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**JUDGING OPPORTUNITY LOST:
ASSESSING THE VIABILITY OF RACE-BASED AFFIRMATIVE
ACTION AFTER *FISHER v. UNIVERSITY OF TEXAS***

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Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After *Fisher v. University of Texas*



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ABSTRACT

In this Article, Mario Barnes, Erwin Chemerinsky, and Angela Onwuachi-Willig examine and analyze one recent, affirmative action case, *Fisher v. University of Texas, Austin*, as a means of highlighting why the anti-subordination or equal opportunity approach, as opposed to the anti-classification approach, is the correct approach for analyzing equal protection cases. In so doing, these authors highlight several opportunities that the U.S. Supreme Court missed to acknowledge and explicate the way in which race, racism, and racial privilege operate in society and thus advance the anti-subordination approach to equal protection. In the end, the authors suggest that, with regard to race-conscious affirmative action, courts should guide their consideration by the role that law must play in mitigating long-term, structural disadvantages maintained through race, which now functions as caste within the United States.

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You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe you have been completely fair . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity . . . not just equality as a right and a theory, but equality as a fact and as a result.

—Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965).¹

INTRODUCTION

Within U.S. history, social and judicial understandings of the Constitution's pronouncement "nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws" have been deeply conflicted when applied to the concept of race. In 1896, in *Plessy v. Ferguson*, the U.S. Supreme Court held that the Equal Protection Clause was not violated by state laws that required racially segregated public accommodations.² Less than sixty years later, however, the Court overturned that decision in *Brown v. Board of Education*.³ While the Court's treatment of race has shifted over time, these two cases reflect the Court's decisions related to programs that are explicitly designed to disadvantage racial minorities. Even more controversial in our country's recent history have been state considerations of race that have allegedly advantaged members of some minority racial groups. These programs, which have been constructed for myriad purposes, from remedying past racial exclusion to fostering racial inclusion and diversity, have typically come to be referred to as affirmative action.⁴

1. Lyndon B. Johnson, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965), in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES BK. II § 301, at 636 (1965).
2. *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896) (asserting that the Fourteenth Amendment was meant to ensure political rather than social equality).
3. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494–96 (1954).
4. Affirmative action programs typically include women and minorities, but this Article primarily addresses race-based benefits programs. Although including an analysis of the interrelation of race and gender in affirmative action would be ideal, such intersectional considerations would be too complicated to fully assess in this limited format, especially since white women—who, as a

Concerns about the fairness of race-based affirmative action programs have been the subject of scholarly debate from a wide range of perspectives.⁵ Moreover, citizen attitudes toward such programs are often contradictory.⁶ Although arguments against affirmative action have ostensibly been fueled by contemporary commitments to colorblindness⁷ and post-racialism,⁸ a significant substan-

group, have historically benefited from such programs—have often been plaintiffs in cases challenging race programs. *See* Michele Goodwin, *The Death of Affirmative Action?*, 2013 WIS. L. REV. 715, 721–22 (2013).

5. A number of scholars have argued that affirmative action programs are an important policy tool for ensuring equality for women and minorities. *See, e.g.*, RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION AND THE LAW 11–12 (2013) (describing race-based affirmative action as a public good that serves as a means to redress social wrongs, integrate the marginalized, and enhance learning environments); WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER (2000) (presenting an empirically-focused defense of the use of race-conscious admissions programs in education); CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES (1998) (offering a defense of affirmative action from a social justice perspective). On the other side of the debate, scholars have argued that affirmative action is ill-advised, race-based discrimination. *See, e.g.*, Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33 (1992) (arguing against affirmative action as a remedial tool because it violates the country's commitment to "colorblind law"); Stephan & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. REV. 1583 (1999) (contending that affirmative action is reverse discrimination). A number of critiques have also questioned whether affirmative action programs and policies obscure more important questions about how race figures in conversations about merits and desert. *See, e.g.*, RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION (1996) (advocating for class-based affirmative action); William J. Wilson, *Race and Affirming Opportunity in the Barack Obama Era*, 9 DU BOIS REV. 5, 11 (2012) (using as one example a program initiated at UC Irvine after Proposition 209 went into effect to argue for "affirmative opportunity" premised upon flexible, merit-based criteria rather than race).
6. For example, a recent survey of attitudes regarding affirmative action indicated that 68 percent of Americans favor programs to remedy past discrimination, but 64 percent of respondents reject the use of race-based preferences in education admissions. Ironically, 38 percent of persons who reject race-based affirmative action admissions programs claim to otherwise support affirmative action. *See* Public Religion Research Institute Survey, Americans Divided Between Principle and Practice on Affirmative Action, Divided on DOMA (May 30, 2013), <http://publicreligion.org/research/2013/05/may-2013-religion-politics-tracking-survey>. For an additional discussion of recent studies assessing myriad views on affirmative action, see *Introduction* to CONTROVERSIES IN AFFIRMATIVE ACTION: HISTORICAL DIMENSIONS xvi–xvii (James A. Beckman, ed., 2014).
7. Colorblindness "is, roughly, the view that race does not and should not matter." Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1153 (2013). Colorblindness is often linked to Justice Harlan's call in the *Plessy* dissent that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Harlan further asserted: "In respect of civil rights, all citizens are equal before the law. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved." *Id.* Harlan also proclaimed, "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty." *Id.*

tive debate has centered upon whether courts should regard state considerations of race for affirmative action programs to be as suspect as the use of invidious racial classifications.⁹

Opinions on affirmative action have been shaped by whether the Equal Protection Clause is interpreted to require all people to be treated the same or whether it should be understood as a guarantee of equal opportunity.¹⁰ This distinction is essentially the one that President Johnson drew in the quote highlighted at the beginning of this Article. Within the scholarly discourse, the debate regarding equal treatment versus equal opportunity has been described as the difference that illuminates an anticlassification approach versus an antisubordination approach to equal protection.¹¹

In this Article, we examine and analyze one recent affirmative action case, *Fisher v. University of Texas, Austin*,¹² as a means of highlighting why the equal opportunity or antisubordination approach is the correct approach to equal protection. Although two of us have previously written that the Fourteenth Amendment Equal Protection Clause should be interpreted in light of the goal of

Furthermore, as Devon Carbado and Mitu Gulati have explained, colorblindness does not truly mean colorblindness, it operates as a “color conscious burden” for people of color. For example, “[t]he colorblind norm does not require whites to avoid other whites or to associate with people of color. This norm does, however, require people of color to avoid other people of color (the negative racial duty) and to associate with whites (the affirmative racial duty).” Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1287 (2000).

8. Post-racialism is an extension of colorblindness—a declaration that America has moved beyond race as a salient structure. *See, e.g.*, Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009).
9. One Justice surmised in an educational affirmative action case that the purpose of the Fourteenth Amendment is to eradicate invidious discrimination as opposed to limiting the diversity goals of affirmative action programs. *DeFunis v. Odegaard*, 416 U.S. 312, 334–35 (1974) (Douglas, J., dissenting) (involving a case that the majority dismissed as moot because the petitioner was later admitted to the University of Washington Law School, which first denied the petitioner’s application).
10. *See* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1923, 1929–30 (2000).
11. *See, e.g.*, Bertrall L. Ross, II, *Democracy and Renewed Distrust, Equal Protection and the Evolving Judicial Conception of Politics*, 101 CAL. L. REV. 1565, 1597 (2013) (noting it was the Burger Court that initiated the universalist move toward an anticlassification approach in that, “[r]ather than focusing on the protection of racial minority groups from subordination, the Court sought to protect all individuals, white or minority, from government use of race”); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition, Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2004); Reva Siegel, *Equality Talk, Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004).
12. 133 S.Ct. 2411 (2013).

the Reconstruction Amendments to make freed slaves full citizens,¹³ we now advance a more contemporary approach to constitutional interpretation. In particular, we suggest that with regard to race-conscious affirmative action, courts should guide their considerations by the role law must play in mitigating long-term, structural disadvantages maintained through race, which now functions as caste within the United States.¹⁴

Part I provides an overview of the rise, and perhaps, approaching demise, of race-based affirmative action programs in the United States. Governmental considerations of race-based benefits within the areas of employment and contracting have already been severely curtailed through state executive orders,¹⁵ ballot initiatives,¹⁶ and direct legal challenges to state and federal programs.¹⁷ In fact, education is one of the few areas where there is still some modest possibility to consider race-conscious assignments plans.¹⁸ Part I also analyzes the Court's pre-*Fisher v. Texas* history of applying the Equal Protection Clause to governmental programs that have sought to consider race as a factor in awarding educational opportunities.¹⁹ Part II then assesses the various opinions in *Fisher*. In so doing, it examines what *Fisher* reveals about the Court's understanding of race as a social construct and further specifies the many ways in which the Court's particular understanding of race resulted in missed opportunities for substantively addressing racial inequality. This Article concludes by very briefly considering the viability of race-based affirmative action moving forward.

13. See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1078–79 (2011).
14. For an argument that racial progress in the United States has not eradicated the racial caste system, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–30 (2012).
15. See, e.g., Fla. Exec. Order No. 99-281 (Nov. 9, 1999) (implementing Governor Jeb Bush's "One Florida Initiative," which effectively ended affirmative action in university admissions and state employment and contracting).
16. With Proposition 209, California voters banned affirmative action in employment, contracting, and education in 1996. The ban has been twice upheld by federal courts. See Coal. to Defend Affirmative Action v. Brown, 674 F.3d 1128 (9th Cir. 2012); Coal. for Econ. Equity v. Wilson, 110 F.3d 1431 (9th Cir. 1997). Michigan's Proposal 2 created a similar ban, which was challenged but ultimately upheld by the U.S. Supreme Court. See Schuette v. Coal. to Defend Affirmative Action, 134 S.Ct. 1623 (2014) (overturning a Sixth Circuit decision that struck down Proposal 2 and the resulting Amendment 26).
17. See *infra* notes 32–52 and accompanying text.
18. See, e.g., *Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787–88 (2007), (Kennedy, J., concurring) (joining plurality decision to strike down race-based considerations for integration plans in Seattle and Louisville, but allowing that race might still be considered for such purposes); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (reaffirming the *Bakke* plurality's approval of the consideration of race, based upon its value to diversity within education as a compelling interest).
19. *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013).

I. A BRIEF HISTORY OF AFFIRMATIVE ACTION

This Part offers a brief history of affirmative action. It begins with the origins of affirmative action programs through Executive Orders. Thereafter, it briefly details the history of affirmative action jurisprudence in the U.S. Supreme Court.

A. The Executive Genesis of Affirmative Action

The proliferation of affirmative action programs began with the issuance of Executive Orders. In 1961, President John F. Kennedy issued Executive Order 10925, which created the Committee on Equal Employment Opportunity (CEEO).²⁰ One purpose of the CEEO was to “recommend additional *affirmative steps* which should be taken by executive departments and agencies to realize more fully the national policy of nondiscrimination.”²¹ President Kennedy also ordered government contractors to “take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”²² This mandate to contractors was reiterated in 1965, when President Johnson superseded Kennedy’s Order with Executive Order 11246.²³ Although Johnson’s Order abolished the CEEO, it passed some of its functions to the Equal Employment Opportunity Commission and empowered the Secretary of Labor to ensure contractor and agency compliance.²⁴ Additionally, Johnson’s Order went further by requiring government contractors (except where exempt in light of factors such as numbers of workers or size of the contracts) to post notices of nondiscrimination to workers, unions, and subcontractors; to include nondiscrimination clauses within contracts; and to file compliance reports with the Labor Department.²⁵ Johnson’s

20. See David J. Garrow, *The Evolution of Affirmative Action and the Necessity of Truly Individualized Admissions Decisions*, 34 J.C. & U.L. 1, 2 (2007).
21. Exec. Order No. 10925, 26 Fed. Reg. 1977 (May 8, 1961) (emphasis added).
22. Exec. Order No. 10925, 26 Fed. Reg. 1977 (May 8, 1961) (emphasis added). Some have argued, however, that the earliest forms of legislation committed to race-conscious remedy took place during Reconstruction. See Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretation of Its Legislative Intent by the Supreme Court*, 29 AKRON L. REV. 291, 294 (1996) (claiming that the Freedman’s Bureau legislation of the mid-1890s was designed to remedy the ills of slavery); James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal and Political Realities*, 70 IOWA L. REV. 901, 904 (1985) (citing the NAACP’s amicus brief in *Bakke*, which similarly advanced this point).
23. Neal E. Devins, *The Civil Rights Hydra*, 89 MICH. L. REV. 1723, 1731 (1991) (reviewing HUGH DAVIS GRAHAM, THE CIVIL RIGHTS ERA (1990)).
24. *Id.*
25. Exec. Order No. 11246, 3 C.F.R. 1964-65 (1965).

Order directly influenced what became explicitly recognized as affirmative action during the Nixon administration.

Soon thereafter, affirmative action programs were expanded to not only prohibit discrimination but also to establish hiring goals for African American employees. For example, based on President Johnson's Executive Order 11246 and a local plan originally introduced in 1967, the city of Philadelphia, in consultation with United States Department of Labor, adopted the aptly named Revised Philadelphia Plan on June 27, 1969. The Revised Philadelphia Plan not only prohibited government contractors from discriminating on the basis of race but also specifically required them to create hiring goals for African American employees as a means of ameliorating systemic and historic discrimination practiced in certain trade unions. These affirmative approaches to ensuring opportunities quickly spread to other cities and states.²⁶ Additionally, in August of 1969, President Nixon issued Executive Order 11478, which required equal employment opportunity for federal employees to be achieved through a "continuing affirmative program in each executive department and agency."²⁷ The U.S. Comptroller General initially issued a report indicating that such plans violated Title VII of the Civil Rights Act of 1964, but President Nixon lobbied Congress to reject these findings.²⁸ Furthermore, the plans were presumed to be constitutional when the Supreme Court refused to grant certiorari to a Third Circuit case that held that the Revised Philadelphia Plan violated neither the Title VII nor the Fifth Amendment Due Process Clause.²⁹ This presumption of constitutionality continued when the Court upheld a program that reserved 50 percent of the openings in a training plan for African Americans.³⁰

B. Growing Pains: Affirmative Action Backlash in the Courts (and Elsewhere)

The era in which affirmative action programs were viewed as consistent with the constitutional protection of equality was decidedly short-lived. Less

26. Rudy Sandoval & Laura Lisa Sandoval, *In Search of Equality in Legal Education: The Grutter v. Bollinger Case*, 5 PACE L. REV. 91, 93 n.8 (2004).
27. Exec. Order No. 11478, 3 C.F.R. 803 (1969).
28. See Patricia A. Carlson, Adarand Constructors, Inc. v. Pena: *The Lochnerization of Affirmative Action*, 27 ST. MARY'S L.J. 423, 431 (1996).
29. Contractors' Ass'n of E. Pa. v. Schultz, 442 F.2d 159 (3rd Cir. 1971). Although the Fifth Amendment does not include an equal protection clause, the Court has read this protection into the amendment to prevent any disjunction between the Fifth and Fourteenth Amendments. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).
30. United Steel Workers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193 (1979) (overturning a Fifth Circuit holding that the program violated Title VII).

than ten years after the implementation of the Revised Philadelphia Plan, a plurality opinion in *Regents of the University of California v. Bakke*³¹ signaled that the Court was loath to view affirmative action programs as restoring equality for minorities who had suffered past discrimination. Instead, the Court was more likely to view affirmative action programs as reverse discrimination against groups not favored by such programs.³²

Bakke struck down the use of race-conscious quotas in higher education admissions without directly discussing governmental employment and contracting. In the years immediately following the *Bakke* decision—in cases worth noting because they did not employ the strict scrutiny standard of review³³—the Court upheld two minority set-aside programs in employment.³⁴ Within a decade after the *Bakke* decision, the understanding of remedial race-conscious set-aside programs as unconstitutional would also invade employment and contracting cases. In a set of cases looking at affirmative action within the employment and government contracting arenas—*Wygant v. Jackson Board of Education* (1986),³⁵ *City of Richmond v. J.A. Croson Co.* (1989),³⁶ *Adarand Constructors v. Pena* (1995)³⁷—the Supreme Court systematically exhibited hostility toward affirmative action by requiring strict scrutiny analysis for all governmental uses of racial classifications.³⁸ The Supreme Court de-

31. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

32. *Id.* Justice Powell wrote the Court's opinion and was joined by four justices, who pronounced a special admissions program at the University of California, Davis Medical School that reserved sixteen seats per year for minority applicants—some of whose entry test scores were lower than candidates rejected in the regular admissions program—to be unconstitutional and a violation of federal law. *Id.* at 271; *see also* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 30–31 (2013) (“The earliest arguments for applying strict scrutiny to ‘all classifications’ are concerned about harms to whites. . . . Early justifications for judicial oversight suggest that the Justices who first applied strict scrutiny to affirmative action acted from empathy: they fashioned a body of equal protection law that cares about the impact of state action on citizens, and about citizens’ confidence in the fairness of the state, in ways that the discriminatory purpose decisions of the Burger Court do not.”).

33. Strict scrutiny is the most stringent level of judicial review applied in equal protection cases. It is now automatically applied to cases where government action is based upon a racial classification. *See* Siegel, *supra* note 32. Strict scrutiny requires that the racial classification be narrowly tailored to serve a compelling governmental purpose or interest. Few programs can withstand strict scrutiny review. *See* Barnes & Chemerinsky, *supra* note 13, at 1078–79.

34. *See Weber*, 443 U.S. at 196; *see also* *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding as lawful a section in the Public Works Employment act of 1977 that required state and local recipients of federal funds to use 10 percent of their funding to procure services from among designated minority groups).

35. 476 U.S. 267 (1986).

36. 488 U.S. 469 (1989).

37. 515 U.S. 200 (1995).

38. For an argument that it makes little sense for courts to treat racial classifications that benefit racial minorities in the same manner as they do disadvantaging classifications, see Angelo Guisado,

manded a strong basis in evidence to justify remedial race-based decisionmaking and adopted “colorblindness” as the prevailing perspective for analyzing equal protection claims.³⁹

Wygant, a plurality decision, addressed a race-conscious system of lay-offs for teachers. Five justices agreed that the work policy violated the Equal Protection Clause. The five justices also adopted a “strong basis in evidence” standard to justify the use of race-conscious remedies. Justice Powell, writing for the Court, also proposed that strict scrutiny should apply to any governmental classification or preference based on racial or ethnic criteria.⁴⁰ Three years later, in *Croson*, the Court adopted Justice Powell’s strict scrutiny suggestion, at least for racial classifications used by individual states.⁴¹ Much of the dicta in *Croson* relied upon Powell’s *Bakke* opinion stating that racial classifications could unfairly burden Whites⁴² as well as minorities.⁴³ Additionally, although the Court indicated that remedying specific past discrimination could be a compelling interest, it rejected general societal discrimination as sufficient to meet the test.⁴⁴ Finally, in *Adarand*, the Court struck down a federal government program that created financial incentives for general contractors to hire subcontractors who were “socially and economically disadvantaged,” which, for some contractors, included

Reversal of Fortune: The Inapposite Standards Applied to Remedial Race-, Gender-, and Orientation-Based Classifications, 92 NEB. L. REV. 1 (2013).

39. On colorblindness as “mythologized racial justice,” see Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994). Prominent legal scholar and Harvard Professor Randall Kennedy has described the Court’s colorblind jurisprudence as follows:

Constitutional color blindness threatens policies that are assisting to create a multiracial polity in which previously oppressed peoples participate as productive, equal actors in every sphere of American life. Constitutional color blindness is thus a destructive jurisprudence.

KENNEDY, *supra* note 5, at 12.

40. 476 U.S. at 273–74.

41. 488 U.S. at 493. For states, then, the Court rejected the notion that racial considerations could be regarded as “benign.”

42. Throughout this Article, we capitalize the words “Black” and “White” when we use them as nouns to describe a racialized group; however, we do not capitalize these terms when we use them as adjectives. Professor Kimberlé Crenshaw, one of the founders of Critical Race Theory, has explained that “Black” deserves capitalization because “Blacks, like Asians [and] Latinos, . . . constitute a specific cultural group and, as such, require denotation as a proper noun.” Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

43. A former law professor and current Associate California Supreme Court Justice, however, has argued that claims that affirmative action for African Americans deprive white applicants of spots at selective institutions are erroneous. Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002).

44. 488 U.S. at 496–97. The Court then struck down the city of Richmond’s minority set-aside program and remanded the case back to the Circuit to apply strict scrutiny.

considerations of race.⁴⁵ In so doing, the Court extended *Croson*'s application of strict scrutiny to all state uses of racial classifications to the federal government.

In addition to the Court's curtailment of affirmative action programs, a series of states began prohibiting considerations of race in education, employment, and contracting. The University of California Board of Regents became an early proponent of discontinuing considerations of minority status in education, eliminating affirmative action in admissions in 1995.⁴⁶ Also, in 1995, then Governor Pete Wilson made a similar policy shift when he issued an executive order eliminating affirmative action in state employment.⁴⁷ In 1996, 54 percent of the voters in California passed Proposition 209, which banned minority group considerations in education, employment, and contracting through an amendment to the state Constitution.⁴⁸ Styled as a civil rights initiative, Proposition 209 included universalist language that proclaimed the state shall "not discriminate against, or grant preferential treatment to" any person in employment, education, or contracting, based on "race, sex, color, ethnicity, or national origin."⁴⁹ Soon, it became a model for other states seeking to prohibit the consideration of race in any arena. Following California's lead, anti-affirmative action ballot initiatives expanded to other states, including Washington's Initiative 200, Nebraska's Initiative 424, Amendment 46 in Colorado, and Proposal 2 in Michigan.⁵⁰ The

45. 515 U.S. at 207. With regard to the decision to apply strict scrutiny to federal programs that considered race, *Adarand* overruled the approach followed in an earlier case. *See Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (applying intermediate scrutiny in upholding a federal government program considering racial set-asides, which the Court described as "benign").
46. Linda Martin, Note, *Affirmative Action in University of California Admissions: An Examination of the Constitutionality of Resolution Sp-1*, 19 WHITTIER L. REV. 373, 373 (1997) (noting that Regents' actions were historic).
47. *See MICHAEL D. SUMNER ET AL.*, U.C. BERKELEY THELTON E. HENDERSON CENTER FOR SOCIAL JUSTICE, PROPOSITION 209 AND PUBLIC EMPLOYMENT IN CALIFORNIA: TRENDS IN WORKFORCE DIVERSITY 3 (2008).
48. *Id.* Ward Connerly, a member of the U.C. Board of Regents, spearheaded repeal of affirmative action within the U.C. system and then championed not only Proposition 209 but also similar initiatives in other states. *See Ward Connerly's Falling Star*, 43 J. BLACK ISSUES HIGHER EDUC. 26–29 (Spring 2004). A recent article indicates that Proposition 209 has produced long-term negative consequences to public higher education in California. *See* William C. Kidder, *Mishaping the River: Proposition 209 and the Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 55–56 (2013) (noting of the University of California schools that "data from eight campuses confirms that the campus racial climate is significantly more inhospitable for African Americans and Latinos than at UT Austin" and "Proposition 209 . . . triggered a series of educationally harmful 'chilling effects'").
49. Erwin Chemerinsky, *The Impact of the Proposed California Civil Rights Initiative*, 23 HASTINGS CONST. L. Q. 999, 1004 (1996).
50. *See* Kim West-Faulcon, *The River Runs Dry: When Title VII Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1088–1089 (2009).

proposals passed in each state but Colorado.⁵¹ The U.S. Supreme Court's 2014 decision in *Schuette v. Coalition to Defend Affirmative Action*,⁵² which overturned the Sixth Circuit's decision that Proposal 2 was unconstitutional, ensured that these initiatives would remain a viable means through which white majorities could eliminate affirmative action.⁵³

C. The Last Remaining Vestiges of Affirmative Action (for Now)

Although the Court held that race-conscious set-aside programs in higher education admissions violated the Equal Protection Clause in *Regents of the University of California v. Bakke*, five justices also preserved the idea that achieving diversity among the student body involves a compelling state interest and that race can be considered a “plus” factor in creating diversity in admissions.⁵⁴ In *Grutter v. Bollinger*, a Justice O’Connor-led majority reaffirmed what has come to be referred to as “the diversity rationale” articulated in *Bakke*. The Court upheld the constitutionality of a race-conscious admissions process at the University of Michigan Law School, which considered race as one factor in a highly individualized admissions process.⁵⁵

Although *Grutter* legitimized the diversity rationale for race-conscious admissions considerations, Justice O’Connor opined: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁵⁶ Though not intended, Justice O’Connor’s looming expiration date placed on the diversity rationale has, in many ways, invited more affirmative action litigation.⁵⁷ Based on the Court’s opinion in *Fisher v. Universi-*

51. Nebraska and Washington both passed the initiatives with 58 percent of the votes. Ward Connerly’s group attempted similar initiatives in Oklahoma, Arizona, and Missouri, but they failed. *See* Naomi Zeveloff, *Amendment 46 to Repeal Affirmative Action Loses Despite Hefty Odds*, COLO. INDEP. (Nov. 7, 2008), <http://www.coloradoindependent.com/14699/amendment-46-to-repeal-affirmative-action-loses-despite-hefty-odds>.
52. *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).
53. *Id.* (finding that Michigan’s constitutional amendment that prohibited state universities from considering race as part of university admissions processes did not alienate minorities from the political process and did not violate the Equal Protection Clause of the U.S. Constitution).
54. *Bakke*, 438 U.S. at 311–14, 317. Scholars have contested whether the meaning of the diversity rationale is clear. *See* Carbado, *supra* note 7, at 1144.
55. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003). In the same term, the Court found the University of Michigan undergraduate admissions system’s consideration of race to be unconstitutional. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (finding that the points awarded to race in the admissions system involved no individual assessment and almost always made the difference for the admissions decision).
56. *Grutter*, 539 U.S. at 330–31.
57. Kevin R. Johnson, *From Brown to Bakke to Grutter: Constitutionalizing and Defining Racial Equality: The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENTARY 171, 187

ty of Texas—a case involving race-conscious higher education admissions standards—it appears we may not have to wait until 2028 for a new determination on the efficacy of affirmative action. Although *Fisher* did not overrule *Grutter* or ban affirmative action in educational admissions, it did refine *Grutter*'s meaning to require less deference to institutions of higher education. In so doing, *Fisher* actually increased the likelihood of other similar cases being appealed to the Court.

II. *FISHER V. UNIVERSITY OF TEXAS AND AFFIRMATIVE ACTION—MISSSED OPPORTUNITIES IN SUBSTANCE AND PROCESS*

Through its decision in *Fisher*, the Supreme Court revealed the damaging consequences of the use of narrow conceptions and understandings of race. In 2008, petitioner Abigail Fisher was denied admission to the undergraduate college of the University of Texas, Austin, which has a two-pronged admissions system. The largest portion of undergraduates is admitted via the race-neutral practice⁵⁸ of accepting the top 10 percent of graduating Texas high school students. The year that Fisher applied to the University, residents in the top 10 percent of their high school classes took 81 percent of the seats in the entering class.⁵⁹ This result left 17,131 applicants to compete for only 1216 remaining seats for Texas residents in the second prong of the admissions system.⁶⁰ Although Fisher was admitted to another University of Texas campus and ultimately enrolled at Louisiana State University, she sued the University and school officials, alleging that the University's use of a race-conscious system violated the Equal Protection Clause.⁶¹

(2004) (“At the same time, by encouraging future litigation, a 25-year limit almost ensures the Court’s reconsideration of affirmative action.”); Derrick Bell, *On Grutter and Gratz: Examining “Diversity” in Education: Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1628 (2003) (arguing that the various opinions in *Grutter* and *Gratz* “further confuse rather than clarify Justice Powell’s opinion in *Bakke*,” and “[they] will likely encourage affirmative action opponents to mount more litigation challenges . . .”).

58. As discussed below, whether the plan is, in fact, race-neutral is a point of contestation. *See infra* notes 94–104 and accompanying text.
59. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (2014).
60. *Id.*; *see also* Erwin Chemerinsky, *What’s Next for Affirmative Action*, ABA JOURNAL (Aug. 6, 2013 9:25am), http://www.abajournal.com/news/article/chemerinsky_whats_next_for_affirmative_action.
61. Fisher also claimed violations of 42 U.S.C. §§ 1981 and 1983, and Title VI of the Civil Rights Act of 1964. *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009), *vacated*, *Fisher*, 33 S.Ct. at 2411. Interestingly, at least one scholar has described suits such as Fisher’s as involving the assertion of an individual property-like interest in diversity, which should be a shared common good for universities and all students. *See Sheldon Lyke, Diversity As Commons*, 88 TULANE L. REV. 317, 323 (2014) (“[I]ndividuals like Fisher sue to end affirmative action, thereby “privatizing” admissions processes in order to gain admission to elite universities. As a result, these plaintiffs enclose education, and extinguish common rights to use diversity.”).

The Supreme Court decided Fisher's appeal in June 2013. Affirmative action opponents thought there might be five votes in *Fisher* to overrule, or greatly narrow, *Grutter v. Bollinger*. After all, Justices Scalia, Kennedy, and Thomas dissented in *Grutter*. Chief Justice Roberts wrote an opinion in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* that stated that the Constitution requires the government to be colorblind and rejected diversity in the classroom as a compelling government interest.⁶² Additionally, the replacement of Justice O'Connor, the author of the Court's opinion in *Grutter*, was Justice Alito, who joined the *Parents Involved* opinion. Taken together, the changed composition of the Court and decisions from other germane cases led many to believe that a majority of the Court was poised to deem most forms of racial considerations within educational admissions processes unconstitutional.⁶³

Justice Kennedy, who essentially replaced Justice O'Connor as the tiebreaker in contentious race-related cases, authored the *Fisher* majority opinion. With Justice Kennedy as the author, many imagined *Fisher* would produce a close decision divided along ideological lines. Instead, *Fisher* was a 7–1 decision, with only Justice Ginsburg dissenting. The near unanimity in *Fisher* was especially surprising given the Court's current conservative majority that often produces 5–4 decisions on cases involving hot-button social issues, such as race.⁶⁴ Rather than substantially revisiting *Grutter*'s core points, the seven justices in *Fisher* voted to remand the case to the Circuit Court for further proceedings. The scope of their decision, however, was very narrow. The Court reached its decision by avoiding the question of whether diversity is a suitable compelling interest and focusing instead on the lower court's application of the narrow tailoring prong of strict scrupu-

- 62. *Parents Involved*, 551 U.S. at 702–04.
- 63. A new biography detailing Justice Sotomayor's rise to the Court makes the changed composition point and indicates it was the Court's new (post-*Grutter*) make-up that led conservative anti-affirmative action proponents to select and fund Abigail Fisher's case. JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 194–97 (2014).
- 64. In fact, a prominent author and Supreme Court journalist has indicated that until the final week of the Court's term in June 2013, *Fisher* was likely to produce a 5–3 majority (with Justice Kagan recusing herself) for striking down the university's admissions policy. *Id.* at 200–01. The 7–1 compromise was brokered in response to a stinging dissent drafted by Justice Sotomayor, for which "some [justices] were anxious about how Sotomayor's personal defense of affirmative action and indictment of the majority would ultimately play to the public." *Id.* at 205–06. In the term in which *Fisher* was decided, however, there were several 5–4 opinions, divided along ideological lines. *See* Vance v. Ball State Univ., 133 S.Ct. 2434 (2013) (5–4 Justice Alito decision narrowing the definition of who can be treated as a supervisor under Title VII); Univ. of Tex. Southwestern Med. Ctr v. Nassar, 133 S.Ct. 2517 (2013) (5–4 Justice Kennedy decision requiring Title VII retaliation plaintiff's to prove but-for causation for their claims); and Shelby Cnty. v. Holder, 133 S.Ct. 2612 (2013) (5–4 Justice Roberts decision striking down Section 4 of the Voting Rights Act).

tiny analysis. The Court called for “careful judicial inquiry” into whether acceptable diversity could be achieved without using race, requiring courts to determine whether there were race-neutral alternatives.⁶⁵

In so deciding *Fisher*, we argue, the Court ignored significant issues of both process and substance. Specifically, we argue that based on precedent addressing remedies for denied University applicants, the Court never should have heard Fisher’s complaint. We further contend that even as the Court heard the arguments from Fisher, the majority, concurrences, and dissent all failed to use the *Fisher* case as a meaningful opportunity to explicate equal protection doctrine as a function of the lived experiences of racial minorities within the United States.

A. Why *Fisher* Never Should Have Been Heard: Precedent and Process Limits for Denied Applicants

In deciding to hear *Fisher*, the Supreme Court failed to issue a decision that comported with its precedent. The Court never should have heard or decided *Fisher* because it lacked jurisdiction to do so. The plaintiffs in other affirmative action cases involving higher education such as *Regents of the University of California v. Bakke* and *Grutter v. Bollinger* were seeking injunctive and declaratory relief. Abigail Fisher was not. She had already graduated from Louisiana State University in 2012, and she no longer had a claim for an injunction or a declaratory judgment. She had no desire to return to college. Additionally, her lawsuit was not a class action suit or a suit with any other remaining plaintiffs.⁶⁶ Her only remaining claim was for \$100 in money damages—\$50 for her application fee and \$50 for her housing deposit.

Another problem was that the defendants named in the lawsuit were the University of Texas, a state university, and its officers who were sued in their “official capacity.” The Eleventh Amendment and sovereign immunity bar lawsuits for money damages against a state government or its officials who are sued in their official capacity for a constitutional violation.⁶⁷ The fact that Fisher failed to name any other defendants and that those defendants who were named could not

65. *Fisher*, 133 S.Ct. at 2420–21.

66. Originally, *Fisher* included co-plaintiff Rachel Michalewicz, who was also admitted to and enrolled at a school other than the University of Texas, Austin; unlike *Grutter*, *Fisher* involved no claims on behalf of future applicants. See Adam D. Chandler, *How (Not) To Bring an Affirmative-Action Challenge*, 122 YALE L.J. Online 85, 86–88 (2012), <http://www.yalelawjournal.org/forum/how-not-to-bring-an-affirmative-action-challenge> (also commenting that the case arguably could have been rendered moot had the University returned the application fees).

67. See *Scheuer v. Rhodes*, 416 U.S. 232, 241–43 (1974).

be sued in federal court because of the Eleventh Amendment similarly should have doomed Fisher's affirmative action lawsuit.

Moreover, it is questionable whether Fisher had standing to bring the claim. Her injury—a loss of money for the application and housing fees—was not caused by the University of Texas's affirmative action plan. Given her family's legacy at the University of Texas, Austin and her self-proclaimed childhood dream of attending the University, Fisher surely would have applied anyway.⁶⁸ In fact, in *Texas v. Lesage*, the Court expressly distinguished between an affirmative action case that sought an injunction, prospective relief, as opposed to one that sought only money damages. The Court declared:

Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is the inability to compete on an equal footing. But where there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government's conclusive demonstration that it would have made the same decision absent the alleged discrimination precludes any finding of liability.⁶⁹

In the federal district court, the University of Texas demonstrated that Fisher would not have been accepted even if she had a perfect personal achievement score.⁷⁰ As the Fifth Circuit recently explained in its 2014 decision for the remanded *Fisher* case,

Fisher's [Achievement Index] AI scores were too low for admission to her preferred academic programs at UT Austin; Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1. And, because nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students, all holistic review applicants “were only eligible for Summer Freshman Class or CAP [Coordinated Admissions Program] admission, unless their AI exceeded 3.5.” Accordingly, even if she had received a perfect PAI score of 6, she could not have re-

68. Adam Liptak, *Race and College Admissions, Facing a New Test by the Justices*, N.Y. TIMES (Oct. 8, 2012), http://www.nytimes.com/2012/10/09/us/supreme-court-to-hear-case-on-affirmative-action.html?pagewanted=all&c_r=0.
69. *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (quoting *Assoc. Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993)).
70. Brief for Respondents at 15–16, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. at 2411 (No. 11-345) (internal quotation marks omitted). Fisher's exact Personal Achievement Index (PAI) is in a sealed brief. *Id.* at 15.

ceived an offer of admission to the Fall 2008 freshman class. *If she had been a minority the result would have been the same.*⁷¹

For Fisher to have had standing to sue in federal court, she would have been required to allege and prove an injury that was caused by the unconstitutional policy. But Abigail Fisher's remaining injury, for which she was suing, was simply the loss of \$100 in her application fees. That harm simply was not caused by the University of Texas's affirmative action plan because she would have applied to the school even if the affirmative action plan did not exist.

Although it is puzzling that the University of Texas did not do more to emphasize these procedural issues in its brief and argument to the Court, such lack of emphasis should not have been the reason that Fisher's case moved forward. The Court is obligated to raise problems with jurisdiction on its own, including Eleventh Amendment violations and lack of standing. Yet, the Court did not even acknowledge these jurisdictional obstacles. It appears that the Court's desire to decide the issue caused it to ignore that dismissal was required.⁷²

B. The *Fisher* Majority and Missed Opportunities for Addressing the Lived Experience of Race

Beyond narrowing how strict scrutiny is applied and ignoring procedural constraints, the Supreme Court repeatedly missed opportunities to challenge routinely held assumptions (mainly by Whites) about race and its relevance to the everyday lives of applicants. By so doing, the Court essentially defined the experiences of Whites in the United States as the normative standard by which all college and university applicants, and thus all affirmative action programs, should be evaluated. The end result of the *Fisher* majority opinion was the reinforcement and fortification of white privilege. For example, while detailing its precedent in

71. *Fisher v. Univ. of Tex.* at Austin, 758 F.3d 633, 639 (2014) (emphasis added). *See infra* note 85 and accompanying text (detailing what is considered in computing the PAI).

72. On remand, the University argued that Fisher lacked standing to bring her lawsuit, and the Fifth Circuit acknowledged its arguments, but declined to decide the case on standing grounds. The Fifth Circuit explained:

UT Austin's standing arguments carry force, but in our view the actions of the Supreme Court do not allow our reconsideration. The Supreme Court did not address the issue of standing, although it was squarely presented to it. Rather, it remanded the case for a decision on the merits, having reaffirmed Justice Powell's opinion for the Court in *Regents of the University of California v. Bakke* as read by the Court in *Grutter v. Bollinger*. It affirmed all of this Court's decision except its application of strict scrutiny. The parties have identified no changes in jurisdictional facts occurring since briefing in the Supreme Court. Fisher's standing is limited to challenging the injury she alleges she suffered—the use of race in UT Austin's admissions program for the entering freshman class of Fall 2008.

Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 640 (2014).

the affirmative action arena, the Court proffered a statement about “race” that tends to comport with the actual lived experiences of Whites in the United States. Specifically, the Court asserted:

Justice Powell’s central point . . . was that this interest in securing diversity’s benefits, although a permissible objective, is complex. ‘It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. . . . To be narrowly tailored, a race-conscious admissions program cannot use a quota system,’ but instead must ‘remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.’⁷³

Implicit in these statements is the notion that race does not play a defining role in the actual lives of university and college applicants. Such statements assume that race has no meaning other than to work as a plus or minus during the admissions process. Indeed, the Court assumes that race plays no role but the role that applicants and admissions officers choose to assign to it.

The Court’s statements about and treatment of race ignores the lived experience of non-Whites in the United States. As Professors Michael Omi and Howard Winant reveal in their book *Racial Formation in the United States: From the 1960s to the 1990s*, “[f]rom the very inception of the Republic to the present moment, race has been a profound determinant of one’s political rights, one’s location in the labor market, and indeed one’s sense of ‘identity.’”⁷⁴ In other words, race has never represented a mere decorative symbol for individuals in our society. Instead, race has always carried with it real substantive consequences for the lives of people of color, who generally endure some form of racial subordination on a regular basis.⁷⁵ As Professors Richard Delgado and Jean Stefancic describe, unlike most Whites, who generally do not “have to think about race,”⁷⁶

73. *Fisher*, 133 S.Ct. at 2418 (quoting *Bakke*, 438 U.S. at 315 (citation omitted)).

74. MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S 1 (2d ed. 1994).

75. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, available at <http://www.case.edu/president/action/UnpackingTheKnapsack.pdf>.

76. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 11 (2d ed. 2012). See also Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 n.73 (1993) (quoting

race and racism “[s]till, by every social indicator . . . continue[] to blight the lives of people of color, including holders of high-echelon jobs, even judges.”⁷⁷ Indeed, for most people of color in the United States, particularly African Americans, American Indians, and Latinos, race has involuntarily become a defining feature in their lives.⁷⁸

For this reason, when the Court failed to acknowledge the real meaning of race, racism, and their consequences in the United States, it essentially solidified what Professors Devon Carbado and Cheryl Harris have identified as a racial preference in favor of Whites in the admissions process.⁷⁹ After all, as Carbado and Harris point out in reference to the tasks of writing and evaluating personal admissions essays, to assume that race has no meaning or consequence in people’s lives and thus should not be a part of their applications unfairly assumes that one can speak about herself and her life in a coherent fashion without regard to race. While the requirement to completely avoid race in describing one’s self and one’s potential contributions to a school may make sense for most Whites, who, due to their skin color, view and think of themselves as raceless,⁸⁰ it makes little sense for people of color for whom race often plays a key part in social and work interactions.⁸¹ In sum, “the life story of many people—particularly with regard to describing disadvantage—simply does not make sense without reference to race.”⁸²

Robert W. Terry, *The Negative Impact on White Values*, in IMPACTS OF RACISM ON WHITE AMERICANS 119, 120 (Benjamin B. Bowser & Raymond G. Hunt eds., 1981)).

77. DELGADO & STEFANCIC, *supra* note 76.

78. *See id.* at 1–2.

79. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CAL. L. REV. 1139, 1148, 1168 (2008) (arguing that a mandate to ignore race in admissions ends up “conferring a preference for applicants for whom race does not matter”).

80. Flagg, *supra* note 76, at 970 (“White people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive. Whites’ ‘consciousness’ of whiteness is predominantly *unconsciousness* of whiteness.”) (emphasis in the original).

81. *See* DELGADO & STEFANCIC, *supra* note 77, at 1–2 (briefly discussing how microaggressions can “mar the days of women and folks of color” and referring to microaggressions as “dispiriting transactions”); DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION 5 (2010) (defining microaggressions as “brief and commonplace, daily, behavioral and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative, racial, gender, sexual-orientation, or religious slights and insults to the target person or group”).

82. Carbado & Harris, *supra* note 79, at 1148–53 (highlighting how essays written by President Barack Obama and Justice Clarence Thomas, for example, would make little sense if race were ignored or if President Obama or Justice Thomas were assumed to be white). For example, in discussing how a portion of Justice Thomas’s autobiography would be distorted without acknowledging race and its saliency in his life, Professors Carbado and Harris note:

In Thomas’s case, that history of disadvantage is also racial. It would be virtually impossible for him to tell the story of his background without reference to race. His story would

When the Court's opinion failed to acknowledge how race is a central and defining feature in the lives of many people of color, it essentially accepted, without challenge, that a person of color can describe, explain, or make sense of his or her existence without any account of race and thus missed an opportunity to deconstruct white privilege.⁸³

In addition, the Court missed an opportunity to highlight how failures to account for race in admissions evaluations can discount the achievements of a candidate of color in the admissions process.⁸⁴ For example, in its facts section, the Court described the University of Texas's Personal Achievement Index, which in conjunction with the Academic Index, was used to evaluate applicants who did not earn admission under the Texas Ten Percent Plan, stating:

This Personal Achievement Index (PAI) measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background. These included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family.⁸⁵

By detailing the University's statements that factors such as growing up in a single-parent home or speaking a language other than English can provide useful insights into a person's background and thus their potential contributions to an institution, the Court acknowledged, to some extent, that the evaluation of an applicant's leadership, awards, and extracurricular activities is contextual. After all, many would consider a student's achievement in becoming her school's best fiction writer to be more impressive if that student were a nonnative English speaker. Similarly, a student's significant achievements in being elected and serving as a strong leader in many activities at her school would be even more impressive if that student grew up in a poor single-mother household that required her to work twenty hours per week in addition to her

be both incomplete and incomprehensible. The difficult position Thomas finds himself in here exposes the problem of formally removing race from an admissions process against a social backdrop in which race both matters and is cognizable.

Id. at 1186.

83. For a cogent discussion of how current affirmative action policies, including the diversity rationale, are supportive of white privilege and thwart the development of white antiracist identity formation, see Osamudia R. James, *White Like Me, The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 430-31 (2014).
84. Angela Onwuachi-Willig, *I Wish I Were Black' and Other Affirmative Action Tales of Privilege*, CHRON. HIGHER EDUC., Oct. 28 2013, available at <http://chronicle.com/article/I-Wish-I-Were-Black-and/142561>.
85. *Fisher*, 133 S.Ct. at 2415-16 (emphasis added).

academics than if that student grew up in a wealthy household and did not encounter such burdens.

Nevertheless, the Court missed the opportunity to take this understanding even further by exploring and explicating how race may often further contextualize each of these judgments during the admissions process. For instance, if the fiction writing student mentioned above is of Mexican descent and speaks Spanish as her first language, as opposed to being of French descent and speaking French as her first language, an astute admissions officer would consider the extreme prejudices and presumptions of incompetency and criminality that are generally imposed on Latinos who are of Mexican descent in evaluating her achievements.⁸⁶ More so, the same admissions officer would consider and give the student credit for the extra focus, skill, and hard work it must have taken to overcome those stereotypes and prejudices in achieving her literary accomplishments. Or, if one were to add the fact that the student in a single-parent home lives with her black mother, such information, too, would attach important dimensions to understanding the applicant's story, as the public has both historically and presently had different perceptions of single mothers, particularly if they require any government assistance, depending on whether they are black or Latino as opposed to white.⁸⁷ In sum, in both instances, the inclusion of racial details

86. See, e.g., Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1585 (2011) (discussing the implication of immigration being used as a pretext to investigate criminality and contending "assuming that the officer is persuaded that the Latino is a citizen or legal resident, he might still believe that the Latino is a criminal (based on stereotypes about Latino criminality) and, under the guise of enforcing immigration laws, continue to detain the Latino to confirm or dispel that race-based suspicion"); Mary Romero, *State Violence and the Social and Legal Construction of Latino Criminality: From El Bandido to Gang Member*, 78 DENV. U. L. REV. 1081, 1083–85 (2001) (discussing how black and Latino youth are viewed as "superpredators" and how this designation is "socially constructed through a racial lens—the lens that reflects the images of White middle class youth as 'our' children and Latino adolescent males as violent, inherently dangerous and endangering"). See generally Lu-in Wang, *Race as Proxy: Situational Racism and Self-Fulfilling Stereotypes*, 53 DEPAUL L. REV. 1013, 1013–14 (2004) (arguing that stereotypes are often deployed to associate people of color with undesirable personal qualities, such as "laziness, incompetence and hostility"); Neil Gotanda, *A Critique of "Our Constitution Is Colorblind,"* 44 STAN. L. REV. 1, 6 (1991) ("Any trace of African ancestry makes one Black. In contrast, the classification white signifies 'uncontaminated' European ancestry and corresponding racial purity. The socially constructed racial categories white and Black are not equal in status. They are highly contextualized, with powerful, deeply embedded social and political meanings.").

87. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 107 (1995) ("[I]n the public's mind, and despite overwhelming evidence to the contrary, the face of poverty has increasingly become that of a single mother, particularly the African-American single mother."); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1542–44 (1995) (asserting that there is an assumption that many welfare recipients are poor Mexican immigrant mothers); see also Angela Onwuachi-Willig,

gives a fuller picture of the student's background—their Personal Achievement Index—and thus their merits for admission. Race and an individual's background cannot be separated—trying to separate them undercuts the significance of the different applicants' achievements by failing to take into account the race-related obstacles that they overcame.

Ignoring race also leads to discounting the struggle and success of people of color. For example, it would make little sense to ignore race when considering the fact that a student was the first African American student body president at a predominantly white institution. Ignoring this fact would also mean ignoring positive qualities that demonstrate leadership, vision, and tenacity, such as how the student was able to first visualize himself in this pathbreaking role and then achieve that goal despite never seeing any role models in that position, or how that student was able to overcome what may have been a historically hostile racial environment in school to persuade enough white students to cast their votes for him. Indeed, as many scholars have pointed out, evaluating Justice Thomas's achievements from elementary school until his appointment to the Supreme Court, and even his performance on the Supreme Court, is impossible without taking race, racism, and their effects on him into account.⁸⁸ Justice Thomas's autobiography is full of references to the ways in which race has influenced his life and stories concerning the race-based obstacles and hostilities he has encountered and overcome. The central focus given to race in his autobiography suggests that, at least implicitly, Justice Thomas agrees with the idea that examining race-related obstacles that have been overcome is critical to assessing achievement.⁸⁹

Finally, the Court missed the opportunity to confront perhaps the most offensive assumption behind challenges to race-based affirmative action: the notion that Whites, not people of color, naturally belong in the seats at public institutions. Public institutions are meant to serve the entire public within the state, regardless of the state's demographics. The Court missed this important oppor-

The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control, 93 CAL. L. REV. 1647, 1665–73 (2005) (highlighting how black mothers, specifically black welfare mothers, are stereotyped and demonized); Adrien Katherine Wing & Laura Weselmann, *Transcending Traditional Notions of Mothering: The Need for Critical Race Feminist Praxis*, 3 J. GENDER RACE & JUST. 257, 274 (1999) (“The law’s preference for stay-at-home mothers never applied to Black mothers.”).

88. See Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113–14 (2005) (using Thomas’s life, including the race-based obstacles he faced, to highlight why the Justice is a good example of affirmative action working in the right manner).
89. See generally CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* (2007); see also Caraldo & Harris, *supra* note 79, at 1174–86, 1195–99 (examining excerpts from Thomas’s autobiography and explicating how his narrative makes little sense without attention to race).

tunity when it described what it believed to be an increase in the African American and Latino student populations at the University of Texas, Austin since the Fifth Circuit's last affirmative action decision in *Hopwood v. Texas*⁹⁰ in 1996. The Court failed to make any reference to the demographic changes in the state that had taken place during the ten-year period. The Court stated:

The University's revised admissions process, coupled with the operation of the Top Ten Percent Law, resulted in a more racially diverse environment at the University. Before the admissions program at issue in this case, in the last year under the post-*Hopwood* AI/PAI system that did not consider race, the entering class was 4.5% African-American and 16.9% Hispanic. This is in contrast with the 1996 pre-*Hopwood* and Top Ten Percent regime, when race was explicitly considered, and the University's entering freshman class was 4.1% African-American and 14.5% Hispanic.⁹¹

The Court, however, is factually wrong in one important respect. The measure for the increase in students of a particular racial group at a public university cannot simply be determined over a ten-year period by the rise in numbers alone—that is, unless the percentages of each racial group in that state essentially remained constant over that fifteen-year period. In Texas, demographics changed significantly during that short period, particularly with respect to the Latino population, which, as the University asserted, exploded during that time. For instance, in 2004, Latinos made up 34.2 percent of the state's population as compared to just 25 percent in 1996.⁹² In this sense, the Court missed the opportunity to challenge assumptions deeply held by many Whites about who belongs in the United States more generally, and at the University of Texas, Austin, specifically.

In essence, the Supreme Court's assumptions about race in *Fisher* only worked to reinforce white privilege by identifying the experiences of Whites as the normative standard by which all others are to be evaluated.⁹³ In so doing, the Court ended up "conferring a preference for applicants for whom race does not matter,"⁹⁴ or more accurately, for those who do not suffer the traditional harms

90. 78 F.3d 932 (5th Cir. 1996).

91. *Fisher*, 133 S.Ct. at 2416.

92. U.S. CENSUS BUREAU, THE AMERICAN COMMUNITY—HISPANICS 2004, AMERICAN COMMUNITY SURVEY REPORTS 6 (2007).

93. See Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2012-13 (1995) (articulating the "transparency phenomenon," which results in decisions being based upon white norms that many whites understand as race neutral). The operation of white norms and white privilege within the affirmative action context have been deftly addressed in recent scholarship. See James, *supra* note 83, at 470-79.

94. Carbado & Harris, *supra* note 79, at 1168.

stemming from structural racism. In all, the Court failed to challenge white privilege and colorblind rhetoric that works to reify current racial hierarchies. This failure to acknowledge the meaningfulness of race within the admissions scoring process at the University of Texas, Austin ignores and discounts the lived experience of many people of color in the United States.

C. Fisher's Modest Dissent and Justice Thomas' Misplaced Analogies

In *Fisher*, Justice Ginsburg dissented, and Justices Thomas and Scalia wrote separate concurring opinions. Each of these opinions could have moved equality jurisprudence forward by clarifying how race-conscious admissions practices should be reconciled with modern conceptions of equal protection. Yet Justice Ginsburg missed this opportunity, Justice Scalia wholesale rejected it, and Justice Thomas confused the contemporary equality conversation by relying significantly on ahistorical analogies in his analysis of the University of Texas's use of race. Taken together, these opinions have not provided balanced or nuanced approaches to assist in deciding future cases.

1. Justice Ginsburg: Questioning Neutrality and Dissenting Without Raising the Race Question

The other *Fisher* opinions failed to remedy the majority's avoidance of substantive questions regarding the acceptable contours of constitutionally-sound considerations of race in admissions. Justice Scalia's one-paragraph opinion need not be discussed at length because he merely wrote to state that the Court was not asked to overturn *Grutter*—a result he supports and that many commentators predicted would occur when *Fisher* was granted certiorari. In contrast, Justice Ginsburg's dissent claimed that the Fifth Circuit opinion complied with the *Grutter* decision. She, however, did not provide compelling or detailed support for this claim. In her *Gratz* dissent, by contrast, she strongly stated: "The stain of generations of racial oppression is still visible in our society. . . , and the determination to hasten its removal remains vital."⁹⁵ Despite her failure to reiterate this point or similar points regarding the significance of racial disparities that still remain in this country in *Fisher*,⁹⁶ her dissent was nevertheless critical because it was the only direct challenge to the majority's controlling argument—that *Grutter* requires a more robust application of the "narrow tailoring" prong of strict scrutiny.

95. *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003).

96. *Id.* at 299–300.

Justice Ginsburg's more significant, and perhaps more controversial point in her *Fisher* dissent was that the majority was misguided in framing the debate over the University of Texas program as involving a choice between race-conscious admissions and the Texas Ten Percent Plan. Specifically, she stated: "I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious,"⁹⁷ and "it [the Texas Ten Percent Plan] was adopted with racially segregated neighborhoods and schools front and center stage."⁹⁸ According to Justice Ginsburg, the Texas Ten Percent Plan is not a "race neutral" program. This claim acknowledges that ostensibly race-neutral admissions practices have likely been so labeled to achieve diversity in the wake of court decisions invalidating explicitly race-conscious methods.⁹⁹ This claim also undoubtedly complicates the judicial landscape moving forward. On the one hand, Justice Ginsburg's pronouncement is designed to influence future cases by pointing out the fallacy of the Court's attempt to argue that race-conscious admissions are unnecessary given the availability of race-neutral alternatives. Consistent with her *Gratz* dissent, this argument is made in support of transparent considerations of race in admissions.¹⁰⁰ Nevertheless, this argument also has a potential downside. As previously noted, if the intent behind the Texas Ten Percent Plan was to improve minority enrollment, then one could argue that it should be subject to strict scrutiny rather than rational basis review.¹⁰¹ This claim seems somewhat contradictory when one considers cases where the Court has ignored evidence of disparate racial impact for constitutional claims because the government's actions or the relevant statutory language were facially neutral and

97. *Fisher*, 133 S.Ct. at 2433 (Ginsburg, J., dissenting).

98. *Id.*

99. For example, the Texas Ten Percent Plan was formed in the wake of *Hopwood v. Texas*, *supra* note 90, which struck down race-conscious admissions in the Fifth Circuit. Kim Forde Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2332–33, (2000). A recent article, however, has questioned when the race-neutral form of legislation, rather than its race-conscious objective, should provide a basis for strict scrutiny to be applied. Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525 (2013).

100. See *Gratz*, 539 U.S. at 302–05. Like Justice Ginsburg, others have argued that the more formulaic consideration of race at issue in *Gratz* was superior to the individualized review approved in *Grutter*. Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 519–20 (2007).

101. See Mazrui, *supra* note 99, at 2388 ("[T]he use of race-neutral classifications as a proxy for racial minorities as a proxy for diversity would also involve a discriminatory purpose."); Brian Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277 (2007). One scholar has recently described this tension between race-neutrality and race-consciousness in the Texas Ten Percent Plan as a paradox for both supporters and detractors of affirmative action policies. Leslie Y. Garfield, *The Paradox of Race-Conscious Labels*, 79 BROOK. L. REV. 1523 (2014).

the Court was unwilling to infer a discriminatory purpose.¹⁰² In the future, however, critics are likely to cite to Justice Ginsburg's dissent as a reason to interrogate admissions plans based on their presumed improper purpose rather than their facial neutrality.¹⁰³

Justice Ginsburg's dissent, however, might have been more helpful had she included either a more particularized defense of why the Texas Ten Percent Plan was sufficiently narrowly tailored or otherwise addressed the continuing constitutionality of race-conscious decisionmaking in education. The *Grutter* opinion borrowed the diversity rationale from *Bakke* and premised the importance of diversity, in part, on its importance to business and military interests.¹⁰⁴ It would have been much more useful to future cases if Justice Ginsburg had spent some time describing the forces that make race-conscious admissions necessary and why these programs remain consistent with the goals of equal protection.

Had she been so inclined, Justice Ginsburg could have also pointed out for the Court that the Texas Ten Percent Plan cannot be separated from race in light of residential and, thus, school segregation in Texas. It is hard to separate race and the consequences of our social structure from the lives of many people of color, which in turn makes it impossible to evaluate the application of any student or any person's life without taking race into account. Put simply, race and racism infect and affect all aspects of our lives, whether our privilege allows us to ignore them or whether our disadvantage forces us to confront them. As Professor Neil Gotanda explained in his formative article, *A Critique of "Our Constitution Is Colorblind,"* "any revised approach to race and the Constitution must explicitly recognize that race is not a simple, unitary phenomenon. Rather . . . race is a unique social formation with its own meanings, understandings, discourses, and interpretive frameworks. As a socially constructed category with multiple meanings, race cannot be easily isolated from lived social experience."¹⁰⁵

2. Justice Thomas: Concurring Through the Lens of (Contested) History

Unlike Justice Ginsberg's dissent, Justice Thomas's concurrence provided a detailed account of how race-based affirmative action should be reconciled with the Fourteenth Amendment's equality mandate. Justice Thomas concurred in

102. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976).

103. See e.g., Ilya Somin, *Fisher, The Texas Ten Percent Plan, and "Race-Neutral" Alternatives to Affirmative Action*, VOLOKH CONSPIRACY (June 24, 2013, 12:41 PM), <http://www.volokh.com/2013/06/24/fisher-the-texas-ten-percent-plan-and-race-neutral-alternatives-to-affirmative-action>.

104. *Grutter*, 539 U.S. at 308.

105. Gotanda, *supra* note 86, at 63.

the judgment because he agreed that the Fifth Circuit incorrectly applied strict scrutiny but wrote separately to assert that race-based affirmative action is categorically unconstitutional. Most of his opinion, however, centered on justifying the overturning of *Grutter*. Justice Thomas believes very few governmental considerations of race should withstand judicial review, though he would support the use of racial classifications to support “pressing public necessity.”¹⁰⁶ He contend- ed that this standard was met by the national security concerns at stake in *Korematsu*. Justice Thomas also endorsed the race considerations in *Richmond v. Croson* to remedy past discrimination where there was a strong basis in evidence supporting the need of the program.¹⁰⁷ This standard, however, is unlikely to be met without specific proof of continuing discrimination being carried out by an identifiable actor. Because of Justice Thomas’s beliefs about the very limited ways the state can or should consider race, he interprets *Grutter* as a radical departure from an acceptable standard of racial classification.

Justice Thomas expanded his attack on *Grutter* through comparisons to other cases and circumstances where he believes race was improperly considered. His analogies, however, are somewhat controversial. He first attacked the concept of the diversity rationale itself by citing to *Brown v. Board of Education*¹⁰⁸ for the proposition that “the argument that education benefits justify racial discrimination was advanced in support of racial segregation in the 1950’s.”¹⁰⁹ He went on to compare contemporary supporters of affirmative action with segregationists and maintained that their specific justifications—claims related to creating leaders, improving interracial relations, and understanding such practices as temporary—were substantially congruent.¹¹⁰ He made a final historical argument by analogy to support his belief that it is nearly impossible to discern when race-based decisions help or hurt minorities. Justice Thomas equated affirmative action advocates who claim such programs involve so-called benign considerations of race with slaveholders and segregationists who claimed racial segregation was beneficial for black children.¹¹¹ Then, Justice Thomas articulated a modern example of the harm such programs produce for minorities by citing to studies of “mismatch”—the negative consequences and stigma produced from purportedly underprepared minority students being undeservedly admitted into elite institutions.¹¹² For many, Justice Thomas’s concurring opinion was ahistorical, mis-

106. *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944).

107. *Fisher*, 133 S.Ct. at 2423.

108. 347 U.S. 483 (1954).

109. *Fisher*, 133 S.Ct. at 2424.

110. *Id.* at 2424–27.

111. *Id.* at 2429–30.

112. *Id.* at 2430–32.

leading, and rife with contradictions. Indeed, there are too many contradictions to discuss in this short Article, but we highlight just a few examples.

First, as Justice Thomas compared the arguments of segregationists to the supporters of affirmative action, he simultaneously referenced research concerning mismatch theory. Mismatch theory posits that African Americans and Latinos would perform better in college and beyond if they went to schools for which their scores indicate they would be better matched. Justice Thomas and other proponents, however, never raised any concerns about ostensibly mismatched white students under this theory.¹¹³ Specifically, Justice Thomas never raised any concerns about students like Abigail Fisher, who would have been a mismatched student had she been admitted to and enrolled at the University of Texas, Austin. In its Supreme Court brief, the University of Texas, Austin asserted that Fisher, who had an Academic Index score of 3.1, “would not have been admitted to the Fall 2008 freshman class even if she had received a ‘perfect’ [Personal Achievement Index (PAI)] score of 6.”¹¹⁴ In fact, Ms. Fisher was also denied admission to the University’s 2008 summer freshmen admissions program, in which 168 African Americans and Latinos with AI/PAI scores equal to or higher than Fisher’s were also denied admission.¹¹⁵ Moreover, Fisher’s SAT score of 1180 would

113. See generally Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004). Within legal academia, Sander’s theory has been significantly criticized. See, e.g., William Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Lack of Empirical Evidence and Logic Supporting Mismatch*, 92 TEXAS L. REV. 895 (2014) (reviewing RICHARD H. SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT* (2013)); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*, 57 STAN. L. REV. 1807 (2005) (refuting Sander’s claim that mismatch, which is fueled by affirmative action, leads to fewer black lawyers); David Wilkins, *A Systematic Response to Systematic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005). Additionally, there are other university admissions policies, such as legacy programs that favor the children of alumni, which create types of advantage for applicants that go largely uncontested by the Court. Based purely on the racially disproportionate numbers of Whites who have attended college throughout U.S. history—numbers themselves influenced by opportunities being foreclosed to minorities until quite recently—the legacy privilege confers a benefit that is racialized without ever being considered in this way. On this point, see Mark S. Brodin, *The Fraudulent Case Against Affirmative Action—The Untold Story of Fisher v. University of Texas*, 62 BUFF. L. REV. 237, 240–41 (2014) (“We of course have always had (with nary a complaint) ‘affirmative action’ for certain privileged groups. In higher education, these include athletes (especially those on the coach’s recruiting list), ‘legacies’ (dubbed ‘affirmative action for rich white people’), ‘development cases,’ oboe players, applicants from farm states, children of faculty, etc.” (footnotes omitted)).

114. Brief for Respondents at 15–16, *Fisher v. Univ. of Tex.* at Austin, 133 S.Ct. 2411 (2013) (No. 11-345) (internal quotation marks omitted). Fisher’s exact PAI is in a sealed brief. *Id.* at 15.

115. For example, the *Fisher* Brief stated:

Although one African-American and four Hispanic applicants with lower combined AI/PAI scores than petitioner’s were offered admission to the summer program, so were 42 Caucasian applicants with combined AI/PAI scores identical to or lower than petitioner’s.

have placed her below at least 84 percent of the summer-program students at UT Austin in 2008.¹¹⁶

Moreover, Justice Thomas and other opponents of affirmative action fail to acknowledge that advocating mismatch theory can be viewed as supporting racial discrimination. While Justice Thomas tries to liken affirmative action supporters to segregationists, he completely fails to acknowledge that same comparison can be made more forcefully between the proponents of mismatch theory and segregationists. After all, unlike proponents of affirmative action, whose arguments center on the benefits of racial integration through diversity programs, proponents of mismatch theory arguably make claims that are akin to those of segregationists.¹¹⁷ Indeed, much like past segregationists argued that racially segregated schools provided the best learning environments for African Americans, mismatch proponents argue that institutions without affirmative action—schools that are less integrated—would be more suitable learning environments for black students. Furthermore, mismatch proponents indicate that their form of discrimination—worrying about mismatch for African Americans but not for

In addition, 168 African-American and Hispanic applicants in this pool who had combined AI/PAI scores identical to or *higher* than petitioner's were *denied* admission to the summer program.

Id. at 15–16.

116. Compare *id.* at 15 (identifying Fisher's SAT score of 1180), with Univ. of Tex. at Austin Office of Admissions, *The Performance of Students Attending The University of Texas at Austin as a Result of the Coordinated Admission Program (CAP): Students Applying as Freshmen 2008*, at 4 (Mar. 11 2011), available at <http://www.utexas.edu/student/admissions/research/CAPreport-CAP08.pdf> (demonstrating that a sum of 84 percent of the 2008 summer-program freshmen at UT Austin had SAT scores of 1200 or higher). See also Kidder & Onwuachi-Willig, *supra* note 113, at 937 (noting that Richard Sander, the primary proponent of mismatch theory, argued in his book that “Hispanics who are admitted due to preferences typically enter with markedly less academic preparation,” and then cited as his supporting evidence that in 2009 Latinos admitted outside the Ten Percent Plan had SAT scores at the 80th percentile nationally in 2009, compared to the 89th percentile for whites and 93rd percentile for Asian Americans, when Fisher's SAT score itself was equivalent or lower to the Latino SAT mean score that Sander and Taylor cited as primary evidence of “markedly less academic preparation” (quoting Brief Amici Curiae for Richard Sander and Stuart Taylor, Jr. in Support of Neither Party, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345))). Sander and Taylor were referencing SAT percentile ranks for scores on the 2400-point scale that includes the writing section, but the sparse record in *Fisher* only seems to report her SAT of 1180 on the 1600-point scale (500 on critical reading; 680 on math). Joint Appendix at 41a, *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411 (2013) (No. 11-345). We use the terms “or lower” because it is unclear if Abigail Fisher took the SAT writing test, but if she did, then her discrepant scores between reading and math provide some reason to think that her SAT score on a 2400-point scale (including writing) was not at the 80th percentile (1780) nationally. See College Board, *SAT Percentile Ranks for Males, Females, and Total Group: 2008 College Bound Seniors—Critical Reading + Math + Writing*, http://professionals.collegeboard.com/profdownload/sat_percentile_ranks_2008_composite_cr_m_w.pdf.

117. We are not making such claims against mismatch proponents.

Whites and thus separating black students from Whites—is what is best for African Americans. In sum, Justice Thomas's views on benign and malicious discrimination leave his concurrence with multiple layers of inconsistency.

Second, Justice Thomas's declarations in his concurring opinion fail to account for the realities of race even as he has previously employed them in opinions and his own writings, including his autobiography. For instance, in his *Fisher* concurrence, Justice Thomas proclaimed, just as he did in *Grutter*, that “[t]here is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' assertion that segregation yielded those same benefits.”¹¹⁸ Yet years before, during a conference on *Missouri v. Jenkins*,¹¹⁹ Justice Thomas made a statement that seems to reveal that he at least intuitively realizes the distinctions between the two. He announced to his colleagues: “I am the only one at this table who attended a segregated school.”¹²⁰ In fact, he was not the only justice who attended segregated schools, because all or nearly all of his colleagues at the time had attended all-white schools. Intuitively, Justice Thomas understood that his experience—his type of segregation—was not the same as his colleagues' because of the unequal resources and stigma that attached to such inequities. Justice Thomas's additional statements demonstrate this understanding, for he continued:

And the problem with segregation was not that we didn't have white people in our class. The problem was that we didn't have equal facilities. We didn't have heating, we didn't have books, and we had rickety chairs. All society owed us [were] equal resources and an equal opportunity to make something of ourselves. . . . The evil of segregation was that black students had inferior facilities, not that they were denied the chance to go to school with white students. . . . All my classmates and I wanted . . . was the choice to attend a mostly black school or mostly white school, and to have the same resources in whatever school we chose.¹²¹

This sentiment is arguably the most significant missed opportunity in the *Fisher* opinions: the opportunity to link the segregation and discrimination experienced by Justice Thomas and civil rights icons such as Heman Sweatt, a black man and grandson of slaves who fought for and won the right to gain admission to the University of Texas Law School in 1950,¹²² to the very different but still dis-

118. *Fisher*, 133 S.Ct. at 2428 (Thomas, J., concurring).

119. 515 U.S. 70 (1995).

120. Jeffrey Rosen, *Moving On*, NEW YORKER, Apr. 29, 1996, at 66.

121. *Id.*

122. Brief of the Family of Heman Sweatt as Amicus Curiae in Support of Respondents, at p.30, *Fisher v. Univ. of Tex.* at Austin, 133 S.Ct. 2411 (2013) (No. 11-345). In a case argued by

heartening discrimination that so many students of color, as well as white students, are experiencing today. As the Sweatt family highlighted in its amicus brief: “Public schools in Texas’s major cities are even more highly segregated [today]. In 2011–12, only 8.1% of all students in the 279-school Houston Independent School District were white. At Jack Yates High School, from which Heman Sweatt graduated, only 6 of the 1,179 students that year—or 0.5%—were white, and 91.7% were African American.”¹²³ The family explained that such racial segregation in public schools is not what the Court envisioned when it asserted in *Sweatt v. Painter* that “that education ‘cannot be effective in isolation from the individuals and institutions with which the law interacts’; it ‘cannot be removed from the interplay of ideas and exchange of views with which the law is concerned.’”¹²⁴ According to the Sweatt family, such interplay and exchange requires the consideration of, not the avoidance of, race. Such considerations of race, the family explained, are distinct from the considerations of race that nearly prevented Heman Sweatt from obtaining admission to the University of Texas Law School in 1950.¹²⁵

Clearly, Justice Thomas believes racial classifications are never benign and that history is pertinent to exposing the dangers of state considerations of race in education. The problem is that he ignores his personal history and uses history more generally to suggest that justifications for considering race that were once advanced by segregationists share some commonality with the arguments of proponents of affirmative action. Unlike the Sweatt family, Justice Thomas claims to see no meaningful difference in using race as a tool for inclusion or segregation, despite the historical significance of the Fourteenth Amendment’s intended purpose of integrating freed slaves into society. Also absent from his analysis are any references to generations of institutional racialized inequalities—inequalities not likely to be remedied with either of the race-conscious standards Justice Thomas claims are acceptable under precedent. For example, scholars have described the dangers of regarding racial inequality as produced only through the willful actions of self-motivated individuals, rather than considering the “historical-structural, state-based account.”¹²⁶ Specifically, they argue: “As this historical narrative sug-

Thurgood Marshall in 1946, the Court ordered that Mr. Sweatt be admitted to the University of Texas Law School because the “law school for negroes” that Texas planned to open in 1947 would not provide an education “substantially equal to that which he would receive if admitted to the University of Texas Law School.” *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

123. Brief of the Family of Heman Sweatt, *supra* note 122.

124. *Id.* at 17 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

125. *Id.* at 37; *see also* *Sweatt v. Painter*, 339 U.S. 629 (1950).

126. Michael K. Brown & David Wellman, *Embedding the Color Line: The Accumulation of Racial Advantage and the Disaccumulation of Opportunity in Post-Civil Rights America*, 2 DU BOIS REV.

gests, federal social policies have combined with White control of labor markets to promote White accumulation of economic advantages while contributing to Black disaccumulation through segregation and disinvestment.”¹²⁷ The history of racialized distribution of resources continues to create material deficits in the lives of minorities today, especially African Americans.¹²⁸ Given Justice Thomas’s penchant for connecting present considerations of race to the past, the question that proponents of affirmative action should next pose to him is why it is unconstitutional for the state to more broadly consider race-conscious remedies today when history reveals longstanding, race-conscious origins to the problems.

CONCLUSION: THE VIABILITY OF RACE-BASED AFFIRMATIVE ACTION MOVING FORWARD

In economic theory, an opportunity loss is the value of a lost chance or profit forgone through actions taken that did not permit it to be realized. The *Fisher* opinions resulted in lost opportunities arising from the Court’s failure to resolve critical questions relevant to the future of race-based affirmative action in education. A number of these questions—such as the resolution of jurisdictional issues, what constitutes a critical mass for diversity purposes, and whether the Texas Ten Percent Plan will continue to be treated as race-neutral moving forward—may be litigated in future affirmative action challenges. Alongside these questions, we have attempted to identify other topics important to reconciling race-conscious decisionmaking in higher education admissions with the Equal Protection Clause.

Our hope is that the Court will come to grips with the myriad ways that race shapes opportunities and outcomes in American life. To do so, the Court

187, 189 (2005); *see also* JOHN A. POWELL, RACING TO JUSTICE: TRANSFORMING OUR CONCEPTIONS OF SELF AND OTHER TO BUILD AN INCLUSIVE SOCIETY 79 (2012) (“Privilege is distributed and mediated through structures, language, power and institutions that always outrun the control of any given individual.”).

127. Brown & Wellman, *supra* note 126, at 201; *see also* WILLIAM JULIUS WILSON, *Structural and Cultural Forces that Contribute to Racial Inequality*, in MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY 1-24, 17 (2009) (“One of the effects of living in racially segregated neighborhoods is exposure to group-specific, cultural traits . . . that emerged from patterns of racial exclusion and that may not be conducive to factors that facilitate social mobility.”); Thomas W. Mitchell, *Destabilizing the Normalization of Rural Black Land Loss: A Critical Role for Legal Empiricism*, 2005 WIS. L. REV. 557 (2005) (tracking government’s differential financial treatment across race of rural southern landowners and the high resulting levels of black land loss).

128. *See, e.g.*, Barnes, Chemerinsky & Jones, *supra* note 8, at 981-92 (detailing racial gaps in income, wealth accumulation, home ownership, educational attainment, and treatment within the criminal justice system).

will need to do much more than merely question whether racial classifications may operate in a benign manner. Instead, the Court will have to concern itself in a more robust way than it previously has with the societal deficits of those who have been marked by minority racial status and how these deficits are reproduced institutionally and structurally, rather than by individual decisions. So while the Court has moved beyond the proffered biological origins of race that were prevalent during the time of *Plessy*,¹²⁹ they must do more to understand the post-*Brown* social construction of race. The modern concept of race “more meaningfully reflects cultural and cognitive frames than any objective differences between people,”¹³⁰ but it still involves identifying a subgroup so that their place in a hierarchical society can be justified. Mismatch theory is one example of how a belief that certain bodies—marked by minority racial classifications—should be limited to certain places is operationalized. It is for this reason that a more critical analysis of how affirmative action interacts with equality would ensue from the Court moving toward understanding constructions of race as the purpose for, rather than merely a result of, an assignment system.¹³¹

With regard to expanding the scope of its analysis, the Court will need to pay closer attention to population demographics, statistics reflecting the continuing consequences of racial segregation in America, and the ways in which belonging to a minority racial group creates challenges relevant for deciding the merits of distributing opportunity. Neither *Fisher*, nor *Shelby County v. Holder*¹³²—a recent case concerning voting rights where the Court underestimated the influence of America’s history of racism on contemporary life—provide reasons for proponents to hope that affirmative action programs will survive moving forward. Real change will only occur when the terms of the debate shift, likely through appointments that disrupt the Court’s current conservative majority, in a manner that allows for interpretations of equality under the Fourteenth Amendment that do not require dissimilar life circumstances to be treated similarly. While this may contradict conservative commitments to colorblindness, we believe that concept is often applied ahistorically.¹³³

129. See Ian F. Haney-López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 9-10 (1994); Jennifer Eberhardt, *Imaging Race*, 60 AMERICAN PSYCHOL. 181, 186-87 (2005).

130. CHARLES EPP ET AL., PULLED OVER: HOW POLICE STOPS DEFINE RACE AND CITIZENSHIP 41 (2014) (footnote omitted).

131. See VILNA BASHI TREITLER, THE ETHNIC PROJECT: TRANSFORMING RACIAL FICTION INTO ETHNIC FACTIONS 11 (2013) (“Racialized societies are inherently hierarchical—the purpose of race is to assign differential human value to human lives.”).

132. 133 S.Ct. 2612 (2013).

133. We find the following approach to colorblindness more desirable:

The long history of race discrimination in America that is bounded between the decisions in *Plessy* and *Brown* is one where opportunities for non-Whites were limited and decidedly unequal. That the period where opportunities were somewhat more evenly distributed was cut so short by the rise of a universalist conception of equality—a conception, which is remarkable for the fact that there was little judicial acknowledgment of it during the period of “separate but equal”—is regrettable. Anticlassification, colorblind, and postracial approaches to interpreting Fourteenth Amendment equality now treat the act of being classified by race as the problem. The real problem, we have tried to argue here, is not that one may be classified by race, but the negative treatment and limited opportunities extended to persons who belong to unfavorably viewed racial groups. In other words, classification itself is not necessarily a proxy for an invidious motive. Opportunities being afforded and denied based upon the stigmatized perceptions tied to certain racial groups is the problem. At bottom, affirmative action programs within education, which may well not survive another review in the Supreme Court, are one of very few legal means for fighting this injustice. For those who would suggest that it is the affirmative action programs that are stigmatizing, we agree with the words of Heman Sweatt and his family: “Stigma attaches not when one is recognized as a member of a racial or ethnic group; stigma attaches when one is seen as nothing more.”¹³⁴

I do not even want to insist that the ideal government would at all times and at all places be entirely blind to color . . . What is needed, rather, is the development of a better grammar of race, a way through which we can at once take account of it and not punish it.

STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 227–28 (1991).

134 Brief of the Family of Heman Sweatt, *supra* note 122, at 37.