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### SELLING DIVERSITY SHORT

*An Essay Responding to Nancy Leong's "Racial Capitalism,"* 126 HARV. L. REV. \_\_\_\_ (2013)

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### INTRODUCTION

Nancy Leong's forthcoming article in the *Harvard Law Review*, *Racial Capitalism*, has received much attention even in advance of its publication.<sup>1</sup> The article was posted to the popular site for academic and scholarly work, the Social Science Research Network ("SSRN"), on February 21, 2012,<sup>2</sup> which coincidentally was the same day that the Supreme Court granted certiorari in *Fisher v.*

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<sup>1</sup>See, e.g., Lawrence B. Solum, *Leong on Racial Capitalism*, LEGAL THEORY BLOG (Mar. 1, 2012)

<http://lsolum.typepad.com/legaltheory/2012/03/leong-on-racial-capitalism.html>; Nancy Leong, *Diversity and the Commodification of Non-Whiteness*, PRAWFSBLAWG (May 14, 2012)

<http://prawfsblawg.blogs.com/prawfsblawg/2012/05/diversity-and-the-commodification-of-non-whiteness.html>;

Nancy Leong, *Principles of Productive Conversations About Race*, PRAWFSBLAWG (May 7, 2012)

<http://prawfsblawg.blogs.com/prawfsblawg/2012/05/how-to-talk-about-race.html>.; Khiara M. Bridges, *The Problem with Affirmative Action After Grutter: Some Reflections on Fisher v. University of Texas*, CONCURRING OPINIONS (last visited Dec. 6, 2012) <http://www.concurringopinions.com/archives/2012/03/the-problem-with-affirmative-action-after-grutter-some-reflections-on-fisher-v-university-of-texas.html>; David Gans, *Fisher v. University of Texas, Justice Kennedy, and the Text and History of the Fourteenth Amendment*, BALKINAZATION (Feb. 28 2012)

<http://balkin.blogspot.com/2012/02/fisher-v-university-of-texas-justice.html>.

<sup>2</sup> Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. (forthcoming 2013) *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2009877](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2009877).

*Texas*.<sup>3</sup> Leong's article has since received nearly 2,500 views.<sup>4</sup> Nancy Leong has, to say the least, hit on a hot button issue with *Racial Capitalism*, which has become the focus of only more acute attention since the discourse on race has hit a fever pitch in anticipation of the Court's ruling later this term in the *Fisher* case.<sup>5</sup> It is this furor of interest over whether this newfound "diversity" interest attacked by Leong and scrutinized by the Court offers anything substantively different than past remedial uses of race and, perhaps even more important, whether that difference is beneficial that motivates this response.<sup>6</sup> Leong answers both of these questions in the negative. I respectfully disagree.

In *Racial Capitalism* Nancy Leong attempts to vilify "diversity"<sup>7</sup> by casting it as an impediment, perhaps the impediment, to our collective ambition to achieve racial reconciliation.

Rather than succeed in her objective, Leong instead exposes her fundamental misapprehension of

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<sup>3</sup> 132 S.Ct. 1536 (2012) (this case challenges the University of Texas at Austin's race-conscious admissions practices in pursuit of "student body diversity" under the standards set forth in *Grutter v. Bollinger*, 539 U.S. 306 (2003), as violating the Equal Protection rights of a white female applicant, Abigail Fisher, denied admission to the university. See Petition for Writ of Certiorari, *Fisher*, 132 S.Ct. 1536 (No. 11-345)).

<sup>4</sup> See Leong, *supra* note 2.

<sup>5</sup> Seemingly every manner of legal and news publication spanning the political and ideological spectrum has dedicated precious content space to coverage of this controversial issue even in the midst of one of the most contentious presidential election cycles in recent memory; see, e.g., Mark Sherman, *Fisher v. University of Texas: Supreme Court Takes Up Affirmative Action*, THE HUFFINGTON POST, Oct. 10, 2012, [http://www.huffingtonpost.com/2012/10/10/fisher-vs-university-of-texas-supreme-court\\_n\\_1954297.html](http://www.huffingtonpost.com/2012/10/10/fisher-vs-university-of-texas-supreme-court_n_1954297.html); Adam Liptak, *Justices Weigh Race as Factor at Universities*, THE NEW YORK TIMES, Oct. 10, 2012, <http://www.nytimes.com/2012/10/11/us/a-changed-court-revisits-affirmative-action-in-college-admissions.html?pagewanted=all>; Terry Eastland, *The Texas Diversity Wars*, THE WEEKLY STANDARD, Oct. 31, 2011, <http://www.weeklystandard.com/keyword/Fisher-v.-Texas>; Lee C. Bollinger and Claude M. Steele, *A high-stakes battle for higher education*, THE LOS ANGELES TIMES, Oct. 9, 2012, <http://articles.latimes.com/2012/oct/09/opinion/la-oe-bollinger-fisher-texas-race-20121009>; Richard D. Kahlenberg, *A Liberal Critique of Racial Preferences*, THE WALL STREET JOURNAL, Oct. 10, 2012, <http://online.wsj.com/article/SB10000872396390444897304578046531385328710.html>; Lisa McElroy, *Commentary: The sad spectacle of the dismantling of affirmative action*, THE NATIONAL LAW JOURNAL, Oct. 15, 2012, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202574961003>.

<sup>6</sup> This response essay is in one sense long overdue in view of the substantial interest already generated by pre-publication of Leong's article and its wide circulation among legal scholars. See Solum, *supra* note 1. Yet in another sense it is obviously premature (since it precedes formal publication of Leong's article). In the current age of electronic communication and twenty-four hour news cycles, today's news is already out of date by the early morning post. So the opportunity to respond in real time to Leong's critique of diversity, rather than being forced by the delay of the print process to play "Johnny-come-lately" to the discourse, is a welcome one.

<sup>7</sup> Leong's critique of diversity defines it as synonymous with race-conscious policies and practices. However, diversity is defined, understood, and practiced in terms far broader than race or ethnicity and even, in many respects, beyond other socially or legally salient dimensions of identity. See Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21<sup>st</sup> Century View of Equality*, 2 COLUM. J. RACE & L. 75, 82 (2012) [hereinafter *A Deliberative Defense*]. In an effort to address only the issues raised in Leong's analysis, I will limit my response to Leong's definition of diversity, which pertains exclusively to racial/ethnic diversity.

diversity in both theory and practice. The crux of Leong's claim indicts diversity for our present system of exchanging racial identity in social status markets. The problem is that the commodification of race pre-existed the rise of diversity and will likely survive long past its demise if the late Derrick Bell's prediction about the permanence of racism holds true. Critiques of diversity are nothing new, even those from the left,<sup>8</sup> but Leong does more than just assail the efficacy of diversity's means or the legitimacy of its ends. *Racial Capitalism* goes beyond prior critiques in attempting to render diversity not only bereft of its instrumental value, but also laden with harmful effects. On the former point Leong's critique is familiar even if more cynical. But the latter critique is novel and reveals the error of Leong's assumptions about the ways in which diversity operates both conceptually and practically. The trap into which Leong falls is not an unfamiliar one. She fails to recognize how diversity's instrumental approach to race diverges substantially from the remedial/corrective justice approach to race under affirmative action theory and practice.<sup>9</sup> She critiques only some watered-down and ineffectual version of diversity. The more robust version of diversity has more instrumental value than Leong admits and less harmful effects. Rather than creating or even exacerbating the problems Leong has identified, diversity is instead endeavoring to achieve the egalitarian goals to which Leong herself says we should be aspiring, and it is producing tangible results along the way. Leong's theory of *Racial Capitalism* fails because, in essence, it *sells diversity short*.

*Racial Capitalism* does, however, make a significant contribution to the discourse on race by articulating a theory of market capitalism in racial identity that is rich with complexity and insight. Leong constructs a unique and convincing narrative of "racial capitalism" that draws on the Marxian theory of social capital in which she casts non-white participants as sellers and white participants as

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<sup>8</sup> See Hawkins, *A Deliberative Defense*, *supra* note 1, at 78; see also Leong, *Racial Capitalism* at \_\_\_\_ (citing Derrick Bell and Richard Ford).

<sup>9</sup> For a fuller explanation of this divergence, See Hawkins, *A Deliberative Defense*, *supra* note 1.

buyers in a market for non-white racial identity and legitimacy. Along the way Leong makes many observations and draws certain conclusions with which I readily agree, such as the indignities of identity performance demanded of people of color,<sup>10</sup> or the need to pursue the equality goals of corrective and distributive justice with vigor notwithstanding the impediment of entrenched racialization. She makes others with which I hesitate to agree, but for which I have less personal or professional basis for contest – such as the inherently corrupting consequence of commoditizing race or that certain traits are inalienable and should not be subject to commodification, such as freedom or identity.<sup>11</sup> These latter claims may or may not be convincing, but they are not probative of the remaining claims about diversity, which are highly contestable. My response to Leong's claims are limited to her critique of how diversity has single-handedly created a market for trading on an individual's racial identity that is demeaning to non-white people specifically and damaging to society more generally.

Leong does not dismiss diversity as outright problematic. She concedes that diversity is not inherently bad, and argues only that its costs are significant, and its benefits are marginal at best.<sup>12</sup> There are several ways in which *Racial Capitalism* overvalues diversity's negative attributes and undervalues its positive attributes that result in Leong's miscalculation that diversity is a losing cost/value proposition. First, Leong miscasts diversity as something more akin to affirmative action in diversity's clothing, than diversity itself, while at the same time overemphasizing diversity's role in the commodification of race. This skewed view distorts the lens through which Leong illuminates the costs and benefits of diversity. As a result, Leong exaggerates the costs associated with

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<sup>10</sup> Leong cites the groundbreaking work of Kenji Yoshino, in which he weaves personal narrative with legal analysis to construct a powerful argument about the identity performance demands on subordinated groups, including people of color. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (1st ed. 2006).

<sup>11</sup> I can think of many ways in which freedom is commoditized, such as the sale of one's labor in the labor market, or that the commodification of identity is or should be permitted, such as the commodification of sexuality in the sex trades or, more innocuously, the sale of "celebrity" for product endorsements.

<sup>12</sup> In Leong's own words, "[a]ssigning value to non-whiteness . . . feels empty; a poor exchange for the many detriments to capitalizing non-whiteness. . ." *Racial Capitalism* at \_\_\_\_.

diversity's commodification of race and misrepresents its practical effects. Perhaps most troubling about Leong's critique of diversity is that she devalues the benefits derived from diversity's instrumental approach to race. In her rush to condemn diversity, Leong offers only a thin-slice view of it, missing both its significant impact on the larger equality agenda and its beneficial effect for people of color individually.

## I. A NARROW VIEW OF DIVERSITY

Although Leong acknowledges that race was commoditized long before the advent of diversity as either a legal construct or social preoccupation, she nevertheless overemphasizes diversity's role in the resulting market in racial capitalism. Leong readily acknowledges that the commodification of race dates to our Nation's founding when slavery was not just a figurative exercise of trading non-white race in social markets,<sup>13</sup> but a literal process of trading black persons on the auction block. Leong further acknowledges the continuation of this commodification under affirmative action policies and practices.<sup>14</sup> Thus, diversity has not instantiated the commodification of race, a point which Leong seems to concede.<sup>15</sup> More important, Leong admits that decommodification of race is both unlikely and in many ways undesirable. Still Leong assigns unique blame to diversity for the present harmful effects of the commodification of race. If history absolves diversity of blame for commoditizing race and decommodification is out of reach, is

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<sup>13</sup> Leong acknowledges that this more figurative market in racial identity is also historically derived, citing the seminal work Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993), to demonstrate that race has long operated as a form of status property. *Id.* at \_\_\_\_; (in other words, Leong admits that race has long been commoditized both literally and figuratively).

<sup>14</sup> *Id.* at \_\_\_\_.

<sup>15</sup> Race has long been reified. See Justin Desautels-Stein, *Race as a Legal Concept*, COLUM. J. RACE & L. (2012); Ian Haney Lopez, *WHITE BY LAW* (2006); Ariela Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth Century*, 108 YALE L. J. 109 (1998); Cheryl Harris, *Whiteness as Property*, 106 H. L. REV. 1709 (1993). Leong herself does as much to reify race as diversity. Her claim that race is so "important to personhood" that to commoditize it is to "do violence to our deepest understanding of what it is to be human" reifies race beyond that which is generally accepted by critical race scholars about race as a social construct rather than either an inevitable or biological fact of personhood. Leong, *Racial Capitalism* at \_\_\_\_ (quoting the theory of inalienable objects in, Margaret Jane Radin, *Market -Inalienability*, 100 HARV. L. REV. 1849, 1903-06 (1987)).

curious that Leong would condemn diversity for any role it may play in racial commodification? It seems Leong's real charge is that diversity fails to mitigate the harm produced by the commodification of race or to generate any substantial value in exchange for this harm. Leong contrasts this with the remedial use of race (most often under affirmative action), which she reasons at least has beneficial value in achieving the corrective justice aims of equality, even if it too does nothing to mitigate the harms of racial commodification. However, Leong misconstrues the purpose and effect of diversity in important ways.

Affirmative action is one dimensional, diversity is multi-dimensional. The exclusive aim of affirmative action is remedial; it seeks to correct for past injustice.<sup>16</sup> Diversity's instrumental value for non-white racial identity is not limited to increasing the cultural competence of white individuals/institutions or merely "signaling" their status as non-racist, as Leong suggests. Diversity as a social and business construct is at least two decades old.<sup>17</sup> Its legal origins are older still.<sup>18</sup> It has developed a robust theoretical foundation and is supported by both experiential learning and empirical data. At present there are three different instrumental theories of diversity,<sup>19</sup> only one of which aligns with Leong's cultural competence theory. In addition to facilitating cultural competence (often referred to as the "business case"), diversity improves group functioning (functional theory) and enhances democratic legitimacy (pluralist theory).<sup>20</sup> Leong says nothing of the latter two theories of diversity, which explains why she substantially discounts its value. Leong rightly observes that these instrumental theories of diversity substantially increase the positive valuation of non-white racial identity in whatever market exists for its exchange. From Leong's perspective this increase in value is undesirable because it creates more of a bad thing — exchanges

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<sup>16</sup> See Hawkins, *A Deliberative Defense*, *supra* note 7, at 83.

<sup>17</sup> *Id.* at 80 (dating the origins of modern diversity practice to the mid-1990s).

<sup>18</sup> See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 313 (1978) (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950) for the assertion that "the contribution of diversity is substantial" in the context of higher education.)

<sup>19</sup> See Hawkins, *A Deliberative Defense*, *supra* note 7, at 84-90 (discussing the theories underlying modern diversity practice).

<sup>20</sup> *Id.*

in racial identity. However, the bad may not be as bad as Leong describes, and the good is definitely better than she acknowledges.

Diversity's positive and instrumental valuation of non-white identity has been beneficial both for non-white persons and for society in ways that prior forms of racial commodification, particularly those in pursuit of racial remediation, have not and for which Leong fails to account.<sup>21</sup> This positive value may not entirely disrupt the existing social order, but it at least attempts to raise the social standing of non-white persons in relation to white persons, with the effect of closing the social status gap between the races and perhaps even gesturing toward racial equality.<sup>22</sup> Moreover, diversity may in fact minimize some of the harmful effects generated by racial commodification, thereby reducing its costs.

## II. EXAGGERATING DIVERSITY'S COSTS

Leong catalogues both individual and societal costs attendant to the commodification of race. The individual costs include, among others, a pernicious demand on people of color to perform their racial identity in ways that placate whites. Among the societal costs, Leong posits that diversity's instrumental approach dampens racial discourse and impedes racial progress. Notwithstanding the fact that these costs were not instantiated by diversity, diversity's instrumental approach to race certainly does more to immunize individuals from the harms occasioned by the performance demands of racial commodification than Leong's account gives it credit for. It also

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<sup>21</sup> In addition to the obvious harms of slavery, claims of stigma harm abound in relation to the remedial valuation of racial identity. Justice Clarence Thomas has been one of the chief purveyors of this claim. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J. *dissenting in part*) (identifying the problem of race-conscious admissions policies as the "stigma" imposed on those otherwise "qualified" black students admitted to the University of Michigan Law School.); *see also* Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43 (1997) (describing generally Justice Thomas's objection to affirmative action because of the claim of "stigma").

<sup>22</sup> This is a primary aim of the anti-subordination theory of equal protection and the remedial use of racial identity. *See, e.g., Harris, Whiteness As Property, supra* note 9, at 1781 (arguing in favor of a distributive justice theory of affirmative action as a means of narrowing inequality between the races resulting from the privileging of whiteness); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9-10 (2003-2004) (citing a myriad of scholars, including themselves, who all advocate for an anti-subordination principle of equal protection that disestablishes the system of stratification of persons on the basis of race).

may be able to do more to advance racial progress than affirmative action's remedial/corrective justice approach in view of the narrow legal straightjacket to which the remedial theory of race has been confined.<sup>23</sup>

The performance identity costs of racialization are nothing new. DuBois wrote of the "duality of black folk" at the turn of the last century, alongside his prediction that "the problem of the twentieth century [would be] the problem of the color line."<sup>24</sup> Both persist, but the positive value diversity assigns to non-white race has the effect of encouraging and even facilitating authenticity in identity performance, rather than continuing to suppress it. Diversity values non-white persons for their ability to inject cultural variation into white institutions and increase the cultural competence of white individuals; it depends on an authenticity of self from non-white persons that is not similarly rewarded when non-white persons are valued purely in representational terms for corrective justice purposes as under the remedial approach to race. This is not the assimilation model of integration promoted by affirmative action and described by Leong. Institutions are not only welcoming authenticity, they are encouraging it. It is the key driver of the instrumental benefits derived from diversity under both the cultural competence and functional theories of diversity. Improving institutional and collateral individual cultural competence is dependent on the extent to which cultural variation is recognized and leveraged. Through workplace affinity groups, non-white persons (and women and people of gender non-conformity) are being encouraged to leverage their cultural and other differences to benefit institutions in myriad ways.<sup>25</sup> As the cultural competence

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<sup>23</sup> Beginning with *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) (denying the availability of remedial relief under the equal protection clause premised on societal discrimination rather than proof of institutional discrimination) and continuing through *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (imposing strict scrutiny review on even federal affirmative action programs previously reserved for state action) and most recently in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007) (rejecting racial integration, rather than racial desegregation, as a legitimate interest under the equal protection clause) the Court has increasingly narrowed the scope of the permissible remedial ends and means available under equal protection analysis.

<sup>24</sup> W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903).

<sup>25</sup> For example, Eli Lilly's Chinese Culture Network sponsors a hosting program for visiting executives from Lilly's Chinese affiliate. Jason Forsythe, *Winning with Diversity*, N.Y. TIMES,



theory of diversity is strengthened by a growing body of data, so too will the ways in which racial and other cultural differences are welcomed, encouraged, and leveraged.

Leong also expresses skepticism about the prospect of diversity's positive valuation of non-white racial identity to improve racial discourse or advance progress toward racial equality.<sup>26</sup> But that skepticism is belied by the improvements and progress that diversity has already generated. Diversity has resuscitated an equality doctrine thought dead under the weight of the color-blind, anti-discrimination principle.<sup>27</sup> We may not all agree on the ultimate ends of the diversity rationale or the appropriate means for pursuing them, but we are at least having a renewed conversation about race and (in)equality in our society.<sup>28</sup> By and large, that discourse is positive. To the extent diversity's push to improve cross-cultural competence allows us to make any progress towards reducing racism, a possibility which Leong concedes, its contribution to equality will be significant. Thanks to the diversity rationale introduced by Justice Powell's plurality opinion in *Bakke* and adopted by the Court in *Grutter*, we may also be ushering in a new era in our equality doctrine that embraces an expansive principle of democratic pluralism in addition to the increasingly narrow contours of the remedial principle of equal protection. This is perhaps diversity's greatest promise, which Leong entirely fails to acknowledge. Leong's description of diversity's instrumental ends, focusing exclusively on the "business case" for diversity to the exclusion of its other instrumental goals, both misapprehends diversity's instrumental ends and misrepresents its beneficial effects.

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<http://www.nytimes.com/marketing/jobmarket/diversity/affinity.html>. The Central Intelligence Agency's (CIA) affinity groups help its "diverse employees feel welcome and valued." *Id.* And among Ford Motor Company's ten affinity groups, GLOBE, for its gay, lesbian, bisexual and transgendered employees and allies, helped Ford launch a successful marketing campaign targeted to the gay community. *Id.* These are but a few examples from a handful of organizations demonstrating the potential positive impact of diversity for institutional inclusion and cultural competence.

<sup>26</sup> Leong, *Racial Capitalism*, 126 HARV.L.REV. (forthcoming 2013).

<sup>27</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (reaffirming the vitality of the equal protection doctrine and rejecting the claim of strict scrutiny of racial classifications as "fatal in fact" by acknowledging a non-remedial compelling interest in diversity and finding that the University of Michigan Law School's race-conscious admissions program satisfied the strict scrutiny standard insofar as it sought to increase student body diversity.)

<sup>28</sup> See, e.g., *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (Kennedy, J. concurring) (affirming that diversity can be a compelling interest in primary and secondary education, but discussing the proper means of pursuing diversity goals); *Fisher v. Texas*, 631 F.3d 213 (5<sup>th</sup> Cir. 2011), *cert. granted*, 80 U.S.L.W. 3475 (U.S. Feb. 21, 2012) (evaluating how the goal of student body diversity may be properly pursued).

### III. UNDERVALUING DIVERSITY'S AIMS

Leong posits that the diversity rationale undermines the goal of equality because the value diversity assigns to non-white race distorts our collective social lens from a proper focus on the corrective or remedial goals of equality to purely instrumental goals. In other words, Leong's disapproval of diversity's instrumental goals is that they inure solely to the benefit of white persons and institutions, whereas remedial goals inure to the benefit of people of color, which according to Leong is as it should be. Diversity's instrumental ends are, according to Leong, "antithetical to equality." It is true that diversity does not attend to remedial goals, but its instrumental goals do inure to the benefit of both white and non-white persons, as well as to society at large.

Leong herself admits, at least implicitly, that improving cross-cultural competence could in fact minimize racism and thereby further equality.<sup>29</sup> However, rather than credit the sincerity and rigor of this diversity motive, Leong says diversity actors settle for the superficiality of merely "signaling" diversity without any meaningful changes in institutional cultures or individual attitudes. In Leong's view, white individuals/institutions substitute the means (diversity) for the end (cross-cultural competence). Here she cites to an incident at the University of Wisconsin in which the image of an African-American student was photo-shopped into a recruiting brochure, belying the lack of actual diversity on campus. While it is true that diversity has been poorly implemented in some institutions, diversity cannot be condemned wholesale for the sins of a few. Nor can practical failures in implementation jettison diversity as a critical conceptual and theoretical framework for addressing pressing legal and social challenges. For every University of Wisconsin, there is a University of Texas at Austin ("UT Austin"). UT Austin has become infamous not for its superficial commitment to diversity, but for attempting to institutionalize its robust commitment to

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<sup>29</sup> Leong, *Racial Capitalism* at \_\_.

student body diversity down to the classroom level. This earnest pursuit of diversity resulted in a challenge by Abigail Fisher, a rejected white applicant, to UT Austin's race-conscious admissions policy that will result in the Supreme Court deciding this term whether we prefer just enough diversity to "signal" cross-cultural competence, or if the law permits the rigorous and often difficult process of trying to obtain the true instrumental benefits of diversity. Hopefully, the Court will not follow Leong's lead by short-changing diversity's instrumental ends or hamstringing institutional actors by foreclosing the necessary means of achieving these instrumental ends.

Indeed, each of the claims Leong makes about the superficiality of diversity efforts is based more on suspicion than observation and demonstrates not only a deep mistrust of diversity's good intentions, but a fundamental misapprehension of diversity practice. Contrary to Leong's claims, diversity does define its goal as inclusion, rather than mere representation. Likewise, diversity eschews a compliance-driven orientation in favor of fostering changes in institutional attitudes, approaches, and outcomes. This change management approach is fundamental to deriving the instrumental benefits touted by diversity. Regardless of the reasons diversity is pursued, if those reasons are instrumental, substituting means for ends, as Leong suggests, simply betrays the utilitarian value which motivates diversity practice. While it is undoubtedly true that some individual and institutional diversity actors are insincere and operate in ineffectual ways, it is equally true that many believe earnestly in the benefits obtained from diversity and vigorously pursue it as a means to those ends.

More than aspiring to mere functional or operational ends, however, diversity also aspires to ends that are indeed egalitarian in purpose and effect. One of the newest instrumental rationales for diversity is to increase democratic legitimacy in our pluralist nation by expanding access to

opportunity broadly across all demographic groups.<sup>30</sup> Justice O'Connor said in best when she remarked that the diversity rationale is about much more than just the operational goals of improving business competence or enriching students' educational experiences. She described the more lofty ambitions of diversity:

Ensuring that . . . institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective . . . . Effective participation by members of all racial and ethnic groups in the . . . life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.<sup>31</sup>

This too is part of the instrumental rationale of diversity, and it holds great promise for extending the egalitarian goals that are the legacy of the civil rights and anti-subordination movements, which have long championed the remedial/corrective justice rationale. The diversity rationale has already enabled an expansion, if limited, of our equality doctrine by realizing the first new compelling interest under equal protection in nearly sixty years.<sup>32</sup> Its precise legal contours are still being determined<sup>33</sup> as we continue to amass a growing body of empirical and sociological evidence about its importance and effects. We should not cut short what could be the important and enduring legacy of diversity as we pursue new means of achieving the egalitarian ideals to which we aspire.

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<sup>30</sup> See Stacy L. Hawkins, Grutter's *Promise: Bridging the Gap Between Colorblind Rhetorical Equality and Real Racial Inequality*, (on file with author).

<sup>31</sup> Grutter v. Bollinger, 539 U.S. 306, 324-5 (internal citations omitted).

<sup>32</sup> The last compelling interest recognized by the Court was national security. See *Korematsu v. U.S.*, 323 U.S. 214, 216 and 223 (1944) (the Court defined the interest as "military urgency" and reasoned "[p]ressing public necessity may sometimes justify the existence of . . . restrictions" which curtail the civil rights of a single racial group). Subsequent attempts to proffer compelling interests under the Equal Protection Clause have failed, see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (rejecting remedying societal discrimination as compelling); *Taxman v. Bd. Of Ed. of Piscataway*, 91 F.3d 1547 (3d. 1996) (rejecting teachers as role models as compelling); *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007) (rejecting racial integration as compelling).

<sup>33</sup> For what those contours should look like and how they should be constructed, see Hawkins, *A Deliberative Defense*, *supra* note 1, at 112-4.

## CONCLUSION

Race has a troubled history in our society. At a time when people are celebrating what many claim to be our post-racial society,<sup>34</sup> Leong rightly reminds us in *Racial Capitalism* that the present remains fraught with problems of racial inequality. I hope Derrick Bell was wrong when he declared the permanence of racism.<sup>35</sup> But if his interest convergence theory<sup>36</sup> is right, then diversity has the potential to benefit non-white people and further the equality agenda, even as it endeavors to enrich white people/institutions. Diversity may just offer us the opportunity for a renewed commitment to racial progress, and perhaps even a chance to realize meaningful equality, if only we don't sell it short.

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<sup>34</sup> Interestingly, in the scholarly literature, characterizations of society as “post-racial” more often occur as a point of departure, rather than as a principle claim. See, e.g., Helen Norton, *The Supreme Court's Post-Racial Turn Towards a Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197 (2010); Ian Haney-Lopez, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, CALIF. L. REV. 101 (2010); Karla McKanders, *Black and Brown Coalition-Building During the 'Post-Racial' Obama Era*, 29 ST. LOUIS U. PUB. L. REV. 473 (2010); but cf. Jason Rathod, *A Post-Racial Voting Rights Act*, 13 BERKLEY. J. AFR.-AM. L. POL'Y 139 (2011) (suggesting that even if America is not yet post-racial, it can and should be).

<sup>35</sup> DERRICK A. BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

<sup>36</sup> The interest convergence theory posits that the fate of (black) equality is inextricably tied to white self-interest. Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).