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# MULTICULTURALISM AS METAPHOR

Linda S. Greene\*

## INTRODUCTION

How ironic that the meaning of a single word—*multiculturalism*—has come to embody both transformative hope as well as deep-seated fear. *Multiculturalism* certainly sums up the hope and the aspiration for an inclusive principle that would transcend the limits of formal equality and jettison traditional race and gender power relationships. And, not surprisingly, the multiculturalism debate has also begun to raise questions about the future structure of relationships among groups. The symbolic dimension of *multiculturalism* and its potential unbounded content evoke fear that the traditions and assumptions of the existing order are at risk.

*Multiculturalism* is the ultimate soundbite. It embodies not only a claim of inclusion. It is also metaphor for the opposition to institutional rules that reframe in meritocratic terms the historical exclusion of people of color and women. It is metaphor for the demand for a reconceptualization of the “public” as heterogeneous, not homogenous and assimilated. It is also metaphor for an idea of inclusion that transcends formal equality and narrow conceptions of legal remediation. The power of *multiculturalism* may flow from the emergence of the word at a historical point at which the opposition to the greater inclusion of historically disempowered groups has achieved clear legal legitimacy.<sup>1</sup> Understood this way, *multicul-*

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1. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.”); *id.* at 520 (Scalia, J., concurring) (“The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected.”); *cf.* *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997, 3028 (1990) (O’Connor, J., dissenting, joined by Rehnquist, C.J., and Scalia and Kennedy, J.J.) (deriding majority’s approval of FCC race-based remedial measures in award of broadcast licenses). Confirmation of Justice Thomas, while narrowly achieved, was significant on this point in light of his historical opposition to affirmative action. He was not really challenged on these views by the Senate Judiciary Committee. This

*turalism* symbolizes so much more than a rotating series of cultural awareness days or festivals. Like the 1960s *Black Power* cry,<sup>2</sup> it is an utterance that places the existing order symbolically at risk.

In this paper I examine the relationship between the core claim of inclusion, which multiculturalism represents, and legal doctrine. First, I suggest that the cry for multiculturalism comes just as the legal foundation for more inclusive institutions seems to be crumbling. The Supreme Court has limited the scope of constitutional equality and has created a normative vacuum—a field on which individuals and groups compete for influence. Against this background, multiculturalism should be understood as a demand for discourse-democratization and a plea for access to those institutions that will shape future norms. Moreover, I suggest that, among other things, *multiculturalism* has become the loose appellation that might characterize diverse claims to participate as power-sharers in existing institutions.<sup>3</sup> Finally, I discuss one of the most attention-getting attacks on multiculturalism, the charge that multiculturalism is simply an effort to censor and limit an open dialogue on questions of race and gender—that multiculturalism is simply a demand for “political correctness.”<sup>4</sup> I conclude that the framing of the debate over inclusion in terms of *multiculturalism*—as either slogan or epithet—adds little to our understanding of the complexity of outsider claims for inclusion or the institutional implications of taking those claims seriously. The implications of multiculturalism are numerous, and yet the packaging of the debate over it contributes little to a debate over a post-*Brown* order of inclusion. If legal doctrine has reached its limits in terms of facilitating a “new world order” of inclusion, perhaps it is all the more important that a wide

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opposition wears a powerful cloak of legitimacy because it is framed in terms of the same equality principles that historically disempowered groups have invoked in support of inclusion. The *Croson* majority's rejection of the idea that measures of inclusion ought to be generously viewed is an important symbolic victory for those who fear a reallocation of resources. *Croson* accords existing racially identified distributions constitutional legitimacy and places a heavy burden on those who desire a redistribution of resources.

2. STOKELY CARMICHAEL & CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* (1967).

3. The variety of essays on multiculturalism compiled in the book *DEBATING P.C.: THE CONTROVERSY OVER POLITICAL CORRECTNESS ON COLLEGE CAMPUSES* (Paul Berman ed., 1992) [hereinafter *DEBATING P.C.*] is evidence of the diverse understandings of the meaning and implications of multiculturalism.

4. See Dinesh D'Souza & Robert MacNeil, *The Big Chill? Interview with Dinesh D'Souza*, in *DEBATING P.C.*, *supra* note 3, at 29, 32 (“[C]ritical examination does not . . . take place . . . [because] non-Western classics are politically incorrect.”) [hereinafter *D'Souza, Interview*].

diversity of "empowered" voices participate in the creation of knowledge that might ground a resolution of inclusion claims. Whatever *multiculturalism* may "mean," it has become a symbol, a "soundbite" preempting meaningful discussion of the conditions under which groups might share authority with respect and without subordination.

## I. MULTICULTURALISM AGAINST THE BACKGROUND OF NORMATIVE VACUUMS AND NORMATIVE CHAOS

### A. Introduction

The Court-created dichotomy between the judicially enforceable scope of constitutional equality and the legislatively enforceable scope of statutory equality creates a normative vacuum. The result is unlimited opportunity for norm contests that are relatively unbounded by constitutional parameters. Consequently, the currency of current struggles for inclusion is possession of the means in which opinion—political, public—is formulated. The claim of inclusion with respect to institutions that participate in the norm-generation process is especially powerful. For if the next phase of "equality" norm formulation is unaided by reference to transformative legal principles, democratic principles would suggest that new norms might be legitimate if and only if they are generated in a process in which all perspectives and experiences have been considered. In my view, the cry for multiculturalism symbolizes the quest for the replacement of traditional republicanism's "commitment to a unified public that in practice tends to exclude or silence some groups"<sup>5</sup> with "the heterogeneous public."<sup>6</sup>

### B. *Brown<sup>7</sup> to McCleskey<sup>8</sup> and Beyond—The Court's Refusal To Articulate a Transformative Vision*

The failure of the Supreme Court to articulate a normative vision in support of racial and gender transformation has created a normative gap in which a contest exists for domination of the norm-formulation process. Though our history of a formal embrace of equality is over one hundred years old, our history of trying to make consti-

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5. IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 183 (1990).

6. *Id.* at 183-84.

7. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

8. *McCleskey v. Kemp*, 481 U.S. 279 (1987).

tutional equality promises a reality is much shorter, either forty years if one counts from *Brown I*<sup>9</sup> or barely twenty years if one counts from the important constitutional remedies decision *Swann*<sup>10</sup> or the important federal employment discrimination decision *Griggs*.<sup>11</sup> Against this short background, the question of who participates in the shaping of knowledge assumes even greater importance. If we concede that in the past certain groups had almost no access to the processes in which knowledge is denominated authoritative, how do we continue to rationalize a future in which there might be no concession on the questions of institutional democratization? The demand to participate that multiculturalism represents is challenge to a past in which a limited number of people participated in the process of deciding what ought to count as authoritative. The question of limited participation, always an issue that raised important questions about the legitimacy of our institutions, assumes even greater importance if key questions about the contours of equality remain to be resolved. And, given doctrinal developments to date, key questions do remain.

Neither *Brown* nor subsequent Supreme Court decisions explicitly articulated a doctrinal vision that would place judicially enforceable constitutional law at the forefront of racial transformation. In *Brown*, the Court did not choose to condemn the history of segregation and its rationales. Rather, the Court focused upon the effects of segregation of young black children.<sup>12</sup> Nonetheless, *Brown* anti-apartheid principles contained great potential, especially in the clear suggestion that the effects of government policy were much more important than its motivations. But until *Washington v. Davis*,<sup>13</sup> the contours of post-*Brown* equality seemed fuzzy indeed, and the Court did not articulate a consistent principle to guide its decisions during the resistance to *Brown*'s letter and spirit.<sup>14</sup> When, in *Davis*, the

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9. *Brown*, 347 U.S. at 483 (overturning "separate but equal" doctrine).

10. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (supporting broad remedial powers of federal district courts in school desegregation cases).

11. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that Title VII bars discrimination manifested in facially neutral policies that disparately impact protected classes).

12. *Brown*, 347 U.S. at 493-95 (relying on the "feeling of inferiority" visited upon black children in holding that educational segregation violates the Equal Protection Clause).

13. 426 U.S. 229 (1976).

14. See *Crawford v. Board of Educ.*, 458 U.S. 527 (1982) (state constitutional provision forbidding courts to bus except when Federal Constitution so requires); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457 (1982) (statute forbidding busing unless approved at state board level); *Palmer v. Thompson*, 403 U.S. 217 (1971) (public swimming pools closed in response to order to

Court was asked to consider whether a facially neutral government policy that had a racially disparate impact was constitutional, it did so against the background of its own ambivalence about the scope of *Brown*. When the Court decided that the judicially enforceable Fourteenth Amendment would be limited to provable, intentional, conscious, racially motivated state action, it limited the scope of the judicial enforcement of the Fourteenth Amendment to formal equality<sup>15</sup> and thus limited the judiciary's role in the process of post-*Brown* racial transformation. Subsequent judicial events, including the *McClesky v. Kemp*<sup>16</sup> case in which the Court declined to consider a claim of racial discrimination in the imposition of the death penalty unless the inmate facing a death sentence could show that the state intentionally maintained the death penalty system to execute more blacks, and *City of Richmond v. J.A. Croson Co.*<sup>17</sup> in which the Court agreed to apply the most rigorous level of judicial scrutiny to state and local government affirmative action programs, suggest that the Court has unequivocally embraced a nontransformative role.<sup>18</sup> At the same time, in *Davis*, the Supreme Court announced a legislative alternative to a significant judicial transformative role. The Court said that "extension of the [disparate impact rule] beyond those areas where it is already applicable by reason of statute . . . should await legislative prescription."<sup>19</sup>

What are the substantive and process limitations on the exercise of this legislative authority? Congress has relied upon the Commerce Clause,<sup>20</sup> the Thirteenth Amendment,<sup>21</sup> the Fourteenth

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desegregate Jackson, Mississippi, recreation facilities); *Reitman v. Mulkey*, 387 U.S. 369 (1967) (legislature forbidden by state constitution to pass fair housing legislation); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (schools closed in response to desegregation order).

15. *Davis*, 426 U.S. at 239.

16. 481 U.S. 279 (1987).

17. 488 U.S. 469 (1989).

18. See also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). These statutory civil rights decisions, and others, were overruled by the Congress in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at scattered sections of U.S.C.).

19. *Davis*, 426 U.S. at 248; see also Linda S. Greene, *Twenty Years of Civil Rights: How Firm a Foundation?*, 37 *RUTGERS L. REV.* 707, 745-49 (1985) (criticizing the *Davis* court's delegation to the legislature).

20. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964) (finding Commerce Clause authorized application of Title II of the Civil Rights Act of 1964 to public accommodation serving interstate travel); *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964) (same where public accommodation served food that had moved in interstate commerce).

21. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968) (upholding Section 1982 proscription of discrimination in sale or rental of real property as authorized by the Thirteenth

Amendment,<sup>22</sup> the Spending Clause,<sup>23</sup> and the respective enforcement clauses<sup>24</sup> of these constitutional provisions as authority for equality-enforcing legislation. The general principle applicable to each of these acts of legislative authority is the understanding that the enforcement clauses confer upon Congress discretion to determine which rules are rationally related to the enforcement of the norms embodied in these constitutional provisions<sup>25</sup> and that the court will not second-guess these decisions.<sup>26</sup> However, the Court's decision to limit its own statement of constitutional principle to governmental decisions that show provable, consciously race-based decision-making leaves to Congress and state legislatures a wide-ranging legislative authority. The result is a debate without boundary norms, a debate in which all comers compete to shape principles.

### C. Legislative Politics

The debate over the meaning of "business necessity" in the course of Congress's consideration of the Civil Rights Act of 1991 ("1991 Act")<sup>27</sup> is a poignant example of normative chaos in the context of equality legislation. One of the most important purposes of the 1991 Act was the clarification of the status of *Griggs v. Duke Power Co.*<sup>28</sup> after the 1989 Supreme Court decision in *Wards Cove Packing Co. v. Atonio*.<sup>29</sup> So important was this objective, the purposes clause of the legislation included the mention of both cases by

Amendment); see also Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified at scattered sections of 42 U.S.C.).

22. See *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (upholding the Voting Rights Act as within Congress' Fourteenth Amendment Section Five powers).

23. See, e.g., *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 599 (1983) (White, J., concurring) (referring to Title VI of the Civil Rights Act of 1964 as "Spending Clause legislation").

24. See, e.g., *Katzenbach*, 384 U.S. at 649-51.

25. Certainly, significant judicial checks will be applied if a state or the Congress employs a race-conscious means to accomplish an equality objective. In *Croson*, five Justices agreed that strict scrutiny was the proper standard to be applied to race-based remedial measures, at least at the state or local level. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1988) (opinion of O'Connor, J., joined by Rehnquist, C.J., and White, J.); *id.* at 519 (opinion of Kennedy, J.); *id.* at 520 (Scalia, J., concurring) (emphasizing that state and local remedies should almost always receive strict scrutiny).

26. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1984) (overruling "traditional governmental functions" exception to Congress's broad Commerce Clause authority).

27. Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified at scattered sections of U.S.C.).

28. 401 U.S. 424 (1971).

29. 490 U.S. 642 (1989).

name.<sup>30</sup> In addition, the legislation explicitly attempted to confine the legislative history of the phrase *business necessity* to a specific page of the congressional record.<sup>31</sup> In spite of these efforts, Senator Robert Dole introduced a memorandum into the record after the language of the bill had been agreed upon asserting that no agreement had been reached on the precise meaning of business necessity. In support of his assertion of normative flux, Senator Dole inserted in the record the numerous formulations of business necessity that at one time or another had been proposed to the Congress during its lengthy consideration of the Civil Rights Act of 1991 and its predecessor, the Civil Rights Act of 1990.<sup>32</sup> The battle over the scope of the *Griggs* principle is an example of the unbounded nature of the legislative debate over the definition of equality. In such an unbounded debate, the existence of a contest over competing ideals depends upon the participation of groups with diverse and divergent interests in the outcome. Imagine the content of the *Griggs-Wards Cove* discussion without the participation of the Leadership Conference on Civil Rights<sup>33</sup> and the NAACP Legal Defense and Educational Fund.<sup>34</sup>

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30. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 3(2), 105 Stat. 1071, 1071.

31. *Id.* § 105(b), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(k)(3)(b) (1988 & Supp. III 1991)) ("No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.").

32. *Dole Interpretative Memorandum*, 137 CONG. REC. S15,472-75 (daily ed. Oct. 30, 1991). In addition, President Bush included a reference to the Dole Memorandum in his own statement on signing the Civil Rights Act of 1991. See *Statement on Signing the Civil Rights Act of 1991*, 29 WEEKLY COMP. PRES. DOC. 1701 (Nov. 21, 1991). For a political history of the Civil Rights Act of 1991, see generally Reginald C. Govan, *Framing Issues and Acquiring Codes: An Overview of the Legislative Sojourn of the Civil Rights Act of 1991*, 41 DEPAUL L. REV. 1057 (1992).

33. The Leadership Conference on Civil Rights was founded in 1950 by A. Philip Randolph, Roy Wilkins, and Arnold Aaronson to implement the historic report of President Truman's Commission on Civil Rights *To Secure These Rights*. The Leadership Conference is composed of 185 national organizations that represent minority groups, labor unions, women, religious groups, the disabled, and older Americans. It is committed to an integrated, democratic, plural society in which every individual is accorded equal rights, equal opportunities, and equal justice without regard to race, sex, religion, ethnic origin, handicap, or age. Among other things, the Leadership Conference lobbies Congress to pass civil rights legislation that will implement its goals. Telephone interview with Karen McGill Arrington, Policy Research Associate, Leadership Conference on Civil Rights, Washington, D.C. (June 8, 1992).

34. In an amicus brief filed in the *Metro Broadcasting* case, the NAACP Legal Defense and Educational Fund described itself:

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist blacks to secure their constitutional and civil rights by means of litigation. For many years attorneys of the Legal Defense Fund have represented par-



The sudden explosion of discussion about sexual harassment after Nina Totenberg's revelation of Anita Hill's allegations regarding Supreme Court nominee Clarence Thomas<sup>35</sup> is another example of an unbounded discussion substantively changed by the inclusion of the experiences and perspectives of additional participants. The Senate Judiciary Committee's disposition of Professor Hill's allegations may not have taken into account the possibility that a large number of women might consider an allegation of sexual harassment highly relevant to then-Judge Thomas's fitness to serve as a Supreme Court Justice. In addition, the dispute over the definition of conduct that constitutes sexual harassment and the bearing of Hill's long silence on the issue of her credibility are issues that cannot be resolved by reference to foundational standards. Indeed, constitutional standards as currently formulated would provide limited guidance and would have limited applicability.<sup>36</sup>

These two illustrations of normative openness suggest that access to the processes in which consensus and norms develop may, in the absence of any fundamental constitutional principles, be crucial to the content of future norms, even if these norms lack constitutional sanction. I have already illustrated the normative contest with the example of the *Griggs* recodification in the context of the 1991 Act. But there are other sites on which the contest over the scope of equality is located.

#### D. Electoral Politics

Electoral politics is one such site on which the battle over the meaning and content of equality has been waged. The image of

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ties in litigation before [the Supreme] Court and the lower courts involving a variety of race discrimination and remedial issues, including questions involving the proper scope and interpretation of the Fourteenth and Fifth Amendments.

Brief Amicus Curiae for the NAACP Legal Defense and Educational Fund, Inc. at 1-2, *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990) (No. 89-453), reprinted in 199 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 445, 456-57 (1991).

35. See *All Things Considered* (National Public Radio broadcast, Oct. 6, 1991).

36. The Court reaffirmed the *Davis* intentional-discrimination rule in *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979) (refusing to strike down veteran-preference system in state hiring procedures). Of course, to the extent that a public employer actually adopted a policy of sexual harassment the harassment would be actionable. But the current statutory law of sexual harassment makes employers liable for the actions of employees in a wider range of circumstances than constitutional law would require, see EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1991), and the law covers private employers who cannot be reached due to the state-action limitation of the Fourteenth and Fifth Amendments.

whites as "victims" of civil rights laws was reinforced by the imagery in television advertisements used by Senator Jesse Helms against Harvey Gantt during the 1990 United States Senate race. In the ad, white hands angrily crumpled an employer's rejection letter. The background voice-over suggested that Gantt supported a civil rights bill that would take jobs away from whites. The now infamous Willie Horton ad communicated a related idea of blacks victimizing whites. These messages are as much a part of the process of defining equality norms as any legal contest that specifically addresses the scope of equal protection.<sup>37</sup> In fact, the extent to which the language in certain judicial opinions seems to include parallel fears about black victimization of whites suggests that the discourse on equality norms is fluid across institutional boundaries.<sup>38</sup> In addition, events such as the emergence of Carol Moseley Braun's candidacy for the United States Senate in Illinois also suggest that the discourse on the meaning of equality does in fact occur outside the parameters of legal doctrine; the Moseley Braun candidacy has been widely interpreted as a sign that women—especially black women—may define equality in terms of power sharing in powerful institutions, not simply formal equality. A related message is the suggestion that the Senate's decision to confirm Justice Thomas in spite of Anita Hill's allegations was flawed in part due to the composition of the Senate. This idea is both a statement that the outcome may have been different had women been present as well as a statement that institutional composition affects decisional legitimacy.<sup>39</sup>

### E. Other "Opinion" Centers

Those institutions that shape the acceptance of formulated norms play a more important role in today's normative vacuum than do the legislative, judicial, and electoral institutions. Television and radio,

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37. Of course, questions of equality have often played an important role in electoral politics. See, e.g., ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION* 44 (campaign of Vice President Johnson); *id.* at 62 (race issues in 1864 Louisiana constitutional convention); *id.* at 412-15 (race in post-Civil War elections in Mississippi, Texas, Tennessee, and Virginia); *id.* at 575-76 (Hayes-Tilden presidential election).

38. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1988) (opinion of O'Connor, J.) (discussing the relevance of the black majority on the Richmond City Council to the adoption of strict scrutiny).

39. See YOUNG, *supra* note 5, at 91-95 (describing the relationship between justice and democratization).

newspapers, popular magazines, and the academic press all contribute to the background against which norms are developed inside and outside the political process. Television in particular, in light of its pervasiveness as a medium of information/imagery exchange, wields a disproportionate influence on the process of idea development. Colleges and universities as well as important business institutions<sup>40</sup> also shape the ideas that fill the Court-created normative vacuum.

The inclusion and discourse-democratization claims embodied in *multiculturalism* have implications that transcend educational institutions. If the meaning of equality is indeed "up for grabs," the decision-making processes in institutions that influence the development of opinion and knowledge ought to be more closely scrutinized for their influence on the process of private and public norm development.

## II. BEYOND MULTICULTURALISM—INCLUSION ON NEW TERMS

While *multiculturalism* is metaphor for claims of inclusion, it does not resolve questions related to legally imposed limitations on inclusion or the terms upon which previously excluded groups might be included. A much more thoughtful discussion of these issues is necessary to evaluate what vision of multiculturalism might coincide with or transcend current doctrinal limitations.

### A. Inclusion Rationales

There have been sharp doctrinal differences of opinion over both the constitutional rationales for inclusion as well over the terms of inclusion. The various opinions in *Bakke*, *Croson*, and *Metro* show sharp doctrinal divisions over the appropriate terms of inclusion. At the outset, it is important to recall that Justice Powell's own opinion in *Bakke* seemed to reject racial pluralism as a legitimate basis for inclusion.<sup>41</sup> A majority appears to reject affirmative inclusion mea-

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40. The Fortune 100, for example, is composed of companies such as IBM and General Motors. These companies are important centers of power and influence. The decision of the Leadership Conference on Civil Rights to negotiate a compromise with the Business Roundtable on the deadlocked Civil Rights Act of 1990, H.R. 4000, 101st Cong., 2d Sess. (1990), illustrates the role that major corporations play in shaping and limiting all policies, including equality-related policies. See Govan, *supra* note 32, at 1076 (describing the negotiations between the Business Roundtable and the Leadership Conference on Civil Rights).

41. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287-305 (1977) (opinion of Powell, J.).

asures based on the goal of eliminating societal discrimination,<sup>42</sup> at least when state and local governments act.<sup>43</sup> And *Metro*, a five-to-four decision, approved diversity as a substantial government interest,<sup>44</sup> but the possibility that the concept of diversity might be expanded beyond broadcast diversity interests seems doubtful given the outright rejection of this rationale by four Justices and the retirement of two members of the five-Justice majority.<sup>45</sup> Remedying provable, intentional racial discrimination seems a safe rationale in light of *Croson* and *Metro*; the tragedy is that this rationale requires an institutional admission of past illegality or proof of past illegality. This element requires that the past of racial division be resurrected before inclusive measures can be pursued. But the differences of opinion are not surprising in light of the Court's historical ambivalence over the scope of constitutional equality and the severe limitations adopted. Severe doctrinal limitations on remedies of inclusion are the flip-side of that limited constitutional vision.

The *Metro* debate over the legitimacy of broadcast diversity as a government interest provided a provocative peek at the Justices' views on the *value* of diversity. The dissenters' sharp dismissal of diversity rationales as ill-conceived, "amorphous," and racist show the extent to which the participatory and enrichment ideals embodied in multiculturalism would be rejected by at least four Justices.

### B. Empowerment

One question of importance is whether constitutional equality doctrine will serve as a shield against empowering measures. *Metro's* affirmation of measures to promote broadcast diversity increased the possibility that constitutional equality doctrine might not preclude empowerment as a value. But *Croson*, which also was an economic empowerment decision, severely limited state and local governments in these efforts. *Presley v. Etowah County Commis-*

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42. See *supra* note 25.

43. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 409, 520-21 (1988) (rejecting state or local remedial efforts absent "imminent danger to life and limb").

44. See *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990).

45. Justice Thomas replaced Justice Marshall, and Justice Souter replaced Justice Brennan. Justice Thomas' decision in *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (striking down, on equal protection grounds, FCC program of providing preferential treatment to female applicants for broadcast licenses), indicates that he might limit application of the diversity rationale in different circumstances.

sion,<sup>46</sup> which held that a shift of authority away from offices to which "first blacks" were elected did not violate the Voting Rights Act of 1965,<sup>47</sup> exposed a significant difference of opinion on the relationship between formal voting rights and political empowerment.<sup>48</sup> Justice O'Connor joined the decision in *Presley* and yet wrote in *Croson* that the exercise of legislative power by a black city council majority provided a rationale for strict judicial scrutiny.<sup>49</sup>

In *Presley*, the question was whether a transfer of power away from an office slated to be held for the first time by newly elected black officials was a change "with respect to voting" subject to preapproval (or preclearance) by the United States Attorney General pursuant to section 5 of the Voting Rights Act of 1965.<sup>50</sup> Justice Kennedy, writing for Justices Rehnquist, O'Connor, Scalia, Souter, and Thomas, said that these changes were not changes with respect to voting,<sup>51</sup> despite the effect of the transfers of power on the authority of the newly elected black officials and their constituencies. Justice Kennedy's conclusion turned on a textually oriented interpretive approach—"with respect to voting" is plain language and does not mean "with respect to governance."<sup>52</sup> The dissenters—Justices Stevens, White, and Blackmun—had urged the Court to require preclearance when, as in *Presley*, the "reallocation of decisionmaking authority of an elective office is taken (1) after the victory of a black candidate, and (2) after the entry of a consent decree designed to give black voters an opportunity to have repre-

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46. 112 S. Ct. 820 (1992).

47. 42 U.S.C. §§ 1973 to 1973bb (1988).

48. This result—another example of narrowing statutory interpretation—is correctable through legislation. After the ordeal accompanying the passage of the 1991 Act, *see generally* Govan, *supra* note 32, it is unlikely that immediate correction will be sought.

49. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495-96 (1988) (opinion of O'Connor, J.).

50. *Presley*, 112 S. Ct. at 824; *see also* 42 U.S.C. § 1973c.

51. *Id.* at 832.

52. Justice Kennedy used similar plain-meaning reasoning in his *Patterson* decision. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). There, the Court held that the language in section 1981, 42 U.S.C. § 1981 (1988), guaranteeing "all persons . . . the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens" did not include the right to be free from racial harassment in the performance of a contract. "The right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions." *Patterson*, 491 U.S. at 177. *Patterson* was overruled by Congress in the Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72 (codified at 42 U.S.C. § 1981 (1988 & Supp. III 1991)).

sentation on an elective body."<sup>53</sup> In essence, the *Presley* dissenters argued that the reallocation of authority was so closely connected with the black constituencies' exercise of the franchise as to warrant preclearance lest those voting rights be nullified.<sup>54</sup>

*Presley* may be limited in its ultimate impact because actions to counter power-allocation shifts in anticipation of black office-holding are actionable under section 2 of the Voting Rights Act.<sup>55</sup> And, the decision, like so many recent Supreme Court civil rights rulings, may be overturned by Congress.<sup>56</sup> But its empowerment implications are more important than the statutory interpretation debate because the case reveals a majority indifferent to the relationship between full citizenship and political empowerment.

The *Presley* Court's indifference to a white majority's reallocation of increased power to itself decidedly contrasts with the Court's hostility towards the exercise of power by a government controlled by a majority of black elected officials in *Croson*. In *Croson*, Justice O'Connor's opinion specifically noted that strict judicial scrutiny was necessary because the black majority Richmond City Council had advantaged blacks.<sup>57</sup> In addition, Justice Scalia wrote that state and local governments must almost never be permitted to use race to ameliorate past discrimination, among other things, on the basis that local governments lack the dispassionate objectivity and flexibility to act responsibly in racial matters. The tone with respect to Richmond in *Croson* is distinctly different from that adopted in *Presley*. In *Croson*, federalism considerations are not only swept aside, the local action is the subject of active suspicion.<sup>58</sup> The result in each case is different but substantively consistent: Black political empowerment is thwarted.

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53. *Presley*, 112 S. Ct. at 839.

54. *Id.* at 840.

55. 42 U.S.C. § 1973 (1988).

56. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at scattered sections of U.S.C.) (overturning six Supreme Court civil rights decisions from the 1988 Term). See generally Govan, *supra* note 32.

57. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.). In this respect, Justice O'Connor wrote for Justices Rehnquist, White, and Kennedy.

58. In *Croson*, Justice Scalia wrote that "[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States. . . . And the struggle retains that character in modern times. See, e.g., *Brown v. Board of Education*." *Id.* at 522 (Scalia, J., concurring) (citations omitted).

## III. POLITICAL CORRECTNESS AND MULTICULTURALISM

The charge of "political correctness" ("PC") has been made at an interesting time in the development of equality and inclusion norms. On the one hand, the Court has articulated a limited vision of constitutional equality that affords little constitutional cover or legitimacy to groups seeking wider participation in society's institutions. The constitutional equality norms are limited in scope as well as application. On the other hand, the Supreme Court has legitimized in constitutional terms the opposition to remedies that guarantee participation opportunities for racial minorities.<sup>59</sup> These developments do not directly lead to the charge of being PC, but they certainly lend fuel to the fire of opposition to the claim of inclusion, diversity, and respect that multiculturalism represents.

The narrow PC charge seems to be the claim that certain groups want to discard the literary canon and replace it with a new canon that includes the work of people of color and women.<sup>60</sup> A more sweeping message embodied in the PC charge is the claim that women and minorities want to end tolerance and substitute an orthodoxy in place of open debate.<sup>61</sup> The opponents of PC cite campus restrictions on hate speech as the quintessential example of this censorship.<sup>62</sup> But they are also concerned that university officials are stifling discussion of other topics in order to avoid offense to certain groups.<sup>63</sup> Thus, the proponents of the political correctness charge ground their own message in a charge of censorship.

The PC charges and countercharges seem to create a fragile and inadequate framework for a serious discussion of opportunity distribution. What sort of social consequences might flow from a frank

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59. See *Croson*, 488 U.S. at 469; see also *Freeman v. Pitts*, 112 S. Ct. 1430 (1992) (approving final dismissal of 1969 court-ordered school-desegregation decree in suburban Atlanta school system).

60. Compare, e.g., Irving Howe, *The Value of the Canon*, NEW REPUBLIC, Feb. 18, 1991, at 40 (defending the program of classical Western education) and Roger Kimball, *The Periphery v. the Center: The MLA in Chicago*, in DEBATING P.C., *supra* note 3, at 61 (same) with, e.g., Henry Louis Gates, Jr., *Whose Canon Is It Anyway?*, in DEBATING P.C., *supra* note 3, at 190 (urging a process of "canon reformation" leading to the definition of a "black American canon").

61. See, e.g., D'Souza, *Interview*, *supra* note 4; see also Michael Kinsley, *P.C. B.S.*, NEW REPUBLIC, May 20, 1991, at 8 (noting the extent of and questioning the foundations of "PC hysteria").

62. See D'Souza, *Interview*, *supra* note 4, at 34-35; Nat Hentoff, 'Speech Codes' on Campus and Problems of Free Speech, in DEBATING P.C., *supra* note 3, at 215, 221. But see Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing Too*, in DEBATING P.C., *supra* note 3, at 231 (defending hate speech codes as consistent with First Amendment principles).

63. See D'Souza, *Interview*, *supra* note 4, at 34.

opposition to opportunity for women and minorities? And what if opposition to hate speech rules were framed not as a slippery-slope-end-of-the-First-Amendment issue but as an affirmative espousal of the opportunity to utter racist, sexist, and homophobic epithets? I do not suggest the absence of gray areas. Proponents of affirmative action do not suggest that there is no room for a discussion of the circumstances under which affirmative action is appropriate. Proponents of hate-speech codes do not suggest that there are no disputes with respect to differences between the sensitive—and often painful—discussion of race and the purposeful spitting out of a dehumanizing epithet to an eighteen-year-old away from home for the first time. There are indeed degrees, but PC charges obscure both substance as well as subtlety.

Moreover, those who charge PC implicitly deny the true power of extant hierarchies. A false assumption of power and authority is incorporated into the PC charge. If women and minorities held the important positions of power on campuses—faculty majorities and key policymaking posts—the claim of silencing might be meritorious. In the absence of raw power, women and minorities may only make legal and moral claims for inclusion and protection.

Often, and especially in the context of the debates over hate speech on campus, the political correctness charge seems to prevent a discussion about the formation of new norms about discourse. In addition to the question of whether it is reasonable to do nothing at all in response to a rising tide of hate crimes,<sup>64</sup> is it reasonable to deny the effect of unfettered hate speech on the very ability of members of maligned and disparaged groups to participate effectively in any debate? This is not patronization but an acknowledgment of the real effects of hate speech on the personal self esteem of those maligned<sup>65</sup> as well as on the status of the groups in a larger sense. The regulation of hate speech is justified, not only because of its effect on specific people but also because of its effect on the speech efficacy of members of maligned groups.<sup>66</sup> Creating a context in

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64. See, e.g., Don Terry, "Pink Angels" Battle Anti-Gay Crime, N.Y. TIMES, Apr. 6, 1992, at A18.

65. See Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

66. Can we deny that our heritage of slavery diminishes the power of African-American speech and taints and colors it with the imagery of slavery based on inferiority assertions? Put another way, is it possible that our experience of slavery and its attendant and pervasive claim of our inferiority does not influence the perceptions of whites about the value of African-American



which all persons and groups have an opportunity to have their ideas valued ought to be the prerequisite for any meaningful discourse at all. The very values opponents of hate-speech regulation invoke—the marketplace of ideas, for example—are undermined when the speech of certain groups is rendered irrelevant in an atmosphere of hate and hostility.

So much of the PC discussion seems an effort to prevent discourse democratization by precluding a discussion of the morality of opposition to inclusion. Indeed, perhaps it is the moral claim that is most troubling and that accounts best for the crafting of a phrase that obfuscates the moral issues of institutional legitimacy. After all, by now—over 350 years after Jamestown—it may be possible to insist that ruling majorities may not craft rules that exclude people of color and women from sharing power.<sup>67</sup>

#### IV. CONCLUSION

The core question of our era is inclusion, and the multiculturalism debate symbolizes this question. The failure of the Supreme Court to articulate a sweeping inclusive vision, and the Court's significant restrictions on inclusive efforts, limit the role that both courts and government might play in constructing a pluralist vision. The Court has permitted Congress to legislate principles protective of equality, but the normative vacuum created by the narrowness of the Court's constitutional equality principles permits a spirited political contest over the opportunity to define equality. In this normative vacuum, the role of nonjudicial institutions in defining inclusion principles increases. Broad-based participation in these institutions becomes more significant, the creation of a civil and tolerant environment for a new "heterogeneous public" becomes more crucial, and the opposition to ideas of presumptive inclusion—whether framed in a PC charge or in more significant ways—become more troubling.

But the cry for multiculturalism is not simply a symbolic demand for inclusion; it is also a cry for inclusion with empowerment. Here, too, opposition to inclusion is not easily separated from opposition to

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speech?

67. This proposition is certainly as plausible as the *Croson* principle that the nascent exercise of power by blacks to benefit themselves to a limited extent while permitting whites overall economic control (through unlimited prime contracting opportunities) of a multimillion-dollar contracting business justifies strict judicial scrutiny. See *supra* note 38 (noting Justice O'Connor's finding in *Croson* that the majority of the Richmond City Council's being black militated in favor of applying strict scrutiny to the program of inclusion).

empowerment. *Presley* demonstrates the distance legal doctrine must travel to reach an empowering vision. More importantly, however, the result in *Presley* alerts us to the poverty of a vision of inclusion without a vision of empowerment.

