

5-2024

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Repository Citation

Paul Gowder, *Standpoint Epistemology, the First Amendment, and University Affirmative Action*, 32 Wm. & Mary Bill Rts. J. 979 (2024), <https://scholarship.law.wm.edu/wmborj/vol32/iss4/8>

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STANDPOINT EPISTEMOLOGY, THE FIRST AMENDMENT, AND UNIVERSITY AFFIRMATIVE ACTION

Paul Gowder*

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.¹

INTRODUCTION

Egalitarian legal scholars understandably might have been troubled by the end of June 2023, when, on two successive days, the Supreme Court appeared to put an end to public as well as to private university affirmative action on a theory of race discrimination in *Students for Fair Admissions v. Harvard*,² then appeared to put an end to the application of anti-discrimination law to any private enterprise that could be characterized as “expressive” in *303 Creative LLC v. Elenis*.³ Yet the June 30 case, I shall contend, has the potential to undermine the negative impact of the June 29 case, at least as applied to private universities—for teaching and research is undoubtedly expressive. Thus, this Essay sketches the outline of a case for First Amendment protection of private university race-based affirmative action.

I begin by clarifying what the argument in this Essay is not. First, it is not an “expressive association” theory, according to which universities are attempting to send a message to students or society about the importance of diversity via the composition of their student bodies and/or faculties. At least one scholar has argued

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¹ *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (quoting a statement from scholars in South Africa).

² *See generally* *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

³ *See generally* *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023).

that the expressive association doctrine shields university affirmative action, but this argument seems unduly narrow to me.⁴

Second—like *303 Creative LLC*—it does not depend in any way on the Religion Clauses of the First Amendment.⁵ While religious universities with a faith-based commitment to social justice may have a Free Exercise Clause–based case for a constitutional right to engage in affirmative action, such an argument would do little for secular universities, and, moreover, I have argued elsewhere that the developing doctrine of Free Exercise–based carve outs from generally applicable law, including anti-discrimination law, is socially harmful.⁶

Instead, the heart of my argument is as follows: university research and teaching are about as pure as expressive activities can get, being entirely about the communication of ideas. There are both intellectual and pragmatic reasons to believe that universities and their students and faculty cannot freely carry out those expressive activities without being allowed to recruit members of their intellectual communities from socially subordinated groups. It is this connection between community composition and the capacity to conduct the core expressive activities of research and teaching—activities that universities and their members can endorse notwithstanding their acceptance or rejection of the broader importance of racial justice—which connects the freedom of speech with the freedom to engage in affirmative action.

Accordingly, this Essay articulates a case for the connection between university *speech* and university *people*. It articulates two independent bases for this connection. Part I argues that existing and likely future attacks on the current membership, research, and teaching activities of universities link personnel and expression—entitling universities to defend themselves against attacks on the ideas they develop

⁴ See David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619 (2001) (arguing for expressive association based affirmative action). This argument is problematic because it requires universities to be invested in sending particular messages about diversity or injustice. See *id.* at 629 (characterizing goal of “[m]any private universities” as “instill[ing] in their students an appreciation of the importance of racial diversity at the highest levels of society.”); *id.* at 631 (quoting law school dean as basing affirmative action on effort to “do something about the really fundamental problem of racial prejudice in this society.”); *id.* at 635 (characterizing affirmative action as communicating message about rejection of meritocracy). While I happen to endorse these messages, other members of university communities and their leadership might not.

⁵ While the petitioner’s motivation for declining to serve same-sex couples was religious, the Court made its decision under the Speech Clause, not the Religion Clauses. *303 Creative LLC*, 600 U.S. at 588. The fact that the Court contemplated non-religious motivations for the speech interest at play is illustrated, for example, by the fact that one of its parade of horrors in elucidating the consequences of the contrary view is that “the government could force a male website designer married to another man to design websites for an organization that advocates against same-sex marriage.” *Id.* at 589–90.

⁶ See generally Paul Gowder, *Why Majority Religions Should Not Be Accommodated*, 108 IOWA L. REV. 2153 (2023) (describing and criticizing developing doctrine of Free Exercise–based accommodations).

and communicate by defending their freedom to select the people who develop and communicate those ideas. Part II argues that the theory of standpoint epistemology from feminist philosophy of science (and taken up by critical race theorists) gives universities a basis for asserting that having communities with a critical mass of people from all kinds of subordinated groups is necessary to carry out their expressive missions for the search for and propagation of truth.

The Conclusion addresses the main objection to a First Amendment case for affirmative action, namely, that such a right could also be used by anti-egalitarian movements, such as universities run by white supremacists, misogynists, or transphobes. In mitigation of this worry, it argues that the expressive case for *inclusion* is significantly stronger than that for *exclusion*.

I. EXISTING ATTACKS ON THE UNIVERSITY LINK PERSONNEL AND EXPRESSION

In 2010, the Ninth Circuit in *McDermott v. Ampersand Publishing* rejected, on First Amendment grounds, a preliminary injunction in an unfair labor practices case against a newspaper that fired several employees “for union activity directed at pressuring the newspaper’s owner and publisher to refrain from exercising editorial control over news reporting.”⁷ The court observed that ordinarily the First Amendment does not entitle newspapers to avoid the application of general law, including labor law—notwithstanding the fact that newspapers (like universities) can speak only through their employees.⁸ However, the *McDermott* court confronted a special case: the publisher was not making the abstract assertion that it spoke through its employees and accordingly needed to be exempt from employment laws in order to control its own speech. Rather, the newspaper’s employees were unionizing for the express purpose of controlling the publisher’s speech: they were upset that it was allegedly producing biased reporting and were seeking “editorial independence” to write and publish what they pleased notwithstanding the publisher’s wishes.⁹ This made the difference for the First Amendment because granting a preliminary injunction to give those employees their jobs back would lend government power to their bid for control of their employer’s speech.¹⁰ In the words of the court:

First Amendment rights are not jeopardized when it comes to those wage and hour demands—a newspaper is not protected by the First Amendment against having to pay more money to its reporters—but freedom of the press is jeopardized when the

⁷ *McDermott ex rel. NLRB v. Ampersand Publ’g, LLC*, 593 F.3d 950, 953 (9th Cir. 2010).

⁸ *Id.* at 959; *see also* *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 719–23 (Cal. 2019) (reviewing First Amendment doctrine establishing that the government retains the right to regulate press employment by generally applicable law).

⁹ *McDermott*, 593 F.3d at 960–61.

¹⁰ *Id.* at 961–62.

employees' primary demand is for the publisher to cede control of her newspaper's content.¹¹

I contend that universities are presently confronting a *McDermott*-like situation, albeit at a larger scale: those on the political right who attack affirmative action also attack the content of university teaching and research and seem to understand those two things as being interlinked under a general rubric of diversity, equity, and inclusion (DEI) or critical race theory (CRT). To show this, I will focus on the advocacy of the most prominent present-day challenger to the autonomy of American universities, Christopher F. Rufo—presently most famous as the leader of the successful effort to depose Harvard's first black president, Claudine Gay.¹²

Rufo's advocacy has consistently linked the identity of his opponents, the ideas they express, and affirmative action/diversity policies.¹³ Thus, he simultaneously criticized former Harvard President Claudine Gay for allegedly “buil[ding] a ‘diversity empire’” by leading Harvard's affirmative action programs and seeking to change the dominance of white men in the “visual culture” of portraits in Harvard buildings.¹⁴ Further connections between President Gay's ideas, identity, and leadership become clear in another of Rufo's articles in which he alleged that Gay is “the living embodiment and administrative enforcer of DEI ideology” and explained that the way to combat people like Gay is “to uncover the ideological corruption within America's institutions and build[] a counter-elite capable of challenging those institutions.”¹⁵ In the same piece, he explains that this fight includes “campaigns

¹¹ *Id.* at 963.

¹² On Rufo as a major leader of a concerted right-wing assault on American higher education, see generally Paul Kiernan, *Conservative Activist Grabbed Trump's Eye on Diversity Training*, WALL ST. J. (Oct. 9, 2020, 7:18 AM), <https://www.wsj.com/articles/conservative-activist-grabbed-trumps-eye-on-diversity-training-11602242287> [<https://perma.cc/T8WE-Y5RT>] (describing Rufo's influence over Trump Administration efforts to change federal “diversity training” and attack “critical race theory”) and Arian Campo-Flores, *Ron DeSantis Claims of Liberal Bias Put Florida College at Crossroads*, WALL ST. J. (Jan. 27, 2023, 10:06 AM), <https://www.wsj.com/articles/new-college-of-florida-at-crossroads-as-ron-desantis-sees-liberal-bias-11674794682> [<https://perma.cc/6V3X-FCQK>] (describing Rufo's role in the state takeover of New College of Florida). On Rufo as the architect of President Gay's removal from her post, see Ian Ward, *We Sat Down with the Conservative Mastermind Behind Claudine Gay's Ouster*, POLITICO (Jan. 3, 2024, 11:20 AM), <https://www.politico.com/news/magazine/2024/01/03/christopher-rufo-claudine-gay-harvard-resignation-00133618> [<https://perma.cc/C9SW-LWFX>].

¹³ Michael Kruse, *DeSantis' Culture Warrior: 'We Are Now Over the Walls,'* POLITICO (Mar. 24, 2023, 4:30 AM), <https://www.politico.com/news/magazine/2023/03/24/chris-rufo-desantis-anti-woke-00088578> [<https://perma.cc/4BDG-N8Y4>].

¹⁴ Christopher F. Rufo, *Claudine Gay's DEI Empire*, CITY J. (Dec. 18, 2023), <https://www.city-journal.org/article/claudine-gays-dei-empire> [<https://perma.cc/7C2N-4SZU>].

¹⁵ Christopher F. Rufo, *Harvard and Hegemony*, CITY J. (Dec. 13, 2023), <https://www.city-journal.org/article/harvard-and-hegemony> [<https://perma.cc/7TG3-GBLF>].

against critical race theory, gender ideology, and DEI [which] have eroded trust in educational institutions.”¹⁶ In other words, he identifies that the campaign within which he is a leader wishes to simultaneously fight the *university policies* that include people of color and the *scholarly ideas*, such as critical race theory and the critique of gender concepts, which he associates with them.

The notion of Gay as the “living embodiment” of “DEI ideology” appears to be a coded suggestion that she was promoted because of her gender or race. Another piece in the same outlet made that message explicit: in it, Rufo interviews—in a way which seems to me to strongly imply endorsement—a political scientist who alleges that Gay was promoted not because of her merit but because “standards were lowered in the mid-1990s, and the elites came together and decided that they were going to defend affirmative action,” and “[w]hite progressives have always rewarded the blacks who supported their ideas.”¹⁷ Again we see the merger of the intellectual and the personal, as this interview subject runs together Gay’s identity as a Black scholar with her intellectual support of ideas like affirmative action.

Those examples illustrate that Rufo’s combined effort to take control of university personnel and university speech is similar to the situation in *McDermott*, insofar as those who wish to interfere with the personnel decisions of an institution, whether it be a newspaper or a university, are doing so at least in part for the purpose of exercising power over the expressive choices of that institution.

The association between personnel and ideas has been a feature of the conservative critique of higher education since its inception. William F. Buckley explains a core idea of his seminal 1951 book, *God and Man at Yale*, in an introduction to a reissue edition as follows:

My notion, as elaborated in the book, was that alumni would concern themselves with the purpose of a university; that, if mind and conscience led them to the conclusion, they would not only be free, but compelled, to decide that certain values should be encouraged, others discouraged. That, necessarily, this would give them, through their representatives, the right to judicious hiring and firing, precisely with the end in mind of furthering broad philosophical objectives and cultivating certain ideals[.]¹⁸

In addition to affirming that the plan was to influence the composition of the faculty in order to influence the ideas being taught, that passage also presages the

¹⁶ *Id.*

¹⁷ Christopher F. Rufo, *A White Male Would Probably Already Be Gone*, CITY J. (Dec. 11, 2023), <https://www.city-journal.org/article/white-male-would-probably-already-be-gone> [<https://perma.cc/R8PS-AQ68>] (interview with Carol Swain).

¹⁸ WILLIAM F. BUCKLEY, *GOD AND MAN AT YALE: THE SUPERSTITIONS OF ACADEMIC FREEDOM* 36 (50th Anniversary ed. 2012).

tactics of the recent upheavals surrounding Claudine Gay and Elizabeth Magill: the intervention of conservative alumni to attempt to reshape campus intellectual culture by intervening on personnel.¹⁹

The examples above primarily concern the composition of university faculty and administration, but Rufo *qua* the leader of the present-day campaign against university autonomy has also alleged that the ideas he despises are in part driven by the excessive presence of the wrong kind of students on campus. He told a *New York Times* columnist that the New College of Florida was “wildly out-of-balance” because of its prior predominance of women amongst the student body, and that the supermajority of women created “what many have called a social justice ghetto,” which he and his fellow New College trustees were remedying in part by promoting college athletics to recruit more men.²⁰

Universities have a First Amendment interest similar to *McDermott* in protecting themselves from challenges to the shaping of their intellectual environments and output via the shaping of their students and faculty composition. However, to translate this to a usable legal argument under a *McDermott* theory, it would be helpful to trace a particular challenge to a particular university’s affirmative action policy in a particular case to content-based motivations. For example, what if Donald Trump returns to office in 2024, indulges in outraged rhetoric alleging a linkage between affirmative action and critical race theory or Marxism, and orders the

¹⁹ Robert Reich, *Powerful Donors Managed to Push Out Harvard’s Claudine Gay. But at What Cost?*, THE GUARDIAN (Jan. 3, 2024, 7:20 AM), <https://www.theguardian.com/commentisfree/2024/jan/03/powerful-donors-managed-to-push-out-harvards-claudine-gay-but-at-what-cost> [<https://perma.cc/237H-MS6E>] (describing Harvard alumni Bill Ackman and Kenneth Griffin’s efforts to oust Gay after disapproving of several Harvard student organizations’ statements regarding Hamas’ October 7, 2023, attack on Israel); Melissa Korn et al., *How Rich Alumni Ousted Penn’s President Liz Magill*, WALL ST. J. (Dec. 11, 2023, 6:52 PM), <https://www.wsj.com/us-news/education/university-pennsylvania-liz-magill-resignation-alumni-pressure-president-liz-magill-40654f7c> [<https://perma.cc/3WDG-CFN6>] (describing how Penn alumni threatened to withhold millions of dollars in donations unless Magill resigned).

²⁰ Michelle Goldberg, *At a College Targeted by DeSantis, Gender Studies Is Out, Jocks Are In*, N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/14/opinion/columnists/gender-studies-ron-desantis-florida.html> [<https://perma.cc/BR4X-23TL>]; see also Christopher F. Rufo, *The Great Feminization of the American University*, CHRISTOPHER F. RUFO (Mar. 10, 2023), <https://christopherrufo.com/p/the-great-feminization-of-the-american> [<https://perma.cc/TPS4-HFXU>] (arguing that the predominantly female population of New College contributed to the alliance between students and administration about converting personal identity and struggles into political power on the basis of claims of oppression). While in that blog post Rufo disclaims being against women in universities, that disclaimer is not credible given his emphasis on the relationship between gender and culture, including the statement that “[w]e can use New College of Florida as an example to understand this demographic shift and to understand the related cultural shift. The data is quite clear. The student body at New College is 66% female.” *Id.*

Department of Education to file suit against universities (allegedly) continuing to use affirmative action policies? Under such circumstances, university defendants should argue that the government is intentionally preventing them from teaching or researching critical race theory/Marxism by preventing them from recruiting a community interested in such fields. The same argument, under the *McDermott* theory, arguably also applies to defenses to private “discrimination” suits demonstrably rooted in such content-based motivations.

II. STANDPOINT EPISTEMOLOGY SUPPLIES A BASIS FOR LINKING PERSONNEL AND EXPRESSION

The key insight of standpoint epistemology, an analytic framework which began in feminist philosophy of science and has been carried forward in critical race theory, can be described as that even if one thinks one is engaged in a neutral, objective, search for truth, there is no Archimedean point free of social hierarchy from which to actually conduct such a search.²¹ The sorts of things one looks for, the priors from which an investigation begins, the knowledge that one brings to the table—all of those things condition the sorts of new knowledge which one is able to discover, and all are themselves conditioned by one’s prior experiences in the world, which in turn are conditioned by one’s socially rooted identity.²²

Sandra Harding, one of the core scholars in the field, has described standpoint epistemology as a pathway to what she calls “strong objectivity.”²³ She characterizes

²¹ See generally Paul Gowder, *Critical Race Science and Critical Race Philosophy of Science*, 83 *FORDHAM L. REV.* 3155, 3162–73 (2015) (summarizing standpoint epistemology in philosophy of science).

²² *Id.* at 3163–64.

²³ See generally Sandra Harding, *Stronger Objectivity for Sciences from Below*, 5 *EM CONSTRUÇÃO* 173 (2019) [hereinafter Harding, *Stronger Objectivity*]. I have consciously chosen a weak (in the sense of making only relatively uncontroversial claims) version of standpoint epistemology that does not posit a thick connection between individual identity and available knowledge. While stronger versions of standpoint epistemology may be true, the advantages of the weaker version are twofold. First, it is likely to be acceptable to more members of a broader university community. Second, it avoids the worry articulated frequently by the pre-*Students for Fair Admissions*-Court about racial “stereotyping,” which supposes some kind of consistent cognitive world among members of a given race. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 914–15 (1995) (criticizing racial stereotyping in that sense). Harding’s weak version of standpoint epistemology could be interpreted simply as an observation about *incentives*: people who are members of a subordinated group have more of an incentive to study problems relevant to that group while superordinated groups have the power, in the absence of conscious efforts for inclusion, to shape the research enterprise with reference to their own interests (even unintentionally). See generally Sandra Harding, *Rethinking Standpoint Epistemology: What Is “Strong Objectivity?”*, 36 *CENTENNIAL REV.* 437, 442–44 (1992) (offering interpretation of standpoint epistemology focusing on the way that power hierarchies structure choice of research questions).

the output of standpoint epistemology as “objectivity” to illustrate that science carried out without attention to the inclusion of marginalized voices tends to embed unnoticed biases, for example, toward researching health problems characteristically experienced by predominantly male researchers.²⁴ Prominent present-day examples of the consequences of these knowledge/interest biases in the industrial context include gender-based disparities in automobile injuries, which have been attributed to automakers’ failure to conduct crash tests for women’s body types²⁵ and problems with computer vision models failing to recognize Black women with the same degree of accuracy as whites and men.²⁶

Nor is the core research program of standpoint epistemology the only scholarly literature that points to the knowledge benefits of including the otherwise-excluded. Another prominent example is the research program of Lu Hong and Scott Page, who have used mathematical modeling to suggest that groups of problem-solvers can perform better when they are more diverse because they can search a broader solution space.²⁷ Obvious university examples of such problem-solving groups would include a hard sciences research lab or even a study group of students working on a difficult problem set. Moreover, philosopher Elizabeth Anderson has cogently argued, using the historical example of moral debate over slavery, that moral reasoning (like that carried out in university philosophy departments) is carried out deficiently when conducted under conditions of hierarchical social advantage because occupying an advantaged position distorts the reflective process.²⁸

Combining those three categories of scholarship suggests a corresponding three ways in which universities dominated by members of hierarchically advantaged social groups are likely to do worse at their missions of creating and sharing knowledge: (a) lack of interest, rooted in ignorance, about the needs of others; (b) homogeneity leading to the failure to explore novel ideas; and (c) normative biases about the underlying goals of the intellectual enterprise. Each of these is a pathology of the search for and transmission of truth, and universities that accept any of these theories have strong reason *in pursuing their expressive missions* to ensure that they have a critical mass of faculty and students from socially subordinated groups.

The importance of this theoretical framework in the constitutional context is to establish the connection between a university’s need to control who its personnel are and its expressive activity. As noted, the Supreme Court and lower courts have

²⁴ Harding, *Stronger Objectivity*, *supra* note 23, at 174–75.

²⁵ Hannah E. Frye et al., *Motor Vehicle Crash Testing Regulations for More Inclusive Populations*, 18 J. SCI. POL’Y & GOVERNANCE (SPECIAL ISSUE) (2021).

²⁶ Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROCS. MACH. LEARNING RSCH. 1, 3 (2018).

²⁷ Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROCS. NAT’L ACAD. SCIS. 16385, 16389 (2004).

²⁸ Elizabeth Anderson, *Moral Bias and Corrective Practices: A Pragmatist Perspective*, 89 PROCS. & ADDRESSES AM. PHIL. ASS’N 21, 32 (2015).

consistently rejected, most prominently in the press context, the notion that an employer can be exempt from labor regulation²⁹ just because it operates an expressive enterprise and speaks through its employees.³⁰ The rationale of that idea is that an employer ordinarily has the right to control its employees, no matter who they are. In other words, a newspaper publisher is not exempt from anti-discrimination or labor law because its choice of employees does not directly control its capacity to say what it wants as anti-discrimination law and labor law still permit it to order the editors and reporters to say whatever it so desires and to terminate them if they refuse to do so.³¹ This rationale also explains why *McDermott* was an exception—the proposed injunction would have kept the press from implementing its own editorial policy by forcing it to retain employees who were attempting to seize control of it.³²

The function of the epistemological theories described in this Part is to suggest that the rationale for the rejection of First Amendment exceptions to workplace (and presumably education) law similarly does not hold with respect to university affirmative action to include members of subordinated communities. Even though a private university has the right to control the speech of its students and faculty by, for example, choosing which research to fund, which courses to offer, and which student organizations to permit, that degree of control is not sufficient to give it full control of its expression if certain subjects cannot be fully examined in a way consistent with the core academic value of truth-seeking without a critical mass of people from subordinated groups. Therefore, the capacity to engage in affirmative action is necessary for universities to fully exercise their rights of free expression.

CONCLUSION: THE EXPRESSIVE ASYMMETRY BETWEEN INCLUSION AND EXCLUSION

One worry that this Essay immediately raises is the danger that what is good for the race progressive (or sex progressive, or gender progressive, or sexual orientation progressive) goose is good for the regressive gander. If we accepted a First Amendment defense to Title VI, could not, for example, Bob Jones University revive its claims of a First Amendment right to discriminate against interracial couples while having a tax exemption?³³

²⁹ See 29 U.S.C.A. §§ 157–158. An analogous argument plausibly applies to university and workplace anti-discrimination law under Titles VI and VII. See 42 U.S.C. §§ 2000d–2000e.

³⁰ *Wilson v. Cable News Network, Inc.*, 444 P.3d 706, 719–23 (Cal. 2019).

³¹ See *Associated Press v. NLRB*, 301 U.S. 103, 130–33 (1937) (explaining that labor regulation did not impinge on the First Amendment because it did not impede the right of the press to enforce its editorial policies or terminate personnel who disobeyed them).

³² *McDermott ex rel. NLRB v. Ampersand Publ'g, LLC*, 593 F.3d 950, 959–60 (9th Cir. 2010).

³³ See generally *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (rejecting freedom

However, there is a difference between inclusion of subordinated groups and exclusion of subordinated groups, in terms of the connection to the First Amendment interests of a university. Recall that the expressive interest of the university is to fully pursue truth in the classroom and the lab.³⁴ That interest entails an expansive, not a restrictive, conception of the university community, one which has a critical mass of students and faculty from all groups whose distinctive situated knowledge might turn out to be the instrumental bit that leads to some discovery or some pedagogical insight. No such argument is available for the sort of interest that Bob Jones University might articulate for keeping out interracial couples. The same is true of, for example, a university desiring to exclude LGBTQ+ students or faculty: it would not be able to articulate a colorable claim that there is some teaching or research that it cannot produce so long as there are LGBTQ+ people on campus.³⁵

The concept of “critical mass” is central to this analysis. The concern of standpoint epistemology as deployed in this Essay is to ensure that sufficient voices from those who would not be otherwise included make their way into the classroom and the lab so that the knowledge and priorities that they have gained from their experiences on the lower end of various social hierarchies can make it into the cognitive mix of the intellectual enterprises of the university. To the extent some group of people is already in the room in bulk, efforts to further include them are not necessary to carry out a university’s expressive goals. Since both being a student and being a faculty member are beneficial to an individual and the ways that one gets those statuses absent something like affirmative action are in part the products of advantageous positions in various social hierarchies,³⁶ it is far more likely that members of socially advantaged groups will already be in the room and will not require anything like affirmative action to ensure they are present in a critical mass.³⁷

of religion challenge to IRS refusal of tax exemption for Bob Jones University because of its policy against interracial relationships).

³⁴ Bernstein, *supra* note 4, at 638.

³⁵ See *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (identifying that even if “parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable . . . [I]t does not follow that the practice of excluding racial minorities from such institutions is also protected by the same principle” because “there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma.”) (quoting *McCrary v. Runyon*, 515 F.2d 1082, 1087 (4th Cir. 1975), *aff’d*, 427 U.S. 160 (1976)).

³⁶ Consider, on the student side, expensive test preparation, legacy admissions, and donor admissions. On the faculty side, consider also the “hidden curriculum” of social class, professionalization, etc. on faculty job markets.

³⁷ For example, Bob Jones University might try to argue for an admissions policy ensuring a critical mass of same-race couples if there were some reason to believe that same-race couples had access to distinctive situated knowledge based on their (risible) subordinated position in society. But even if we were to take that claim seriously, Bob Jones University need not use something like affirmative action to achieve it as many couples are still racially

I conclude by observing that this one-way ratchet in favor of inclusion is another advantage of the pure expressive theory of First Amendment affirmative action as opposed to Bernstein's theory of expressive association affirmative action. The theory of expressive association typically depends on arguments about what an association's membership policies communicate to the outside world about their views.³⁸ For that reason, it would be available to a university that wished to communicate messages about, say, its opposition to gay marriage. The pure expressive theory has no such defect.

homogenous. For example, according to the 2022 Census, interracial marriages made up 19% of opposite-sex marriages and 31% of same-sex marriages. Nestor Hernandez & Paul Hemez, *Interracial Couples More Common Among Same-Sex Couples*, U.S. CENSUS (Nov. 8, 2023), <https://www.census.gov/library/stories/2023/11/same-sex-couple-diversity.html> [<https://perma.cc/EL5N-2YK7>]. It is almost guaranteed that Bob Jones will get a critical mass of same-race couples just by sitting on its hands.

³⁸ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000) (arguing that expressive association does not “erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message”; however, Dale was a leader in the gay community and thus his “presence in the Boy Scouts would, at the very least, force the organization to send a message . . . that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior”); see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (recognizing that the First Amendment grants the Council, an expressive group, the right to exclude groups from marching in its parade in order to control its overall message); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 696 (9th Cir. 2023) (Forrest, J., concurring) (arguing that a Christian student organization has the right to require student leaders to sign a pledge that they will not engage in premarital sex under the Free Speech Clause of the First Amendment).