW*: THE FIRST AMENDMENT MEETS EQUAL PROTECTION

To appreciate the perils that formalism creates for affirmative action in higher education, it is essential to explore the roots of the diversity rationale first set forth in *Regents of the University of California v. Bakke*.<sup>12</sup> That decision made the First Amendment interest in academic freedom a critical bulwark against attacks on the use of race in admissions. Recognition of this interest enabled college and university administrators to enroll a diverse student body, even if this meant deviating from a strict principle of colorblindness. Over the years, the Court has continued to embrace this deferential approach and deepen its understanding of the underlying purposes of diversity. Recently, however,

---

11. See, e.g., *Hobby Lobby Stores, Inc.*, 573 U.S. at 733; see also James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. C.R.-C.L. L. REV. 99, 120–21 (2015) (noting that scholars emphasize “the singular place of racial discrimination in American history” to deny protection from religious exemptions to gays and lesbians).

12. 438 U.S. 265 (1978).

the Justices have expressed increasing doubt about administrators' discretionary judgments, and attacks on affirmative action in admissions persist unabated.

A. *Bakke and the Origins of the Diversity Rationale*

Issues of racial equality dominate today's debates about affirmative action in higher education. That framework is hardly surprising, given that the litigation leading up to the Court's pathbreaking decision in *Bakke* focused on permissible uses of race in admissions under Title VI and the Equal Protection Clause.<sup>13</sup> Despite that preoccupation with equality, Justice Lewis Powell's pivotal opinion ultimately relied on an institutional autonomy interest under the First Amendment—academic freedom—to preserve some role for race in composing a student body.<sup>14</sup> To understand contemporary challenges to affirmative action, it is imperative to understand how interests in liberty and equality have intersected in *Bakke* and later Supreme Court decisions.

When the newly created medical school at the University of California at Davis rejected Allan Bakke's application, he framed his lawsuit wholly in terms of race.<sup>15</sup> U.C. Davis had a special admissions program that set aside sixteen percent of the seats in the entering class for students from disadvantaged backgrounds.<sup>16</sup> As Bakke alleged in his complaint, he "was duly qualified for admission to Medical School and the sole reason his application was rejected was on account of his race, to-wit, Caucasian or white, and not for reasons applicable to persons of every race."<sup>17</sup> The lower courts accepted this framing. A California superior court judge struck down the special admissions program as a form of impermissible racial discrimination but doubted whether the medical school would have admitted Bakke even in the absence of the set-aside.<sup>18</sup> The California Supreme Court affirmed in a five-to-one decision, finding that the program's goals were laudable but that the "overemphasis on race"<sup>19</sup> produced divisive harms that outweighed any societal benefits. As Justice Stanley Mosk wrote for the majority, "the principle that the Constitution sanctions racial discrimination against a race—any race—is a dangerous concept fraught with potential for misuse in situations which involve far less laudable

---

13. *See id.* at 270–72.

14. *See id.* at 312.

15. Complaint for Mandatory Injunctive & Declaratory Relief at 2–3, *Bakke v. Regents of the Univ. of Cal.*, No. 31287 (Sup. Ct. Cal. 1974) (describing "separate segregated admissions procedures with separate standards for admissions," which "resulted in the admission of minority applicants less qualified than plaintiff and other non-minority applicants who were therefore rejected").

16. *Id.*

17. *Id.*

18. *See Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1156 (Cal. 1976) (en banc), *aff'd in part, rev'd in part*, 438 U.S. 265 (1978) (describing lower court opinion).

19. *Id.* at 1171–72.

objectives than are manifest in the present case.<sup>20</sup> Even the lone dissenter, Justice Matthew Tobriner, understood the litigation as centrally about race. Emphasizing the nation's long history of segregation, he considered U.C. Davis's affirmative action program a modest and constitutionally permissible effort to integrate predominantly White colleges and universities.<sup>21</sup>

Nothing in the lower court decisions suggested that Bakke's lawsuit would be transformed into a First Amendment case before the U.S. Supreme Court.<sup>22</sup> Nor did the briefs submitted by the parties and amici fundamentally alter the perception that, at its core,<sup>23</sup> the litigation was about racial equality.<sup>24</sup> Out of the many amicus briefs filed, only two—both submitted by colleges and universities—mentioned diversity as an important pedagogical objective that required leeway to experiment with different approaches to voluntarily integrating the student body.<sup>25</sup> At oral argument, Archibald Cox, a former Solicitor General and Harvard Law School professor, argued on behalf of the University of California that diversity was one of several compelling interests served by the special admissions program.<sup>26</sup> However, the University offered three other objectives focused on equality concerns: rectifying the underrepresentation of racial and ethnic minorities in the medical profession, enhancing the availability of doctors to serve minority communities, and compensating for past societal discrimination.<sup>27</sup> As a result, diversity—with its emphasis on the learning process at the medical school—was something of an outlier among the program's stated aims. The medical school's other goals primarily targeted changes in the larger society, mostly in the world of medicine, to overcome patterns of racial exclusion.

So, it undoubtedly came as something of a surprise that the pivotal opinion in the case, written by Justice Powell, conceptualized the lawsuit in terms of

20. *Id.*

21. *Id.* at 1191 (Tobriner, J., dissenting).

22. Moran, *supra* note 1, at 2581.

23. Oral Argument of Archibald Cox, Esq., on Behalf of the Petitioner, in 100 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 1977 TERM SUPPLEMENT 628–29 (Philip B. Kurland & Gerhard Casper eds., 1978).

24. See William Claiborne, *57 Law Briefs on Bakke*, WASH. POST (Sept. 17, 1977), <https://www.washingtonpost.com/archive/politics/1977/09/17/57-law-briefs-on-bakke/b3cb7c7c-b70e-4008-adc1-964886cbd552/> [<https://perma.cc/VL5M-CR9X> (dark archive)] (describing the large number of briefs filed in the *Bakke* litigation and noting that they focused heavily on remedies for discrimination and dangers of reverse discrimination).

25. Brief of Columbia University, Harvard University, Stanford University & the University of Pennsylvania as Amici Curiae at 12, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1976 WL 181278, at \*12; Brief of the State of Washington & the University of Washington as Amicus Curiae at 27, *Bakke*, 438 U.S. 265 (No. 76-811), 1976 WL 178775, at \*27.

26. Oral Argument of Archibald Cox, Esq., on Behalf of the Petitioner, *supra* note 23, at 628–29.

27. *Id.* at 623, 628–29, 632, 637–38.



academic freedom for colleges and universities under the First Amendment.<sup>28</sup> His opinion became decisive because it navigated between his colleagues' polarized positions on racial equality. While four Justices would have prohibited voluntary affirmative action in admissions as unlawful reverse discrimination, four others were willing to accept U.C. Davis's program as a permissible way to redress societal inequality, including exclusion from the medical profession.<sup>29</sup> Justice Powell was loath to adopt either view, so he set about finding a middle way. That turned out to be a diversity rationale rooted in institutional autonomy. In particular, he invoked academic freedom as a justification for deferring to university officials' decisions about how to compose the student body.<sup>30</sup>

Not only did Justice Powell have to tread carefully given his colleagues' fundamentally irreconcilable positions on racial equality, he also had to make certain that his opinion bolstered, rather than undermined, earlier decisions protecting corporate speech from government regulation.<sup>31</sup> During the Court's deliberations on Bakke's case, Justice William Rehnquist circulated a memorandum contrasting the medical school's arguments with those in *Buckley v. Valeo*,<sup>32</sup> a case that rejected campaign finance limits imposed on individuals, partnerships, committees, associations, corporations, and other organizations.<sup>33</sup> Congress had adopted the restrictions to reduce unfair advantages in influencing electoral politics, but the Justices concluded that the law impermissibly "restrict[ed] the speech of some elements of our society in order to enhance the relative voice of others," a concept that was "wholly foreign to the First Amendment."<sup>34</sup> Justice Rehnquist saw U.C. Davis's affirmative action program as similarly problematic because it sacrificed Bakke's liberty interest—

28. Memorandum to the Conference from Justice Lewis F. Powell (Nov. 22, 1977), in BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 195, 217–23 (1988).

29. See *Bakke*, 438 U.S. at 324–26, 336–49 (Brennan, J., concurring in part and dissenting in part); *id.* at 412–18 (Stevens, J., concurring in part and dissenting in part); Moran, *supra* note 1, at 2597; Adam Harris, *The Supreme Court Justice Who Forever Changed Affirmative Action*, ATLANTIC (Oct. 13, 2018), <http://theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938> [<https://perma.cc/WWG6-5PZV> (dark archive)] (noting that the four-to-four split on the Court allowed Powell to "upend[] the dominant view of the time," which focused on remediation).

30. See Moran, *supra* note 1, at 2594–95, 2597. For a critique of Powell's "revisionist view of institutional academic freedom" as a rationale "for that day and trip only," see Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 855–56 (1987).

31. Moran, *supra* note 1, at 2591–94.

32. 424 U.S. 1 (1976) (per curiam), *superseded in part by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81, as recognized in *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003).

33. Memorandum to the Conference from Justice William H. Rehnquist (Nov. 10, 1977), in SCHWARTZ, *supra* note 28, at 192.

34. *Buckley*, 424 U.S. at 48–49.

that is, his right to compete for a seat in the entering class—to promote the equality interests of others.<sup>35</sup>

Justice Rehnquist's observations surely got Justice Powell's attention. As a principal architect of the *Buckley* decision, Justice Powell considered the opinion central to his longstanding commitment to empower businesses to play a prominent role in politics.<sup>36</sup> He had to find a way to embrace the diversity rationale without casting doubt on the emerging corporate free speech doctrine. For the strategy to work, Justice Powell needed to make clear that diversity was not a means to level the playing field by redressing racial disadvantage. For that reason, he rejected all of U.C. Davis's objectives related to rectifying inequities in the medical profession and in society in general. Instead, Justice Powell focused on academic freedom and the role that colleges and universities play in promoting the robust exchange of ideas.<sup>37</sup> This shift allowed him to characterize special admissions programs as tools to advance a better learning environment for all students, rather than as a means to compensate for past discrimination.

By focusing on institutional autonomy rather than racial redress, Justice Powell's opinion in *Bakke* was consistent with *Buckley*, even as it found a way to preserve some use of race in higher education admissions.<sup>38</sup> That said, his deference to colleges and universities was still cabined. Even after substantially narrowing the mission of affirmative action programs, he continued to express considerable reservations about racial classifications as well as the dangers of reverse discrimination against applicants like Bakke.<sup>39</sup> As a result, Justice Powell imposed strict scrutiny on affirmative action programs.<sup>40</sup> Under this heightened standard of review, U.C. Davis's program had to be necessary to promote the medical school's compelling interest in diversity.<sup>41</sup> The program did not pass muster because its set-aside needlessly rigidified racial categories and segregated the admissions process.<sup>42</sup>

35. Memorandum to the Conference from Justice William H. Rehnquist, *supra* note 33, at 192–93.

36. *The Powell Memo (AKA the Powell Manifesto)*, RECLAIM DEMOCRACY, [http://reclaimdemocracy.org/powell\\_memo\\_lewis/](http://reclaimdemocracy.org/powell_memo_lewis/) [<https://perma.cc/EX2W-CFJE>]; see also Richard L. Hasen, *The Untold Drafting History of Buckley v. Valeo*, 2 ELECTION L.J. 241, 243 (2003). See generally ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 283–89 (2018) (describing the origins of the Powell memorandum).

37. Moran, *supra* note 1, at 2593–94. In this respect, Powell was not especially deferential to colleges and universities, in part because he defined academic freedom to apply narrowly to their teaching function. See Paul Horwitz, Fisher, *Academic Freedom, and Distrust*, 59 LOY. L. REV. 489, 498–509 (2013) [hereinafter Horwitz, Fisher, *Academic Freedom, and Distrust*] (contrasting broad and narrow judicial views of the missions of colleges and universities).

38. See Moran, *supra* note 1, at 2593–94.

39. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 285, 289–99 (1978).

40. *Id.*

41. *Id.* at 305–06, 314–15.

42. *Id.* at 315–19.

In order to preserve a place for race while rejecting quotas, Justice Powell offered a constitutionally viable alternative: the program of undergraduate admissions at Harvard College.<sup>43</sup> That program weighed race as one factor in the holistic review of a prospective student's file.<sup>44</sup> Harvard's approach allowed each applicant to compete as an individual with every other applicant in the pool by using a wide range of criteria, of which race was just one.<sup>45</sup> Justice Powell's disposition of the case combined deference with distrust. He could respect the medical school's mission and goals after carefully circumscribing them, and he could aggressively police the use of race in admissions—even when programs promoted the exchange of ideas so central to academic freedom.

B. *Post-Bakke Decisions and the Development of the Diversity Rationale*

Later Supreme Court decisions embraced Justice Powell's compromise and built upon it. In *Grutter v. Bollinger*,<sup>46</sup> a lawsuit challenging affirmative action at the University of Michigan's law school, a majority of the Court endorsed diversity as a compelling interest.<sup>47</sup> This was an important development because critics, including some lower-court federal judges, had cast doubt on the vitality of the rationale, noting that Justice Powell wrote only for himself and no other Justice joined his opinion in *Bakke*.<sup>48</sup> *Grutter* expanded on *Bakke*, which had narrowly focused on diversity's role in the learning process and the exchange of ideas on campus. Now, the Justices deferred to a new goal: Michigan's promotion of democratic legitimacy through inclusive pathways to leadership at a highly selective institution.<sup>49</sup> Expressing a high regard for the law school's autonomy, the Court rejected the dissent's demands that Michigan choose between preserving its elite status and enrolling a diverse student body.<sup>50</sup> The majority concluded that academic freedom allowed Michigan to maintain its identity as a top law school by combining a selective admissions process with inclusive racial policies.<sup>51</sup> The Court then applied strict scrutiny to the means that Michigan used to achieve these goals.<sup>52</sup> Because the law school's program relied on holistic review and eschewed racial quotas, the Court upheld it.<sup>53</sup>

43. *Id.* at 316–19.

44. *Id.*

45. *Id.*

46. 539 U.S. 306 (2003).

47. *See id.* at 328–33.

48. *Hopwood v. Texas*, 78 F.3d 932, 944–45 (5th Cir. 1996) (describing Powell's lonely opinion in *Bakke* and rejecting it as binding precedent), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

49. *See Grutter*, 539 U.S. at 328–33.

50. *See id.* at 339.

51. *See id.* at 340.

52. *See id.* at 326.

53. *Id.* at 334–43.

Later, in *Fisher v. University of Texas at Austin (Fisher I)*,<sup>54</sup> a case challenging affirmative action in undergraduate admissions at the University of Texas at Austin, the Court initially appeared to be recalibrating its approach to reviewing the use of race in admissions. In *Fisher I*, the Justices continued to express considerable deference when evaluating the University's goal of diversity, but appeared to adopt a more skeptical stance when scrutinizing the permissibility of race-conscious means.<sup>55</sup> Most notably, *Fisher I* criticized the lower federal courts' use of a "good faith" test to assess whether the University properly determined that it needed to consider race to generate a diverse student body.<sup>56</sup> The Court's call for heightened scrutiny likely had to do with the unique history of the admissions process at the University of Texas. In 1996, the Fifth Circuit Court of Appeals, in *Hopwood v. Texas*,<sup>57</sup> openly rejected the diversity rationale and prohibited the use of race except when necessary to correct an institution's own past discrimination.<sup>58</sup> As a result, for nearly a decade, all public colleges and universities in Texas had to rely on race-neutral admissions. One strategy, the Top Ten Percent Plan, made automatic offers of admission to seniors who graduated in the top ten percent of their class at recognized high schools in the state.<sup>59</sup> With this guarantee, the overwhelming majority of seats in the University of Texas's entering class were filled under the plan.<sup>60</sup> Because secondary schools were often identifiable by race and ethnicity, the plan also generated substantial diversity in the student body.<sup>61</sup> After *Grutter* overturned *Hopwood* seven years later, the University of Texas continued to use the Top Ten Percent Plan but supplemented it with a race-conscious process for filling the remaining seats in the entering class.<sup>62</sup> A disappointed applicant, Abigail Fisher, argued that the university already had achieved substantial diversity through race-neutral means and that race-conscious measures were therefore constitutionally impermissible.<sup>63</sup>

The Court wanted stronger evidence that the university's race-neutral admissions process was inadequate and required some race-conscious adjustments at the margins. On remand, the lower courts once again upheld the admissions process based on evidence from a yearlong study conducted by the

---

54. 570 U.S. 297 (2013).

55. *Id.* at 312–14.

56. *Id.*

57. 78 F.3d 932 (5th Cir. 1996), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

58. *Id.* at 934–35.

59. *Fisher I*, 570 U.S. at 305.

60. *Fisher II*, 136 S. Ct. 2198, 2206 (2016). The Texas legislature subsequently allowed the University of Texas at Austin to cap admissions under the plan to seventy-five percent of the freshman class. *Id.*

61. *Fisher I*, 570 U.S. at 304–05.

62. *Id.* at 305–06.

63. *See id.* at 306; *Fisher II*, 136 S. Ct. at 2211–12.

university.<sup>64</sup> That research found that a substantial number of undergraduate classes still were not racially diverse, and that students from underrepresented backgrounds continued to feel isolated on campus.<sup>65</sup> Armed with these findings, the Court ultimately affirmed the permissibility of the affirmative action program, while the dissent complained that the majority had retreated from an earlier promise of exacting scrutiny when it first remanded the case to the district court.<sup>66</sup>

Today, the battle over affirmative action in higher education continues in the courts. Remarkably, one of the most high-profile challenges, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,<sup>67</sup> relates to Harvard University's undergraduate admissions program, the very program that Justice Powell held up as a model in *Bakke*.<sup>68</sup> Harvard has defended its exercise of institutional autonomy, citing a need for "the freedom and flexibility to create the diverse communities that are vital to the learning experience of every student."<sup>69</sup> Meanwhile, the plaintiff in the case, Students for Fair Admissions, Inc. ("SFFA"), has alleged that Harvard is engaging in reverse discrimination against Asian American applicants and that "the Supreme Court was misled" because the undergraduate admissions program "has always been an elaborate mechanism for hiding Harvard's systematic campaign of racial and ethnic discrimination against disfavored classes of applicants."<sup>70</sup> The federal district court rebuffed these allegations, and a court of appeals affirmed the decision.<sup>71</sup> Even so, the litigation reveals the ongoing conflict over Justice Powell's compromise, as Harvard seeks to shield its program on First Amendment grounds and the plaintiff indicts it as violating equality norms under the Fourteenth Amendment.

SFFA has filed a similar complaint against the University of North Carolina ("UNC").<sup>72</sup> The lawsuit alleges that UNC's undergraduate admissions process "is not using race merely as a 'plus factor'" but is applying racial

64. See *Fisher II*, 136 S. Ct. at 2208 (citing *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 659–60 (5th Cir. 2014)).

65. See *id.* at 2211–12.

66. See *id.* at 2214–15; *id.* at 2215–17 (Alito, J., dissenting).

67. 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020).

68. See Complaint at 3, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 397 F. Supp. 126 (D. Mass. 2015) (No. 14-CV-14176-DJC), 2014 WL 6241935, at \*3 [hereinafter *Harvard Complaint*].

69. Nick Anderson, *Justice Department Criticizes Harvard Admissions in Case Alleging Bias Against Asian Americans*, WASH. POST (Aug. 30, 2018), <https://www.washingtonpost.com/education/2018/08/30/justice-dept-criticizes-harvard-affirmative-action-case/> [<https://perma.cc/3RYG-975R> (dark archive)].

70. *Harvard Complaint*, *supra* note 68, at 3.

71. In particular, the federal district court ruled that Harvard did not intentionally discriminate against Asian Americans. *Students for Fair Admissions, Inc.*, 397 F. Supp. 3d at 147–48, 201–04.

72. See Complaint at 1–2, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 14-cv-00954 (M.D.N.C. filed Nov. 17, 2014), 2014 WL 6386755, at \*1–2.

preferences “so large that race becomes the ‘defining feature of [a student’s] application.”<sup>73</sup> To support that assertion, SFFA cites “the disparate treatment of high-achieving Asian-American and white applicants and underrepresented minority applicants with inferior academic credentials.”<sup>74</sup> According to the complaint, UNC has persisted in using a heavy-handed, race-conscious approach when race-neutral measures, such as a Top Ten Percent Plan, could achieve significant diversity.<sup>75</sup> Recently, a federal district court upheld the admissions process, concluding that UNC had a compelling interest in enrolling a diverse student body, had employed a narrowly tailored form of holistic review, and had regularly considered the viability of race-neutral alternatives.<sup>76</sup> In response, SFFA filed a petition asking the U.S. Supreme Court to review the district court ruling in the UNC case along with the lower court decisions in the Harvard lawsuit.<sup>77</sup> The Court has granted certiorari to hear both cases.<sup>78</sup> According to court commentators, SFFA’s request for joint review creates an opportunity to abolish or significantly restrict affirmative action at all institutions of higher education, whether public or private.<sup>79</sup>

As the Harvard and UNC lawsuits remind us, the middle way that Justice Powell forged in *Bakke* clearly has not resolved the constitutional controversy over affirmative action in higher education. As biographer John C. Jeffries, Jr. notes, Justice Powell was a “pragmatic conservative”<sup>80</sup> whose opinions reflected a “mosaic of accommodation, highly differentiated and strongly variegated but of a generally conservative hue.”<sup>81</sup> *Bakke* displays Justice Powell’s penchant for balancing competing interests as well as his rejection of a narrowly textual, formalist approach.<sup>82</sup> In the intervening years, the Court has consistently embraced the approach set forth in *Bakke*, but the rise of formalism under both

73. *Id.* at 4 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)).

74. *Id.*

75. *Id.* at 5–6.

76. Trial Findings of Fact & Conclusions of Law at 6–15, 18–31, 93–118, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 14-CV-00954-LCB-JLW (M.D.N.C. filed Oct. 18, 2021).

77. Anemona Hartocollis, *The Supreme Court Tactic that Aims To Kill Affirmative Action*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/11/11/us/affirmative-action-harvard-unc.html> [<https://perma.cc/6VTB-SDJN> (dark archive)].

78. See, e.g., Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, N.Y. TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/24/us/politics/supreme-court-affirmative-action-harvard-unc.html> [<https://perma.cc/63H7-ZV6Y> (dark archive)]; Laura Krantz & Deirdre Fernandes, *Supreme Court To Hear Harvard Affirmative Action Case, Could Cause ‘Huge Ripple Effect’ in College Admissions*, BOS. GLOBE, <https://www.bostonglobe.com/2022/01/24/metro/future-affirmative-action-higher-education-limbo-supreme-court-agrees-hear-harvard-case/> [<https://perma.cc/YY4V-3XGF> (dark archive)] (Jan. 24, 2022, 7:57 PM).

79. Hartocollis, *supra* note 77.

80. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 470 (1994).

81. *Id.* at 403.

82. Mark Tushnet, *Justice Lewis F. Powell and the Jurisprudence of Centrism*, 93 MICH. L. REV. 1854, 1854–55 (1995).

the First and Fourteenth Amendments presents new challenges for the diversity rationale.

## II. THE UNBEARABLE EMPTINESS OF FORMALISM AND THE PROBLEMS POSED FOR THE FIRST AND FOURTEENTH AMENDMENTS

The delicate balance between First and Fourteenth Amendment interests that undergirds the Court's affirmative action jurisprudence is increasingly imperiled by an unduly formalist approach to both sources of constitutional protection.<sup>83</sup> Formalism has many meanings, but here I use the term to refer to a heavy reliance on textual analysis, particularly to determine the "plain meaning" of relevant language. Judges may rely on the text itself, legislative history, and even legislative intent to discern that meaning.<sup>84</sup> However, courts typically do not strike pragmatic compromises of the type that characterized Justice Powell's jurisprudence. Instead, a formalist approach is closely linked to reasoning by analogy.<sup>85</sup> That form of reasoning in turn can lead to juridical missteps that have serious implications for affirmative action.

### A. *Formalism's Failings: False Equivalencies and Missed Analogies*

Formalism and analogical reasoning can lead to two kinds of jurisprudential failings: false equivalencies and missed analogies. These mistakes are mirror images of one another. A false equivalency treats categories as the same when they are different, while a missed analogy treats categories as different when they are the same. These difficulties arise because formalist analogies often interpret facts narrowly without considering the values that a particular rule of law serves.<sup>86</sup> The resulting blind spots can pose problems for a range of constitutional issues.

Under equal protection law, for example, scholars have mainly elaborated on the problem of wrongly treating categories as the same when they are in fact

83. See, e.g., Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1504–09 (2007) [hereinafter Horwitz, *Universities as First Amendment Institutions*]; R. George Wright, *Equal Protection and the Idea of Equality*, 34 LAW & INEQ. 1, 1–3, 5–6 (2016).

84. Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy, and Realism*, 48 VILL. L. REV. 305, 309–11 (2003).

85. *Id.* at 312. There have been disputes over whether formalism and formalist analogy are two aspects of the same form of legal reasoning or are different, albeit closely related forms. *Id.* at 314. This matter of taxonomy does not affect the arguments here. Despite disagreements over how to categorize and operationalize analogical reasoning, the notion that like cases should be treated alike remains a bedrock principle of American law. Brian N. Larson, *Law's Enterprise: Argumentation Schemes & Legal Analogy*, 87 U. CIN. L. REV. 663, 664–65 (2019). Analogies therefore are a well-accepted means to promote fairness and predictability in the legal community. *Id.* at 667–68.

86. Huhn, *supra* note 84, at 315.

different.<sup>87</sup> Most notably, by ignoring relevant context, the Court has expressed a deep distrust of all racial classifications, regardless of whether officials use them to address racial stratification or entrench racial subordination. As a result, critics say the Justices have lost sight of the central aim of equal protection: fighting ongoing racial inequities.<sup>88</sup> In particular, the Court has repeatedly failed to recognize distinctions between the transgressive history of discrimination against underrepresented groups and reverse discrimination against Whites.<sup>89</sup> Although false equivalencies are most prominent in equal protection doctrine, there are also examples in First Amendment law. For instance, the Court recently ruled that a closely held, for-profit corporation has standing to assert that a regulation designed to protect women's access to contraception unconstitutionally burdens religious liberty interests.<sup>90</sup> A formalist conception of personhood has led some Justices to wrongly equate adherents of faith and nonprofit religious organizations on the one hand with for-profit businesses that have incidental religious commitments on the other.<sup>91</sup> As a result, courts have grown unduly deferential to a wide array of actors claiming some form of religious affiliation, even when that deference undermines principles of nondiscrimination for vulnerable groups.<sup>92</sup>

In addition to false equivalencies, formalism can produce missed analogies if judges fail to acknowledge and explain differential treatment of similarly situated groups. With a narrow focus on facts rather than underlying values, formalist analogies compartmentalize areas of the law, making it easy to overlook similarities across different jurisprudential categories. Precisely for that reason, missed analogies can be more difficult to discern than false equivalencies.<sup>93</sup> Missed analogies pose considerable difficulties for affirmative action law. For instance, First Amendment scholars argue that the Justices have given insufficient weight to an institution's unique identity, most importantly the role that it plays in fostering dialogue and exchange.<sup>94</sup> Consequently, the Court's rationale for according some institutions substantial deference while

87. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 31 (2003) ("By reinterpreting and remembering the civil rights movement through the formalist lens of anticlassification, white America could more easily believe that racial inequality was a thing of the past . . .").

88. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1546–47 (2004).

89. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 239–300 (1978).

90. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691, 705–09 (2014).

91. See *id.* at 739–40, 751–54 (Ginsburg, J., dissenting).

92. See *id.*

93. See Huhn, *supra* note 84, at 314–15, 380.

94. Horwitz, *Grutter's First Amendment*, *supra* note 5, at 567.



imposing strict standards of review on others remains mysterious.<sup>95</sup> Most significantly, the Justices have provided robust protections for the autonomy of religious organizations, even as protections for academic freedom at colleges and universities remain considerably weaker.<sup>96</sup> This differential treatment is largely overlooked because the Court ignores the ways in which both kinds of institutions advance critically important discourse, a valuable function that is one of the First Amendment's core concerns.<sup>97</sup>

The difficulties associated with missed analogies are not limited to the First Amendment. Under equal protection law, ascribed traits trigger different degrees of judicial scrutiny. As a result of this constitutional hierarchy, race-based government action prompts the most searching level of review, while gender-based decisions result in a less rigorous, intermediate level of scrutiny. Government actions relating to a wide swath of individual characteristics, including alienage, illegitimacy, and poverty, regularly receive highly deferential, hands-off treatment.<sup>98</sup> The reasoning behind these markedly different degrees of scrutiny can seem puzzling at times.<sup>99</sup> In recent cases, for instance, courts have upheld the autonomy to discriminate against gays and lesbians based on religious beliefs about the propriety of same-sex marriage.<sup>100</sup> In doing so, judges regularly offer assurances that these holdings will not legitimize racial discrimination on religious grounds; race is different, the courts say.<sup>101</sup> Yet, gays and lesbians, like racial minorities, have experienced a long history of bias and hostility, and sincere religious beliefs can underlie both kinds

95. Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1520–21 (noting that the Court's institutional agnosticism has produced stark differences in the treatment of colleges and universities on the one hand and churches on the other).

96. *Id.* at 1516–22.

97. *See id.* at 1520–22 (offering reasons why colleges and universities might be treated differently than churches if courts recognized their roles as First Amendment institutions).

98. *See, e.g.*, *Dandridge v. Williams*, 397 U.S. 471, 485–86 (1970) (poverty); *Mathews v. Lucas*, 427 U.S. 495, 509–10 (1976) (illegitimacy); *Lalli v. Lalli*, 439 U.S. 259, 273–74 (1978) (same); *Ambach v. Norwick*, 441 U.S. 68, 80–81 (1979) (alienage). The Court's treatment of alienage and illegitimacy has fluctuated over time with some decisions using a “rational basis” test and some using a more exacting level of scrutiny. Jane Guerin, *Illegitimacy and Equal Protection: Lalli v. Lalli—A Retreat from Trimble v. Gordon*, 57 *DENV. L.J.* 453, 454–60 (2021) (illegitimacy); Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 *FORDHAM L. REV.* 155, 173–86 (2014) (alienage).

99. Suzanne B. Goldberg, *Equality Without Tiers*, 77 *S. CAL. L. REV.* 481, 485–91, 494–578 (2004) (describing the varying degrees of scrutiny applied in equal protection analyses).

100. For a discussion of the growing conflict between religious liberty and marriage equality, see Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 *CALIF. L. REV.* 1169, 1176–77, 1180–95 (2012). There is preliminary evidence that religious exemptions can increase discrimination against same-sex couples. Netta Barak-Corren, *Religious Exemptions Increase Discrimination Toward Same-Sex Couples: Evidence from Masterpiece Cakeshop*, 50 *J. LEGAL STUD.* 75, 75–76, 104–06 (2021).

101. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (“The principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction. . . . Our decision today provides no such shield.”).

of discrimination.<sup>102</sup> Because of a heavy reliance on formal categories, courts have offered no persuasive rationale to explain why religious adherents can discriminate against gays and lesbians with impunity but must face severe consequences if they discriminate against racial minorities.<sup>103</sup>

Formalism's failings can be especially troublesome for affirmative action jurisprudence because of the ways in which the First and Fourteenth Amendments interact in *Bakke* and its progeny. With respect to the First Amendment, for instance, scholars have taken the Court to task for failing to attend to the speaker's identity when affording protections to speech, association, and religious expression.<sup>104</sup> Because of this agnosticism, the Justices' decisions lack the nuance that would come with a close attention to the institutional characteristics that matter in advancing the First Amendment's goals.<sup>105</sup> Without that sensitivity to context, courts can easily lose sight of Justice Powell's underlying reasons for conferring robust institutional autonomy on colleges and universities.

As for the Fourteenth Amendment, critics have challenged the Court's equal protection doctrine for its rigid adherence to a principle of colorblindness, which emphasizes the dangers of official race-based classifications and ignores historical discrimination and the lived experience of race. According to these scholars, the Justices' indifference to context leads them to overlook the central thrust of the Fourteenth Amendment, that is, the effort to combat racial subordination in all its manifestations.<sup>106</sup> As a result, courts can fail to comprehend why Justice Powell left room for race-conscious admissions under a strict scrutiny test. Because blind spots like these can make Justice Powell's compromise in *Bakke* seem mystifying, I turn now to a careful analysis of formalism's failings under the First and the Fourteenth Amendment.

#### B. *A Closer Look at Formalism's Failings in First Amendment Jurisprudence*

When thinking about the future of affirmative action, few attend to the dangers of formalism under the First Amendment. However, a formalist

102. See Oleske, *supra* note 11, at 101–02, 104–10, 119–21 (describing parallels between religious objections to interracial and same-sex marriages and noting that the courts have been more receptive to the latter because of an unwillingness to accord vigorous constitutional protection to sexual orientation under the Equal Protection Clause).

103. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738–44 (2020).

104. Horwitz, *Churches as First Amendment Institutions*, *supra* note 7, at 84–85; Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1523; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1270 (2005).

105. Horwitz, *Grutter's First Amendment*, *supra* note 5, at 569; Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1504–07; Schauer, *supra* note 104, at 1256–60.

106. See, e.g., Barbara J. Flagg, "Was Blind, But Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 1013–14 (1993); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIA. L. REV. 191, 212 (1997).

approach should be a real concern because it blinds the Court to contextual considerations that bear on the Constitution's underlying goals. Scholars like Paul Horwitz have been highly critical of the Court's "top-down, institutionally agnostic approach," one that treats the particularities of a speaker's identity as largely irrelevant to the level of protection that liberty interests should receive.<sup>107</sup> In his view, the Justices "strive to craft pure, formal doctrine," but they "are confronted with brute facts that ill fit the hermetic doctrinal structure they have erected."<sup>108</sup> Out of a misplaced yearning for acontextuality, the Court has made egregious blunders. The most notable is a failure to recognize any special privileges for the press based on concerns that the Court cannot fashion comprehensive and cogent criteria to determine who qualifies as a journalist.<sup>109</sup> Similarly, Horwitz argues, the Justices have failed to account for distinct features of religious groups, instead embracing a formally neutral approach, out of fear that courts cannot "weigh the social importance of all laws against the centrality of all religious beliefs."<sup>110</sup> In Horwitz's view, the Court's commitment to formalism has survived without descending into doctrinal incoherence only because a norm of deference allows institutions themselves to grapple with the messy reality of their specific circumstances.<sup>111</sup>

There are significant questions about when deference is due and how much should be given to different types of institutions. To rectify the limits of a formalist approach, Horwitz draws on the seminal work of constitutional scholar Frederick Schauer to argue for judicial recognition of what he terms "First Amendment institutions."<sup>112</sup> Cognizant of the speaker's identity and how it relates to core First Amendment values, Horwitz singles out these institutions because they play a uniquely important role in advancing speech, association, and sectarian beliefs.<sup>113</sup> Prominent examples include "the press, universities, religious associations, [and] libraries."<sup>114</sup> All of these organizations deserve substantial deference because they are well established and have internal norms and practices that safeguard First Amendment values.<sup>115</sup> By granting these institutions presumptive autonomy, the Court can avoid factual quagmires and allow trustworthy organizations to adapt to their own unique challenges.<sup>116</sup>

---

107. Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1503–04; *see also* Schauer, *supra* note 104, at 1259–60, 1270–73.

108. Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1508.

109. *Id.* at 1505.

110. *Id.* (quoting *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872, 890 (1990)).

111. *Id.* at 1509.

112. *Id.* at 1510.

113. *See id.*

114. *Id.*

115. *Id.* at 1510–11.

116. *See id.* at 1511–12.

This strategy requires some elaboration of what qualifies as a First Amendment institution. Despite the Court's waning deference in recent affirmative action cases, Horwitz concludes that universities easily merit autonomy to advance the exchange of ideas.<sup>117</sup> After all, the *raison d'être* for institutions of higher education is the promotion of discourse, and they are ideal sites for democratic experimentalism through lively interchange.<sup>118</sup> Moreover, colleges and universities are readily identifiable, allaying any concern that it could prove hard to limit the scope of First Amendment privileges.<sup>119</sup> Finally, institutions of higher education have developed "a highly disciplined environment" with strong norms and procedures to protect the integrity of academic discourse.<sup>120</sup>

Even as the Court has heightened its scrutiny of colleges' and universities' admissions practices, it has grown increasingly deferential to religious organizations. The Justices have adopted this stance on largely formalist grounds. For one thing, the First Amendment expressly acknowledges religious liberties as constitutionally protected interests.<sup>121</sup> Moreover, religious institutions have figured prominently in the nation's history and remain influential today.<sup>122</sup> According to Horwitz, the Court's insistence on formal neutrality in state action and its failure to fully acknowledge the special nature of religious organizations has led to a strained constitutional jurisprudence.<sup>123</sup> In his view, "[t]he courts will bend and distort existing doctrine to take account of institutional variation, while still trying to preserve some sense of their attachment to acontextual legal categories."<sup>124</sup> By recognizing that churches and other religious organizations are indeed First Amendment institutions, Horwitz argues, the Court can accord them strong deference as presumptively self-governing institutions insofar as they advance a discourse related to matters of faith.<sup>125</sup>

Precisely because First Amendment institutionalism rests squarely on values and context, it offers a way to discern formalism's failings when it comes to protecting the kind of autonomy and equality interests that lie at the heart of affirmative action jurisprudence. Those shortcomings include both false equivalencies and missed analogies, which pose distinct threats. False equivalencies have greatly expanded the number of organizations allowed to

---

117. See Horwitz, *Grutter's First Amendment*, *supra* note 5, at 568–69, 579–80.

118. See *id.* at 575–76; Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1513–14.

119. Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1513–14.

120. *Id.* at 1514–15.

121. U.S. CONST. amend. I.

122. Horwitz, *Churches as First Amendment Institutions*, *supra* note 7, at 82, 102–03, 114–15.

123. See *id.* at 85–86.

124. *Id.* at 86.

125. See *id.* at 88–89.

discriminate with impunity based on religious beliefs. At the same time, missed analogies have weakened academic freedom claims that undergird the diversity rationale.

### 1. The Danger of False Equivalencies

Understanding why actors qualify as First Amendment institutions is essential to avoid the dangers of false equivalency. False equivalencies can extend judicial deference to organizations when they should be subject to scrutiny. That danger has materialized with a steady expansion in the category of religious actors authorized to discriminate with impunity, a development that should be of concern to equality scholars, including those focused on affirmative action.<sup>126</sup> The issue came to a head in the Court's 2014 decision in *Burwell v. Hobby Lobby Stores, Inc.*<sup>127</sup> There, the plaintiffs, closely held family corporations, asserted that their owners' religious liberties had been violated by a federal requirement mandating that employers provide contraceptive coverage for female staff.<sup>128</sup> The complaint relied on the Religious Freedom Restoration Act, which provides more vigorous protection to religious institutions than the Free Exercise Clause does—at least based on some interpretations of Supreme Court precedent.<sup>129</sup> The lower courts rejected the plaintiffs' claims, concluding that for-profit corporations were incapable of exercising religious liberties.<sup>130</sup>

In an opinion by Justice Samuel Alito, the Court reversed, holding that owners of closely held corporations, even if large and run for profit, could pursue charitable goals and religious purposes as part of their mission.<sup>131</sup> The Court refrained from inquiring into the sincerity of the plaintiffs' religious views on contraception, nor did it question the reasonableness of their conclusion that providing contraceptive coverage for employees would violate those beliefs.<sup>132</sup> Given the substantial fines that the companies could incur for failing to offer the coverage, the Court found a substantial burden on the plaintiffs' free exercise of religion.<sup>133</sup> That burden could be justified only if the federal requirement regarding contraceptive coverage was necessary to advance

126. See Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 698–701 (2017); Ira C. Lupu, *Hobby Lobby and the Dubious Enterprise of Religious Exemptions*, 38 HARV. J.L. & GENDER 35, 93 (2015); Elizabeth Sepper, *Gays in the Moralized Marketplace*, 7 ALA. C.R.-C.L. L. REV. 129, 142–49 (2015); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 625 (2015).

127. 573 U.S. 682.

128. *Id.* at 700–04.

129. *Id.* at 693–95.

130. *Id.* at 702, 704.

131. *Id.* at 710–13. The Court did not extend its analysis to publicly traded companies, however. *Id.* at 717.

132. *Id.* at 717–19, 723–24.

133. *Id.* at 720–26.

a compelling interest.<sup>134</sup> Even assuming the federal government had a compelling interest in protecting women’s health, the majority concluded there was a less restrictive alternative: using an accommodation that agency officials already had devised for religious nonprofits that objected to funding the coverage.<sup>135</sup>

Justice Alito’s opinion prompted a sharp dissent from Justice Ruth Bader Ginsburg, who contended that the majority had falsely equated individuals, churches, and religious nonprofits—all centrally involved in the formation of faith-based communities—with for-profit companies led by owners who incidentally held certain religious beliefs.<sup>136</sup> According to Justice Ginsburg, the Court had relied on an impoverished, formalist conception of personhood that did not distinguish between natural persons capable of sectarian worship, churches and nonprofits dedicated to cultivating communities of faith, and for-profit corporations with some ancillary faith-based commitments.<sup>137</sup>

In keeping with Justice Ginsburg’s concerns, legal scholar Elizabeth Sepper has warned of the dangers associated with “zombie religious institutions.”<sup>138</sup> In her view, a presumption of autonomy for religious organizations has gone hand in hand with a tendency to defer to their self-designation as sectarian, however tenuous. As a result, the number of religious institutions that can escape regulatory mandates, including nondiscrimination laws, has steadily grown.<sup>139</sup> In line with Horwitz’s analysis of First Amendment institutions, Sepper acknowledges that “religious institutions have intrinsic as well as instrumental value and prove uniquely able to protect individual conscience through their independent and autonomous existence.”<sup>140</sup> She recognizes that institutional rights are distinguishable from individual rights and that “[r]eligious institutions . . . are not just like other associations but play a distinctive role in the social order.”<sup>141</sup> Sepper’s concern, however, is that courts’ increasingly expansive definition of religious institutions dilutes the justification for deferring to these largely self-governing organizations.<sup>142</sup> In the field of health care, for example, sectarian hospitals have merged with secular ones, producing systems with faith-based characteristics that range from negligible to pervasive.<sup>143</sup> Sepper worries that allowing exemptions for anything

134. *Id.* at 726.

135. *Id.* at 728–31.

136. *See id.* at 739–40, 751–54 (Ginsburg, J., dissenting).

137. *See id.* at 754–56.

138. Elizabeth Sepper, *Zombie Religious Institutions*, 112 NW. U. L. REV. 929, 930–32 (2018) [hereinafter Sepper, *Zombie Religious Institutions*] (focusing on Catholic healthcare institutions).

139. *See id.* at 955–57, 963–64.

140. *Id.* at 968.

141. *Id.*

142. *Id.* at 964.

143. *See id.* at 937–43.

but “pervasively sectarian institutions” will undermine the rationale for according substantial autonomy to religious organizations under the First Amendment.<sup>144</sup>

Acknowledging how organizations function as First Amendment institutions could avoid the dangers of false equivalency that have emerged in cases like *Hobby Lobby* and in the health care industry. In particular, before according deference, courts should ask whether a for-profit company plays a central role in fostering religious discourse in communities of faith. As Justice Ginsburg observed in her dissent, the Court has conferred free exercise protections on churches and nonprofit religious organizations because “[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community,’ and ‘furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.’”<sup>145</sup> In Ginsburg’s view, according similar protections to for-profit corporations is not appropriate because, unlike churches and nonprofit religious organizations, these companies do not “exist to foster the interests of persons subscribing to the same religious faith.”<sup>146</sup>

An approach rooted in the concept of First Amendment institutions allows for a more searching analysis of the *Hobby Lobby* majority’s conclusions about the scope of religious autonomy. The Court based its deference to the company’s rejection of contraceptive coverage on a corporate statement of purpose, the owners’ pledges to run the business in a manner consistent with Christian principles, and the companies’ charitable activities, which were designed to promote the Christian faith.<sup>147</sup> The Court noted that *Hobby Lobby*, like many for-profit corporations, pursued charitable causes even when those efforts hurt the bottom line.<sup>148</sup> The Court concluded that family-owned corporations like these should have free exercise rights as a way to “protect[] the religious liberty of the humans who own and control those companies.”<sup>149</sup> In short, the mission statement, pledges, and decisions about charitable giving promoted discourse about Christianity among the family owners. However, it is hard to see how that dialogic community extended to employees, some Christian and some not, who had no real say in the commitments that the

---

144. *Id.* at 985 (quoting *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976)); *see id.* at 979–82.

145. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 752 (2014) (Ginsburg, J., dissenting) (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring)).

146. *Id.* at 754.

147. *See id.* at 701, 703 (majority opinion).

148. *See id.* at 703, 711–12.

149. *Id.* at 707.

owners made.<sup>150</sup> Given that churches and other religious organizations receive deference to foster communities of faith, it seems appropriate to protect family owners' free exercise rights as an individual matter but inappropriate to confer additional protection because they happen to oversee a closely held corporation. This is especially true because owners' decisions about contraceptive coverage appear unlikely to spark a company-wide, faith-based discussion of Christian principles.

A similar approach can resolve the problem of zombie religious institutions in the health care industry that Professor Sepper describes. She has argued that only "pervasively sectarian" hospitals should benefit from religious exemptions based on faith-based beliefs and practices. She distinguishes these nonprofit institutions, which are sponsored by a religious order and recognizably religious, from hospitals that are largely secular but accept some faith-based restrictions or obligations under merger agreements.<sup>151</sup> Sepper argues that only pervasively sectarian healthcare providers are true to a history of faith-based care that treats these services as an extension of a religious ministry.<sup>152</sup> For that reason, she says, only those hospitals deserve religious exemptions, a view consistent with First Amendment institutionalism.<sup>153</sup> Conversely, if hospitals do not foster formative discourse about religion because they operate in a secular manner except for some incidental faith-based commitments, there is no reason to accord these healthcare providers heightened deference based on religion.

The dangers of false equivalencies in defining religious organizations demonstrate the shortcomings of the Court's agnosticism about a speaker's identity. By ignoring the values that motivate deference to institutions, the Justices have allowed entities with the slimmest of connections to sectarian beliefs to engage in discriminatory practices.<sup>154</sup> By contrast, Justice Powell's decision in *Bakke* was highly contextual and explicitly driven by First Amendment objectives. He expressly acknowledged the unique role of colleges and universities in advancing the robust exchange of ideas as a way to justify the need for a diverse student body. The Court's recent failure to engage with context and values in cases like *Hobby Lobby* undercuts the First Amendment institutionalism that made Justice Powell's approach to diversity both intelligible and persuasive. A purely formalist approach has the potential to leave academic freedom unmoored from the purposes it serves and open to

---

150. See *id.* at 745–46 (Ginsburg, J., dissenting) ("The exemption sought by *Hobby Lobby* and *Conestoga* would override significant interests of the corporations' employees and covered dependents. It would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage . . .").

151. Sepper, *Zombie Religious Institutions*, *supra* note 138, at 985–87.

152. *Id.* at 935–36.

153. See *id.* at 932.

154. See, e.g., *Hobby Lobby Stores, Inc.*, 573 U.S. at 707–13, 716–19, 735–36.



charges that any consideration of race in admissions is simply impermissible discrimination, as Professor Sunstein has warned. Colleges and universities are especially vulnerable to formalism's failings because they cannot invoke a faith-based label as a shield against intrusive judicial scrutiny. As a consequence, formalism has the potential to weaken deference to institutions of higher education even as regard for religious institutions flourishes, a danger of missed analogies to which this discussion now turns.

## 2. The Danger of Missed Analogies

The dangers associated with missed analogies are of special concern to affirmative action jurisprudence. These failures of formalism are often overlooked because a narrow focus on parsing textual passages leads to compartmentalization of doctrinal holdings.<sup>155</sup> Yet, these kinds of blind spots pose important dangers because they can diminish the standing of colleges and universities as First Amendment institutions, even as churches and other religious organizations become paradigmatic examples. The growing disparity will go largely unremarked because distinct judicial precedents apply, but the differential treatment nonetheless can corrode respect for the special mission of institutions of higher education.<sup>156</sup> That regard has long been fundamental to the Court's protection of affirmative action in higher education under an academic freedom rationale.

The dangers of missed analogies are well illustrated by the different degrees of scrutiny that the Court applies to institutions, all of which play a significant role in advancing the exchange of ideas so prized by the First Amendment. According to Professor Horwitz, First Amendment institutionalism produces distinct levels of deference, which in turn lead to significant disparities in the treatment of colleges and universities on the one hand and religious organizations on the other. Under a "weak-form" version, courts accord deference to institutions in their areas of expertise but otherwise are prepared to scrutinize their policies and practices.<sup>157</sup> Horwitz concludes that the Court has used this approach when reviewing the conduct of colleges and universities in affirmative action cases. The Justices have deferred to judgments about academic mission and goals but have closely scrutinized the choice of means.<sup>158</sup> In *Bakke*, for example, Justice Powell accepted the diversity rationale but rejected other objectives related to redress of societal discrimination because

---

155. See Huhn, *supra* note 84, at 314–15 (noting that analogical reasoning requires judges to determine whether a previously decided case is sufficiently "on point" to count as precedent; formalist analogies may focus narrowly on factual parallels and ignore similarities based on values).

156. See J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J. COLL. & U.L. 79, 132–33 (2004).

157. Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1516.

158. *Id.* at 1516–17.

they fell outside the purview of academic expertise regarding the learning process.<sup>159</sup> In addition, he was quite ready to substitute his own judgment about the appropriate means to achieve the goal of diversity by endorsing Harvard's approach to undergraduate admissions while invalidating the medical school's set-aside program.<sup>160</sup> This limited deference to colleges and universities has persisted, most notably when the Court in *Fisher I* demanded that the University of Texas provide hard evidence that race-conscious admissions programs remained necessary to achieve diversity in the student body.<sup>161</sup>

Under a "medium-form" version of First Amendment institutionalism, the courts treat organizations that advance critically important dialogue as substantially autonomous so long as they operate within their designated sphere.<sup>162</sup> These institutions have "a fairly substantial positive privilege to rebut government attempts to intrude upon their ability to shape their own affairs," as long as they demonstrate adherence to their own well-developed internal norms and processes.<sup>163</sup> If the Court had adopted this approach for colleges and universities, Horwitz says, there would be far more deference not just to pedagogical goals but also to the policies and practices used to realize them.<sup>164</sup> That deference would allow admissions officers considerably more leeway in administering race-conscious programs without fear of legal challenge.

Finally, courts could rely on a "strong-form" version of deference, which assumes that institutions "operate on a largely self-regulating basis," placing them "outside of the supervision of external legal regimes."<sup>165</sup> Under this approach, colleges and universities would command "near-absolute discretion" to "compos[e] classes based explicitly on considerations of race or gender" because these institutions would be presumptively autonomous.<sup>166</sup> Clearly, institutions of higher education do not enjoy this kind of hands-off institutional independence.<sup>167</sup> However, churches and religious organizations now receive the highest level of deference for their autonomous decision-making under the First Amendment.

Heightened deference to sectarian institutions manifests itself in several ways. First, courts have refused to exercise "subject-matter jurisdiction over the internal affairs of religious organizations."<sup>168</sup> This approach stems in part from

159. See *supra* notes 37–38 and accompanying text.

160. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 285, 316–18 (1978).

161. See *Fisher I*, 570 U.S. 297, 311–14 (2013).

162. See Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1518.

163. *Id.*

164. See *id.* at 1518–19.

165. *Id.* at 1519–20.

166. *Id.* at 1520.

167. See *id.*

168. *Id.* at 1520–21 (quoting Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1589).

a sense that judges are ill equipped to second-guess faith-based judgments.<sup>169</sup> For instance, the Court has repeatedly made clear that it cannot evaluate the sincerity of religious beliefs without unduly intruding into sectarian matters.<sup>170</sup> As a result, when faith-based institutions adopt the view that the Bible prohibits same-sex marriage, courts have accepted the authenticity of this belief without question.<sup>171</sup> Moreover, the Court has refrained from judging the reasonableness of a religious organization's conclusion that compliance with a government regulation would significantly burden a religious belief.<sup>172</sup> So, the Justices have accepted uncritically the claim that providing contraceptive coverage to women under company health care plans, for example, would render faith-based organizations complicit in sinful behavior.<sup>173</sup> Finally, the Court has protected the autonomy of churches and religious organizations by immunizing important choices that they make about internal operations, most notably the employment of faith leaders under the ministerial exception.<sup>174</sup> Although denominated as ministerial, the exception has steadily expanded beyond pastors to include teachers at religious schools, press secretaries, counselors, and church organists.<sup>175</sup> By treating all of these employees as equivalently central to faith-based concerns, courts have allowed churches and other religious entities to make hiring, promotion, and firing decisions that are beyond the reach of antidiscrimination laws. Judges simply will not evaluate whether race, gender, age, or other protected traits played an impermissible role in these employment actions.<sup>176</sup>

169. See Horwitz, *Churches as First Amendment Institutions*, *supra* note 7, at 97–98 (arguing that judges cannot make “determinations about who is the true church” and must refrain from intruding on religious sovereignty).

170. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 717–19, 723–24 (2014).

171. See, e.g., *Masterpiece Cakeshop v. Colo. Hum. Rts. Comm'n*, 138 S. Ct. 1719, 1728 (2018); *Knapp v. City of Couer D'Alene*, 172 F. Supp. 3d 1118, 1121 (D. Idaho 2016); 303 *Creative LLC v. Elemis*, 385 F. Supp. 3d 1147, 1161 (D. Colo. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 921 (Ariz. 2019).

172. See, e.g., *Hobby Lobby Stores, Inc.*, 573 U.S. at 717–19, 723–24.

173. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383–84 (2020); *Hobby Lobby*, 573 U.S. at 691. See generally Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2518–19 (2015) (arguing that complicity-based conscience claims differ from traditional religious accommodation claims because of the concentrated costs imposed on citizens outside the faith-based community).

174. *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061–62 (2020); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012).

175. See, e.g., *Hosanna-Tabor*, 565 U.S. at 171–74 (teacher); *Morrissey-Berru*, 140 S. Ct. at 2049 (same); *Sterlinski v. Cath. Bishop of Chi.*, 934 F.3d 568, 569, 572 (7th Cir. 2019) (music director and organist); *Rogers v. Salvation Army*, No. 14-12656, 2015 WL 2186007, at \*5–7 (E.D. Mich. May 11, 2015) (counselor); *Kirby v. Lexington Theological Seminary*, 426 S.W.3d 597, 605 (Ky. 2014) (professor) (“Although ministerial it is in name, the exception . . . has been applied to lay employees, seminary professors, hospital workers, press secretaries, musicians, and many others.”).

176. See, e.g., *Penn v. N.Y. Methodist Hosp.*, 884 F.3d 416, 424–26 (2d Cir. 2018) (rejecting an African American pastor's employment discrimination claims due to the ministerial exception); *Moreno v. Episcopal Diocese of Long Island*, No. CV 14-7231, 2016 WL 8711448, at \*7–10 (E.D.N.Y.

Clearly, the courts' treatment of institutions of higher education and religious institutions has been widely divergent, even though both qualify as First Amendment institutions. Because relevant bodies of law have developed independently under rubrics of academic freedom and the religion clauses, courts have not even acknowledged the substantial disparities. That silence in the face of a missed analogy has continued, even as the Justices have simultaneously grown more aggressive in questioning universities' exercise of discretion and more deferential to claims of religious autonomy.<sup>177</sup> If the Court were to recognize the differential treatment, a formalist response might emphasize that the Constitution nowhere explicitly mentions academic freedom, while protections for religious liberty feature prominently in the text of the First Amendment itself.<sup>178</sup> That kind of response is distinctly unsatisfying, of course, because it presumes that constitutional interpretation is little more than literalism and parsing.<sup>179</sup>

It is no accident that “the judges who have contributed the most to creating a doctrine of institutional academic freedom have been centrists, concerned for some balance of freedom and order.”<sup>180</sup> Like Justice Powell in *Bakke*, they “share a regard for learning, appreciation for the complexity of institutional arrangements, and skepticism about judicial lawmaking.”<sup>181</sup> Inherent in protections for academic freedom, then, is a recognition that the First Amendment as a whole is greater than the sum of its parts. Whether or not institutional autonomy for colleges and universities is explicitly mentioned, their decisions are entitled to deference if they play a central part in advancing the conditions for a flourishing democracy. As philosopher Martha Nussbaum explains,

---

Jan. 20, 2016) (dismissing an African American pastor's racial discrimination claim under the ministerial exception); see also Leslie C. Griffin, *The Sins of Hosanna-Tabor*, 88 IND. L.J. 981, 997–99 (2013); Elizabeth Sepper, *Ever-Expanding Immunity for Religious Institutions Augur Trouble for Worker Protections*, AM. CONST. SOC'Y EXPERT F. (July 14, 2020), <https://www.acslaw.org/expertforum/ever-expanding-immunity-for-religious-institutions-augurs-trouble-for-worker-protections/> [<https://perma.cc/247R-X58M>].

177. See *supra* notes 94–97, 113–25, 156–67 and accompanying text; Horwitz, Fisher, *Academic Freedom, and Distrust*, *supra* note 37, at 519–20, 526–29 (describing increasing distrust of academic institutions among courts and the public). The distrust of American colleges and universities has deep roots, including Justice Powell's own concerns about liberal faculty who undermined students' faith in “the American political and economic system.” WINKLER, *supra* note 36, at 286.

178. See Dahlia Lithwick & Richard C. Schragger, *Jefferson v. Cuccinelli: Does the Constitution Really Protect a Right to “Academic Freedom”?*, SLATE (June 1, 2010, 6:19 PM), <https://www.slate.com/news-and-politics/2010/06/does-the-constitution-really-protect-a-right-to-academic-freedom.html> [<http://perma.cc/7GS6-4W7V>].

179. See Owen Fiss, *The Democratic Mission of the University*, 76 ALB. L. REV. 735, 738 (2012) (arguing that the method of interpreting the First Amendment has been purposive rather than textualist).

180. Byrne, *supra* note 156, at 132.

181. *Id.*

[o]ur country has embarked on an unparalleled experiment. . . . Unlike all other nations, we ask a higher education to contribute a general preparation for citizenship, not just specialized preparation for a career. To a greater degree than all other nations, we have tried to extend the benefits of this education to all citizens, whatever their class, race, sex, ethnicity, or religion. We hope to draw citizens toward one another by complex mutual understanding and individual self-scrutiny, building a democratic culture that is truly deliberative and reflective . . . .<sup>182</sup>

*Bakke* and *Grutter*, taken together, endorse the constitutional significance of this unique role for colleges and universities, one essential to the democratic experiment the First Amendment was designed to safeguard. That vision is integral to the part that academic freedom plays in affirmative action cases and turns on a First Amendment institutionalism that transcends any narrowly formalist interpretation.

That said, there may be some legitimate reasons to treat institutions of higher education and religious organizations differently, but in light of the underpinnings of the First Amendment, only a consideration of context can reveal meaningful distinctions. For one thing, colleges and universities are largely engaged in secular activities, while churches and religious organizations devote themselves to faith-based activities. Judges therefore might conclude that, as secular officials in a state-based system of adjudication, they are more competent to evaluate academic decisions than they are sectarian ones.<sup>183</sup> The courts also might find that a range of institutions can encourage the secular exchange of ideas much as colleges and universities do, while churches and religious organizations play a singularly indispensable role in fostering faith-based dialogue.<sup>184</sup>

If the Court tacitly gives these considerations some weight, it might be more willing to second-guess the pedagogical decisions of religious colleges and universities than the sectarian commitments of churches. There is some evidence that this is the case. In *Bob Jones University v. United States*,<sup>185</sup> the Internal Revenue Service denied a religiously affiliated university its tax exemption because the school denied admission to and expelled students if they engaged in interracial marriage or dating.<sup>186</sup> According to school officials, the policies were based on a sincere belief that the Bible forbade these behaviors. The university therefore argued that it was entitled to a religious exemption

182. MARTHA C. NUSSBAUM, *CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION* 294 (1997).

183. See Horwitz, *Universities as First Amendment Institutions*, *supra* note 83, at 1522.

184. See *id.* (arguing that universities may not occupy as central a role as churches do in individual lives).

185. 461 U.S. 574 (1983).

186. *Id.* at 579–82, 585. The case also addressed the tax-exempt status of Christian elementary and secondary schools that had racially discriminatory admissions policies. *Id.* at 583–85.

from federal antidiscrimination laws based on its free exercise of the Christian faith.<sup>187</sup>

In marked contrast to the deference recently accorded to churches, the Justices did not treat Bob Jones University as presumptively autonomous and therefore free from scrutiny. Instead, citing the tax code and accompanying regulations, the Court considered whether Bob Jones's practices contravened an important public policy.<sup>188</sup> According to the eight-to-one decision, the federal government's interest in preventing racial discrimination was well established through judicial precedent, congressional action, and agency interpretation. That interest therefore sufficed to override Bob Jones's claim to a religious exemption.<sup>189</sup> Notably, in joining the *Bob Jones* decision, Justice Powell focused on the university's autonomy as an institution of higher education, rather than as a religious organization.<sup>190</sup> For Justice Powell, *Bakke* and *Bob Jones* both implicated the appropriate level of deference to afford pedagogical decisions when colleges and universities make use of race. Even though Justice Powell appreciated these parallel considerations, the two cases are seldom considered together. Presumably the different sources of precedent, distinct situations, and divergent outcomes have obscured their mutual relevance.

Courts could also explain the varying levels of deference for institutions of higher education and religious organizations based on their status as public and private institutions. That is, some colleges and universities are public, while churches and other religious organizations are uniformly private. This distinction is not entirely satisfying, however. In the affirmative action context, the public/private divide provides little traction in evaluating the strength of an academic freedom claim, a point brought home by SFFA's recent request for joint Supreme Court review of the Harvard and UNC cases. As these lawsuits illustrate, both private and public universities invoke institutional autonomy to be free of state overreach, most notably by federal courts.<sup>191</sup> In defending their

187. *Id.* at 602–04.

188. *See id.* at 592–96, 604.

189. *Id.* at 604.

190. Bench Memorandum from Mark Newell to Justice Lewis F. Powell 30–33 (Oct. 2, 1982) (on file with the North Carolina Law Review) (noting that the advocates disagreed about whether Bob Jones University sought an exemption as an educational or a religious organization); Handwritten Notes of Justice Lewis F. Powell 2 (on file with the North Carolina Law Review) (observing that William T. Coleman, appointed by the Court to defend the judgment below, had contended that Bob Jones was seeking an exemption as an educational institution); Memorandum from Mark Newell to Justice Lewis F. Powell 4 (Mar. 8, 1983) (on file with the North Carolina Law Review) (agreeing that the Bob Jones case could come out differently if it were a seminary rather than a university preparing students for secular careers).

191. *See* Philip Lee, *A Contract Theory of Academic Freedom*, 59 ST. LOUIS U. L.J. 461, 496 (2015) (“When the government is acting against a university, then state action is implicated in a constitutional claim. This is true whether the university is public or private.”). The same is not true “when a university is acting against its own faculty members” and “a court must determine whether or not the institution is a state actor before constitutional analysis can proceed.” *Id.*

admissions policies, the University of California at Davis, the University of Michigan, the University of Texas, and the University of North Carolina—all public institutions—have offered rationales largely identical to those proffered by a quintessentially private school like Harvard.<sup>192</sup> Moreover, some states expressly recognize that public colleges and universities are semisovereign,<sup>193</sup> and many private universities accept large amounts of government funding and agree to abide by public norms, including nondiscrimination mandates.<sup>194</sup> Although sectarian institutions are necessarily private to avoid any official establishment of a religion, the public/private distinction is not always a neat one. For example, the Court increasingly has permitted churches and religious organizations to pursue public funding.<sup>195</sup> In doing so, the Justices typically try to assure themselves that the grants will not lead to excessive government entanglement in sectarian affairs.<sup>196</sup> Moreover, as the Justices broaden eligibility to make religious liberty claims, for-profit corporations increasingly assert these rights, even though they operate in public markets in which their competitors must comply with nondiscrimination mandates.<sup>197</sup> Given these complexities, it is not obvious that an organization's designation as public or private should be dispositive in deciding how central it is to fostering discourse or how much autonomy it should enjoy as a First Amendment institution.

In sum, then, the formalism of the Court's First Amendment jurisprudence creates dangers of false equivalencies and missed analogies. False equivalencies can lead to an expansive interpretation of which institutions enjoy deference under the First Amendment, as with religious organizations. As

192. See *Fisher I*, 570 U.S. 297, 311–14 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003); Trial Findings of Fact & Conclusions of Law, *supra* note 76, at 6–15, 18–27, 93–118; Anderson, *supra* note 69; *supra* notes 26–27 and accompanying text.

193. See, e.g., CAL. CONST. art. IX, § 9(a); *Smith v. Regents of the Univ. of Cal.*, 844 P.2d 500, 513 (Cal. 1993); *Miklosy v. Regents of Univ. of Cal.*, 188 P.3d 629, 637 (Cal. 2008). See generally Michael Park, *Sovereignty and First Amendment Rights of Higher Education Institutions: An Affirmative and Institutional Approach*, 54 FIRST AMENDMENT STUD. 110, 113–14 (2020) (discussing how public institutions of higher learning could assert free speech rights against the federal government); DAVID F. LABAREE, *A PERFECT MESS: THE UNLIKELY ASCENDANCY OF AMERICAN HIGHER EDUCATION* 129–34 (2017) (recognizing that public and private universities are similar in many ways but that private institutions may have somewhat more autonomy than public ones; however, the most selective flagship public schools, where affirmative action is most significant, have considerable autonomy).

194. Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2345 (2000) (arguing that *Bakke* treated Title VI and the Equal Protection Clause as coextensive, so private universities that accept federal funds at least are bound by nondiscrimination norms under Title VI).

195. See, e.g., *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2254–57 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019–25 (2017).

196. See, e.g., *Espinoza*, 140 S. Ct. at 2260–61; *Comer*, 137 S. Ct. at 2023–24.

197. See Zoë Robinson, *What Is a "Religious Institution"?*, 55 B.C. L. REV. 181, 204–13 (2014) (arguing that the definition of religious institutions should be linked to their unique and separate institutional sovereignty and that courts should err on the side of a narrow definition).

growing numbers of organizations clamor for presumptive autonomy, the Justices confront a formidable task in explaining their hands-off approach to institutional practices that violate public norms and leave vulnerable groups susceptible to discrimination. At the same time, missed analogies allow the Court to ignore the divergent treatment of churches, on the one hand, and colleges and universities on the other. Institutions of higher education must hew closely to principles of nondiscrimination, even as they try to diversify their student bodies. At the same time, the Court has allowed more space for religious organizations to discriminate with impunity based on sectarian beliefs.

The resulting doctrinal incoherence can call into question the Court's commitment to the norms of both institutional liberty and individual equality.<sup>198</sup> These formalist tendencies are at odds with an affirmative action jurisprudence that rests on a broader appreciation of the First Amendment's role in safeguarding the conditions of democratic exchange. *Bakke* and its progeny recognize the essential role that colleges and universities play in advancing an inclusive and deliberative model of civic life. Formalism threatens to undercut this understanding of institutional academic freedom by adopting a wooden interpretation of the meaning of liberty and its relationship to equality. In the next section, I turn to the ways in which formalism weakens the concept of equality itself.

### C. *A Closer Look at Formalism's Failings in Equal Protection Jurisprudence*

The failings of formalism infect both Fourteenth Amendment and First Amendment jurisprudence. Under equal protection law, scholars mainly have criticized the Court for a false equivalency, that is, adopting a colorblind approach that applies strict scrutiny, regardless of whether race is used for benign or malign purposes. As a result, in the affirmative action context, judges treat reverse discrimination against White applicants like Allan Bakke as constitutionally indistinguishable from discrimination against marginalized racial and ethnic minorities. So long as admissions programs include race as one factor in the decision-making process, the Justices apply an exacting level of review that is extraordinarily hard to satisfy. The very prospect of strict scrutiny narrows the range of programs that colleges and universities can adopt, requires them to constantly gather evidence that continued reliance on race is justified, and leaves even the most carefully crafted policies perennially open to legal attack.

Despite the preoccupation with false equivalencies, missed analogies pose dangers of their own to equality jurisprudence. The Court has relied on tiers of scrutiny under the Equal Protection Clause that allow substantial leeway for discrimination against some groups. The most notable example has been the

---

198. *Id.* at 230–31; Sepper, *Zombie Religious Institutions*, *supra* note 138, at 981–82.



limited protection accorded to same-sex couples. The failure to acknowledge a history of disadvantage and marginalization has allowed courts to uphold exemptions that permit vendors to deny these couples wedding services based on religious objections. The decisions regularly note that racial discrimination is wholly distinct and utterly intolerable, even if differential treatment based on sexual orientation is permissible.<sup>199</sup> Due to this widely disparate treatment, the increasingly contingent and uncertain reach of nondiscrimination mandates undermines any principled understanding of equality.

### 1. The Danger of False Equivalencies

Colleges and universities must operate within the constitutional constraints of colorblindness, as expressed through the strict scrutiny test, even if they have a compelling interest in enrolling a diverse student body.<sup>200</sup> Beginning with *Bakke*, the Court has made clear that it is unwilling to distinguish among race-conscious admissions policies based on whether they harm White applicants like Allan Bakke or burden members of historically underrepresented minority groups. In his controlling opinion, Justice Powell concluded that in “a Nation of minorities,” there is no meaningful way for the Court to distinguish between well-intentioned and pernicious uses of race.<sup>201</sup> Instead, the Justices must be vigilant in protecting any racial or ethnic group that is targeted for differential treatment.<sup>202</sup> Applying strict scrutiny to affirmative action in higher education has prompted widespread criticism that the Court is indifferent to history and context, elevating formal categories over the lived experience of race.<sup>203</sup> The false equivalency embedded in *Bakke* has, in turn, altered the dynamics of affirmative action litigation, allowing conservative think tanks and legal organizations to appropriate the language of civil rights to

199. See, e.g., *Telescope Media Grp. v. Lucero*, 936 F.3d 740, 757 (8th Cir. 2019); *Chelsey Nelson Photography v. Louisville/Jefferson Cnty. Metro Gov’t*, 479 F. Supp. 3d 543, 560 n.133 (W.D. Ky. 2020); *303 Creative LLC v. Elenis*, 385 F. Supp. 3d 1147, 1163 (D. Colo. 2019); *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 915–16, 924 (Ariz. 2019) (finding protections against racial discrimination under public accommodations laws will not be affected because they do not implicate free speech interests and that *Hobby Lobby* rejects the “slippery slope” argument about other protected classes).

200. David A. Strauss, *Fisher v. University of Texas and the Conservative Case for Affirmative Action*, 2016 SUP. CT. REV. 1, 2–5, 16–18, 22–24 (describing how the demands of strict scrutiny can be an uneasy fit with an amorphous interest in diversity and concluding that deference to institutional tradition plays a key role in explaining the Court’s decisions).

201. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291–93 (1978).

202. *Id.* at 292–96.

203. See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 48–52 (1991); R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 575–77 (2003); Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1034–40 (2007).

challenge the exclusion of prospective White (and, more recently, Asian American) students from selective colleges and universities.<sup>204</sup>

Interestingly, most commentators have overlooked the irony inherent in the Court's formalist treatment of racial categories and its simultaneous rebuke of college and university administrators for adopting unduly wooden approaches to defining race. By equating reverse discrimination against White applicants with discrimination against underrepresented racial and ethnic minorities, the Justices have treated race as a fungible classification. That is, all the categories are abstractions and there is no way to differentiate among them based on a personal experience of race. At the same time, the Justices have taken colleges to task for treating the racial and ethnic identities of minority applicants as equivalent in the admissions process. In *Gratz v. Bollinger*,<sup>205</sup> the University of Michigan relied on a point system to determine which applicants it would admit to the undergraduate class.<sup>206</sup> When an applicant stated that he or she was from an underrepresented racial or ethnic group, admissions officers automatically allocated twenty points to the file without examining the applicant's life experiences further.<sup>207</sup>

This point system treated all underrepresented racial and ethnic categories as indistinguishable and interchangeable. According to the Court, the emphasis on abstract racial classifications violated the principle of holistic review because it failed to treat applicants from underrepresented groups as individuals based on their potential contributions to a diverse student body.<sup>208</sup> A more nuanced approach, one that accounted for experience, was required to evaluate racial and ethnic identities. In a telling move, the Court invoked the pedagogical rationale for affirmative action to reject the approach to racial classifications that it has otherwise adopted under the Fourteenth Amendment.<sup>209</sup> Ironically, the formalism of these categories appeared to be at odds with the notion of diversity that Justice Powell embraced in *Bakke*.

---

204. See generally ANN SOUTHWORTH, LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION 12–18, 73 (2008) (describing how conservatives created their own institutions to support a conservative agenda); Ann Southworth, *Lawyers and the Conservative Counterrevolution*, 43 LAW & SOC. INQUIRY 1698, 1700–02 (2018) (describing how conservative legal advocates appropriated the strategies and tactics of public interest lawyers).

205. 539 U.S. 244 (2003).

206. See *id.* at 255.

207. See *id.* at 256.

208. *Id.* at 271–72.

209. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218–27, 235 (1995) (describing the evolution of the Court's jurisprudence on racial preferences and mandating that strict scrutiny apply to a federal program that considered race in awarding government contracts to remedy past societal discrimination); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–500 (1989) (striking down the city of Richmond's preference for minority business enterprises under a strict scrutiny standard and noting that *Bakke* similarly rejected amorphous efforts to correct societal discrimination).

Beyond debates over the meaning of racial identity, there have been other important concerns about false equivalencies under equal protection law. In the Court's 2018 decision in *Masterpiece Cakeshop v. Colorado Human Rights Commission*,<sup>210</sup> the majority overturned penalties imposed on a Christian baker who refused to make a wedding cake for a same-sex couple.<sup>211</sup> The baker argued that, under the First Amendment, officials could not force him to comply with a public accommodations law prohibiting discrimination based on sexual orientation.<sup>212</sup> In his view, custom-made cakes were a form of expressive activity, and the law compelled him to engage in speech endorsing same-sex marriage when he would prefer to remain silent.<sup>213</sup> Moreover, the baker claimed, the law burdened his free exercise of religion because he was forced to choose between adhering to his Christian belief that same-sex marriage is sinful or incurring substantial fines that could destroy his business.<sup>214</sup>

At the time, many observers thought that *Masterpiece Cakeshop* would resolve a growing controversy over whether for-profit businesses, ranging from bakeries to photography shops to custom stationery stores, should be able to obtain exemptions from laws requiring them to provide services for same-sex weddings.<sup>215</sup> The Court, however, sidestepped the issue by finding that Colorado officials had acted with impermissible animus when they took punitive actions against the baker. To reach that conclusion, the Justices relied on some officials' remarks that religious adherents had a long history of invoking their faith to justify discrimination.<sup>216</sup> In addition, the Court pointed out that Colorado administrators had treated the owner of *Masterpiece Cakeshop* differently than bakers who refused to serve customers ordering cakes with derogatory messages about gays and lesbians.<sup>217</sup> According to the Court, this evidence sufficed to make out a case of illicit animus.<sup>218</sup>

Legal scholar Melissa Murray argues that *Masterpiece Cakeshop* relied on a false equivalency that she describes as "inverted" animus.<sup>219</sup> As she explains, "[t]he oppressed victim of discrimination is no longer the 'discrete and insular minorities' . . . , but rather religious objectors who were once trumpeted as a 'moral majority,' but now cloak themselves as 'religious minorities' in need of

---

210. 138 S. Ct. 1719.

211. *See id.* at 1723–24.

212. *Id.* at 1726.

213. *Id.* at 1726, 1728.

214. *See id.* at 1726.

215. Stephen M. Feldman, *Having Your Cake and Eating It Too? Religious Freedom and LGBTQ Rights*, 9 WAKE FOREST J.L. & POL'Y 35, 36, 46 (2018) (noting that the Court sidestepped the conflict between LGBTQ rights and religious liberties but that the tensions ultimately must be resolved).

216. *Masterpiece Cakeshop*, 138 S. Ct. at 1729–30.

217. *Id.* at 1730–31.

218. *Id.* at 1731–32.

219. Melissa Murray, *Inverting Animus: Masterpiece Cakeshop and the New Minorities*, 2018 SUP. CT. REV. 257, 281.

state protection.”<sup>220</sup> The Court emphasizes “a broader climate of hostility and disdain directed toward people of faith,”<sup>221</sup> even as the opinion elides the long history of discrimination against gays and lesbians that prompted Colorado to protect them in the first place. For Murray, this shows “the malleability of animus—and the antidiscrimination narrative more generally.”<sup>222</sup>

Formalism makes animus especially protean because it divorces protected categories from histories of exclusion and ongoing inequities that make groups particularly vulnerable to mistreatment.<sup>223</sup> Take, for example, the Court’s recent five-to-four decision in *Bostock v. Clayton County*,<sup>224</sup> in which the majority concluded, over vigorous dissent, that Title VII of the Civil Rights Act of 1964 extends protection from workplace discrimination to gays, lesbians, and transgender individuals.<sup>225</sup> Both the majority and dissenting opinions focused entirely on questions of textual interpretation, in particular, the meaning of the term “sex” in the statute.<sup>226</sup> In fact, Justice Neil Gorsuch’s majority opinion and Justice Alito’s dissent argued over which most faithfully adhered to textualism while reaching opposite conclusions.<sup>227</sup> For the majority, discrimination against gays and lesbians necessarily turned entirely on the sex of their chosen partners, while discrimination against gender nonconforming persons depended on a lack of alignment between their biological and self-identified sex.<sup>228</sup> Therefore, the majority argued, Title VII covers these forms of discrimination, regardless of whether they were uppermost in the minds of legislators.<sup>229</sup> Justice Alito’s dissent similarly focused on the term “sex” but contended that at the time Congress enacted the Civil Rights Act of 1964, no one would have understood it to apply to gay, lesbian, and transgender individuals.<sup>230</sup> Moreover, in the intervening years, Congress had declined to adopt nondiscrimination measures protecting gays and lesbians, and the very notion of gender nonconformity was not widely understood until years after Title VII’s passage.<sup>231</sup>

220. *Id.* at 282.

221. *Id.*

222. *Id.* at 285.

223. See Sunstein, *supra* note 9.

224. 140 S. Ct. 1731 (2020).

225. *Id.* at 1737.

226. See *id.* at 1738–44; *id.* at 1755–74 (Alito, J., dissenting). The dissenting opinion also attached dictionary excerpts in a lengthy set of appendices. *Id.* at 1784–91.

227. *Id.* at 1738 (majority opinion) (detailing the majority’s search for “ordinary public meaning” of statutory language); *id.* at 1755–56 (Alito, J., dissenting) (giving the dissent’s accusation that the majority “sails under a textualist flag” but “actually represents . . . a theory of statutory interpretation that Justice Scalia excoriated”).

228. *Id.* at 1741–43 (majority opinion).

229. *Id.* at 1749–54.

230. *Id.* at 1766–73 (Alito, J., dissenting).

231. *Id.* at 1767–73.

Whatever the differences in these approaches to textual interpretation, both Justice Gorsuch's majority opinion and Justice Alito's dissent in *Bostock* focused almost entirely on the language of the statute, its legislative history, and its plain meaning to legislators.<sup>232</sup> As a result, the opinions treated a history of discrimination based on sexual orientation and gender nonconformity as largely irrelevant. The very invisibility of this history is a hallmark of formalism, one that deprives the Court of any meaningful way to grapple with animus and its role in antidiscrimination law. Demonstrating the doctrinal malleability that Murray describes, the Court can narrowly conclude that civil rights law protects gays and lesbians without ever engaging with questions of bias and hostility. At the same time, the Justices can nullify efforts to punish that very bias and hostility, again with little discussion of the dimensions of the problem, by citing limited evidence of illicit animus against a religious baker. In fact, the Court's highly formalist approach to equality in *Bostock*, an opinion devoid of context and values, prompted Professor Sunstein to predict affirmative action's imminent demise.<sup>233</sup>

## 2. The Danger of Missed Analogies

Equal protection law also can fall prey to problems of missed analogies, another failing of formalism. Here, the incomplete conceptualization of animus takes a different form. As law professor Jane Schacter explains, the emphasis on formal categories can blind the Court to the varied histories of discrimination that are predicates for stigmatization and subordination.<sup>234</sup> For Schacter, a formalist approach rests on "a conceptual foundation of sameness."<sup>235</sup> As a result, civil rights becomes "a closed category" that is "constant in meaning, impervious to change, and reducible to an irrefutable essence."<sup>236</sup> By "erasing complexity and difference," formalism ignores larger dynamics of disadvantage by insisting that groups demanding protection meet a static definition of harm.<sup>237</sup> So, for example, because discrimination against gays and lesbians has diverged from the historic experiences of racial minorities, courts are reluctant to recognize sexual orientation as deserving of legal protection based on a longstanding history of bias and hostility.<sup>238</sup> In Schacter's view, the Court's failure to engage with lived experiences of discrimination leads to missed analogies—blind spots created by unduly rigid and reductionist understandings of protected identity traits.

---

232. *Id.* at 1738–44 (majority opinion); *id.* at 1767–78, 1784–91 (Alito, J., dissenting).

233. Sunstein, *supra* note 9.

234. Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285 (1994).

235. *Id.* at 296.

236. *Id.*

237. *Id.* at 297.

238. *Id.* at 298–300.

The perils of missed analogies have been palpable in recent decisions addressing whether religious beliefs can be a basis for discrimination based on gender but not race. In *Hobby Lobby*, for instance, the Court found that the company owners held sincere religious beliefs that justified a decision to deny contraceptive coverage to female employees.<sup>239</sup> To rebuff the dissent's charge that businesses had invoked similar arguments about religion to oppose racial integration,<sup>240</sup> the majority noted, in dictum and without elaboration, that "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."<sup>241</sup> This unadorned recitation of the strict scrutiny standard says nothing about the lived experience of race nor why it differs so dramatically from gender.

Meanwhile, lower courts have been grappling with the distinction between race-based and gender-based discrimination in cases involving vendors with faith-based objections to same-sex marriage. These business owners seek to deny wedding services to gay and lesbian couples, just as the baker in *Masterpiece Cakeshop* did. In *Brush & Nib Studio, LC v. City of Phoenix*,<sup>242</sup> for example, the Arizona Supreme Court held that Phoenix's public accommodations ordinance could not compel designers who prepared custom wedding invitations to provide these services to same-sex couples.<sup>243</sup> The majority found that the law violated the First Amendment by requiring business owners to speak when they would prefer to remain silent.<sup>244</sup> In addition, the ordinance denied owners a right to religious liberty under the state's Free Exercise of Religion Act.<sup>245</sup> In response, the dissent argued that the majority had ignored precedent requiring businesses to serve customers of all races, regardless of any faith-based objections to integration.<sup>246</sup> Those objections were also rooted in sectarian convictions that civil rights laws "contravene[d] the will of God" and violated business owners' religious liberties.<sup>247</sup> Because of this disregard for history, the dissent concluded that the majority's approach wrongly "diminishes our defining statement that all are created equal."<sup>248</sup> The majority roundly rejected

239. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720, 736 (2014).

240. *Id.* at 769–70 (Ginsburg, J., dissenting).

241. *Id.* at 733 (majority opinion).

242. 448 P.3d 890 (Ariz. 2019).

243. *Id.* at 895.

244. *Id.* at 904, 926.

245. *Id.* at 917, 926.

246. *Id.* at 933–34 (Bales, J., dissenting).

247. Jim Shahin, *A Barbecue Case that Helped the Cause of Civil Rights*, WASH. POST (Aug. 2, 2016), [https://www.washingtonpost.com/lifestyle/food/a-barbecue-case-that-helped-the-cause-of-civil-rights/2016/08/01/cc5edcd8-5203-11e6-b7de-dfe509430c39\\_story.html](https://www.washingtonpost.com/lifestyle/food/a-barbecue-case-that-helped-the-cause-of-civil-rights/2016/08/01/cc5edcd8-5203-11e6-b7de-dfe509430c39_story.html) [<https://perma.cc/G3G8-CXCM> (dark archive)] (describing *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941 (D.S.C. 1966), *rev'd and remanded*, 377 F.2d 433 (4th Cir. 1967), *aff'd as modified*, 390 U.S. 400 (1968)).

248. *Brush & Nib Studio, LC*, 448 P.3d at 937.

the dissent's fears that the decision condoned racial discrimination, insisting that earlier opinions interpreted civil rights statutes and did not implicate concerns about free speech under the First Amendment.<sup>249</sup> Because the majority's justification rested on parsing doctrinal authority, the dissent dismissed the response as misguided "legal formalism," which failed to account fully for equality concerns.<sup>250</sup>

Court watchers anticipated that the Justices would offer further guidance on whether religious liberty interests include a right to discriminate in *Fulton v. City of Philadelphia*.<sup>251</sup> Catholic Social Services ("CSS"), a licensed foster care agency affiliated with the Catholic Church, was founded in 1917 at a time when child placements were handled on a private basis.<sup>252</sup> In the intervening years, the city of Philadelphia took over the system and contracted with thirty agencies, including CSS, to perform placement services.<sup>253</sup> Under the contracts, the city required agencies to refrain from discriminating on the basis of race, color, national origin, religion, and sexual orientation.<sup>254</sup> CSS refused to certify same-sex, married couples as foster parents based on its religious conviction that marriage must be between a man and a woman.<sup>255</sup> The city therefore declined to renew CSS's contract, noting that despite "respect [for CSS's] sincere religious beliefs," the "freedom to express them is not at issue here where you have chosen voluntarily to partner with us in providing government-funded, secular social services."<sup>256</sup>

CSS challenged the termination, and the Supreme Court unanimously concluded that the city's action violated the Free Exercise Clause.<sup>257</sup> Although all the Justices reached the same conclusion, their reasoning diverged sharply. Writing for the Court, Chief Justice John Roberts sidestepped the most controversial constitutional issues, much as the majority did in *Masterpiece Cakeshop*.<sup>258</sup> To avoid addressing the conflict between religious liberties and nondiscrimination mandates, the Court first concluded that CSS was not a public accommodation under Pennsylvania law. According to the opinion,

249. *Id.* at 916.

250. *Id.* at 933–34 (Bales, J., dissenting).

251. 141 S. Ct. 1868 (2021); Andrew R. Lewis, *The Fight for Religious Freedom Isn't What It Used To Be*, ATLANTIC (June 17, 2021), <https://www.theatlantic.com/ideas/archive/2021/06/fulton-and-polarization-religious-freedom/619158/> [<https://perma.cc/R7EG-NT9A> (dark archive)] ("The *Fulton* decision is substantial, but it is not the blockbuster outcome that some had expected.").

252. *Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019), *rev'd*, 141 S. Ct. 1868 (2021). Foster parents who used CSS's services joined CSS in the suit as plaintiffs. *Id.* at 150.

253. *Id.* at 147.

254. *Id.* at 148; 141 S. Ct. at 1875–76.

255. 922 F.3d at 148; 141 S. Ct. at 1875–76. CSS also refused to certify unmarried couples and considered all same-sex couples to be unmarried. 922 F.3d at 148; 141 S. Ct. at 1875.

256. 922 F.3d at 150.

257. 141 S. Ct. at 1882.

258. *See supra* notes 215–18 and accompanying text.

foster care certifications involved services that are “not readily accessible to the public” and instead required “customized and selective assessment that bears little resemblance to staying in a hotel, eating at a restaurant, or riding a bus.”<sup>259</sup> As a result, the Court focused only on the nondiscrimination provisions in contracts between the city and foster care agencies like CSS.<sup>260</sup>

The Court next found that Philadelphia’s contractual arrangements with CSS were subject to strict scrutiny because they were not neutral, nor were they generally applicable.<sup>261</sup> In particular, a provision allowed city officials to grant exemptions from the nondiscrimination policy at their sole discretion.<sup>262</sup> The city had clearly indicated that it would not make an exception for CSS, despite its claim of religious hardship.<sup>263</sup> In applying strict scrutiny, the Court rejected Philadelphia’s claim that its officials enjoyed broad managerial authority when administering municipal contracts and were therefore entitled to judicial deference.<sup>264</sup> The Justices ultimately concluded that the proffered reasons for terminating CSS’s contract did not satisfy a highly exacting standard of review. The city identified three compelling interests to justify its action: (1) maximizing the number of foster parents; (2) minimizing liability; and (3) ensuring equal treatment of prospective foster families.<sup>265</sup> Despite describing the first two goals as “important,” the Court found no reason to believe that granting an exemption to CSS would jeopardize those interests.<sup>266</sup> Including CSS in the foster care program appeared to increase the number of foster parents, and the threat of litigation was speculative.<sup>267</sup> The Court agreed that the interest in equal treatment was “a weighty one” but determined that it did not justify “denying CSS an exemption while making them available to others,” particularly when CSS “does not seek to impose [its religious] beliefs on anyone else.”<sup>268</sup>

Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas concurred in the judgment. In separate opinions, Justices Alito and Gorsuch chided the Court for evading pressing constitutional questions about the scope of religious liberties when they conflict with nondiscrimination provisions. Justice Alito wrote that “[t]his decision might as well be written on the dissolving paper sold in magic shops”<sup>269</sup> because Philadelphia could easily amend its

---

259. 141 S. Ct. at 1180.

260. *Id.* at 1881.

261. *Id.* at 1876–78, 1881.

262. *Id.* at 1878.

263. *Id.*

264. *Id.*

265. *Id.* at 1881.

266. *Id.* at 1881–82.

267. *Id.* at 1882.

268. *Id.*

269. *Id.* at 1887 (Alito, J., concurring).



nondiscrimination clause and terminate CSS's contract again.<sup>270</sup> Justice Gorsuch echoed these concerns, noting that “[d]odging the question today guarantees it will recur tomorrow” because “[t]hese cases will keep coming until the Court musters the fortitude to supply an answer.”<sup>271</sup> Justice Alito's concurrence in the judgment is especially instructive because he relied on a formalist interpretation in according broad protection to religious liberties under the Free Exercise Clause. In particular, he examined the clause's text and general meaning at the time of adoption to conclude that officials must refrain from interfering with religious liberties unless their exercise poses a threat to public peace or safety.<sup>272</sup> In other words, any law that imposes a substantial burden on religious exercise, whether or not it is neutral and generally applicable, should be subject to strict scrutiny.<sup>273</sup>

Justice Alito recognized that this approach would permit religious beliefs and practices to justify discriminatory conduct.<sup>274</sup> In his view, however, “[s]uppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game.”<sup>275</sup> In defending his position, Justice Alito was quick to distinguish between discrimination based on sexual orientation and on race, refusing even to consider the possibility of analogous histories of marginalization and exclusion. He asserted that “[w]hile CSS's ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs.”<sup>276</sup> To support that view, he noted that in recognizing a right to same-sex marriage, the Court “refused to equate traditional beliefs about marriage, which it termed ‘decent and honorable,’ with racism, which is neither.”<sup>277</sup> In short, Justice Alito continued to draw sharp distinctions between gender-based and race-based discrimination, treating the latter as *sui generis* and plainly impermissible—even in the face of religious liberty claims.

The *Fulton* litigation makes clear that religious organizations continue to demand increasing judicial deference and that this expanding deference is on a collision course with nondiscrimination provisions. Although the treatment of

270. *Id.*

271. *Id.* at 1931 (Gorsuch, J., concurring). In fact, the Court has granted certiorari to hear another case, this time involving a website designer's challenge to a Colorado nondiscrimination law that allegedly requires her to serve same-sex couples in violation of her religious beliefs. Adam Liptak, *Supreme Court To Hear Case of Web Designer Who Objects to Same-Sex Marriage*, N.Y. TIMES (Feb. 22, 2022), <https://www.nytimes.com/2022/02/22/us/colorado-supreme-court-same-sex-marriage.html> [<https://perma.cc/Y24F-P2FQ> (dark archive)].

272. 141 S. Ct. at 1894–907 (Alito, J., concurring).

273. *Id.* at 1924.

274. *Id.* at 1925.

275. *Id.*

276. *Id.*

277. *Id.* (quoting *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015)).

same-sex couples has garnered the lion's share of attention, the impact on protected groups is more sweeping. The Court has already allowed free exercise claims to weigh against women's access to contraception, for example.<sup>278</sup> In addition, there have been repeated concerns that some religious beliefs will be at loggerheads with a norm of racial nondiscrimination.<sup>279</sup> This ongoing struggle for primacy between liberty and equality interests has immediate implications for affirmative action, an area in which the Court has relied on institutional autonomy to justify the consideration of race in admissions. Professor Sunstein already has predicted that the Justices' commitment to formalism will spell the end for affirmative action in higher education. However, a careful examination of false equivalencies and missed analogies under the First and Fourteenth Amendments provides the necessary jurisprudential tools to determine whether affirmative action can be saved and, if so, how. Fidelity to *Bakke* and its progeny means that issues of institutional autonomy are as central to the analysis as principles of nondiscrimination. In fact, it will be critical to preserve a recognition of the unique mission of colleges and universities when determining the appropriate level of deference to accord the use of race in admissions.

### III. FORMALISM AND THE FUTURE OF AFFIRMATIVE ACTION

The Court's reliance on formalism, with its attendant dangers of false equivalencies and missed analogies, presents new challenges for an affirmative action jurisprudence rooted in Justice Powell's pragmatic vision. A danger of missed analogies arises because of the Court's increasing willingness to intrude on institutional autonomy in higher education, even as the Justices maintain a hands-off approach to corporate speech rights and, more strikingly, enhance protections for religious liberties. Although the Court has heightened demands for proof that race-conscious admissions are necessary, it has shown no similar appetite for second-guessing how corporations engage in speech once freed from the strictures of campaign finance laws.<sup>280</sup> Religious advocates have actively supported a laissez-faire approach to corporate speech in order to bolster autonomy rights that undergird many religious liberty cases.<sup>281</sup> In

278. See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691, 705–09, 719 (2014).

279. See Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 *CARDOZO L. REV.* 67, 97–98, 108–17, 136–39 (2020).

280. See, e.g., *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 227 (2014); *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 754–55 (2011); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 371–72 (2010).

281. See KEVIN M. KRUSE, *ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA* 7–8 (2015) (describing how Christian activism “helped reshape the national debate about the proper functions of the federal government, the political influence of corporations, and the role of religion in national life”); Kevin M. Kruse, *How Corporate America Invented Christian America*, *POLITICO* (Apr. 16, 2015), <https://www.politico.com/magazine/story/2015/04/corporate-america-invented-religious-right-conservative-roosevelt-princeton-117030/> [<http://perma.cc/7RUC-FF7X>] (“In many ways, the marriage of corporate and Christian interests that has recently

keeping with this muscular interpretation of First Amendment freedoms, the Justices have declined to scrutinize faith-based activities of churches, nonprofit religious organizations, and even for-profit closed corporations.<sup>282</sup> That deference has grown so great that the Court examines neither the sincerity of a religious belief nor the reasonableness of a conclusion that a neutral and generally applicable government requirement burdens that belief.<sup>283</sup> Due to the Court's growing deference, religious liberty interests have trumped nondiscrimination principles in areas ranging from employment to public accommodations.<sup>284</sup>

The Court's approach to colleges and universities looks very different, as the Justices express growing skepticism in affirmative action cases. In *Fisher I*, the Court criticized lower federal courts for applying a "good faith" test to evaluate whether race-based admissions are necessary to promote a compelling interest in diversity. The Justices acknowledged that courts had to defer to academic judgments about mission and goals, but no such deference was due when decisions involved programmatic implementation of these values and objectives.<sup>285</sup> As a result, the Court demanded persuasive evidence that the university's race-based admissions process was still essential to achieve a diverse student body.<sup>286</sup> On remand, the university produced studies that satisfied the Court's demand for proof, even as the dissent attacked the majority for retreating from a promise of aggressive scrutiny of the admissions program.<sup>287</sup>

Nowhere has the Court explained why searching scrutiny of college and university decision-making is appropriate even as the Justices have adopted a far more hands-off approach when reviewing actions by other institutions, especially religious organizations. Under the framework of First Amendment institutionalism, the Court should defer to judgments that have a unique relationship to academic expertise.<sup>288</sup> At present, the Justices have done so only when evaluating pedagogical objectives. Yet, crafting programmatic initiatives arguably is as integral to educators' know-how as choosing institutional values and goals. Indeed, mission statements often are couched in lofty generalities, while the real implications emerge in developing concrete policies and programs.<sup>289</sup> If so, courts at least should move to a medium version of First

---

dominated the news—from the *Hobby Lobby* case to controversies over state-level versions of the Religious Freedom Restoration Act—is not that new at all.”).

282. See *supra* Section II.B.1.

283. See, e.g., *Hobby Lobby Stores, Inc.*, 573 U.S. at 717–19, 723–24.

284. See *supra* notes 127–37, 168–76, 210–21, 239–49 and accompanying text.

285. *Fisher I*, 570 U.S. 297, 311–14 (2013); see also *supra* Section I.B.

286. See *Fisher I*, 570 U.S. at 311–14; *Fisher II*, 136 S. Ct. 2198, 2208, 2211–12 (2016).

287. See *Fisher II*, 136 S. Ct. at 2214–15; *id.* at 2215–17 (Alito, J., dissenting).

288. See *supra* notes 157–58 and accompanying text.

289. See V. Kasturi Rangan, *Lofty Missions, Down-to-Earth Plans*, HARV. BUS. REV. (Mar. 2004), <https://hbr.org/2004/03/lofty-missions-down-to-earth-plans> [<https://perma.cc/AZ8Q-NHGA>]

Amendment institutionalism, which defers to colleges' and universities' choices about ends and means, so long as administrators follow well-developed internal norms and procedures. This change would allow institutions of higher education to adopt flexible approaches to enrolling a diverse student body, rather than conform to the holistic approach Justice Powell endorsed in *Bakke* as a hoped-for, albeit highly imperfect, safe harbor from litigation.<sup>290</sup>

That move could avoid an unduly cramped understanding of deference in higher education, a parsimony that has grown all the more evident as the Court's respect for the autonomy of other First Amendment institutions flourishes. Absent any explanation for the differential treatment, the Court's limited regard for college and university decision-making sends a message that institutions of higher education play, at most, a subsidiary role in nurturing discourse in a democratic society. There is no basis for such a conclusion. On the contrary, our public dialogue has grown increasingly polarized, information has been weaponized, and distrust of experts has grown.<sup>291</sup> Given these trends, respect for the academic freedom of colleges and universities as an essential bulwark of the nation's democratic traditions should be strengthened rather than diminished.<sup>292</sup>

If left unaddressed, a missed analogy—the failure to recognize and rectify the declining status of institutional autonomy in higher education as compared to other First Amendment institutions—could mean the end of affirmative action in admissions. A negative message about the academic freedom of colleges and universities entrenches distrust about higher education administrators' ability to make responsible judgments.<sup>293</sup> These doubts could undercut the prevailing view that admissions programs may properly use race

---

(arguing that successful nonprofit organizations must move from generalized missions to operationalized plans and strategies to have successful programs).

290. See *supra* notes 163–64 and accompanying text.

291. See, e.g., Nathaniel Persily, *Can Democracy Survive the Internet?*, 28 J. DEMOCRACY 63, 71–72 (2017); Harry Bruinius, *Who Made You an Expert? Is America's Distrust of 'Elites' Becoming More Toxic?*, CHRISTIAN SCI. MONITOR (Aug. 27, 2018), <https://www.csmonitor.com/USA/Politics/2018/0827/Who-made-you-an-expert-Is-America-s-distrust-of-elites-becoming-more-toxic> [<https://perma.cc/LT7Z-8JT5> (dark archive)]; Michael Dimock, *How Americans View Trust, Facts, and Democracy Today*, PEW RSCH. CTR. (Feb. 19, 2020), <https://www.pewtrusts.org/en/trust/archive/winter-2020/how-americans-view-trust-facts-and-democracy-today> [<https://perma.cc/YZ58-6CLV>].

292. See Judith Rodin & Stephen P. Steinberg, *Incivility and Public Discourse*, in PUBLIC DISCOURSE IN AMERICA: CONVERSATION AND COMMUNITY IN THE TWENTY-FIRST CENTURY 1, 13, 20–21 (Judith Rodin & Stephen P. Steinberg eds., 2011).

293. See Peter Kanelos, *The Public Is Losing Confidence in Higher Ed—Here's Why*, HILL (Oct. 19, 2018), <https://thehill.com/opinion/education/411924-the-public-is-losing-confidence-in-higher-ed-heres-why> [<https://perma.cc/J984-AW3H>] (reporting a Gallup poll that showed that confidence in higher education in the United States dropped below fifty percent for the first time); Scott Jaschik, *Falling Confidence in Higher Education*, INSIDE HIGHER ED (Oct. 9, 2018), <https://www.insidehighered.com/news/2018/10/09/gallup-survey-finds-falling-confidence-higher-education> [<https://perma.cc/FH A4-D8EW>] (explaining that higher education saw the largest decline in confidence of any sector between 2015 and 2018).

to promote diversity in the student body.<sup>294</sup> The Justices have steadfastly endorsed a principle of colorblindness,<sup>295</sup> and there is no reason to think that they will retreat from this position. As a result, the role of academic freedom in countering the Court's hostility to racial classifications remains vital.

So far, every Supreme Court decision on affirmative action has used institutional deference as an antidote to the false equivalencies inherent in colorblindness. In *Bakke*, even as the Court dismantled U.C. Davis's set-aside program, it turned to another institution of higher education, Harvard University, to identify a race-conscious admissions program that could permissibly advance the goal of diversity.<sup>296</sup> In *Fisher II*, the Justices ultimately upheld the admissions program at the University of Texas after some saber-rattling about the need for convincing proof that race-conscious policies and practices were still necessary.<sup>297</sup> Contemporary assaults on the legitimacy of academic decision-making jeopardize these precedents, as the recent litigation at Harvard and the University of North Carolina makes clear. Indeed, the plaintiff in the Harvard case has attacked the bona fides of the very admissions policy that Justice Powell held up as a model. The lawsuit characterizes the Harvard plan not as a benign effort to enroll a diverse student body but as a nefarious way to camouflage discrimination against Jews and Asian Americans, who also belong to vulnerable minority groups.<sup>298</sup> These allegations not only deprecate Harvard's trustworthiness, but they also reinforce the notion that all racial classifications are corrosive and pernicious.

Ironically, though, even if the Court reaffirms or strengthens its regard for colleges' and universities' autonomy, dangers remain based on other risks of false equivalencies and missed analogies that currently plague antidiscrimination jurisprudence. In recent religious liberty cases, courts have created hierarchies of disadvantage that treat gender and race very differently. According to these decisions, religious entities can discriminate based on gender, for example, by refusing to provide contraceptive coverage or by denying services to same-sex couples. However, racial discrimination is so uniquely invidious that even religious beliefs cannot justify a departure from public accommodations laws.<sup>299</sup> The Supreme Court has explicitly endorsed this

---

294. Scott Jaschik, *Positive View of Higher Ed, with Lots of Caveats*, INSIDE HIGHER ED (Sept. 17, 2018), <http://www.insidehighered.com/news/2018/09/17/new-national-survey-finds-generally-positive-views-higher-education-weak-points-well> [<https://perma.cc/JW9W-XVJM>] (reporting on a poll that generally found more favorable views of higher education than other polls but noted that seventy-two percent disagreed with the use of race in admissions though sixty-four percent thought a diverse student body was extremely or very important).

295. See *supra* notes 40–41, 52–53, 55 and accompanying text.

296. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 285, 316–18 (1978).

297. See 136 S. Ct. 2198, 2211–12, 2214–15 (2016).

298. See Harvard Complaint, *supra* note 68, at 3.

299. See *supra* note 199 and accompanying text.

distinction. In *Hobby Lobby*, for instance, Justice Ginsburg raised the possibility that for-profit corporations might discriminate based on race due to faith-based objections to interracial marriage.<sup>300</sup> Justice Alito summarily rejected her concerns by citing the compelling interest in providing equal opportunity without regard to race.<sup>301</sup> Because of these precedents, renewed deference to academic freedom might not be enough to save affirmative action. The programs could still founder on recent statements that differential treatment based on race, in contrast to other forms of discrimination, is utterly intolerable.<sup>302</sup> Given the Court's longstanding commitment to colorblindness, the Justices might create a false equivalency between a business's use of race to deny a customer service and a university's use of race to promote racial inclusion.<sup>303</sup>

For affirmative action to survive, then, advocates must find a way to neutralize this peril. To that end, they should challenge the compartmentalization that arises when the Court focuses on factual similarities and ignores the underlying values at stake.<sup>304</sup> In particular, the Justices must acknowledge the full implications of the precedents set in *Bob Jones* and *Bakke*, two decisions seldom mentioned in the same breath. Seven years after Justice Powell found a way to permit affirmative action in higher education in *Bakke*, the Court upheld the Internal Revenue Service's refusal to grant tax-exempt status to Bob Jones University, a nonprofit religious institution, because it had denied students admission and expelled them based on their involvement in interracial relationships.<sup>305</sup> At no time did the *Bob Jones* decision cast any doubt on the legitimacy of affirmative action under *Bakke*.<sup>306</sup> On the contrary, even as the Court concluded that Bob Jones's practices violated an important public

300. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 769–70 (2014) (Ginsburg, J., dissenting).

301. *Id.* at 733 (majority opinion).

302. *See supra* Section II.C.2 (describing how the courts have treated race-based discrimination as uniquely pernicious even when based on religious beliefs).

303. This kind of false equivalency would flout distinctions that the Court itself made in the *Bob Jones University* case. *See supra* notes 185–90 and accompanying text.

304. *See supra* notes 84–85, 155 and accompanying text.

305. *See supra* notes 185–90 and accompanying text.

306. If affirmative action had been impermissible racial discrimination, there could have been challenges to the tax-exempt status that many colleges and universities enjoy. *See* ASS'N OF AM. UNIVS., TAX EXEMPTION FOR UNIVERSITIES AND COLLEGES: INTERNAL REVENUE CODE SECTION 501(C)(3) AND SECTION 115, at 1–2 (Mar. 2014), <http://aau.edu/sites/default/files/AAU%20Files/Key%20Issues/Taxation%20%26%20Finance/Tax-Exempt-Status-of-Universities-FINAL.pdf> [<https://perma.cc/5CV2-CBQJ>] (describing tax-exempt status of most American institutions of higher education). In 2020, President Donald J. Trump threatened to revisit the tax-exempt status of nonprofit colleges and universities because their curricula focused on “Radical Left Indoctrination, not Education.” Paul Fain, *Trump Threatens Tax Exemption of Colleges*, INSIDE HIGHER ED (July 13, 2020), <https://www.insidehighered.com/quicktakes/2020/07/13/trump-threatens-tax-exemption-colleges> [<https://perma.cc/J5LX-X2RS>].

policy, the Justices consistently found that diversity in the student body is a compelling interest.<sup>307</sup>

In short, the Court can and has distinguished between constructive and destructive uses of race in higher education for nearly forty years. As a result, dicta about racial discrimination in *Hobby Lobby* and other religious liberty cases should not automatically determine the fate of race-conscious admissions in higher education. After all, the denial of services based on religious objections closely resembles the race-based enrollment policies at Bob Jones University. Yet, the Court has never found that the decision in *Bob Jones* undercuts *Bakke*'s recognition of the permissibility of some forms of affirmative action in admissions. On the contrary, even with relatively modest deference to the autonomy of colleges and universities, the Justices have repeatedly upheld both the diversity rationale and the narrowly tailored use of race in selecting a student body. So long as academic freedom remains a constitutionally protected value, there is no reason to undo the Court's affirmative action jurisprudence simply because the Justices appear to be strengthening the autonomy of religious institutions to discriminate.

#### CONCLUSION

The unbearable emptiness of formalism resides in its incuriosity about context in cases in which both facts and values matter greatly. In First Amendment jurisprudence, this difficulty manifests itself in an indifference to the speaker's identity when the Court evaluates speech, association, and free exercise rights. That indifference has led to missed analogies that obscure the importance of First Amendment institutions, especially colleges and universities, in advancing robust discourse. A proper understanding of their unique role could enable the Court to better calibrate the appropriate level of deference due to pedagogical decision-making. The Justices have accorded some weight to academic freedom, but regard for this value has paled in comparison to the respect accorded to other forms of institutional autonomy, most notably the liberty interests of religious organizations. The missed analogy to other First Amendment institutions has weakened the case for affirmative action in admissions, which turns heavily on accepting academic judgments about the learning environment.

In Fourteenth Amendment cases, the limits of formalism mainly manifest themselves in false equivalencies. Because the Court emphasizes categorical labels rather than histories of discrimination and persistent inequities, it has no way to distinguish between benign and malign uses of race. In litigation over college and university admissions, this lack of context has prompted the Court to apply strict scrutiny to race-based admissions policies, even when they are

---

307. See *supra* notes 30, 37, 41, 47, 55, 189 and accompanying text.

designed to promote inclusion of underrepresented groups. That formalistic approach has a renewed potential to undo affirmative action because the Court recently has treated race-based distinctions as uniquely pernicious in religious liberty cases. Only by overcoming formalism's tendency to treat all forms of discrimination as equivalently insidious can advocates deflect this danger.

The perils of formalism for affirmative action jurisprudence have grown in recent years. The deference to decision-making in higher education seems increasingly crimped, and the characterization of race-based policies and practices as singularly dangerous has intensified. To secure the future of affirmative action, advocates must make the failures of formalism transparent by demonstrating the ongoing importance of colleges and universities in advancing an inclusive discourse that reflects the nation's diversity and advances its democratic ideals.



