

# Arab Americans, Affirmative Action, and a Quest for Racial Identity

Christine Tamer \*

I. INTRODUCTION.....	101
II. THE WORST OF BOTH WORLDS.....	103
A. Post 9-11 Racism, Hate, and Discrimination .....	105
B. Discrimination, Racism, and Overt Acts of Hate on Campus .....	106
III. OFFICIALLY WHITE; REALISTICALLY BLACK .....	108
A. Check it Right, You Ain't White!.....	112
B. The Mark of Blackness.....	114
IV. RACE-BASED AFFIRMATIVE ACTION AND WHY ARAB AMERICANS SHOULD BE INCLUDED .....	117
A. Arab American Students on Campus.....	121
B. The Campus Quad and Beyond .....	125
C. Getting Outside the Box .....	126
V. CONCLUSION .....	127

## I. INTRODUCTION

“If I see someone come in and he's got a diaper on his head and a fan belt around that diaper on his head, that guy needs to be pulled over and checked.” – U.S. Congressman John Cooksey of Louisiana, September 17, 2001<sup>1</sup>

---

\* J.D. Candidate, 2011, The University of Texas School of Law; B.A. Baylor University, 2008. I would like to thank Professor Justin Driver for his guidance and counsel in the preparation of this Note. I would also like to express my gratitude to the editors and staff of the Texas Journal on CIVIL LIBERTIES & CIVIL RIGHTS and my husband, Jonathan Bassham, for his inspiration and support. This Note is dedicated to my grandfather, Roger Tamer.

<sup>1</sup> Steve Ritca, *Republicans Say Cooksey Used Poor Choice of Words*, TIMES-PICAYUNE (New Orleans), Sept. 21, 2001, at 3.

Sand nigger, camel jockey, towel head. Disloyal, threatening, foreign. Billionaires, bombers, belly dancers. Fundamentalist, extremist, militant. Dune coon, raghead, Mohammedan. Dirty, derelict, vermin. *Terrorist.*

Historically Arab Americans<sup>2</sup> have been negatively stereotyped in a variety of ways. Today, Arab Americans have essentially been “raced as terrorists.”<sup>3</sup> The classification of Arab Americans as officially “white” in the census, while society perceives Arab Americans as socially “black,” is problematic. It denies a group that is historically and presently suffering discrimination the benefits and protections of minority status, as well as the benefit of official recognition as a way of conferring identity. The main argument of this Note is that undergraduate colleges and universities should recognize Arab Americans as a minority for purposes of their race-based affirmative action programs since Arab Americans contribute to the diversity rationale as set forth by the Supreme Court. The purpose of this Note is not to analyze the pros and cons of affirmative action or the diversity rationale, but rather to argue that as long as such affirmative action programs exist, Arab Americans should be recognized as contributing to a race-based diversity rationale.

This Note first briefly outlines the recent history of discrimination, racism, bias, and stereotypes against Arab Americans, with a focus on discrimination and racism in the context of colleges and universities. Next, this Note describes how society perceives Arab Americans and why classifying Arab Americans as white in the census is both arbitrary and harmful. Then, this Note argues that Arab Americans have essentially been given the “mark of blackness,” rather than a so-called “white privilege” in today’s society. The Note goes on to discuss the diversity rationale for affirmative action as articulated in *Grutter v. Bollinger*, and to describe how enrolling a critical mass of Arab American students can contribute to diversity. Finally, this Note calls on colleges and universities to recognize Arab American students by giving them their own race “box” on college applications for purposes of their affirmative action programs, even if the census still officially classifies Arab Americans as white.<sup>4</sup>

---

<sup>2</sup> Throughout this Note I will refer to “Arab American” as a distinct racial group of people. I realize that grouping people of Middle Eastern descent under the title of “Arab” is problematic in itself, and I merely use this label for the sake of simplicity. Additionally, I recognize that there are Arab people who have immigrated to this country or who are here on visas and thus using the term “American” is in many ways under-inclusive. However, the main focus of this Note is on people of Arab descent who are living in America.

<sup>3</sup> Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab-Americans as “Terrorists,”* 8 ASIAN L.J. 1, 12 (2001) (internal quotations omitted).

<sup>4</sup> Recognition of Arab Americans, as distinct from the white majority, is important for reasons beyond affirmative action, diversity, and identity. For instance, currently Arab Americans are the subject of heightened racial profiling. Because Arab Americans are classified as white the extent of such profiling has gone uncounted since, as put by Roughy Shalabai, president of the Arab American Bar Association, “[y]ou can’t tell whether Arab-Americans are being profiled if we’re counted with

## II. THE WORST OF BOTH WORLDS

“Arab spokesmen similarly argue that the Arab world is being branded anti-American because of the extremism of a few. But that’s nonsense. In that world, hatred of the U.S. and anti-social international behavior are nearly universal.” – Zev Chafets, “Arab Americans Have to Choose,” September 16, 2001<sup>5</sup>

Although the Supreme Court has rejected the use of affirmative action as a way of remedying societal discrimination,<sup>6</sup> it is still important to recognize that Arab Americans’ experience in the United States falls within the social justice rationale. Nevertheless, remedying societal and racial discrimination against minorities, including Arab Americans, greatly motivates support for affirmative action.<sup>7</sup> For instance, Justice O’Connor’s majority opinion in *Grutter v. Bollinger* was arguably influenced by a social justice rationale in imposing a potential twenty-five-year limit on affirmative action, as “time limits are normally associated with affirmative action programs designed to remedy past discrimination, not those aimed at ensuring a diverse student body”<sup>8</sup> since the “benefits of diversity are forever.”<sup>9</sup> Certain scholars have also noted that after the 1989 Supreme Court case *City of Richmond v. J.A. Croson Co.*,<sup>10</sup> “the need to justify the inclusion of particular groups in

---

whites.” See JOHN TEHRANIAN, *WHITEWASHED: AMERICA’S INVISIBLE MIDDLE EASTERN MINORITY* 167 (2009) (discussing an Illinois law that requires police officers to identify the race of individuals they stop and how a majority of police officers initially checked the “Asian/Pacific Islander” box when stopping Arab Americans before being instructed that Arab Americans should be classified as white).

<sup>5</sup> Zev Chafets, *Arab Americans Have to Choose*, N.Y. DAILY NEWS, Sept. 16, 2001, available at [http://www.nydailynews.com/archives/opinions/2001/09/16/2001-09-16\\_arab\\_american\\_have\\_to\\_choose.html](http://www.nydailynews.com/archives/opinions/2001/09/16/2001-09-16_arab_american_have_to_choose.html).

<sup>6</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (rejecting the affirmative action rationales of “reducing the historic deficit of traditionally disfavored minorities,” “countering the effects of societal discrimination,” and increasing professional services to disadvantaged communities).

<sup>7</sup> Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1149, n.28 (2007); Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 946–47 (1997) (“A judge will be more likely to read precedent as permitting a broader range of action if the judge is personally convinced there are good reasons to do so, even if those good reasons are reasons (like societal discrimination) that must go unstated. Thus, a justice faced with the question whether diversity as a justification for affirmative action survives strict scrutiny might well be influenced by her (unstated) views about why diversity cannot be achieved without affirmative action – which might well turn on the effects of societal discrimination.”).

<sup>8</sup> Kevin R. Johnson, *The Last Twenty-Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 184 (2004).

<sup>9</sup> Onwuachi-Willig, *supra* note 7, at 1149 n.28.

<sup>10</sup> 488 U.S. 469 (1989). In this case, the the City of Richmond’s affirmative action plan, which required prime contractors on city-funded construction to award 30 percent of their subcontracts to minority business enterprises; the Court invalidated the plan because there was insufficient evidence of past discrimination. *Id.* at 477–78, 498. The City of Richmond provided evidence that minority

affirmative action programs became constitutionally mandated.”<sup>11</sup>

While racism against other minorities is arguably declining, at least in respect to overt forms of racism,<sup>12</sup> racism against Arab Americans remains at a comparatively high level.<sup>13</sup> A university’s use of voluntary race-conscious admissions policies remains an important opportunity for those seeking to mitigate vestiges of past wrongs and ameliorate the effects of ongoing discrimination. The Supreme Court stated in *Shaw v. Reno*<sup>14</sup> that our Constitution encourages us to weld together various racial and ethnic communities, and to avoid the racial balkanization that has plagued other nations.<sup>15</sup> In *Grutter v. Bollinger*,<sup>16</sup> the University of Michigan’s race-based admissions program emphasized “racial and ethnic diversity with special reference to the inclusion of students from groups that have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers,”<sup>17</sup> while also seeking “a mix of students with varying backgrounds and experiences who will respect and learn from each other.”<sup>18</sup> Thus, it is important that universities first recognize that Arab Americans are a group that has been historically, and is currently, discriminated against.<sup>19</sup>

---

businesses received less than one percent of prime contracts and that minority contractors had minimal participation in state contractor associations. *Id.* at 499. However, the Court found this evidence, as well as a congressional determination that discrimination depressed construction, insufficient to support a plan that used race classification. *Id.* at 499–500.

<sup>11</sup> George LaNouc & John Sullivan, *Deconstructing Affirmative Action Categories*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 75* (John Skrentny ed., 2001) (citing *City of Richmond*, 488 U.S. at 506) (pointing to Justice O’Connor’s argument that “[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city’s construction industry”).

<sup>12</sup> See, e.g., *United States v. Clary*, 846 F. Supp. 768, 779 (E.D. Mo. 1994) (“[I]ntentional discrimination is unlikely today . . . most Americans have grown beyond the evils of overt racial malice . . . .”); Antony Page & Michael J. Patts, *Poll Workers, Election Administration, and the Problem of Implicit Bias*, 15 *MICH. J. RACE & L.* 1, 22–23 (2009) (noting that “[r]acism has drastically changed in the United States—moving from a regime where explicit prejudice was the order of the day to one where publicly expressing racist views can make one a social pariah” and that “overt racism has declined”); Janet Ward Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Waning Support*, 66 *U. PITT. L. REV.* 83, 94 (2004) (“There has undoubtedly been a true decline in traditional racism.”).

<sup>13</sup> See *infra* notes 19–43 and accompanying text.

<sup>14</sup> 509 U.S. 630 (1993).

<sup>15</sup> *Id.* at 648–49 (citing *Wright v. Rockefeller*, 376 U.S. 52, 66–67 (Douglas, J., dissenting)).

<sup>16</sup> 539 U.S. 306 (2003).

<sup>17</sup> *Id.* at 316.

<sup>18</sup> *Id.* at 314.

<sup>19</sup> The systematic racism engaged in by the government and society against Arab Americans after 9/11 was extensive. Numerous reports, articles, and cases demonstrate the extent of the hate crimes and discrimination suffered by Arab Americans. However, for purposes of this Note, the main focus will be on racist incidents and discriminatory attitudes that have and still do exist on college campuses.

### A. Post 9/11 Racism, Hate, and Discrimination

“[T]he only answer is ethnic profiling. Every Middle-[E]astern-looking truck driver should be pulled over and questioned wherever he may be in the United States.” – Mona Charen, *Jewish World Review*, Oct. 17, 2001<sup>20</sup>

While extreme racism against Arab Americans existed long before September 11, 2001,<sup>21</sup> the events of that day provided legitimacy to anti-Arab racists and caused a major upsurge in hate crimes and illegal discrimination against Arab Americans.<sup>22</sup> During the first nine weeks following the 9/11 terrorist attacks, the American-Arab Anti-Discrimination Committee (ADC) confirmed more than 700 violent incidents toward Arab Americans (or those seeming to resemble the physical appearance of an Arab American).<sup>23</sup> Over 1000 incidents of hate crimes against Arab and Muslim Americans were reported by February 2002.<sup>24</sup> Arab Americans also faced an immense increase in discrimination in the workplace as employers became reluctant to hire them and more eager to dismiss them or treat them with hostility at work.<sup>25</sup> Between September 2001 and September 2002, the ADC received more than 800 complaints of employment discrimination against Arab Americans—a 400 percent increase above previous annual rates of employment discrimination against Arab Americans in the past decade.<sup>26</sup> Furthermore, after 9/11, sixty percent of Americans (compared

---

<sup>20</sup> Mona Charen, *Two Fears*, *JEWISH WORLD REVIEW*, Oct. 17, 2001, <http://www.jewishworldreview.com/cols/charen101701.asp>.

<sup>21</sup> Racism against Arab Americans is not simply a post-9/11 phenomenon. There were numerous instances of racial violence against Arab Americans after the TWA terrorist hijacking in 1985 and after the first Gulf War. Nabeel Abraham, *Anti-Arab Racism and Violence in the United States, in THE DEVELOPMENT OF ARAB-AMERICAN IDENTITY* 155, 161 (Ernest McCarus ed., 1994). For instance, a 1991 ABC News poll during the first Gulf War found that 59 percent of Americans associated Arabs with terrorism. TEHRANIAN, *supra* note 4, at 122. Similarly, after the Oklahoma City Bombing of the Murrah Federal Building, the government received more than 200 reports of threats, harassment, and assault against Arab Americans and Muslims. The predisposition of American society in associating “terrorist” with Arab Americans prevailed even in the face of the reality that a white Caucasian was the one responsible for the attack. Jason A. Abel, *Americans Under Attack: The Need for Federal Hate Crime Legislation in Light of Post-September 11 Attacks on Arab Americans and Muslims*, 12 *ASIAN L.J.* 41, 48 (2005).

<sup>22</sup> See STEVEN SALAITA, *ANTI-ARAB RACISM IN THE USA: WHERE IT COMES FROM AND WHAT IT MEANS FOR POLITICS TODAY* 105 (2006) (arguing 9/11 allowed large numbers of Americans who previously disliked Arabs to express that dislike throughout the events of everyday life without fear of retribution or negative reaction); AM.-ARAB ANTI-DISCRIMINATION COMMITTEE, *Report on Hate Crime and Discrimination Against Arab Americans: The Post-September 11 Backlash* 19 (Hussein Ibish ed., 2003), available at <http://www.adc.org/PDF/hcr02.pdf> [hereinafter ADC 2003 Report] (noting that while Arab Americans have long faced problems with racism, the problem absorbed a widespread intensity post-9/11).

<sup>23</sup> ADC 2003 Report, *supra* note 22, at 20.

<sup>24</sup> Leti Volpp, *The Citizen and the Terrorist*, 49 *UCLA L. REV.* 1575, 1575 n.1 (2002).

<sup>25</sup> ADC 2003 Report, *supra* note 22, at 20.

<sup>26</sup> *Id.*

to eighty-one percent of Americans who opposed racial profiling in 1999)<sup>27</sup> said racial profiling was acceptable, especially if directed at Arabs.<sup>28</sup> Another Gallup poll of Americans showed that one in three favored internment of people of Arab descent, similar to that of the Japanese in World War II.<sup>29</sup> Surprisingly, according to a 2002 Gallup Poll, African Americans, who currently battle racial profiling themselves, were the number one supporters of racial profiling against Arab Americans, seventy-one percent approving of such measures.<sup>30</sup> Today, there should be no hesitation for universities to begin to see Arab Americans as a group that has been “historically discriminated against,” especially because the bulk of the “historical” discrimination has been throughout the past decade.

### B. Discrimination, Racism, and Overt Acts of Hate on Campus

“Arabs do nothing on impulse . . . Muslims, who have no allegiance to any country. Their only allegiance is to Islam. This is what they have been taught since birth. It is all they know. Muslims have no borders.” – David Horowitz, *frontpagemagazine.com*, March 7, 2005<sup>31</sup>

In the wake of September 11th, Arab Americans on university campuses experienced an immense number of hate crimes and discrimination. At the University of Arizona, a freshman’s head was bashed into a brick wall after leaving class.<sup>32</sup> At Pierce College, two

---

<sup>27</sup> Frank Newport, *Racial Profiling is Seen as Widespread, Particularly Among Young Black Men*, GALLUP NEWS SERVICE, Dec. 9, 1999, available at <http://www.gallup.com/poll/3421/Racial-Profiling-Seen-Widespread-Particularly-Among-Young-Black-Men.aspx>.

<sup>28</sup> David A. Harris, *Racial Profiling Revisited: “Just Common Sense” in the Fight Against Terror?*, 17-SUM CRIM. JUST. 36, 37 (2002).

<sup>29</sup> Jeffrey M. Jones, *The Impact of the Attacks on America*, GALLUP NEWS SERVICE, Sept. 25, 2001, available at <http://www.gallup.com/poll/4894/Impact-Attacks-America.aspx>. See also Volpp, *supra* note 24, at 1576–77 (“There is now public consensus that racial profiling is a good thing, and in fact necessary for survival”).

<sup>30</sup> Robert A. Levy, *Blacks for Profiling*, NATIONAL REVIEW, Feb. 6, 2002, available at <http://old.nationalreview.com/comment/comment-levy020602.shtml>.

<sup>31</sup> AM.-ARAB ANTI-DISCRIMINATION COMMITTEE, REPORT ON HATE CRIMES AND DISCRIMINATION AGAINST ARAB AMERICANS: 2003-2007 88 (Hussein Ibish ed., 2008) available at <http://www.ibishblog.com/sites/default/files/hcr07.pdf> [hereinafter ADC 2008 REPORT] (alteration in original).

<sup>32</sup> ADC 2003 REPORT, *supra* note 22, at 107. These are just a few of the many reported incidents of hate crimes and discrimination against Arab Americans at colleges after 9/11. In addition, Arab American children were readily discriminated against and the victim of hate crimes in their secondary schools. For instance, an Arab American high school student was harassed during a football game by an opposing team member threatening, “You f\*\*\*\*\* Arab terrorist, you bombed us Americans and now I am going to kill you.” Although the referee witnessed the incident, he refused to take any action. *Id.* at 109.

students wrote “die” across a Persian Club sign.<sup>33</sup> At the University of California, San Diego, a hijab was torn off a Muslim student’s head.<sup>34</sup> At Arizona State University, an Arab American student was hit with eggs.<sup>35</sup> At the University of California, Berkeley, Arab American students received telephone death threats and hate mail.<sup>36</sup> At the University of Texas, a professor of Middle Eastern language and culture was spat on.<sup>37</sup> At the University of North Carolina, a Lebanese student was beaten by two college-aged men who yelled, “Go home terrorist.”<sup>38</sup> At Wayne State University, vandals broke windows of the Muslim Students Association.<sup>39</sup> At the University of Nebraska, an Arab American employee received an email stating, “You must be put to death. I will go out of my way to kill every man, woman, and child that is even part of your people. You must be treated like the savage you are.”<sup>40</sup>

While such incidents have decreased and such problems have become better contained, a “lingering distrust and underlying enmity remain in many places.”<sup>41</sup> A later report published by the ADC in 2008 found that universities are still the scene of physical assaults, threats, and individual bias against Arab Americans.<sup>42</sup> For instance, in May 2005, “an Arab American student at Tufts University alleged that he was attacked and beaten unconscious” by a group outside a fraternity house who called him a terrorist and “Saddam supporter.”<sup>43</sup> In March 2003, “an Arab American medical student reported that he was nicknamed Osama bin Laden by employees at the medical college.”<sup>44</sup> In May 2004, a mural built by the Society of Arab Students at the University of California, Irvine was the target of arson.<sup>45</sup> Today, racist and other discriminatory incidents against Arab American students continue to occur at colleges and universities across the country. As recently as March 9, 2010, campus police at Brandeis University investigated whether vandalism against the Muslim Student Association should be characterized as a hate crime.<sup>46</sup>

Unlike many other races that have seen increasing progress

---

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 107.

<sup>36</sup> *Id.*

<sup>37</sup> ADC 2003 REPORT, *supra* note 22, at 108.

<sup>38</sup> *Id.* at 110.

<sup>39</sup> *Id.* at 108.

<sup>40</sup> *Id.* at 108–09.

<sup>41</sup> *Id.* at 107.

<sup>42</sup> ADC 2008 REPORT, *supra* note 31, at 63.

<sup>43</sup> *Id.* at 69.

<sup>44</sup> *Id.* at 65.

<sup>45</sup> *Id.* at 67.

<sup>46</sup> *Vandalism Reported at College Muslim Office*, WCVB-TV Boston, Mar. 9, 2010, <http://www.thebostonchannel.com/news/22793330/detail.html>.

throughout the years, Arab Americans suffer increasing rates of discrimination and racism. Critics of affirmative action who argue that racism is on the decline or that diversity does not work, are hard pressed to argue that racism is a thing of the past in the context of Arab American students.

### III. OFFICIALLY WHITE, REALISTICALLY BLACK

“Arabs aren’t really human and most Americans would just like to drop a nuclear bomb on them—any of them” – Michael Savage, radio talk show host, September, 2008<sup>47</sup>

The official government categorization of Arab Americans as white or Caucasian denies Arab Americans, a group still suffering from discrimination, the protection of minority status. Arab American’s legal classification as white essentially ignores the present extreme discrimination and racist attitudes toward Arab Americans in the United States. Given this context of racism, bias, and bigotry, the population at large sees Arab Americans as part of the “other” rather than as part of the white majority.<sup>48</sup> Achieving census recognition of Arab Americans’ classification as distinct from white is an important step in securing minority protections for Arab Americans as a group. There are numerous benefits that flow from such official recognition, including acknowledgment by colleges and universities that the increased presence of Arab Americans in undergraduate schools would contribute to the diversity rationale for affirmative action.

Racial classification of Arab Americans as white is arbitrary. In *St. Francis College v. Al-Khazraji*,<sup>49</sup> the Supreme Court determined that Arab Americans were Caucasian, but nevertheless held that an Arab American can bring a discrimination claim under 42 U.S.C. § 1981.<sup>50</sup> In *Al-Khazraji*, an Iraqi professor claimed he was denied tenure because of his “Arabian race,” even though he was officially classified as a Caucasian.<sup>51</sup> Since *Al-Khazraji*’s claim was brought under 42 U.S.C. § 1981, a nineteenth century anti-discrimination provision that addresses only racial discrimination, the question before the Court was whether Arab American was a protected racial category.<sup>52</sup>

---

<sup>47</sup> ADC 2008 REPORT, *supra* note 31, at 90.

<sup>48</sup> See Therese Saliba, *Resisting Invisibility: Arab Americans in Academia and Activism*, in ARABS IN AMERICA: BUILDING A NEW FUTURE 309 (Michael W. Sulciman ed., 1999).

<sup>49</sup> 481 U.S. 604 (1987).

<sup>50</sup> *Id.* at 613–14.

<sup>51</sup> *Id.* at 606–07.

<sup>52</sup> *Id.* at 607.



While the Court held that all ethnic and religious groups are protected against discrimination under federal law, the interesting part of the Court's opinion was its attempt to define race.<sup>53</sup> The Court recognized that racial categories changed over time and that "[i]t was not until the 20th century that dictionaries began referring to the Caucasian, Mongolian, and Negro races . . . ."<sup>54</sup> Justice White pointed out that although some people believed that Caucasoid, Monogoloid, and Negroid were the three major races, many biologists and anthropologists criticized such racial classifications as "arbitrary and of little use in understanding the variability of human beings" and "some, but not all, scientists . . . conclude[d] that racial classifications are, for the most part, sociopolitical, rather than biological, in nature."<sup>55</sup> Although the Court acknowledged the difficult and often "arbitrary" result of racial classifications, the Court did not recognize Arab Americans as distinct from their arbitrary classification as Caucasian.<sup>56</sup> In a post-9/11 world, where discrimination and racism against Arab Americans is more prevalent than ever, such "arbitrary" classification of Arab Americans is especially problematic.

Today, the question of what is "white" remains open to interpretation. But according to the Census, it is clear that Arab Americans are officially classified as white.<sup>57</sup> The Office of Management and Budget (OMB) defines "white" for purposes of the census as "[a] person having origins in any of the original peoples of Europe, North Africa, or the Middle East."<sup>58</sup> However, what is strange about this classification is that the OMB, which promulgates the survey questions that make up the Census, specifically acknowledges that their data on race and ethnicity are not "anthropologically or scientifically based" but are based on social policy. Therefore, it instructs Census takers to choose a category based on the "individual's recognition in his community."<sup>59</sup> This practice leaves Arab Americans perplexed. If the

---

<sup>53</sup> *Id.* at 610–13.

<sup>54</sup> *Al-Khazraji*, 481 U.S. at 611.

<sup>55</sup> *Id.* at 610, n.4.

<sup>56</sup> What seems clear is that not even the Supreme Court can articulate precisely what makes someone white. For instance, in 1922, the Supreme Court hinted that there was a role for science in racial assignments in regard to who was white. *See United States v. Ozawa*, 260 U.S. 178, 196–98 (1922) (denying citizenship to a Japanese applicant because he was not Caucasian when at the time naturalization rights were limited to whites and persons of African nativity). But in 1923, the Court revised the definition of white person "to be interpreted in accordance with the understandings of the common man." *United States v. Thind*, 261 U.S. 204, 214 (1923) (revising the definition of "White person" to mean whatever is understood by the "common man" and excluding a man of Asian Indian origin from eligibility for citizenship).

<sup>57</sup> OFFICE OF MGMT. & BUDGET, STATISTICAL DIRECTIVE NO. 15: RACE AND ETHNIC STANDARDS FOR FEDERAL STATISTICS AND ADMINISTRATIVE REPORTING, (May 12, 1977) [hereinafter OMB DIRECTIVE NO. 15].

<sup>58</sup> *Id.*

<sup>59</sup> *See* OMB, Recommendations from the Interagency Committee for the Review of the Racial and Ethnic Standards to the Office of Management and Budget Concerning Changes to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 36874-01 (July 9, 1997). *See*

community does not perceive Arab Americans as white, then shouldn't Arab Americans check some other box? Or should they disregard this belief and check the white box because they have "white" origins?<sup>60</sup>

The Census is described as "one of the grand prizes in the politics of identity."<sup>61</sup> Therefore, the best way for Arab Americans to secure recognition and protection is through official acknowledgment in the Census. Numerous federal agencies, state governments, and local governments use Census data to determine important issues such as education grants, affirmative action programs, low-income housing tax credits, voting rights, employment rights, legislative redistricting, food stamps, and veteran benefits.<sup>62</sup> Since the 1960s, lawmakers have used Census data on race and ethnicity in creating civil rights legislation.<sup>63</sup> Abed Ayoub, legal advisor for the ADC, is one of many Arab Americans expressing concern over being counted as white in the 2010 Census.<sup>64</sup> One reason for his concern is that hate crimes against Arab Americans have dramatically increased since 9/11, but the FBI does not keep statistics on these hate crimes because the Census does not recognize Arab Americans as a racial group.<sup>65</sup>

However, it is what the Census does on an "unofficial" level that makes it so important that Arab Americans secure minority recognition.<sup>66</sup> The Census asks respondents to indicate the race in which they believe they belong. Today, self-classification is largely understood "as a matter of individual psychology, of an individual's highly subjective feelings of attachment to some group, its culture or language, or perhaps its historical experience."<sup>67</sup> The ability of a certain group to self-classify in the Census is limited by the specified categories supplied by the government. The Census derives its racial categories from OMB Statistical Directive No. 15, which David Hollinger famously called "the single event most responsible for the lines" that configure our

also Lisa K. Pomeroy, *Restructuring Statistical Policy Directive No. 15: Controversy over Race Categorization and the 2000 Census*, 32 U. TOL. L. REV. 67, 72 (2000).

<sup>60</sup> See *infra* part II.A.

<sup>61</sup> Naomi Mezcy, *Erasure and Recognition: The Census, Race and the National Imagination*, 97 NW. U. L. REV. 1701, 1748 (2003).

<sup>62</sup> *Id.* at 1745.

<sup>63</sup> Shalini R. Deo, *Where Have All the Lovings Gone?: The Continued Relevance of the Movement For a Multiracial Category and Racial Classification After Parents Involved in Community Schools v. Seattle District No. 1*, 11 J. GENDER RACE & JUST. 409, 419 (2008) (noting that "[d]ata were needed to monitor . . . population groups that historically had experienced discrimination and differential treatment because of their race or ethnicity").

<sup>64</sup> Michel Martin, *Arab-American Activist Upset About Census Snub*, NPR, Jan. 4, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=122217013>.

<sup>65</sup> *Id.*

<sup>66</sup> Although the OMB claims that the listed racial categories did not relate to minority group status and did not contribute to the determination of eligibility for federal programs, "the fact is that civil rights laws explicitly link census data with political access for minorities." Mezcy, *supra* note 61, at 1746.

<sup>67</sup> PETER SKERRY, COUNTING ON THE CENSUS? RACE, GROUP IDENTITY AND THE EVASION OF POLITICS 43 (2000).

understanding of race.<sup>68</sup> Directive 15 was propagated in 1977 and laid out four races and two ethnicities to be used in all federal statistics.<sup>69</sup> In 1997, the racial categories were slightly amended to include five race categories: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White, with two choices for ethnicity “Hispanic or Latino” and “Not Hispanic or Latino.”<sup>70</sup> In the 2010 Census, the following racial categories are listed: White; Black, African American, or Negro; American Indian or Alaska Native; Asian Indian; Chinese; Filipino; Other Asian; Japanese; Korean; Vietnamese; Native Hawaiian; Guamanian or Charmorro; Samoan; Other Pacific Islander; or “Some other race.”<sup>71</sup> Arab Americans are still expected to check the “white” box.

Whether or not Arab Americans are more discriminated against than other racial categories that received a check box on the Census form is irrelevant. The point is that the Census is one of the main ways that certain race-based group protections and entitlements are distributed, and it is an essential means of conferring identity. Therefore, it is especially important that Arab Americans secure recognition. The Census plays a dual role of “recognizing identity and also of conferring it.”<sup>72</sup> “[C]ensus classifications have contributed to our understanding of race, to the grammar and logic of identity discourse, and to a particular way of imagining the nation.”<sup>73</sup> Thus, while the Census classifies and tracks individuals according to race, it simultaneously creates race.<sup>74</sup>

It should be noted that some Arab Americans argue that now is not the time to seek official Census recognition.<sup>75</sup> Samia El-Badry, a noted demographer of Arab American descent who previously advocated for a separate Arab racial classification, has temporarily paused his efforts.<sup>76</sup> El-Badry argues that “[g]iven the present stance on terrorism, the war to eliminate a president of an Arab nation and the uneducated fear of the Muslim religion, this is not a time for us to have an Arab American

---

<sup>68</sup> DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* 33 (2000).

<sup>69</sup> Statistical Directive No. 15: Race and Ethnic Standards for Federal Statistics and Administrative Reporting, 43 Fed. Reg. 19,269-70 (May 4, 1978). These racial categories included American Indian or Alaskan Native, Asian of Pacific Islander, black and white, and the ethnic categories were Hispanic and “not of” Hispanic origin. *Id.*

<sup>70</sup> Revisions to the Standards for the Classification of Federal Data on Race and Ethnicity, 62 Fed. Reg. 58,782-90 (Oct. 30, 1997).

<sup>71</sup> Bureau of the Census, *The Questions on the Form*, available at <http://2010.census.gov/2010census/how/interactive-form.php>. The Census also has a separate question for whether a person is of Hispanic, Latino, or Spanish origin and differentiates between Mexican/Mexican American and Chicano, Puerto Rican, Cuban, and other. *Id.*

<sup>72</sup> Mezey, *supra* note 61, at 1747.

<sup>73</sup> *Id.* at 1703.

<sup>74</sup> HEATHER M. DALMAGE, *TRIPPING THE COLOR LINE: BLACK-WHITE MULTIRACIAL FAMILIES IN A RACIALLY DIVIDED WORLD* 143 (2000).

<sup>75</sup> ALLIED MEDIA CORP., *THE QUESTION OF RACE & THE U.S. CENSUS* (2009), available at <http://www.allied-media.com/Arab-American/census.html>.

<sup>76</sup> *Id.*

category on any government form.”<sup>77</sup> El-Badry largely bases his argument on the fact that since “Arab Americans fear being rounded up . . . now is not the time to pursue” the Arab “box.”<sup>78</sup> Others have argued that a separate category for Arab Americans is undesirable since it might be used for disciplinary purposes or might exacerbate the exclusion of Arab Americans from the body politic.<sup>79</sup> There are also arguments that, more generally, the modern Census operates as a disciplinary power that is repressive and reinstates racial subordinations.<sup>80</sup>

Such arguments are unavailing. The first step in combating unreasonable fears, protecting Arab Americans, and educating America about Arab Americans is to recognize Arab Americans as a minority group, rather than allowing them to disappear into an over-inclusive definition of white. Official Census classification would reflect how Arab Americans are recognized and understood—both politically and legally—in a racially stratified society.<sup>81</sup> It would also confer identity on a group who feels excluded from society at large.<sup>82</sup> Official Census classification would allocate funds and protections to Arab Americans<sup>83</sup> and create a sense of group membership among a community that needs to be brought together to face the everyday challenges ahead.

#### A. Check it Right, You Ain’t White!

“We’ve been complaining about discrimination, we’ve been complaining about lack of resources, and here this is a chance to tell the whole world we exist.” – Rami Nuseir, president of the American Mideast Leadership Network, April 2, 2010.<sup>84</sup>

In 1993, the Arab American Institute and the American-Arab Anti-Discrimination Committee lobbied Congress to remove Arabs from the

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Mezey, *supra* note 61, at 1766.

<sup>80</sup> See *id.* at 1721–22 (citing 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 142–43 (Robert Hurley trans., 1978)).

<sup>81</sup> See Julissa Reynoso, Note, *Race, Censuses, and Attempts at Racial Democracy*, 39 COLUM. J. TRANSNAT’L L. 533, 533 (2001).

<sup>82</sup> See Deo, *supra* note 63, at 418 (describing one use of the census as “recognition and affirmation of one’s racial identity”); Mezey, *supra* note 61, at 1701–02 (“In the language of social constructivism, the census helps to construct recognizable identities at a number of different levels: national identity, group identity and individual identity. These identities can be at once mythic and deeply meaningful.”).

<sup>83</sup> See Deo, *supra* note 63, at 416 (“The demographic statistics promulgated by the census are pervasive; everything from political campaigns to funding apportioning relies upon the data collected.”).

<sup>84</sup> Holly Gilbert & Richard Roth, *Arab-American Leaders Push Census Participation*, CNN, Apr. 2, 2010, <http://www.cnn.com/2010/US/04/02/arab.american.census/?hpt=Sbin>.

white/Caucasian category. They sought to create a racial category for “Middle Eastern” or “Arab” Americans (which would include, among others, peoples of Arab, Iranian, Turkish, and Afghani descent) so that they could be eligible for remedial programs and better protected under anti-discrimination laws.<sup>85</sup> However, OMB rejected the proposal and left Arab Americans without the grand prize in the politics of identity.<sup>86</sup>

With the 2010 Census underway and an expectation that Arab Americans are supposed to check the white box, the Arab Complete Count Committee launched the “Check It Right, You Ain’t White” campaign.<sup>87</sup> The goal of the campaign is to push people of Arab origin to check the “other” box on the census, write in their true racial category, and ultimately change how Arab Americans define themselves in the census.<sup>88</sup> A related goal of the campaign is to undermine the fear that many Arab Americans have of being singled out for surveillance or profiling if they fill out the first Census since 9/11.<sup>89</sup>

The 2000 census reported 1.2 million people as having Arab ancestry,<sup>90</sup> but experts believe that the official Arab American population could swell to more than 4 million people if Arab Americans cohesively checked the “some other race” box and wrote in Arab.<sup>91</sup> The Census Bureau has already responded that even if Arab Americans check the “other” box and write in “Arab,” it will still count them as racially white.<sup>92</sup> Clearly, the measure of success of this campaign will not be in the form of official recognition of Arab Americans as distinct from white.<sup>93</sup> Nevertheless, success should come in the form of increased and shared awareness that Arab Americans are simply not white. Already, YouTube videos have been posted,<sup>94</sup> radio shows have been produced,

<sup>85</sup> TEHRANIAN, *supra* note 4, at 168.

<sup>86</sup> *See id.* (noting that the OMB rejected the proposal on several grounds including the difficulty in defining the Middle Eastern race). Tehranian also discusses the following arguments proposed in favor of a separate Middle Eastern category: reducing the difficulty in assessing discrimination against Middle Easterners; alleviating confusion when Middle Easterners respond to race questions; aiding in the administration of certain state and local programs; supporting the principle of self-identification; and providing a more complete composite of society. *Id.*

<sup>87</sup> Roqaya Ashmawey, *A Write-In Campaign*, NEWSWEEK, Mar. 1, 2010, available at <http://www.newsweek.com/id/234325>.

<sup>88</sup> John Blake, *Arab- and Persian- American Campaign: ‘Check it right’ on Census*, CNN, Apr. 1, 2010, <http://www.cnn.com/2010/US/04/01/census.check.it.right.campaign/index.html>.

<sup>89</sup> *See* Gilbert & Roth, *supra* note 84.

<sup>90</sup> *See* U.S. Census Bureau, *The Arab Population: 2000* (2000), available at <http://www.census.gov/prod/2003pubs/c2kbr-23.pdf>.

<sup>91</sup> Ashmawev, *supra* note 87.

<sup>92</sup> Suzanne Manneh, *Census to Count Arabs as White, Despite Write-in Campaign*, NEW AMERICA MEDIA, Mar. 25, 2010, [http://news.newamericamedia.org/news/view\\_article.html?article\\_id=87932e5f600086f93bc8b029e4a6ff40](http://news.newamericamedia.org/news/view_article.html?article_id=87932e5f600086f93bc8b029e4a6ff40) (quoting Roberto Ramirez, chief of the ethnicity and ancestry branch at the Census Bureau, who has said that “[a]nyone from Europe, North Africa or the Middle East [will be classified] as white” and that no matter how many people write in “Arab,” the Census Bureau is required by law to use racial categories determined by the OMB, and those categories do not include Arab).

<sup>93</sup> *Id.*

<sup>94</sup> John-Thomas Kobos, *Ethnic Group Takes Different Approach to Census*, ABC, March 16, 2010, <http://abclocal.go.com/kfsn/story?section=news/local&id=7332372> (describing the new movement

bloggers have spoken, and newspaper articles have been written. The message to be received can be summed up by one unknown Arab American voice—a blogger in cyberspace with a mere 110 followers:

Because “white” does not only embody a color. What the term “white” means in the United States today is something that transcends any skin color. White means the suburbs and white means affluence and white means picket fences. Some people may argue then, that I do fit into the white category based on my definition of the term. *But* white also means no questions asked ever, no extra security checks at the airport or in that same category, no mispronunciations of my last name or being told it's a “cool” name as a precursor for the question of where I'm from. Being white means being untouchable in this country.<sup>95</sup>

#### B. The Mark of Blackness

“I think your motto should be post-9-11, ‘raghead talks tough, raghead faces consequences.’” – Ann Coulter, right-wing attorney and author, February 10, 2006<sup>96</sup>

Discrimination and the civil rights movement have historically been synonymous with the struggle of African Americans to attain racial equality with white Americans—the Black/White Binary Paradigm.<sup>97</sup> While some scholars argue that the unique history of African Americans warrants such a paradigm, other scholars argue that the struggles and battles of other ethnic minorities are often overlooked or marginalized because of it.<sup>98</sup> Although the aforementioned argument is beyond the scope of this Note, it is vital to recognize that Arab Americans have essentially been given the “mark of blackness” in today’s society,<sup>99</sup> rather than being the beneficiaries of so-called “white privilege.”

---

among the Arab American community on YouTube to check the “other” box in the 2010 census).

<sup>95</sup> Jillian C. York, *In Census, Only Some Races Count*, GLOBAL VOICES, March 23, 2010, <http://globalvoicesonline.org/2010/03/23/usa-in-census-only-some-races-count/> (quoting Sarah Alaoui, *The Good, The Bad, The Ugly*, July 17, 2009, <http://sarahalaoui.blogspot.com/2009/07/all-boxed-in.html>).

<sup>96</sup> Howard Kurtz, *Monumental Misfire*, WASH. POST, Feb. 14, 2006, at A3.

<sup>97</sup> Juan Perca, *The Black/White Binary Paradigm of Race: The ‘Normal Science’ of American Racial Thought*, 85 CAL. L. REV. 1213, 1219 (1997).

<sup>98</sup> *See id.*

<sup>99</sup> *See* Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on Latcrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1192–93 (defining “mark of blackness” and arguing that “[b]lack people represent the metaphorical bottom of a colorized racial hierarchy”).

White privilege has been defined as the “pervasive, structural, and generally invisible assumption that white people define a norm and Black people are ‘other,’ dangerous, and inferior.”<sup>100</sup> Critical Race Theory argues that race is not biologically determined, but rather a product of social construction.<sup>101</sup> Such a concept of social construction has been described to mean that “[r]ace exists, if ever, in our individual and cultural consciousness,” and “[i]f we do not constantly and consciously meditate on it, race cannot exist.”<sup>102</sup> In the sense that race is socially constructed, many scholars agree that race is also “fluid”—meaning that it is “subject to redefinition over time by social and political pressure.”<sup>103</sup> The complete history of how Arab Americans’ race has been constructed is beyond the scope of this Note;<sup>104</sup> however, it is important to recognize that Arab Americans have effectively been “socially constructed as ‘Black,’ with the negative legal connotations historically attributed to that designation.”<sup>105</sup> In fact, in many ways Arab Americans are worse off than African Americans, who are often considered to be the bottom of the racial hierarchy.<sup>106</sup> Like blacks, Arabs are stereotyped as “dangerous, evil, sneaky, primitive, and untrustworthy.”<sup>107</sup> But even worse, Arabs are also commonly considered potential or actual terrorists.<sup>108</sup> As Ibrahim Hooper of the Council on American-Islamic Relations noted, “The common stereotypes are that we’re all Arabs, we’re all violent and we’re all conducting a holy war.”<sup>109</sup>

In far greater respect than any other minority, Arab Americans are considered “outsiders” to the definition of a United States citizen. In

---

<sup>100</sup> Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999).

<sup>101</sup> Deo, *supra* note 63, at 420.

<sup>102</sup> Reginald Leamon Robinson, *The Shifting Race-Consciousness Matrix and the Multiracial Category Movement: A Critical Reply to Professor Hernandez*, 20 B.C. THIRD WORLD L.J. 231, 233 (2000).

<sup>103</sup> Patricia Palacios Paredes, Note, *Latinos and the Census: Responding to the Race Question*, 74 GEO. WASH. L. REV. 146, 150 (2005).

<sup>104</sup> See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 303 (2002) (noting that Professor Nabeel Abraham, a leading commentator on racism against Arabs and Muslims in the United States, has identified three distinct ways in which Arab Americans have been socially constructed “(1) through political violence by extremist groups based on the Arab-Israeli conflict in the Middle East; (2) by xenophobic violence targeting Arabs and Muslims at the local level; and (3) through the hostility arising from international crises affecting the United States and its citizens.” *Id.*). See generally Saliba, *supra* note 48 (outlining a complete history of how Arab Americans came to be classified as white).

<sup>105</sup> Adrienne Katherine Wing, *Civil Rights in the Post 9/11 World: Critical Race Praxis, Coalition Building, and the War on Terrorism*, 63 LA. L. REV. 717, 718 (2003).

<sup>106</sup> *Id.* at 752.

<sup>107</sup> *Id.* at 723.

<sup>108</sup> *Id.*

<sup>109</sup> Saito, *supra* note 3, at 12 (quoting Twila Decker, *Muslims Fight Unfairness, the American Way*, ST. PETERSBURG TIMES, Oct. 17, 1999). See also Abel, *supra* note 21, at 56–61 (equating the hate crimes against Arab Americans and the American people’s perception of Arab Americans with the racist philosophy held by slaveholders in America in the 18th and 19th centuries, and noting that the extreme violence against Arab Americans is a product of “deep-rooted racism driving the attackers” that is akin to the type of violence that was an integral part of the institution of slavery).

America, there exists a general failure to identify people who appear Arab or Middle Eastern as constituting part of the “American national identity.”<sup>110</sup> After 9/11, African Americans, East Asian Americans, and Hispanics were “deemed safe and not required to prove their allegiance,” while Arab Americans were seen as enemies and inherently suspicious.<sup>111</sup> “Americanness” was viewed as excluding anyone who “look[ed] Middle Eastern.”<sup>112</sup> Consequently, Arab Americans’ “race” has been socially constructed as equivalent to “terrorist” rather than being associated with the positive attributes often coupled with the social construction of whiteness, such as being virtuous, law-abiding, superior, and loyal.<sup>113</sup> Throughout history, whiteness has been associated most often with the positive characteristics of “citizen” while minorities have been associated with “alien.”<sup>114</sup> If being considered a citizen is a primary characteristic of “whiteness,” Arab Americans have been marked with something far worse than “blackness.”

Peggy McIntosh describes white privilege as “an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks,” whose effects infiltrate society creating a societal norm for “other” individuals to be judged against.<sup>115</sup> Unlike the “other” people, white people may go an entire day without noticing the importance of race.<sup>116</sup> Unlike the “other” people, white people have the option not to think of themselves in terms of race.<sup>117</sup> Unlike the “other” people, “[t]hose with [white] privilege can afford to look away from mistreatment that does not affect them personally.”<sup>118</sup>

Arab Americans are “other” people within this definition. In a manner of speaking, their “invisible weightless knapsack” was taken by airport security years ago. One of the daily benefits of white privilege McIntosh identifies is that white parents “do not have to educate [their] children to be aware of systemic racism for their own daily physical protection.”<sup>119</sup> Arab Americans do not have a similar luxury. Arab Americans must educate their children about the dangers of racism against them. What do you tell your twelve-year-old son when he is

---

<sup>110</sup> Volpp, *supra* note 24, at 1594–95 (“The ‘imagined community’ of the American nation, constituted by loyal citizens, is relying on difference from the ‘Middle Eastern terrorist’ to fuse its identity at a moment of crisis.”).

<sup>111</sup> *Id.* at 1584.

<sup>112</sup> *Id.*

<sup>113</sup> See IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 28 (1996) (noting that whiteness is defined almost exclusively in terms of positive attributes).

<sup>114</sup> *See id.*

<sup>115</sup> Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, 1990 INDEP. SCHOOL 1 (1990).

<sup>116</sup> See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604–05 (1990).

<sup>117</sup> *Id.* at 604.

<sup>118</sup> Stephanie M. Wildman, *Whiteness: Some Critical Perspectives: The Persistence of White Privilege*, 18 WASH. U. J.L. & POL’Y 245, 247 (2005).

<sup>119</sup> McIntosh, *supra* note 115, at 3.



harassed at school and called a “son of Osama”?<sup>120</sup> What do you tell your daughter when her teacher pulls off her hijab and says, “I hope God punishes you. No, I’m sorry, I hope Allah punishes you?”<sup>121</sup>

Another daily benefit of white privilege described by McIntosh is that whites “can travel alone or with [their] spouse without expecting embarrassment or hostility in those who deal with [them].”<sup>122</sup> Unlike white people who have such a “passport” in their invisible knapsack, Arab Americans cannot travel without a fear of encountering hostility. While black people fear “DWB” or “driving while black,”<sup>123</sup> Arab Americans fear FWA or “flying while Arab.” The ADC expresses that airline discrimination remains a concern, and that unfounded fears and baseless stereotypes continue to cloud the opinions of airline employees.<sup>124</sup> For example, Adrien Wing, author of *Civil Rights in a Post 9/11 World* and an African American, recounts that when she traveled with her sons they were often mistaken as Arabs or Muslims and, as a result, to ensure her sons are not racially profiled, she now instructs them to “dress Black.”<sup>125</sup>

Another component of white privilege described by McIntosh is that as a white person, she “can criticize our government and talk about how much [she] fear[s] its policies and behavior without being seen as a cultural outsider.”<sup>126</sup> Conversely, Arab Americans cannot criticize the government without the fear of being seen as unpatriotic or, worse, not loyal to the United States. The Arab American Institute articulated that the “dangerous intersection of popular stereotypes and official policy is perhaps the greatest concern” facing Arab Americans, particularly when crises occur and their loyalty comes into question.<sup>127</sup>

Essentially, Arab Americans, unlike white people, do not have the choice to ignore race and its effects on their everyday lives. As Richard Ford argues, it is racism, not race, that creates racial categories.<sup>128</sup>

#### IV. RACE-BASED AFFIRMATIVE ACTION AND WHY ARAB AMERICANS SHOULD BE INCLUDED

This ain’t no rag / It’s a flag / And we don’t wear it

<sup>120</sup> ADC 2008 Report, *supra* note 31, at 54.

<sup>121</sup> *Id.* at 53 (describing an incident in New Orleans in February 2004).

<sup>122</sup> McIntosh, *supra* note 115, at 4.

<sup>123</sup> See Tracy Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 341–52 (1998).

<sup>124</sup> ADC 2008 REPORT, *supra* note 31, at 10.

<sup>125</sup> Wing, *supra* note 105, at 722–23.

<sup>126</sup> McIntosh, *supra* note 115, at 3.

<sup>127</sup> ARAB AMERICAN INSTITUTE FOUNDATION, NOTES ON ANTI-ARAB RACISM, [http://www.aaiusa.org/page/file/a5773324892438c0e7\\_la7bmvqgt.pdf/NotesonAntiArabRacism.pdf](http://www.aaiusa.org/page/file/a5773324892438c0e7_la7bmvqgt.pdf/NotesonAntiArabRacism.pdf).

<sup>128</sup> Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1805 (2000).

on our heads / It's a symbol of the land where the good  
guys live / Are you listening to what I said?

– Charlie Daniels, country music performer, “This Ain’t No  
Rag, It’s a Flag,” August 2004<sup>129</sup>

Steven Salaita discusses the difficult Arab American student experience in university classrooms by noting that “Arab students [cannot] fully participate in class if they are scared of being branded anti-Semitic or anti-American every time they vocalize their perspectives on the Arab World.”<sup>130</sup> As a professor who has interacted with Arab undergraduate and graduate students, Salaita has found that Arab Americans overwhelmingly report feelings of isolation in American universities.<sup>131</sup> This feeling of isolation is caused by “anxi[ety] about the possibility of hearing contemptuous statements about Arabs from other students and professors”; Arab American students report being “afraid to respond to the contemptuous statements because of the fear of harassment, arrest, or deportation.”<sup>132</sup> While Salaita takes an extreme view on the effect of neoconservative pressure on universities, he correctly notes a pattern of anti-Arab racism in universities that is “comparable, if not identical” to the racism directed against other recognized minorities.<sup>133</sup> However, while Salaita argues that this racism arises from the “same contexts of misinformation, colonial discourse, and hyperpatriotic chauvinism—all nourished, of course, by the relentless encroachment of neoconservatives and their moralistic supporters on humanities curricula”<sup>134</sup>—it would seem that lack of cross-racial understanding on the part of the student body is more realistically the cause.

In a discussion of affirmative action, it is imperative to recognize that inherent white privilege stands in the background of the remedies “that affirmative action seeks to distribute to racial minorities.”<sup>135</sup> A problematic aspect of Arab Americans being legally classified as white while being socially characterized with a “mark of blackness,” is that colleges fail to recognize the benefits of applying race-based affirmative action admission policies to Arab Americans. Racial categories on most college admissions forms consist of some variation of the five racial categories that David Hollinger has famously described as the “ethno-

---

<sup>129</sup> Associated Press, *Arab Community Angry at Charlie Daniels, “Rag” Song*, FOX NEWS, Aug. 6, 2004, <http://www.foxnews.com/story/0,2933,128119,00.html>.

<sup>130</sup> SALAITA, *supra* note 22, at 131.

<sup>131</sup> *Id.* at 120.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 122–23.

<sup>134</sup> *Id.*

<sup>135</sup> Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 ASIAN AM. L.J. 57, 64 (2007).

racial pentagon,” which includes African American/Black, Native American/Alaska Native, Asian American, Hispanic/Latino, and White.<sup>136</sup> Beyond the basic ethno-racial pentagon, there are variations among schools’ applications. Some schools give students numerous options in checking the box that describes their “race”<sup>137</sup> while other schools provide only the “ethno-racial pentagon” and do not even give students the option of checking the “other” box.<sup>138</sup> The common application form, which is used by more than 150 colleges and universities, first asks if the student is Hispanic or Latino and then asks the student to select one or more of the listed “ethnicities” that describe them.<sup>139</sup>

It is legitimate and desirable for schools to treat race differently and tailor race-conscious admissions to the schools’ individual needs.<sup>140</sup> However, when tailoring their race conscious admission policies, schools should seek to realize the benefits of diversity that can be obtained by recognizing the distinct racial classification of Arab Americans. The first step is to include a separate box on the application for Arab American students. American society requires Arab Americans, like other racial groups, to confront certain fundamental issues of race and identity. Such confrontations make race a significant issue for Arab Americans in a way that it is not for the “whites” with whom Arab American students are currently classified.<sup>141</sup> In this section, I will

---

<sup>136</sup> DAVID A. HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* 23–25 (1995).

<sup>137</sup> See, e.g., UNIVERSITY OF WISCONSIN–MADISON, UNDERGRADUATE ADMISSION APPLICATION 2011–12, available at [http://www.admissions.wisc.edu/images/UW-Madison\\_Application.pdf](http://www.admissions.wisc.edu/images/UW-Madison_Application.pdf) (giving prospective students the option of checking 13 different boxes for race).

<sup>138</sup> See, e.g., UNIVERSITY OF OKLAHOMA, THE UNIVERSITY OF OKLAHOMA APPLICATION FOR ADMISSION, available at <http://catalog.ou.edu/Applications/Admissions/cubcUSUGNEWFRESHMAN1009.pdf> (providing two ethnicity boxes of “Hispanic of Any Race” and “Not Hispanic” and the following race boxes: White, Black or African American, Asian, Native Hawaiian or Other Pacific Islander, or American Indian or Alaskan Native).

<sup>139</sup> THE COMMON APPLICATION, 2010-11 FIRST-YEAR APPLICATION FOR SPRING 2011 OR FALL 2011 ENROLLMENT, available at <https://www.commonapp.org/CommonApp/DownloadForms.aspx> (follow the “Application (student form) Only: PDF” hyperlink) (providing the following ethnicity boxes: American Indian or Alaska Native, Asian, Black or African American, Native Hawaiian or Other Pacific Islander, and White (including Middle Eastern)). The student is then given a line to describe his background after he checks any of the aforementioned boxes. *Id.*

<sup>140</sup> See, e.g., *Gutter v. Bollinger*, 539 U.S. 306, 328 (2003) (deferring “to a university’s academic decisions, within constitutionally prescribed limits”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”). However, as a purely administrative matter, schools must report the demographics of the students admitted to the Department of Education and it may be unclear as to how schools should regroup their students to fit in the standard categories provided by the Department of Education, which include White, Black, Hispanic, Asian/Pacific Islander, American Indian/Alaska Native, and Non-residential alien. NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPT’ OF EDUC., *DIGEST OF EDUCATION STATISTICS: 2009 Table 285*, available at [http://nces.ed.gov/programs/digest/d09/tables/dt09\\_285.asp?referrer=report](http://nces.ed.gov/programs/digest/d09/tables/dt09_285.asp?referrer=report).

<sup>141</sup> See, e.g., Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995) (“[P]eople of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views on issues of legal doctrine and policy.”).

discuss the diversity rationale for race-based affirmative action as set forth in *Bakke* and *Grutter* and show why it easily applies to Arab Americans. I will then present an argument that, even in absence of official census recognition of Arab Americans as distinct from whites, colleges and universities should provide a separate racial classification option for Arab American students. It should be noted from the outset that it is unclear how many Arab students are currently enrolled in universities and colleges because presently such students are classified as “white.” Another benefit to giving Arab Americans a separate box to check is that universities would be able to compile more complete statistics on racial representation.

The Supreme Court first recognized the benefits that flow from racial diversity on college campuses in *Regents of the University of California v. Bakke*,<sup>142</sup> The deeply divided court held that colleges could use race conscious affirmative action programs.<sup>143</sup> While the Court held that universities could not use a quota system that reserved a certain number of places for minority student applicants, the Court said that race and ethnicity could be used as one factor or as a “plus” factor in the individual consideration of applications.<sup>144</sup> Justice Powell’s opinion in *Bakke* argued that universities have a compelling interest in “obtaining the educational benefits that flow from an ethnically diverse student body”<sup>145</sup> and in doing so by selecting students who will contribute to a “robust exchange of ideas”<sup>146</sup> and will contribute “experiences, outlooks and ideas that enrich the training of its student body.”<sup>147</sup>

Again in 2003, the Supreme Court considered race-based affirmative action in college admissions when it upheld the University of Michigan Law School’s affirmative action plan that aimed to achieve diversity by enrolling a “critical mass” of underrepresented minority students.<sup>148</sup> In *Grutter*, the Supreme Court held that achieving a diverse student body in the context of higher education was a compelling government interest that, if narrowly tailored, could withstand strict scrutiny.<sup>149</sup> The Court found that the law school’s admission process was narrowly tailored because each student was individually evaluated and race was considered as one factor among many.<sup>150</sup> The Court explained that race may be used in admissions only in a “flexible” and “nonmechanical” way, noting that the Equal Protection Clause requires institutions to make the “individualized assessments necessary to

---

<sup>142</sup> 438 U.S. 265, 312 (1978).

<sup>143</sup> *Id.* at 315–16.

<sup>144</sup> *Id.* at 317.

<sup>145</sup> *Id.* at 306.

<sup>146</sup> *Id.* at 313.

<sup>147</sup> *Id.* at 306.

<sup>148</sup> *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

<sup>149</sup> *Id.* at 334.

<sup>150</sup> *Id.* at 337.

assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”<sup>151</sup> Deferring to “[t]he Law School’s educational judgment that such diversity is essential to its educational mission,”<sup>152</sup> the Court stated that the university’s “good faith” was “presumed” and that “complex educational judgments” as to whether student body diversity was essential to a university’s mission lay “primarily with the expertise of the university.”<sup>153</sup>

The Court highlighted the various ways that the university and society in general could benefit from achieving a racially diverse student body. First, Justice O’Connor noted that the school’s use of race was compelling because diversity benefits the educational process by promoting “cross-racial understanding,” which “break[s] down racial stereotypes,” and “enables [students] to better understand persons of different races.”<sup>154</sup> Second, Justice O’Connor found the school’s use of race was compelling because diversity benefits the educational process by promoting “cross-racial understanding,” which “break[s] down racial stereotypes” and “enables students to better understand persons of different races.”<sup>155</sup> Third, Justice O’Connor found the school’s use of race compelling because diversity in universities benefits society by “better prepar[ing] students for an increasingly diverse workforce and society.”<sup>156</sup>

### A. Arab American Students on Campus

When examining whether and to what extent Arab American students should be the beneficiaries of race-based affirmative action, the Supreme Court requires that the college identify how the students will contribute to diversity. For example, whether Arab American students contribute to the diversity rationale as set forth in *Grutter* and *Bakke* in the same way that other minority students do is an issue to be scrutinized by the Court. Diversity in the classroom is an integral part of promoting cross-racial understanding among students because it allows students of different backgrounds to be exposed to diverse perspectives and viewpoints. The *Grutter* Court noted that these benefits are “important and laudable” and that “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”<sup>157</sup>

---

<sup>151</sup> *Id.* at 340.

<sup>152</sup> *Id.* at 328.

<sup>153</sup> *Grutter*, 539 U.S. at 328–29.

<sup>154</sup> *Id.* at 330.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* (internal quotation marks omitted).

Furthermore, the Court held that a critical mass of underrepresented minorities qualified as a compelling state interest because it leads to a cross-racial understanding that helps erode stereotypes, increase understanding, and heighten tolerance of persons of difference races.<sup>158</sup> The Court accepted that diversity assists in breaking down racial stereotypes by demonstrating that there is not a single, unanimous “‘minority viewpoint’ but rather a variety of viewpoints among minorities.”<sup>159</sup> In this way, racial diversity enhances the understanding and appreciation of the differences of others, which generates educational benefits for all students.

By including Arab Americans in a “critical mass” of underrepresented minority students, undergraduate universities could erode stereotypes and increase cross-racial understanding and tolerance of Arab Americans. Gordon Allport theorizes that “promoting sustained contact between members of different groups is the best way of increasing tolerance and understanding.”<sup>160</sup> As previously noted, Arab Americans have been stereotyped and prejudged as a race and labeled as terrorists. Arab Americans are socially constructed as the “enemy,” the “fanatical terrorist,” and the “crazy Muslim.”<sup>161</sup>

A review of U.S. movies evidences the demonization of Arab Americans in the entertainment industry.<sup>162</sup> In reviewing hundreds of movies, Jack Shaheen found that Arabs are commonly portrayed as terrorists, hostile invaders, or “lecherous, oily sheikhs intent on using nuclear weapons.”<sup>163</sup> Western movie characters have called Arabs “assholes,” “bastards,” “camel-dicks,” “pigs,” “devil-worshippers,” “jackals,” “rats,” “rag-heads,” “towel-heads,” and “sons-of-she-camels.”<sup>164</sup> Negative stereotypes of Arab Americans have also been fostered through the media and popular culture. For instance, in July 2008, Sonny Landham, an actor and Kentucky Libertarian Party Senate

---

<sup>158</sup> *Grutter*, 539 U.S. at 330.

<sup>159</sup> *Id.* at 319–20.

<sup>160</sup> DEREK BOK, *OUR UNDERACHIEVING COLLEGES: A CANDID LOOK AT HOW MUCH STUDENTS LEARN AND WHY THEY SHOULD BE LEARNING MORE* 207 n.31 (2006).

<sup>161</sup> Rachel Saloom, *I Know You are, But What Am I? Arab-American Experiences Through the Critical Race Theory Lens*, 27 *HAMLIN J. PUB. L. & POL’Y* 55, 63 (2005), (quoting Joanna Kadi, *Introduction*, in *FOOD FOR OUR GRANDMOTHERS* xiii, xvi (Joanna Kadi ed., 1994)).

<sup>162</sup> JACK G. SHAHEEN, *REEL BAD ARABS: HOW HOLLYWOOD VILIFIES A PEOPLE* 9 (2001).

<sup>163</sup> *Id.* In 2004, Harris Interactive found that college students ages 18–24 spent nearly \$3 billion annually on movies, DVDs, music, and video games. College students spent \$474 million on music sales, \$658 million on theater tickets, and \$341 million on games each year. “At home and in the dorms, [college students are] watching movies, spending \$600 million to buy and another \$326 million to rent DVD’s.” Nancy Wong, *College Students Tote \$122 Billion in Spending Power Back to Campus This Year*, HARRIS INTERACTIVE, Aug. 18, 2004, <http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=835>.

<sup>164</sup> SHAHEEN, *supra* note 162, at 11. For instance, *The Rules of Engagement*, has been described as “uniformly negative” in its depictions of Arabs. Speaking for the American-Arab Anti-Discrimination Committee, Hussein Ibish said, “It can only be compared to films like the *Birth of a Nation* and *The Eternal Jew* insofar as the principled [sic] purpose seems to be the demonization and vilification of an entire people.” Saito, *supra* note 3, at 13.

candidate, called for an “outright bombing [of Arabs] back into the sand.”<sup>165</sup> He went on to say that “[t]he Arabs, the camel dung-shoveler, the camel jockeys, whichever you wanna call ‘em, are terrorists” during an interview with *The Weekly Filibuster* radio show.<sup>166</sup>

Additionally, Arabs have been negatively portrayed and stereotyped within educational textbooks. A 1980 study by the National Association of Arab-Americans found that textbooks often “discussed Arabs in a negative light”; similarly, in a 1970s textbook study, Arabs were “portrayed as primitive, backward, desert-dwelling, nomadic, war-loving, terroristic, and full of hate.”<sup>167</sup> In the 1990s, the Middle East Studies Association conducted a review of eighty social-studies textbooks and found that many textbooks showed an overrepresentation of Arabs as nomads, living in the desert in tents and using camels as their major mode of transportation.<sup>168</sup> The majority of these textbooks have failed to recognize Arabs’ contributions to society, science, medicine, and mathematics.<sup>169</sup> The fact that Arabs sustained Ancient Greek and Roman knowledge, translating it and preserving it for the rest of the world, has also gone unmentioned.<sup>170</sup> Unfortunately, these textbooks ingrain a negative view of Arab Americans in students’ minds at an early age.

The most problematic aspect of these stereotypes is that they have become socially acceptable and often represent the attitudes of students toward Arab Americans.<sup>171</sup> Isolated incidents do not represent a comprehensive picture of the stereotypes being drawn of Arab American students or the attitudes toward them at universities across the country. However, such incidents are useful in painting a picture of the ongoing battle of Arab American students at universities and the immense need for these universities to recognize Arab Americans when implementing their diversity goals. For example, on April 4, 2006 a student at Baylor University in Waco, Texas was attacked on campus by an assailant who “grabbed her hijab, threw her to the ground, slapped and kicked her several times in the ribs [sic], shouting ‘Arabian (expletive)’ and ‘(expletive) Muslims.’”<sup>172</sup> The student reported that she had previously

---

<sup>165</sup> Council on American-Islamic Relations Research Center, *The Status of Muslim Civil Rights in the United States, 2009: Seeking Full Inclusion* 21 (2009), <http://www.cair.com/Portals/0/pdf/CAIR-2009-Civil-Rights-Report.pdf>.

<sup>166</sup> *Id.*

<sup>167</sup> Saloom, *supra* note 161, at 67 (quoting Samir Ahmad Jarrar, *The Treatment of Arabs in U.S. Social Studies Textbooks: Research Findings and Recommendations*, in *SPLIT VISION: THE PORTRAYAL OF ARABS IN THE AMERICAN MEDIA* 381, 388 (Edmund Ghareeb ed., 1983)).

<sup>168</sup> CTR. FOR MIDDLE E. AND N. AFRICAN STUDIES & MIDDLE E. STUDIES ASS’N, *EVALUATION OF SECONDARY-LEVEL TEXTBOOKS FOR COVERAGE OF THE MIDDLE EAST AND NORTH AFRICA* (Elizabeth Barrow ed., 1994).

<sup>169</sup> GILBERT T. SEWALL, *ISLAM AND THE TEXTBOOKS: A REPORT OF THE AMERICAN TEXTBOOK COUNCIL 8–10* (2003), available at <http://www.eric.ed.gov/PDFS/ED475822.pdf>.

<sup>170</sup> *Id.*

<sup>171</sup> See *supra* part I.B. describing racism on campus.

<sup>172</sup> ADC 2008 Report, *supra* note 31, at 70.

suffered harassment on campus because of her dress.<sup>173</sup> After the incident, Al Siddiq, president of the Islamic Center of Waco, said he approached several Baylor officials, including the University's president and provost, with questions concerning the University's response to the incident. Siddiq said he was "eventually directed to Dr. Dub Oliver, the interim vice president of student life" whom he asked, "'Why did (Baylor) not publicize this?' and 'Why did it take so long for (Baylor) to respond?'"<sup>174</sup> According to Siddiq, Oliver "refused to acknowledge the attack as a hate crime."<sup>175</sup>

If Baylor had included Arab Americans in its race-based affirmative action program, a few things might have happened differently. First, and most optimistically, maybe the stereotype that all Arabs (or Muslims) are terrorists would have been eroded and the incident would never have happened. Since Arab Americans are stereotyped as "terrorists," they are often subject to violence and hate that people feel toward actual terrorists. Increased exposure to Arab Americans on university campuses would help overcome the stereotype that commonly associates Arab Americans with terrorists by promoting a cross-racial understanding. Although social psychologists recognize that it is difficult to control stereotypes that are unconscious and automatic, many experts nonetheless conclude that stereotypes are not permanent and can be altered through exposure.<sup>176</sup> Research has shown that mere physical presence of minorities can help lessen bias. For example, in a university setting, studies suggest that the presence of black students seems to motivate white students be more attentive to race issues. One study found that students noticed more prejudice in a film clip when they were told that they were being watched by black students in an adjacent room.<sup>177</sup> Such effect has been explained by the theory of social tuning, which suggests that since people prefer to have positive interactions with others, they are motivated to bring their own attitudes in line with the suspected views of others in order to have positive interactions.<sup>178</sup>

Another aspect of the Baylor incident that should be examined is the University's delayed and inadequate response. Rather than immediately condemning the incident and using it as a learning experience, the University initially worked to bury the incident, waiting five days to send an email informing the student body. As the editorial staff of the Baylor Lariat student newspaper expressed, "The

---

<sup>173</sup> *Id.*

<sup>174</sup> Van Darden, *Man Assaults Muslim Student Outside of Draper*, BAYLOR LARIAT, April 5, 2006, available at <http://www.baylor.edu/lariat/news.php?action=story&story=40063>.

<sup>175</sup> *Id.*

<sup>176</sup> See, e.g., Irene V. Blair, *The Malleability of Automatic Stereotypes and Prejudice*, 6 PERSONALITY & SOC. PSYCHOL. REV. 242, 242-43 (2002).

<sup>177</sup> Daisuke Akiba & Payneese Miller, *The Expression of Cultural Sensitivity in the Presence of African Americans: An Analysis of Motives*, 35 SMALL GROUP RES. 623, 637 (2004).

<sup>178</sup> Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1950 (2009).



administration should set an example to the student body in the fight to eliminate intolerance by being upfront about acts of hatred occurring at the university . . . . A more timely response would have better conveyed the administration's concern for the well-being of the university's students—Muslim or not.”<sup>179</sup> The student body's response was not much better.<sup>180</sup> For instance, less than a month before the incident, the university held a forum on “Dialogue and Differences.”<sup>181</sup> In front of a standing-room-only crowd, black students voiced their concerns and sought to educate white students and a fraternity about the offensive nature of the “E-dawg” themed fraternity party where a student used excessive bronzer to make her face appear black.<sup>182</sup> Following the racist attack on campus against Arabs and Muslims, the campus held another forum, “Dialogue and Differences II.”<sup>183</sup> Barely anyone showed up.

“Dialogue and Differences II” might have looked more like “Dialogue and Differences I” if the university had striven to enroll a critical mass of Arab American students, like it does black students. If Baylor actively strove to enroll more Arab Americans students, then a group of Arab American students might band together to spread awareness and achieve a promotion of cross-racial understanding much like the black students have been able to accomplish.<sup>184</sup> As long as universities are using race-based affirmative action admission programs to enroll a critical mass of other minority students, Arab Americans should be included because they also contribute to the diversity rationale articulated in *Grutter*.

## B. The Campus Quad and Beyond

The Supreme Court in *Grutter* was influenced by the benefits that campus diversity can provide to society as a whole.<sup>185</sup> One of the

---

<sup>179</sup> Editorial Staff, *Assault Case Requires Continued Discussion*, BAYLOR LARIAT, April 11, 2006, <http://www.baylor.edu/Lariat/news.php?action=story&story=40147>.

<sup>180</sup> It should be said that immediately following the incident a large group of students gathered to hold a candle lighting for the assaulted student.

<sup>181</sup> Sarah Gordon, *Students Tackle Cultural Barriers*, BAYLOR LARIAT, March 9, 2006, available at <http://www.baylor.edu/Lariat/news.php?action=story&story=39483>.

<sup>182</sup> *Id.*

<sup>183</sup> Editorial Staff, *Forum Turnout Lacks Student Dedication*, BAYLOR LARIAT, April 26, 2006, <http://www.baylor.edu/Lariat/news.php?action=story&story=40448>.

<sup>184</sup> Currently there is no campus organization for Arab American students at Baylor. Baylor multicultural student organizations include associations for Black, Asian, Chinese, Filipino, Hispanic, Indian, Japanese, and Korean students. BAYLOR UNIVERSITY, STUDENT ORGANIZATIONS, <http://www.baylor.edu/studentactivities/organizations/index.php?id=74702>.

<sup>185</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). The Court referred to the fact that “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints” and that “numerous studies show that student body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better

benefits of diversity in the classroom is students who graduate as better citizens. As Justice O'Connor wrote, the Supreme Court "ha[s] repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."<sup>186</sup> Former Harvard University President Derek Bok argues that a "successful democracy demands tolerance and mutual respect from different groups within its citizenry in order to contain the religious and ethnic tensions that have riven so many countries around the world"<sup>187</sup> and that college students who are educated in racially diverse environments learn to tolerate and respect people who are different from them.<sup>188</sup>

Using diversity to shape students to be tolerant to Arab Americans is essential to creating a society that fosters democratic legitimacy and an America that is "one Nation."<sup>189</sup> If the students graduating from college learn to tolerate and respect people different from them, including Arab Americans, then the number of hate crimes against Arab Americans may fall.<sup>190</sup> Maybe these students will teach their future children that their Arab American peers are not monsters, but friends.<sup>191</sup> In sum, students' cross-racial understanding and tolerance of Arab Americans may transfer to the rest of society.

### C. Getting Outside the Box

Colleges and universities should give Arab American students their own box on undergraduate applications. In the eyes of Arabs and others, Arab Americans are increasingly seen as "non-white," making the inclusion of Arab Americans in the "white" box on college applications inappropriate. If race-based affirmative action programs are to "remain flexible enough to ensure that each applicant is evaluated as an individual,"<sup>192</sup> it is problematic to limit Arab applicants to a "white" box

---

prepares them as professionals." *Id.* (internal quotation marks omitted). Justice O'Connor articulated that "[t]hese benefits are not theoretical but real" and pointed to the evidence suggesting that "major American businesses" and the United States military could not function without employees and soldiers trained "through exposure to widely diverse people, cultures, ideas and viewpoints." *Id.*

<sup>186</sup> *Grutter*, 539 U.S. at 331 (quoting *Plyer v. Doe*, 457 U.S. 202, 221 (1982)).

<sup>187</sup> BOK, *supra* note 155160, at 195. Bok also notes that employers who are conscious of the growing numbers of minorities and immigrants look for college graduates who can work with diverse groups of people. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *See id.* at 332.

<sup>190</sup> *See* ADC 2008 Report, *supra* note 31, at 10 (describing the fact that serious hate crimes and threats of violence remain a significant problem for Arab Americans).

<sup>191</sup> *See id.* at 47 (discussing the "[n]ew undercurrents of uncertainty, anger, fear, shame, and anxiety" that Arab American students encounter in primary and secondary schools).

<sup>192</sup> *Grutter*, 539 U.S. at 337.

or a set of categories that such students feel inadequately characterize their identity and undermine their contributions to diversity. Providing Arab American students with their own box would not only assure that these students' contributions to diversity are taken into account in race-based admission processes, but also function to "create a sense of group membership or even community where there had been none before."<sup>193</sup>

Even if the Census continues to count Arab Americans as white, universities should exercise their unique academic autonomy and count Arab Americans in a way that recognizes their social construction as a distinct race. In *Grutter*, the Court made it clear it would defer to a school's determination that the goal of "attaining a diverse student body" was central to its mission,<sup>194</sup> based partly on a need to respect the school's "educational autonomy."<sup>195</sup> Universities' recognition that Arab Americans are not white may bring to light the benefits to diversity that flow from enrolling a critical mass of Arab American students, including a student body and society that learns to respect, understand, and tolerate Arab Americans.

## V. CONCLUSION

"But if we remain true to our commitment to liberty and justice, tolerance and diversity, at the very time those ideals are most tested—we send a powerful message. We show those who committed this evil that they have not won, and they will not win. And we show that we are truly one nation, indivisible, with liberty and justice for all." – President George W. Bush, Speech at the Islamic Center of Washington, D.C., September 17, 2001<sup>196</sup>

Unfortunately, there is no way to eliminate the risk of another terrorist attack. But if another attack does happen, hopefully the response of the American people toward innocent Arab Americans will be

---

<sup>193</sup> Sharon M. Lee, *Racial Classifications in the U.S. Census: 1890-1990*, 16 RACIAL & ETHNIC STUD. 75, 84 (1993) (noting the functions of racial classification). For example, a National Academy of Sciences report on federal race classification claims that it was when the Census Bureau used the designation of "Hispanic" in the early 1970s that it became widely used as an identity referent. The report noted that "[t]here is a symbiotic relationship between categories for the tabulation of data and the processes of group consciousness and social recognition, which in turn can be reflected in specific legislation and social policy." Mezey, *supra* note 61, at 1748.

<sup>194</sup> *Grutter*, 539 U.S. at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici.")

<sup>195</sup> *See id.* at 329 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.")

<sup>196</sup> ADC 2003 Report, *supra* note 22, at 137.

different. If Arab Americans are recognized as a distinct racial category in the Census, then lawmakers may be able to use Census data to enforce civil rights laws as they apply to innocent Arab Americans. If the stereotype that all Arabs are terrorists is eroded on university campuses through race-based affirmative action, then fewer innocent Arab American students will be assaulted, threatened, and taunted. If students leave college with a cross-racial understanding of Arab Americans, then when those students enter the workforce, they may combat employment discrimination against innocent Arab Americans. Essentially, society may learn to recognize that not all Arab Americans are terrorists. If we want to take affirmative action seriously, it is essential to apply it to a group who is not only suffering present discrimination but is suffering at the hands of a largely misinformed society. If the goal of affirmative action is diversity, critics would be challenged to find a group that is more in need of the very benefits that diversity provides—a promotion of cross-racial understanding and a subversion of the stereotype that equates Arab Americans with terrorists.