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The Smug Assumption of Reverse Discrimination: Abigail Fisher and *Fisher v. University of Texas at Austin*

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The Smug Assumption of Reverse Discrimination: Abigail Fisher and *Fisher v. University of Texas at Austin*

R. Nicholas Rabold¹

*“Thus it is not enough just to open the gates of opportunity.
All our citizens must have the ability to walk through those gates.”²*

ABSTRACT

Many expected Fisher v. University of Texas at Austin (Fisher I), 133 S. Ct. 2411 (2013)—an appeal from the Court of Appeals for the Fifth Circuit upholding the University of Texas at Austin’s race-conscious admissions program—to sound the death knell for race-based affirmative action in higher education. Instead, in remanding the case back to the Fifth Circuit, the Supreme Court of the United States upheld the consideration of race in college admission programs, so long as such use could satisfy strict scrutiny. Nonetheless, Fisher I concerned academics and practitioners with its potentially limiting language, leaving the future of race-based affirmative action programs uncertain. When the Fifth Circuit again held the University of Texas at Austin’s race-conscious admissions program was constitutional, the Fisher found its way back to the Supreme Court.

Oral arguments for Fisher v. University of Texas at Austin (Fisher II), 136 S. Ct. 2198 (2016) revived concern for the abolition of race-based affirmative action policies in the United States. In ruling, however, the Supreme Court again upheld the constitutionality of race-based affirmative action programs in higher education, this time also explicitly approving of the program used by the University of Texas at Austin. Although the decision was hailed as a great victory for proponents of affirmative action—and it was—this Note argues Fisher II’s admittedly great precedential value is weakened by the case’s failure to confront certain legal fictions enveloping the law of affirmative action. Specifically, this Note argues it is time for the Court to disregard false equivalences between positive and negative racial preferences, recognize the problems associated with the generalized grievances alleged by opponents of affirmative action, and permit universities even greater discretion to explicitly consider flexible racial quotas in their admission programs.

¹ Editor-in-Chief, KENTUCKY LAW JOURNAL; J.D. Candidate, 2017, University of Kentucky College of Law. The author would like to dedicate this piece to all victims of injustice, institutional and otherwise. Special thanks goes to the author’s parents, for their unwavering, absolute love and support. To the Editors of the KENTUCKY LAW JOURNAL for their tireless work. To the Faculty and Staff of the University of Kentucky College of Law for a fabulous legal education. And to the author’s best friend, George Edward “Trip” Carpenter III, for his enduring friendship and affection. It sure is pretty!

² Lyndon B. Johnson, President of the U.S., Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=27021> [<https://perma.cc/9HTX-JN9S>]).

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INTRODUCTION

*Fisher v. University of Texas at Austin*² grew out of an appeal from a ruling of the United States Court of Appeals for the Fifth Circuit that upheld the University of Texas at Austin's race-conscious admissions program.³ At the Supreme Court, the Fifth Circuit's ruling in *Fisher I* was challenged on two general bases. First, the petitioner challenged the ruling on the basis that the University of Texas at Austin's use of affirmative action was prima facie unconstitutional.⁴ Second, on the basis that the Fifth Circuit had improperly applied *Grutter v. Bollinger*.⁵ In ruling, the Supreme Court vacated the decision of the Fifth Circuit, refusing to take a position on whether the University of Texas at Austin's race-conscious admissions program was unconstitutional.⁶ Rather, the Court remanded the case back to the Fifth Circuit, ordering that court to reevaluate its decision properly under *Grutter v. Bollinger* and *Regents of the University of California v. Bakke*.⁷ In so ruling, the Supreme Court upheld the constitutionality of race-conscious admission programs

² For purposes of this Note, the author refers to the 2013 Supreme Court opinion as *Fisher I*; the author refers to the 2016 Supreme Court opinion as *Fisher II*.

³ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 246–47 (5th Cir. 2011).

⁴ Brief for Petitioner at 18–22, *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013) (No. 11-345), at *18–22. Petitioner specifically argued the University of Texas at Austin used its race-conscious admissions program for purposes of racial balancing, which is unconstitutional under *Grutter v. Bollinger*; petitioner also attacked the race conscious admissions program as not based on a compelling governmental interest and as being overly broad. Furthermore, petitioner argued the University of Texas at Austin was improperly applying critical mass theory, and that the University's asserted interest in classroom diversity also is not a compelling interest:

The proper base for measuring “critical mass” is the “student body,” not the classroom. As noted above, the point of *Grutter* was to permit universities to create a “critical mass” of minority students on the campus to foster exchange of ideas and experiences. But *Grutter* nowhere suggests that every classroom must have a “critical mass” of minority students.

Id. at *19 (citation omitted) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003)). Although Justice Kennedy did not point this out in his opinion, there is a logical flaw here. It is true that a critical mass of diverse students in *one* classroom will not necessarily correlate with a critical mass of diverse students at an entire university. But it is also true that a critical mass of diverse students in *all* classrooms will correlate with a critical mass of diverse students at a university. Therefore, it seems perfectly reasonable to rely on classroom diversity—broadly speaking—as an indicium of campus-wide diversity. Further, the educational benefits that flow from a diverse student body will of course manifest themselves most clearly in classrooms, where students interact with each other for purposes of education and thought.

⁵ *Id.* at 23–24; see also *Grutter*, 539 U.S. 306; *Gratz v. Bollinger*, 539 U.S. 244 (2003). *Fisher* argued “even if UT were entitled to more deference than *Grutter* suggests, the Fifth Circuit erred by ‘distort[ing] narrow tailoring into a rote exercise in judicial deference.’” Brief for Petitioner, *supra* note 4, at 23 (quoting *Fisher v. Univ. of Tex. at Austin*, 644 F.3d 301, 306 (5th Cir. 2011) (Jones, J., dissenting)).

⁶ See *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2421–22 (2013).

⁷ See *id.* at 2417–19; *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

in the context of higher education, but the Court also emphasized the constitutional limitations of such a program.⁸

Scholarly commentary immediately following the release of the ruling in *Fisher I* was critical. Academics expressed concern for the potential new limitations on affirmative action.⁹ Some scholars argued subtle differences in the language of *Fisher I*—when compared with its precursors—could make affirmative action programs more difficult to structure and implement.¹⁰ These concerns, however, may have been temporarily assuaged by the ruling of the Fifth Circuit on remand, where the University of Texas at Austin’s race-conscious admissions program was again upheld.¹¹ In reapplying *Bakke* and *Grutter*, the Fifth Circuit found the University of Texas at Austin’s race-conscious admissions program was constitutionally sound: “We are satisfied that UT Austin has demonstrated that race-conscious holistic review is necessary to make the Top Ten Percent Plan workable by patching the holes that a mechanical admissions program leaves in its ability to achieve the rich diversity that contributes to its academic mission.”¹²

But it was not over at the Fifth Circuit. After being denied a rehearing en banc,¹³ the case was again appealed to the Supreme Court. And, again, certiorari was granted. *Fisher II* was argued before the Court on December 9, 2015;¹⁴ the opinion was released six months later—following the death of Justice Antonin Scalia¹⁵—on June 23, 2016.¹⁶ Yet again, the Supreme Court upheld race-conscious

⁸ See *Fisher I*, 133 S. Ct. at 2421–22. A race-conscious admissions program must meet strict scrutiny to be constitutional. This requires such a program to be narrowly tailored to further a compelling governmental interest:

In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context: the benefits of a student body diversity that “encompasses a . . . broa[d] array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”

Id. at 2421 (quoting *Bakke*, 438 U.S. at 315). This standard imposes significant limitations on the manner in which such a program may be expressed, as this Note shall discuss later.

⁹ See generally RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW (Vintage Books 2015) (2013); Scott Warner, Pete Land, & Kendra Berner, *The U.S. Supreme Court’s Decision in Fisher v. University of Texas at Austin: What It Tells Us (and Doesn’t Tell Us) About the Consideration of Race in College and University Admissions and Other Contexts*, FED. LAW., Aug. 2013, at 48, 54–55 (discussing the implications of *Fisher I*).

¹⁰ See, e.g., Richard Sander & Aaron Danielson, *Thinking Hard About “Race-Neutral” Admissions*, 47 U. MICH. J.L. REFORM 967, 967 (2014).

¹¹ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 660 (5th Cir. 2014).

¹² *Id.* at 657. The University of Texas at Austin’s Top Ten Percent Plan, along with the details of its race-conscious admissions program, are discussed in Section IA.

¹³ *Fisher v. Univ. of Tex. at Austin*, 771 F.3d 274, 275 (5th Cir. 2014).

¹⁴ *Fisher v. University of Texas at Austin*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/> [https://perma.cc/YXW8-X7AV] (last visited Mar. 20, 2017).

¹⁵ Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0 [https://perma.cc/5VEE-JYVP].

admissions programs—affirmative action in the context of higher education—as constitutional.

Clarifying the rules meant to be extracted from *Fisher I* whilst reaffirming the fundamental principles of *Bakke* and *Grutter*, *Fisher II* provides hope for the future of affirmative action in higher education. Indeed, the ruling was a great success for proponents of affirmative action. But did the Court go far enough? The Supreme Court never resolved the matter of Abigail Fisher’s lack of standing, failing to mention the issue in either of the Court’s majority opinions.¹⁷ More important for purposes of this Note, however, the Supreme Court failed to directly address the root claim of Abigail Fisher’s challenge: that racial distinctions—no matter their purpose—are necessarily invidious, permitting the preservation of the legal fictions of “false equivalences” and “false standing” in the law of race-conscious affirmative action.¹⁸

It is the purpose of this Note to address Fisher’s root claim and its troubling repercussions. Part I details the facts and legal history of the *Fisher* cases, providing a brief overview of the legal impacts of the two decisions. Part II outlines the complex sociopolitical origins of race-based affirmative action in American law. Part III repudiates the three primary arguments offered against race-based affirmative action: colorblind constitutionalism, the merit and mismatch objections, and the stigma of objection. Part IV discusses the constitutional law surrounding modern affirmative action—and points out the legal fictions that envelop it. All of this will be followed by Part V, an analysis of *Fisher II* and its implications for the future of affirmative action in the context of higher education.

¹⁶ *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 136 S. Ct. 2198 (2016).

¹⁷ *Fisher*, 758 F.3d at 640. The *Fisher II* Court made a sly reference to the issue, stating “this case has been litigated on a somewhat artificial basis.” *Fisher II*, 136 S. Ct. at 2209.

¹⁸ There has been some debate on this assertion, but—because this Note is so timely—scholarly commentary on *Fisher II* remains limited. Regardless, many do take the position that Fisher’s legal challenges were intended to attack racial distinctions more broadly. See, e.g., Nikole Hannah-Jones, What Abigail Fisher’s Affirmative Action Case Was Really About, PROPUBLICA, <https://www.propublica.org/article/a-colorblind-constitution-what-abigail-fishers-affirmative-action-case-is-r> [https://perma.cc/YE94-LA4X] (last visited Apr. 28, 2017).

I. *FISHER I*: GROUNDLESS CHALLENGESA. *Facts of the Case*

Abigail Fisher (“Fisher”), a Texas resident and white woman,¹⁹ was denied admission to the University of Texas at Austin (“the University”) in 2008. She sued, claiming the University’s race-conscious admissions program violated the Equal Protection Clause of the Fourteenth Amendment.²⁰ The University uses a Top Ten Percent Plan to aid in determining admission,²¹ which “grants automatic admission to any public state college, including the University, to all students in the top 10% of their class at high schools in Texas that comply with certain standards.”²² Admittees through the Top Ten Percent Plan took eighty-one percent of the available seats in 2008.²³ Fisher, however, did not graduate in the top ten percent of her class.²⁴ As such, she was not automatically granted admission.²⁵ Instead, Fisher’s application was considered under the University’s “holistic review program, which looks past class rank to evaluate each applicant as an individual based on his or her achievements and experiences.”²⁶ Fisher “so became one of 17,131 applicants for the remaining 1,216 seats for Texas residents.”²⁷ Race is one among many factors considered as a part of the holistic review process.²⁸

¹⁹ From the outset, it should be noted that Fisher is not objecting to the consideration of sex in college admission. See generally Brief for Petitioner, *supra* note 4. As a white woman, it is possible that Fisher herself favors the use of sex-based affirmative action programs. Or, perhaps, Fisher and her counsel simply deny the distinct challenges that arise at the intersections of discrimination on the bases of race and sex, and the way in which such discrimination may be applied with virulent strength against women of color. See, e.g., Laura M. Padilla, *Intersectionality and Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 966 FORDHAM L. REV. 843 (1997) (discussing the intersectionality of discrimination on the bases of race and sex as applied to women of color). This reveals a fundamental flaw in Fisher’s argument, to be discussed later in this Note: that Fisher only objects to affirmative action programs where she perceives disadvantage as applied to *her*, a white woman.

²⁰ *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2417 (2013).

²¹ TEX. EDUC. CODE ANN. § 51.803 (West 2009).

²² *Fisher I*, 133 S. Ct. at 2416. As of mid-2016, “up to 75 percent of the places in the freshman class [of the University] are filled through the Plan.” *Fisher II*, 136 S. Ct. at 2206. “As a practical matter,” because admittees of the Top Ten Percent Plan are now limited to a statutory cap of seventy-five percent of total admittees, “a student actually needs to finish in the top seven or eight percent of his or her class in order to be admitted under this category.” *Id.*

²³ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* (footnote omitted).

²⁷ *Id.* (footnotes omitted).

²⁸ *Id.* at 638.

B. Fisher I at the Fifth Circuit and Supreme Court

Under current law, a race-conscious admissions program in the context of higher education may not be established to redress past discrimination.²⁹ This is so because, allegedly, “a university’s broad mission [of] education is incompatible with making the judicial, legislative, or administrative findings of constitutional or statutory violations necessary to justify remedial racial classification.”³⁰ Rather, the attainment of diversity in higher education “serves values beyond race alone.”³¹ As a “special concern of the First Amendment,”³² the academic mission of a university ought to be to provide an “atmosphere which is most conducive to speculation, experiment, and creation.”³³ A diverse student body in higher education not only helps to achieve these goals, but also ensures “enhanced classroom dialogue and the lessening of racial isolation and stereotypes.”³⁴ Thus, a compelling governmental interest exists for the “educational benefits that flow from a diverse student body” in the context of higher education.³⁵ So long as a university may demonstrate through its experience and expertise that “a diverse student body would serve its educational goals,” the motivations behind a race-conscious admissions policy are accorded deference.³⁶

But “[s]trict scrutiny does not permit a court to accept a school’s assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.”³⁷ Thus, despite the deference accorded to a university’s “educational judgment that . . . diversity is essential to its educational mission,”³⁸ race-conscious admissions policies—like all other racial classifications—must satisfy courts’ strict scrutiny:³⁹ “[W]hen government decisions ‘touch upon an individual’s race or ethnic background, he is

²⁹ *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2417 (2013).

³⁰ *Id.* (internal quotations omitted). This statement of law is deeply ironic. It presumes institutions of the highest level of scholarship, many of which are host to the academics who helped train current and past members of the Supreme Court and Federal Legislature, are incapable of understanding and proposing solutions to redress discriminatory wrongs. Thus, the scholars that are inept to make such evaluations on their own are the same scholars on whom Congress would call to explain the need for such remedial measures as affirmative action. Experts are suited to theorize, but only amateurs are suited to act.

³¹ *Id.* at 2418.

³² *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)).

³³ *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in judgment)).

³⁴ *Id.*

³⁵ *Id.* at 2417. But apparently, no such compelling governmental interest flows from remedying discrimination itself. *Id.*

³⁶ *Id.* at 2419.

³⁷ *Id.* at 2421.

³⁸ *Id.* at 2419 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

³⁹ *Id.* at 2419–21.

entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.”⁴⁰

“Race may not be considered unless the admissions process can withstand strict scrutiny.”⁴¹ To survive strict scrutiny, “[t]he University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal.”⁴² “On this point, the University receives no deference.”⁴³ Each applicant must be “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.”⁴⁴ Further, the reviewing court must verify that it is necessary for the university to use race to achieve diversity. Although “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,”⁴⁵ strict scrutiny does require a court to examine with care, and not defer to, a university’s “serious, good faith consideration of workable race-neutral alternatives.”⁴⁶ The burden lies on a university to demonstrate, “before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”⁴⁷

The Fifth Circuit, attempting to apply these rules as expressed by the Supreme Court in *Fisher I*, held the University’s race-conscious admissions program satisfied strict scrutiny: “The admissions procedures that UT adopted, modeled after the plan approved by the Supreme Court in *Grutter*, are narrowly tailored We are satisfied that the University’s decision to reintroduce race-conscious admissions was adequately supported by the ‘serious, good faith consideration’ required by *Grutter*.”⁴⁸ On appeal, however, the Supreme Court—applying the aforementioned rules to the facts of *Fisher I*—determined the Fifth Circuit misstepped.⁴⁹ The Fifth Circuit failed to apply the proper analysis.⁵⁰ The “Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications.”⁵¹ The Fifth Circuit’s opinion, therefore, was invalid. The case was remanded back to the Fifth Circuit for reconsideration: “The

⁴⁰ *Id.* at 2417 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)). As this Note will later discuss, strict scrutiny can result in a failure to identify certain positive and negative distinctions in racial classifications. There is, for instance, a distinction between a racial classification that seeks to remedy a discriminatory wrong and a racial classification that seeks to inflict a discriminatory wrong.

⁴¹ *Id.* at 2418.

⁴² *Id.* at 2420.

⁴³ *Id.*

⁴⁴ *Id.* (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)).

⁴⁵ *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003). For a thoughtful study on race neutral alternatives and Universities’ attempted use of such race neutral admissions programs, see Richard Sander & Aaron Danielson, *Thinking Hard About “Race-Neutral” Admissions*, 47 U. MICH. J.L. REFORM 967 (2014). Sander is a well-known sophist and proponent of the mismatch objection to race conscious admissions programs at universities. See *infra* Subsection V.B.ii.

⁴⁶ *Grutter*, 539 U.S. at 339.

⁴⁷ *Fisher I*, 133 S. Ct. at 2420.

⁴⁸ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

⁴⁹ See *Fisher I*, 133 S. Ct. at 2421.

⁵⁰ *Id.*

⁵¹ *Id.*

Court vacates that judgment, but fairness to the litigants and the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.”⁵²

C. Fisher II: *On Remand and Back*

On remand, following the Supreme Court’s mandate, the Fifth Circuit reevaluated the University’s race-conscious admissions program.⁵³ The Fifth Circuit, however, again found that the program survived a strict scrutiny analysis and did not violate the Fourteenth Amendment.⁵⁴ The Fifth Circuit also found that the University’s admissions program does not “function as an open gate to boost minority headcount for a racial quota. Far from it.”⁵⁵ “[T]he impact of the holistic review program on minority admissions is already narrow, targeting students of all races that meet both the competitive academic bar of admissions and have unique qualities that complement the contributions of Top Ten Percent Plan admittees.”⁵⁶ In addition, the University “initiated a number of outreach and scholarship efforts targeting under-represented demographics” by race-neutral means.⁵⁷ The University “implemented every race-neutral effort that its detractors now insist must be exhausted . . . in addition to an automatic admissions plan not required under *Grutter* that admits over 80% of the student body with no facial use of race at all.”⁵⁸ The Fifth Circuit concluded it is “settled that universities may use race as part of a holistic admissions program where it cannot otherwise achieve diversity,” and the University’s race-conscious admissions program satisfied the constitutional requirements for such a program.⁵⁹

The Fifth Circuit ruling in *Fisher II* was released on July 15, 2014.⁶⁰ A petition for a writ of certiorari was filed with the Supreme Court on February 10, 2015 and granted on June 29, 2015.⁶¹ Fisher voiced her hope for a different outcome: “I hope the justices will rule that [the University] is not allowed to treat undergraduate applicants differently because of their race or ethnicity.”⁶² Nonetheless, Gregory L.

⁵² *Id.*

⁵³ See generally *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014).

⁵⁴ *Id.* at 637.

⁵⁵ *Id.* at 646. Perhaps sensibly, the use of affirmative action in order to meet a pre-determined racial or ethnic quota is unconstitutional. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

⁵⁶ *Fisher*, 758 F.3d at 647.

⁵⁷ *Id.*

⁵⁸ *Id.* at 649.

⁵⁹ *Id.* at 660.

⁶⁰ *Id.* at 633.

⁶¹ *Fisher v. University of Texas at Austin*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/> [<https://perma.cc/7JZZ-RWUY>] (last visited Mar. 21, 2017); see also Adam Liptak, *Supreme Court to Weigh Race in Admissions*, N.Y. TIMES (June 29, 2015), https://www.nytimes.com/2015/06/30/us/supreme-court-will-reconsider-affirmative-action-case.html?_r=0 [<https://perma.cc/UG22-QT6A>] [hereinafter Liptak, *Supreme Court to Weigh Race in Admissions*].

⁶² Liptak, *supra* note 61.

Fenves, the president of the University, maintained that the race-conscious admissions process is constitutional: “[T]he university’s commitment to using race as one factor in an individualized, holistic admissions policy allows us to assemble a student body that brings with it the educational benefits of diversity Our admissions policy is narrowly tailored, constitutional and has been upheld by the courts multiple times.”⁶³

D. Fisher II: Back at the Supreme Court

At the December 9, 2015, oral arguments for *Fisher II*, it was unclear how the Supreme Court would decide the case. Without a doubt, however, it appeared clear that at least Justices Antonin Scalia⁶⁴ and Clarence Thomas were “ready to issue a major decision on the role race may play in government decision making.”⁶⁵ The ruling, however, upheld the use of race in college admissions.⁶⁶ Relying on his relatively conservative jurisprudential method, Justice Anthony Kennedy determined the University of Texas at Austin’s race conscious admissions program—developed in pursuit of the educational benefits of diversity—was constitutionally sound.⁶⁷ Indeed, “[a] university is in large part defined by those intangible ‘qualities which are incapable of objective measurement but which make for greatness.’”⁶⁸ Thus, “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”⁶⁹ Nonetheless, the Court held, “it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity.”⁷⁰

The surprise outcome of *Fisher II* came as an enormous relief to many advocates of affirmative action; especially considering many of those advocates “had entered the term simply hoping the court would not use the case to ban all uses of

⁶³ *Id.*

⁶⁴ Justice Scalia died on February 13, 2016. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), https://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html?_r=0 [https://perma.cc/FA8A-PG3W]. It is unclear precisely how his death impacted the outcome of *Fisher II*, although, in his absence, only seven justices participated in the ruling. See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2199 (2016). It is speculated that Justice Scalia would have dissented from the majority; he was a noted critic of affirmative action. See Adam Liptak, *Scalia’s Absence is Likely to Alter Court’s Major Decisions This Term*, N.Y. TIMES (Feb. 14, 2016), https://www.nytimes.com/2016/02/15/us/politics/antonin-scalias-absence-likely-to-alter-courts-major-decisions-this-term.html?_r=0 [https://perma.cc/UH5B-4BSK].

⁶⁵ Liptak, *Supreme Court to Weigh Race in Admissions*, *supra* note 61; see also John M. Husband, *Affirmative Action: The Debate Rages On*, COLO. LAW., Jan. 2015, at 39, 40; Warner, Land, & Berner, *supra* note 9, at 54–55.

⁶⁶ Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html?_r=0 [https://perma.cc/2TJG-HU5].

⁶⁷ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2215 (2016).

⁶⁸ *Fisher II*, 136 S. Ct. at 2214 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

⁶⁹ *Id.*

⁷⁰ *Id.*

affirmative action.⁷¹ Scholars at universities across the United States acclaimed the decision.⁷² Phil Trout, the president of the National Association for College Admission Counseling, exclaimed “I think there are going to be some parties tonight in high school counseling offices and in college admissions offices.”⁷³ The importance of *Fisher II*, however, is not limited to the victory that emerged from a predicted loss. Indeed, “in affirming the value of diversity, including race and ethnicity, in higher education, the court recognized that there was not one, immutable way of defining and achieving [diversity].”⁷⁴ The Court, however, failed to eradicate the legal fictions enveloping affirmative action as we know it. The importance of this result may only be fully appreciated after examining the legal and sociopolitical history of race-based affirmative action.

II. SOCIOPOLITICAL HISTORY OF AFFIRMATIVE ACTION⁷⁵

The term “affirmative action” was first used in reference to race by Executive Order 10925, issued in 1961 by President John F. Kennedy.⁷⁶ Executive Order 10925 encouraged executive branch offices to take “affirmative steps” to ensure the full enforcement of “the national policy of nondiscrimination,” particularly with regard to federally funded employment.⁷⁷ To further this initiative, Executive Order 10925 also established the President’s Committee on Equal Employment Opportunity (“PCEEO”).⁷⁸ Contractors to whom the regulation applied were required to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed,

⁷¹ Robert Barnes, *Supreme Court Upholds University of Texas Affirmative-Action Admissions*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/politics/courts_law/supreme-court-upholds-university-of-texas-affirmative-action-admissions/2016/06/23/513bcc10-394d-11e6-8f7c-d4c723a2becb_story.html?utm_term=.0ae8f40b15ff [<https://perma.cc/BW4D-N6Q6>]; see also Tamar Lewin & Richard Pérez-Peña, *Colleges Brace for Supreme Court Review of Race-Based Admissions*, N.Y. TIMES (June 30, 2015), <https://www.nytimes.com/2015/07/01/us/politics/colleges-brace-for-supreme-court-review-of-admissions.html> [<https://perma.cc/V63A-NDWR>] (describing predictions that without affirmative action, “colleges would have to turn their attention to sustained, intensive recruitment to maintain diverse student bodies”).

⁷² See Anemona Hartocollis, *Supreme Court Decision on Affirmative Action Cheered by College Admissions Experts*, N.Y. TIMES (June 23, 2016), https://www.nytimes.com/2016/06/24/us/supreme-court-decision-on-affirmative-action-cheered-by-college-admissions-experts.html?_r=0 [<https://perma.cc/7EJ6-SCTZ>].

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ The author is particularly grateful to George Edward “Trip” Carpenter III for providing literature on issues addressed in Parts II and III of this Note.

⁷⁶ Exec. Order No. 10,925, 3 C.F.R. § 301 (1961); see also TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 60 (2004).

⁷⁷ 3 C.F.R. at § 201

⁷⁸ *Id.*

color, or national origin.”⁷⁹ The PCEEO, chaired by then Vice President Lyndon B. Johnson, was charged with enforcing the policy.⁸⁰

Executive Order 10925 was intended to further an attempt to overcome both past and current discrimination in employment. Executive Order 10925, however, was far too general to effectuate its own purposes.⁸¹ The Kennedy administration was “not demanding any special preference or treatment or quotas for minorities . . . [A]ll the administration seemed to be advocating was racially neutral hiring to end job discrimination.”⁸² Not only did the order fail to define discrimination, but it also failed to provide a meaningful enforcement mechanism for the PCEEO.⁸³ The language dedicated to the enforcement of the order read:

In the event of the contractor’s non-compliance with the nondiscrimination clauses of this contract or with any of the said rules, regulations, or orders, this contract *may* be cancelled in whole or in part and the contractor *may* be declared ineligible for further government contracts in accordance with procedures authorized in Executive Order No. 10925 of March 6, 1961.⁸⁴

This weak “*may*” language ensured there was no real obligation to enforce non-discrimination measures in the context of employment. The most significant weakness of the PCEEO, though, was that it did not apply to jobs that federal loans or grants created, which neutered Executive Order 10925’s scope.⁸⁵ Nonetheless, Executive Order 10925 marked a watershed moment: namely, the first time in which affirmative action was established as a federal policy. And it was only the beginning.

While the movement to undermine discrimination in employment reached its zenith with the Civil Rights Act of 1964, affirmative action policy received little attention until the following year.⁸⁶ In the summer of 1965, President Lyndon B. Johnson re-centered the call for affirmative action policies in a speech to the graduating class at Howard University. President Johnson cried:

You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years,

⁷⁹ *Id.* at § 301.

⁸⁰ *Id.* at § 102(a); Lyndon Baines Johnson, *37th Vice President (1961–1963)*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/generic/VP_Lyndon_Johnson.htm [<https://perma.cc/6V57-M2H6>] (last visited Mar. 21, 2017).

⁸¹ See ANDERSON, *supra* note 76, at 60–63.

⁸² *Id.* at 61.

⁸³ *Id.* at 62.

⁸⁴ 3 C.F.R. § 301(6) (emphasis added).

⁸⁵ ANDERSON, *supra* note 76, at 62.

⁸⁶ Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, “you are free to compete with all the others,” and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.⁸⁷

Johnson’s foundational speech places the justification for affirmative action programs squarely within the historical, moral cause of remedying the wrongs historically committed against people of color in the United States.⁸⁸ Indeed, Johnson cited neither constitutional nor statutory grounds to justify affirmative action programs.⁸⁹ Rather, Johnson affirmed that “the social force that justified the new doctrine of race-conscious affirmative action was *history itself*, in the form of past discrimination.”⁹⁰

While the importance of this historical recognition cannot be overstated,⁹¹ the value of Johnson’s speech as a whole is undermined by his failure to include any acknowledgement of the role that discriminatory public policy played in fostering systemic racism.⁹² Rather than discuss the way in which systemic racism held back black Americans and prevented their upward mobility, Johnson spoke in broad terms. Johnson disappointingly focused on the decline of the black family rather than systemic racism as one of the primary causes of racial inequality.⁹³ Johnson exclaimed “[a]bility is stretched or stunted by the family that you live with, and the neighborhood you live in It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.”⁹⁴

The dearth of a legal explanation of the cause of racial inequities and the shifting of the justifications for affirmative action programs from that of public policy to morality—though righteous—has had the long-term effect of

⁸⁷ Johnson, *supra* note 1.

⁸⁸ See HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 77 (2002) (“[T]he Howard speech metaphor of the unfair footrace captured the essence of a latent theory that programs of social justice must compensate for past injustice.”).

⁸⁹ *See id.*

⁹⁰ *Id.*

⁹¹ See IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 10 (2005).

⁹² *See id.*

⁹³ Johnson, *supra* note 1. This same line of reasoning remains unfortunately potent today. *See, e.g.*, Donald J. Trump, President of the U.S., Inaugural Address (Jan. 20, 2017) (transcript available at https://www.washingtonpost.com/news/the-fix/wp/2017/01/20/donald-trumps-full-inauguration-speech-transcript-annotated/?utm_term=.5f10b1ef5963 [<https://perma.cc/L3KY-FEST>]) (“But for too many of our citizens, a different reality exists: mothers and children trapped in poverty in our inner cities; rusted out factories scattered like tombstones across the landscape of our nation; an education system flush with cash, but which leaves our young and beautiful students deprived of all knowledge; and the crime and the gangs and the drugs that have stolen too many lives and robbed our country of so much unrealized potential. This American carnage stops right here and stops right now.”).

⁹⁴ Johnson, *supra* note 1.

undermining support for affirmative action programs. Indeed, the shifting of the justifications for affirmative action away from a legal framework set the stage for the emergence of sophistic arguments against affirmative action policies. This phenomenon will be discussed in detail in Parts III and IV of this Note.

III. THE FALLACY OF REVERSE DISCRIMINATION

Criticism of affirmative action and claims of reverse discrimination are not new.⁹⁵ White workers reacted with vitriol toward President Kennedy's first antidiscrimination policies.⁹⁶ One white worker decried Kennedy's actions as "undemocratic, unreasonable, unwarranted, and unworkable."⁹⁷ These hyperbolic attacks on all forms of affirmative action continue to be recycled by the right.⁹⁸ Unfortunately, though, the policy's admittedly weak historical justifications have not helped.⁹⁹ As noted in Part II, because affirmative action was originally premised on a vague understanding of history rather than on a deep, structural analysis of racism, affirmative action programs are vulnerable to racist attack.¹⁰⁰ This Part of this Note, however, will show how these racist attacks are flawed by examining the three primary arguments against affirmative action. These include colorblind constitutionalism,¹⁰¹ the supposed lack of merit of affirmative action candidates and their mismatch to schools,¹⁰² and the stigma associated with affirmative action candidates.¹⁰³ This Part of this Note will also refute each of these arguments.

A. Colorblind Constitutionalism

So called "color blindness" is the root of one of the most persistent arguments lodged against affirmative action. Indeed, "[c]olor blindness' is a key idea in American life. It is probably the most popular conception of what is thought to be commendable racial thought and conduct."¹⁰⁴ Colorblind, or post-racial,

⁹⁵ See Thomas J. Sugrue, *The Tangled Roots of Affirmative Action*, 41 AM. BEHAV. SCIENTIST 886, 892–95 (1998).

⁹⁶ *Id.* at 894 (citing a quote from Peter Schoemann, national president of the Plumbers Union, as saying "[w]e resent the use of the equal employment campaign as a reason for a federal takeover in an area where government does not belong").

⁹⁷ *Id.*

⁹⁸ See, e.g., Anemona Hartocollis, *With Remarks in Affirmative Action Case, Scalia Steps into 'Mismatch' Debate*, N.Y. TIMES (Dec. 10, 2015), <http://www.nytimes.com/2015/12/11/us/with-remarks-in-affirmative-action-case-scalia-steps-into-mismatch-debate.html?ref=topics> [<https://perma.cc/7UPD-ZP4T>] (discussing the prevalence of the "mismatch theory," which supposes that minority students fare better at lower-ranked universities, but also noting that the theory is not supported by evidence).

⁹⁹ See *supra* Part II.

¹⁰⁰ See *supra* text accompanying notes 91–95.

¹⁰¹ See *infra* text accompanying notes 104–133.

¹⁰² See *infra* text accompanying notes 134–175.

¹⁰³ See *infra* text accompanying notes 176–192.

¹⁰⁴ KENNEDY, *supra* note 9, at 147.

constitutionalism stands for the premise that “race ought to play no role in assessing individuals—that race ought to be absent from any calculation determining whether a person is detained by police or sent to prison . . . or selected by a university.”¹⁰⁵ Colorblind constitutionalists fight against affirmative action because it recognizes race and provides preferences to people of color.¹⁰⁶ As a general matter, among supporters of colorblind constitutionalism, “[t]here is a consensus . . . that whatever the proper status of affirmative action in the past, it should have no place in American life today.”¹⁰⁷ Colorblind constitutionalism, however—no matter the virtues proclaimed by the theory’s supporters and regardless of such supporters’ potentially benign intent—is particularly useful as a tool to preserve systemic racism.

One might first assume that colorblind constitutionalism would hold no weight as an attack on affirmative action because affirmative action was conceived as a way of remedying past discrimination.¹⁰⁸ Unfortunately, this is incorrect. In fact, colorblind constitutionalists too point to history in justifying their assertions that affirmative action requires “uprooting.”¹⁰⁹ But this history is revisionist. The single most popular statement on colorblindness and the law was written by Justice Marshall Harlan in his dissent in *Plessy v. Ferguson*. Harlan wrote:

In respect of civil rights, common to all citizens, the Constitution of the United States does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. . . . There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.¹¹⁰

Supporters of colorblindness ignore the lack of historical or textual support for Harlan’s statement.¹¹¹ Indeed, “[t]here is little support to offer. Congressional framers of the Fourteenth Amendment declined to accept language that would have expressly prohibited government from drawing racial lines,” even though such language was proposed.¹¹² “Moreover, many of the framers and ratifiers of the Fourteenth Amendment countenanced laws that explicitly differentiated people on a racial basis.”¹¹³ And this is to say nothing of miscegenation laws, which Justice Harlan sanctioned.¹¹⁴

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 148.

¹⁰⁷ *Id.*

¹⁰⁸ See KATZNELSON, *supra* note 91; Johnson, *supra* note 1.

¹⁰⁹ KENNEDY, *supra* note 9, at 148.

¹¹⁰ *Plessy v. Ferguson*, 163 U.S. 537, 554, 559 (1896) (Harlan, J., dissenting).

¹¹¹ See KENNEDY, *supra* note 9, at 150.

¹¹² *Id.* at 150–51.

¹¹³ *Id.* at 151.

¹¹⁴ See generally *Pace v. Alabama*, 106 U.S. 583 (1883).

Perhaps with irony, colorblind constitutionalists oft omit Justice Harlan's endorsement of white supremacy.¹¹⁵ One sentence removed from his statement on the colorblindness of the Constitution in his *Plessy* dissent, Justice Harlan wrote the following:

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.¹¹⁶

Taken as a whole, what Justice Harlan appears to be claiming in his dissent is that the white race is supreme, will remain supreme, and need not resort to segregation in order to maintain power.¹¹⁷ This reading of Justice Harlan's dissent makes a great deal more sense than that typically supported by colorblind constitutionalists. "Justice Harlan—after all . . . was a former slave owner, initially opposed to the Thirteenth Amendment, and tolerated various forms of segregation, notwithstanding his *Plessy* dissent."¹¹⁸ Against this background, Justice Clarence Thomas's support for Justice Harlan's colorblind jurisprudence comes off as pitiful: "My view of the Constitution is Justice Harlan's view in *Plessy*."¹¹⁹

Justice Thomas, currently the only black member of the Supreme Court,¹²⁰ is one of the most ardent supporters of colorblind constitutionalism.¹²¹ Justice Thomas sees all racial classifications—even those designed to remedy past discrimination and aid in the promotion of a more racially equal society—as unconstitutional: "The worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities. . . . I think the lesson of history is clear enough: Racial discrimination is never benign."¹²² Arguing in *Fisher I* that the University's race-conscious admissions program was unconstitutional, Justice Thomas wrote that the

¹¹⁵ See *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

¹¹⁶ *Id.* It is difficult to imagine a clearer statement of white supremacy. Perhaps John C. Calhoun was really a colorblind constitutionalist in disguise? See John C. Calhoun, Speech on Reception of Abolition Petitions (Feb. 6, 1837), in *THE WORKS OF JOHN C. CALHOUN* 631–32 (Richard K. Crallé ed., vol. II, 1883).

¹¹⁷ KENNEDY, *supra* note 9, at 152.

¹¹⁸ *Id.*

¹¹⁹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. I*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring).

¹²⁰ See *Clarence Thomas*, OYEZ.COM, https://www.oyez.org/justices/clarence_thomas [https://perma.cc/29YG-QAWQ] (last visited Mar. 22, 2017).

¹²¹ See *Parents Involved*, 551 U.S. at 772; Aaron Blake, *Clarence Thomas Compares Affirmative Action Policies to Segregation*, WASH. POST (June 24, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/06/24/clarence-thomas-compares-affirmative-action-policies-to-segregation/> [https://perma.cc/YM8J-W2V8].

¹²² *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2429–30 (2013) (Thomas, J., concurring).

“University’s professed good intentions cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.”¹²³ But this analogy is fallacious, and Justice Thomas is wrong.¹²⁴

Justice Thomas’s false equation of “racial distinctions intended to impose white supremacy with racial distinctions” designed to abate white supremacy is one of the strangest formulations in American law.¹²⁵ Truly, “to argue that affirmative action, which gives preferential treatment to disadvantaged minorities as part of a plan to achieve social equality, is no different from the policies that created the disadvantages in the first place is a travesty of reasoning.”¹²⁶ Affirmative action is not exclusionary. Affirmative action programs bear no relationship to Jim Crow laws or historic Slave Codes.¹²⁷ Indeed, “[a]ffirmative action has not meant that white men have unequal opportunities; rather, it has appropriately mandated an end to prior quotas, preferences, and monopolies for white men only. None of the current affirmative action policies in this country excludes white men”¹²⁸ As one of Justice Thomas’s colleagues has written, “[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”¹²⁹ Indeed, Justice Thomas’s arguments have long been discredited.¹³⁰ As Justice Stevens elaborated:

¹²³ *Id.* at 2430.

¹²⁴ See KENNEDY, *supra* note 9, at 165–66.

¹²⁵ *Id.* at 165.

¹²⁶ Stanley Fish, *Reverse Racism, or How the Pot Got to Call the Kettle Black*, ATLANTIC MONTHLY (Nov. 1993), <https://www.theatlantic.com/magazine/archive/1993/11/reverse-racism-or-how-the-pot-got-to-call-the-kettle-black/304638/> [<https://perma.cc/HT5J-V5S3>].

¹²⁷ See FRED L. PINCUS, REVERSE DISCRIMINATION: DISMANTLING THE MYTH 69 (2003). For an excellent Kentucky example of a Jim Crow law, see Act of Jan. 5, 1904, ch. 85, 1904 Ky. Acts 181, 181–82 (1904). The statute, known as the “Day Law,” prohibited private schools from admitting both black and white students. *Id.* The law was upheld by the Supreme Court of the United States in *Berea Coll. v. Commonwealth*, 211 U.S. 45 (1908). The most famous example of a historic slave code is that of South Carolina’s, passed after the famous Stono Rebellion. Act of May 10, 1740, 1740 S.C. Acts 163–75 (1740). Kentucky, of course, had one too. REV. STAT. KY. ch. XCIII (1852).

¹²⁸ BRYAN K. FAIR, NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION 160 (1997).

¹²⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting).

¹³⁰ See *id.* at 245. This favored section of Justice Stevens’s dissent in *Adarand* also points out this false equivalence, by providing:

[T]he term “affirmative action” is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases may be difficult to classify, but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a disfavored few and state action that benefits the few “in spite of” its adverse effects on the many.

Id. at 245–46 (footnote omitted) (quoting *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially" should ignore this distinction.¹³¹

Indeed, to align with Justice Thomas, adhere to colorblind constitutionalism, and disregard the distinction between positive and negative racial classifications is to:

disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers.¹³²

With flawed foundations and damaging effects, colorblind constitutionalism must be dismissed as virulent nonsense. Colorblind constitutionalism is an ideology rooted in racism that functions as an affront to a racially egalitarian society and aims to "devour public policies much needed in the ongoing struggle against racial hierarchy."¹³³ Why this absurd formulation remains persistent is unclear, although it is an unfortunately powerful social force. The only remedy against colorblind constitutionalism, so it seems, may be to protest against its legitimacy, pointing out the illegality and ahistorical roots of the concept. Perhaps through education alone may we work to overcome colorblind constitutionalism.

B. Merit and Mismatch Objections

i. The Merit Objection

The concept of merit as an "objective phenomenon" that can be easily ascertained, and that such a determination of merit should be the only relevant factor in college admissions, is central to the merit-based argument against affirmative action.¹³⁴ "Disappointed opponents of affirmative action often tout their test scores and grade point averages as if those indicia of merit" are the only relevant considerations that a university's admissions program might appropriately

¹³¹ *Id.* at 243 (citation omitted).

¹³² *Id.* at 245.

¹³³ KENNEDY, *supra* note 9, at 168.

¹³⁴ PINCUS, *supra* note 127, at 82.

consider.¹³⁵ These same “[d]isappointed candidates sometimes evince an especially venomous antipathy for affirmative action because they see it as depriving them not only of valuable opportunities but also cheating them of their just deserts on behalf of those less deserving.”¹³⁶ Implicit in this argument is the racist assumption that affirmative action policies disregard merit in giving benefits to minority individuals.¹³⁷ There is usually no mention of the sense of entitlement espoused by white, and typically male, opponents of affirmative action.¹³⁸ Rather, the merit objection is based simply on the *inferiority* of minority candidates.¹³⁹ Echoing the evangelical prosperity gospel, these opponents of affirmative action voice “the smug assumption . . . that success is the crown of virtue,’ that those on top are on top because they are more deserving than those below.”¹⁴⁰

Supporters of the merit-based argument against affirmative action elevate test scores “to some abstract level of scientific purity, especially in the areas of civil service hiring and promotion as well as college admission Any race conscious decisionmaking is seen as discrimination.”¹⁴¹ But in reality, a potential admitted student’s grade point average and standardized test scores are at least somewhat subjective measurements of ability influenced by the socioeconomic background of the test taker and teacher grading preferences.¹⁴² Test scores are never entirely objective because they elevate privileged students “who have been raised in households where education is valued and emphasized, and whose families can spend more on their children’s education.”¹⁴³ Truly, a college admissions program based purely on an objective level of merit could never exist. This is because even so-called “objective” measures of a potential admitted student’s educational prowess

¹³⁵ KENNEDY, *supra* note 9, at 112.

¹³⁶ *Id.*

¹³⁷ *Id.* at 112–13.

¹³⁸ Abigail Fisher, a white woman, is an outlier. Three out of four opponents to race-based affirmative action in *Hopwood*, a precursor of *Fisher*, were white men. *Hopwood v. Texas*, 78 F.3d 932, 938 (5th Cir. 1996). Petitioners in *Gratz* and *Grutter*—the cases that implicitly overruled *Hopwood*, giving rise to *Fisher*—were a mix of women and men, but were all white. *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 316–17 (2003). The respondent in *Bakke* was a white man. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 266 (1978).

¹³⁹ Padilla, *supra* note 19, at 862–64 (discussing the merit objection as applied to women and people of color); *see also* KENNEDY, *supra* note 9, at 112–13.

¹⁴⁰ KENNEDY, *supra* note 9, at 113 (quoting MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 178 (2009)). The merit objection to affirmative action echoes the “gospel of prosperity,” a uniquely American evangelical phenomenon. *See, e.g.*, Kate Bowler, *Death, the Prosperity Gospel and Me*, N.Y. TIMES (Feb. 13, 2016), <https://www.nytimes.com/2016/02/14/opinion/sunday/death-the-prosperity-gospel-and-me.html> [https://perma.cc/46B3-QQML]; Cathleen Falsani, *The Prosperity Gospel*, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/opinions/outlook/worst-ideas/prosperity-gospel.html> [https://perma.cc/86XR-VWEY] (last visited Mar. 22, 2017).

¹⁴¹ PINCUS, *supra* note 127, at 82 (citation omitted).

¹⁴² *See id.* at 82–83; *see also* Padilla, *supra* note 19, at 865–66.

¹⁴³ Padilla, *supra* note 19, at 865–66.

are based on subjective evaluation techniques that are further influenced by a student's socioeconomic background.¹⁴⁴

Of course, as always, there is irony in the merit-based argument against affirmative action: “[M]eritocratic criteria are conveniently excluded when they might give minorities some advantage.”¹⁴⁵ Compared with their white counterparts, “grade point average and class rank suddenly become suspect” when used to evaluate applicants of color, “given the allegedly lower standards in predominantly minority high schools.”¹⁴⁶

Supporters of the merit-based argument against affirmative action are also strangely silent on the subject of legacy preferences.¹⁴⁷ “The use of race-based affirmative action in higher education has given rise to hundreds of books and law review articles” advocating for the ban of the practice.¹⁴⁸ By comparison, however, very little has been “said or written or done” to challenge legacy preferences for children of alumni—or, affirmative action for the rich and typically white.¹⁴⁹ “Like racial preferences, preferences for legacies can be criticized for being based on ancestry rather than individual merit,” however, distinctly unlike racial preferences, “legacy preferences were born of anti-immigrant and anti-Jewish discriminatory impulses.”¹⁵⁰ Supporters of legacy preferences attempt to downplay their impact on admission decisions,¹⁵¹ but, “among applicants to elite colleges, legacy status is worth the equivalent of scoring 160 points higher on the SAT (on a 400–1600 point scale).”¹⁵² As of 2010, there had “been no state ballot initiatives, only one lower court case, and not a single book-length treatment of the issue.”¹⁵³

Legacy preferences were addressed, however, in 2016 when the president of Georgetown University, John J. DeGioia, announced that the descendants of 272 slaves sold by Georgetown University in 1838 to pay debts would receive the same admission advantages as students granted legacy preferences.¹⁵⁴ Although it received little media attention, there is great irony in DeGioia's comparison. Children of alumni, thus beneficiaries of legacy preferences in admission, are

¹⁴⁴ PINCUS, *supra* note 127, at 82–83; *see also* KENNEDY, *supra* note 9, at 113. For an interesting discussion of disparate impact theory on black test takers at the United States Supreme Court, see *Washington v. Davis*, 426 US 229 (1976).

¹⁴⁵ PINCUS, *supra* note 127, at 83.

¹⁴⁶ *Id.*

¹⁴⁷ *See*, RICHARD D. KAHLENBERG, AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 1 (2010).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1–2 (citing Thomas J. Espenshade, Change Y. Chung & Joan L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOC. SCI. Q. 1422, 1431 (2004)).

¹⁵³ KAHLENBERG, *supra* note 147, at 2 (citing DANIEL GOLDEN, THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES 2 (2006)).

¹⁵⁴ Dan Golden, *Manners & Misdemeanors*, TOWN & COUNTRY, Feb. 2017, at 68.

typically well off, or at least sufficiently privileged to be children of college-educated parents.¹⁵⁵ Such children are in little need of aid through social justice programs. Yet, in touting the progressive nature of Georgetown's new measure to benefit the descendants of the 272 slaves, DeGioia was "equating a remedy" for historic racial inequality—indeed, slavery—with legacy preferences, a policy "that itself discriminates against low-income and minority students."¹⁵⁶ It is certainly interesting, to say the least, that the practice of providing children of alumni legacy preferences in admission "has only intensified," in the same era that affirmative action, the practice of providing low income and minority children better odds for gaining an education, has come increasingly under attack.¹⁵⁷

The merit-based argument, similar to the colorblind constitutional argument, privileges the experience of Whites, and particularly straight white males.¹⁵⁸ Implicit to the merit objection to affirmative action is the firm belief that the *necessarily unqualified* beneficiaries of affirmative action rob *necessarily qualified* non-beneficiaries of affirmative action of legitimate entitlements.¹⁵⁹ "Many people [who] believe the merit myth . . . see affirmative action as taking away an entitlement which would exist but for affirmative action."¹⁶⁰ But college admission in the United States is *not* an entitlement, and it has not been based on merit for at least a century: "We have not defined public higher education in this century in terms of merit—that is, who deserves to attend—but in terms of access—that is, how to enable the broad public to attend."¹⁶¹ "[A]dmission is not about an honor bestowed to reward superior merit or virtue. Neither the student with high test scores nor the student who comes from a disadvantaged minority group morally deserves to be admitted."¹⁶² Indeed, a student's admission is only "justified insofar as it contributes to the social purpose the university serves, not because it rewards the student for her merit or virtue, independently defined."¹⁶³

¹⁵⁵ See generally DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* (2006).

¹⁵⁶ Golden, *supra* note 154, at 68.

¹⁵⁷ *Id.*

¹⁵⁸ See generally Padilla, *supra* note 19.

¹⁵⁹ *Id.* at 862.

¹⁶⁰ *Id.* The author has personally experienced many conversations with white men, and, perhaps unsurprisingly, white women, who criticize affirmative action policies on this precise basis. Notably, none of these individuals were ever denied admission to their preferred collegiate institution, or denied a job because of their race. Nonetheless, these individuals express anger that race or sex could be considered in collegiate admission—on the basis that they might be denied admission because they are white. But, again, this has never happened. The position is one of either covert racism or willful blindness to racial injustice.

¹⁶¹ William G. Tierney, *The Parameters of Affirmative Action: Equity and Excellence in the Academy*, 67 REV. EDUC. RES. 165, 173 (1997).

¹⁶² KENNEDY, *supra* note 9, at 113 (quoting MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 174 (2009)).

¹⁶³ *Id.* (quoting MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 175 (2009)).

The merit objection should hold no weight in the evaluation of affirmative action programs because the objection is rooted in racism: that white applicants—especially those with superior test scores—are entitled to college admission, while minority applicants do not deserve college admission *even if* they have superior test scores. This is because scores awarded by schools host to primarily minority students are not reliable indicia of merit, while scores awarded by schools host primarily to white students are reliable indicia of merit. This objection is not only based in racism, but it misses the point: college admission is not an entitlement and no one is morally entitled to or deserving of admission.¹⁶⁴ Rather, admission is determined based on the value, however defined, that candidates may contribute to an academic institution. The merit objection—a theory so objectionable and confused as to facts that even a cursory inspection reveals its inadequacies—should be dismissed.

ii. The Mismatch Objection

Closely related to the merit-based argument against affirmative action is the mismatch objection. Adherents of this theory maintain that affirmative action “creates debilitating mismatches by overpromoting beneficiaries, putting them in positions in which they are doomed to suffer dramatic negative comparisons with better-prepared white peers.”¹⁶⁵ The work of Richard H. Sander exemplifies this theory. He maintains that in the context of affirmative action in law schools, that “blacks are the victims of law school programs of affirmative action, not the beneficiaries.”¹⁶⁶ Sander, reflecting on the mismatch objection as a whole, “denounces the strategy of pushing minority students upward into higher-prestige schools than they would attend absent affirmative action because,” as the theory goes, such students are condemned to “school environments in which they learn less than they would at less prestigious institutions.”¹⁶⁷ While some opponents of

¹⁶⁴ Generally speaking, applicants do not have standing to sue when their application is rejected, because rejected applicants never had an entitlement to a property interest. See *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (“To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”)

¹⁶⁵ *Id.* at 127–28. Justice Scalia was a proponent of the mismatch objection and he brought it up during the oral arguments of *Fisher II*. See Hartocollis, *supra* note 98; Alison Somin, *Justice Scalia and Mismatch*, FED. SOC. (Dec. 9, 2015), <http://www.fed-soc.org/blog/detail/justice-scalia-and-mismatch> [<https://perma.cc/R62X-8VU9>].

¹⁶⁶ KENNEDY, *supra* note 9, at 128 (quoting Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 481 (2004)).

¹⁶⁷ *Id.* at 128.

affirmative action cite the mismatch objection as if it is irrefutable,¹⁶⁸ the theory has been met with significant scholarly attack.¹⁶⁹

Although Sander notes real differences in the performance of minority and white students at elite institutions that may suggest a need to reform some aspects of affirmative action policies,¹⁷⁰ in many cases where students are placed in an environment with overachieving classmates, such students are “carried along to more success,” realizing better classroom results than they have in the past.¹⁷¹ In any event, whether or not students placed in elite environments excel academically, “the socialization, networking, and credentializing benefits of a degree from an elite school dominate” the potential educational disadvantages discussed by Sander.¹⁷² Even Sander concedes that without affirmative action elite schools would see a significant decline in the enrollment of black students.¹⁷³ Interestingly, however, Sander estimates racial demographics at lower-ranked schools would change little without affirmative action. In Sander’s view, black students uplifted through affirmative action would simply return to “where they belonged,” and that “[m]any of them would have dropped out or failed . . . anyway.”¹⁷⁴

Among scholars, Sander is dismissed as a “wily, disingenuous enemy of affirmative action.”¹⁷⁵ His mismatch theory is nothing but a clever work of sophistry designed to undermine the positive public policy of correcting racial inequities. The mismatch objection should be dismissed as such.

C. Stigma Objection

Not satisfied with their fallacious arguments against affirmative action policies alone, opponents of affirmative action also seek to ridicule such programs’ beneficiaries. This is the root of the stigma objection to affirmative action policies, which supposes “that affirmative action cripplingly stigmatizes its beneficiaries and, indeed, anyone affiliated with groups that are perceived as eligible for affirmative

¹⁶⁸ Hartocollis, *supra* note 72. The condescension of this theory is remarkable. At base, this author would propose that the mismatch theory is premised on the presumed inability of black students to keep up with their white counterparts in a competitive environment. Whether attributed to environmental factors or biology, the mismatch theory is eugenicist refuse. It should be dismissed as such.

¹⁶⁹ KENNEDY, *supra* note 9, at 129; see also Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1809 (2005); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915, 1917–19 (2005).

¹⁷⁰ RICHARD H. SANDER & STUART TAYLOR JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 4 (2012).

¹⁷¹ KENNEDY, *supra* note 9, at 129 (quoting Ayres, *supra* note 169, at 1824).

¹⁷² *Id.* at 130 (quoting Wilkins, *supra* note 169, at 1931).

¹⁷³ KENNEDY, *supra* note 9, at 130. This is a very real decline, documented by the New York Times. See Ford Fessenden & Josh Keller, *How Minorities Have Fared in States with Affirmative Action Bans*, N.Y. TIMES, http://www.nytimes.com/interactive/2013/06/24/us/affirmative-action-bans.html?_r=0 [https://perma.cc/YRP8-KK4S] (last visited Mar. 22, 2017).

¹⁷⁴ KENNEDY, *supra* note 9, at 130.

¹⁷⁵ *Id.* at 131.

action assistance.¹⁷⁶ While some *individual* beneficiaries of affirmative action may perceive stigma associated with their achievement,¹⁷⁷ a blanket statement about *all* such beneficiaries would be inaccurate. "It is difficult to quantify . . . with even a modicum of precision how much of a stigmatic cost" is associated with affirmative action.¹⁷⁸ Further, very few beneficiaries of affirmative action complain of any such stigma associated with their presence at elite schools; and, in any event, the material benefits of affirmative action programs far outweigh such programs' hypothetical stigmatic costs, especially when viewed in light of the relative absence of social stigma imposed on beneficiaries of *other* college recruitment programs.¹⁷⁹

Indeed, it is axiomatic that opponents of affirmative action are the source of this stigma. For unless there were some perceived reason to stigmatize minorities and beneficiaries of affirmative action policies, no such stigma would exist. Perhaps this explains the lack of stigma, or at least the lack of substantial structural challenges, attached to legacy programs in college admissions.¹⁸⁰ As noted, many beneficiaries of legacy programs are among the most privileged students in America.¹⁸¹ Although a specific study is wanting, it is likely that the opposite is generally true of beneficiaries of affirmative action.¹⁸² But, given the similarities of such programs, it is unclear what the cause of the stigma associated with affirmative action would be, unless beneficiaries of race-based affirmative action are deemed *inferior* to the beneficiaries of legacy-based affirmative action, and therefore less *deserving*.¹⁸³

Naturally, "[i]t is Justice Clarence Thomas, however, who has voiced this theme most persistently, aggressively, and personally, stating that affirmative action 'programs stamp minorities with a badge of inferiority' and complaining that 'so-called "benign" discrimination teaches many that . . . minorities cannot compete

¹⁷⁶ *Id.* at 115.

¹⁷⁷ *Id.* at 124.

¹⁷⁸ *Id.* at 125.

¹⁷⁹ *Id.*; see also *Regents of Univ. of Cal. v. Bakke*, 436 U.S. 265, 404 (1978) (Blackmun, J., concurring) ("It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning . . . have given conceded preferences . . . to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on institutions, and to those having connections with celebrities, the famous, and the powerful.").

¹⁸⁰ See *supra* text accompanying notes 147–156.

¹⁸¹ See KAHLBERG, *supra* note 147, at 1.

¹⁸² *Id.* (showing that minority students benefitted from affirmative action policies); see also Fessenden & Keller, *supra* note 173 (showing the decline in minority enrollment following the abolition of affirmative action in certain jurisdictions).

¹⁸³ As to the general lack of challenges against legacy programs, and the lack of stigma associated with such programs, perhaps inequality of bargaining power is the best explanation. Broadly speaking, the more power people have, the more substantial their influence. Wealth is associated with power. And legal challenges cost money. It is intuitive that the well-off and influential would be in a better position to successfully impose stigma and assert legal challenges—at least when compared to the theoretically poor and uninfluential beneficiaries of affirmative action. Not that all beneficiaries of affirmative action are poor and uninfluential, but many are. See KENNEDY, *supra* note 9, at 89.

with them without their patronizing indulgence.”¹⁸⁴ Yet again, Justice Thomas’s “animosity toward affirmative action is wildly ironic in that it is hard to imagine *anyone* who has benefited more than he has from affirmative action.”¹⁸⁵ Consider the following:

President George H. W. Bush intimated that race had nothing to do with the decision to select Thomas to fill the seat vacated by the retirement of Justice Thurgood Marshall. But that can be believed only by dint of the most willful and stupid naïveté. *Of course* Thomas’s race played a role, a major role, in his selection. It is not accidental that he was selected to fill the seat vacated by the first black member of the Court, the great Thurgood Marshall.¹⁸⁶

Justice Thomas also ignores the fact that “[n]egative reaction upon being identified as a beneficiary stems largely from the derogatory meaning placed upon affirmative action by its enemies.”¹⁸⁷ As noted, this too is rooted in racism: stigmatization of affirmative action beneficiaries “is due as well to the inescapable inference that those needing the boost of affirmative action are inferior.”¹⁸⁸

The vast majority of the concern for the stigmatization of affirmative action beneficiaries is not rooted in genuine sympathy.¹⁸⁹ Though some may be, and it is pure condescension if it is, the majority of opponents of affirmative action who base their arguments against such policies on the stigma objection are likely expressing their own racist tendencies.¹⁹⁰ In any event, some scholars believe the proper approach to the stigma objection is to:

- (1) acknowledge its strength,
- (2) diminish avoidable harms through careful design of affirmative action programs,
- (3) argue against exaggerations of stigmatic harms, and
- (4) insist that, ultimately, in reaching a conclusion about the wisdom of affirmative action, its benefits must be weighed against its drawbacks.¹⁹¹

This author, however, believes the stigma objection should be entirely disregarded. It is nonsensical that potential stigma could be a reason to oppose affirmative

¹⁸⁴ *Id.* at 115–16 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 241 (Thomas, J., concurring)).

¹⁸⁵ KENNEDY, *supra* note 9, at 116 (emphasis added).

¹⁸⁶ *Id.* at 116–17.

¹⁸⁷ *Id.* at 121.

¹⁸⁸ *Id.*

¹⁸⁹ See *supra* text accompanying notes 142–143.

¹⁹⁰ See *supra* text accompanying notes 142–143.

¹⁹¹ KENNEDY, *supra* note 9, at 124.

action policies. One cannot live one's life burdened and diminished by social stigmas imposed by another.

Social stigma is a preposterous reason to abandon a workable, successful policy. The benefits of affirmative action far outweigh the policy's potential cost, especially in relation to any socially-constructed stigma. Indeed, stigma as an objection to affirmative action simply does not make sense, unless one is willing to concede to racism and racists. And this simply cannot be done. Supporters of race-based affirmative action, and such programs' beneficiaries, should never be "misled by a mistaken impression of where their best interests lie."¹⁹²

IV. CONSTITUTIONAL LAW

Affirmative action programs have a long history of challenges at the United States Supreme Court. And, so far at least, the Supreme Court has upheld affirmative action programs' constitutionality, so long as such programs satisfy strict scrutiny. This Part of this Note discusses this constitutional law, while also pointing out the legal fictions enveloping it.

A. Regents of the University of California v. Bakke

Regents of the University of California v. Bakke,¹⁹³ the foundational case for affirmative action in the context of higher education, found the attainment of a diverse student body to be a "clearly" constitutionally permissible goal for a university.¹⁹⁴ In upholding the constitutionality of affirmative action programs, however, the Supreme Court reaffirmed racial and ethnic distinctions of *any sort* are inherently suspect; call for the most exacting judicial examination, strict scrutiny; are justified if and only if they further a compelling government interest; and, even then, only in the case that no less restrictive alternative is available.¹⁹⁵ The basis for the application of this strict scrutiny inquiry, however, was—and remains—flawed. To justify this strict scrutiny, the Court held that if a university's "purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid."¹⁹⁶ According to *Bakke*, "[p]referring members of any one group for no reason other than race or

¹⁹² *Id.* at 127.

¹⁹³ 438 U.S. 265 (1978). It is notable that *Bakke* did not result in an opinion of the Court. *See id.*; *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 218 (1995). Nonetheless, the tenets of Justice Powell's plurality opinion are now considered established law. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2417–18 (2013).

¹⁹⁴ *Bakke*, 438 U.S. at 311.

¹⁹⁵ *Id.* at 290–306; *see also* *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.").

¹⁹⁶ *Bakke*, 438 U.S. at 307.

ethnic origin is discrimination for its own sake. This the Constitution forbids.¹⁹⁷ *Bakke*, however, disregards the distinction between positive and negative racial preferences.¹⁹⁸

In summary, *Bakke's* reasoning is as follows: “remedying of the effects of ‘societal discrimination,’ [is far too] an amorphous concept of injury that may be ageless in its reach into the past.”¹⁹⁹ “[I]solated segments of our vast governmental structures [such as state universities] are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria.”²⁰⁰ As such, without constitutional or statutory violations, “it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.”²⁰¹ Interestingly, the “harm” the Court is referencing is the placement of black and minority college applicants on equal footing with their white counterparts. The premise of this harm, unstated by the Court, is that something must be “taken” from the white applicant in order to be “given” to the black applicant. This presumes white applicants are *entitled* to admission, while black applicants are not.

White applicants have no moral superiority over black applicants guaranteeing them a place at an institution of higher learning.²⁰² Because there is no entitlement, nothing can be taken from a white applicant by granting admission to a black applicant. Nonetheless, from the outset, the constitutional law on race-based affirmative action, while generally upholding such affirmative action programs, falls into the trap of legal fiction. Most prominently, what this author terms “false equivalences.” The *Bakke* Court supposed that racial preferences—essentially, quotas—may not be supported as such, even if the motivation is to remedy past discrimination.²⁰³ This is because racial distinctions are *always bad*, unless they are motivated by a compelling governmental interest, and maybe not even then.²⁰⁴ Mandating that racial distinctions are always bad—perpetuating false equivalences between positive and negative racial distinctions—and thereby limiting the manner in which universities may use positive racial preferences to ameliorate the effects of racism, has unfortunate practical results.²⁰⁵

¹⁹⁷ *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493–96 (1954)).

¹⁹⁸ Other cases, however, directly address this distinction. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 245–46 (1995) (Stevens, J., dissenting) (discussing the false equivalence between positive and negative racial preferences).

¹⁹⁹ *Bakke*, 435 U.S. at 307.

²⁰⁰ *Id.* at 309.

²⁰¹ *Id.* at 308–09.

²⁰² See Padilla, *supra* note 19, at 862.

²⁰³ See *supra* notes 195–197. This is odd, given that the Court has approved of racial quotas in government hiring where there was evidence of historic discrimination. See *United States v. Paradise*, 480 U.S. 149 (1987). Of course, racial quotas are generally considered unconstitutional.

²⁰⁴ See *supra* text accompanying note 196.

²⁰⁵ See Fessenden & Keller, *supra* note 173.

It is intuitive that racial quotas designed to remedy the effects of racial discrimination would be more effective than almost any other means at establishing racial diversity. And achieving racial diversity would *necessarily* foster the educational benefits of diversity.²⁰⁶ But positive racial distinctions—those that would increase diversity—are indistinguishable from negative racial distinctions—those that would diminish diversity—under the current constitutional regime. Indeed, this blurring of the good and bad has the effect of denying universities the discretion they need to use their educational, credentializing, and networking benefits to remedy the effects of past and current racial discrimination.²⁰⁷ Under *Bakke*, the purpose of helping certain groups of people who are victims of societal discrimination may not justify a racial classification for admissions purposes.²⁰⁸ This is true in some cases even where individualized review of each applicant is granted.²⁰⁹

In addition to the false equivalences trap, however, the *Bakke* Court also fell into another hole that this author terms “false standing.” The *Bakke* Court held “[w]e have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”²¹⁰

This troubling language, also the source of the false equivalences problem, is the basis of the “false standing” conferred on opponents of affirmative action programs.²¹¹ As to the source of the Court’s argument? The weak historical justifications of affirmative action discussed in Part II of this Note.²¹² Indeed, the Supreme Court’s mandate of the constitutional limitations imposed on universities—barring them from attempting to redress the effects of racial

²⁰⁶ Amy Stuart Wells, Lauren Fox, & Diana Cordova-Cobo, *How Racially Diverse Schools and Classrooms Can Benefit All Students*, CENTURY FOUND. (Feb. 9, 2016), https://s3-us-west-2.amazonaws.com/production.tcf.org/app/uploads/2016/02/09142501/HowRaciallyDiverse_AmyStuartWells-11.pdf [<https://perma.cc/R82T-BEX5>].

²⁰⁷ See KENNEDY, *supra* note 9, at 130. There is, of course, a legal fiction flowing from this reasoning. Universities might still use affirmative action programs to remedy the effects of past and present discrimination. And they should.

²⁰⁸ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290–310 (1978).

²⁰⁹ See *Gratz v. Bollinger*, 539 U.S. 244, 293–94 (2003) (Souter, J., dissenting).

²¹⁰ *Bakke*, 438 U.S. at 307. Note the distinction in this language. The Court discusses programs that aid “persons *perceived* as members of relatively victimized *groups*,” versus damage inflicted upon “other *innocent individuals*.” *Id.* (emphasis added). One may infer that it is the opinion of the *Bakke* Court that people of color are only victims of *perceived* discrimination, not *actual*. And that such perceived discrimination, even if real, is intangible—perhaps insufficient to provide an injury in fact necessary for standing in federal court—while damage inflicted on white people—*namely, individuals*—is actual, quantifiable, and most certainly sufficient to establish an injury in fact. Even if such injury is based on a sense of *entitlement*. See *supra* Subsection III.B.i.; see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) (discussing the requirements of Article III standing in federal court).

²¹¹ See Brief for Petitioner, *supra* note 4, at 26–31; Brief for Petitioner at 21–34, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02–241); Brief for Petitioner at 31–48, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02–516).

²¹² See *supra* Part II; see also Johnson, *supra* note 1.

discrimination through affirmative action programs—has had lasting effect. With this flawed statement of the law in hand, all an opponent of affirmative action need do to establish standing is allege they were not admitted to a university because they are white, that this was the case because of that university's flawed affirmative action program, and that the university's affirmative action program is flawed on the basis that it is motivated by an un compelling governmental interest.²¹³ This is the case even though the injury is amorphous, unidentifiable, or perhaps even nonexistent.²¹⁴ Will such an opponent's standing be challenged? Absolutely.²¹⁵ Will such challenge be successful? Absolutely not.²¹⁶

Bakke feeds the false equivalences problem by presuming the admission of black students over white students may impose disadvantages upon white applicants who bear no direct responsibility for the harm the beneficiaries of race-conscious admission programs have suffered.²¹⁷ This is so even though no direct harm can be established by a supposedly injured white applicant who is denied college admission, especially because such "injured" white applicants often still gain an education from another school.²¹⁸ Without direct injury—and with claims bordering on the theoretical—how the challengers of *Bakke*, *Gratz*, *Grutter*, and even *Fisher I & II*, passed the *Lujan v. Defenders of Wildlife* Article III standing requirement is unclear.²¹⁹ Indeed, this was a central theme of the oral arguments in *Fisher I*.²²⁰

²¹³ See, e.g., Brief for Petitioner, *supra* note 4, at 18–20.

²¹⁴ See *infra* notes 213–214 (showing injuries that are perhaps nonexistent have been used as bases for successful challenges to affirmative action).

²¹⁵ See, e.g., Brief for Respondent at 16 n.6, *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for Respondent at 17–24, *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016) (No. 14-981).

²¹⁶ The issue of standing was never resolved by the Supreme Court in either of the majority opinions for *Fisher*, although it was an issue throughout the case. See *Fisher I*, 133 S. Ct. at 2418, 2420; *Fisher II*, 136 S. Ct. at 2207. Standing was a significant issue in both *Grutter* and *Gratz*. With almost comedic simplicity—in both cases—the matter was resolved in favor of the petitioners. *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) ("Petitioner clearly has standing to bring this lawsuit."); *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) ("After being denied admission, Hamacher demonstrated that he was 'able and ready' to apply as a transfer student should the University cease to use race in undergraduate admissions. He therefore has standing to seek prospective relief with respect to the University's continued use of race in undergraduate admissions.")

²¹⁷ *Bakke*, 438 U.S. at 308–09; see also PINCUS, *supra* note 127, at 83.

²¹⁸ The plaintiffs in both *Gratz v. Bollinger* and *Fisher v. Univ. of Tex. at Austin* were granted admission to and gained an education at the university level even though they claimed injury by not being admitted to a particular school. *Gratz*, 539 U.S. at 251; *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 639 (5th Cir. 2014). It is unclear why the Supreme Court did not find both cases moot.

²¹⁹ For an extensive inquiry into the requirements of Article III standing, see *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (discussing how the requirement that a plaintiff prove his or her injury is both concrete and particularized); *Allen v. Wright*, 468 U.S. 737, 751 (1984) (mandating that for an injury to be particular, it must be personal); *Los Angeles v. Lyons*, 461 U.S. 95, 101–02 (1983) (holding an injury must be direct and not hypothetical to establish Article III standing); *Diamond v. Charles*, 476 U.S. 54, 67 (1986) (holding an ideological injury is insufficient to establish Article III standing).

²²⁰ Transcript of Oral Argument at 54–56, *Fisher vs. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

Bakke upheld the constitutionality of race-based affirmative action programs in the context of higher education so long as such programs satisfy strict scrutiny. In so doing, however, *Bakke* fed fallacious claims of reverse discrimination—ignoring the distinction between positive and negative racial preferences—and established precedent for plaintiffs' false standing in affirmative action disputes. It is the legal fictions established by *Bakke* that continue to empower opponents of affirmative action in the federal courts.

B. *Grutter and Gratz*

Petitioners in both *Grutter* and *Gratz* were white applicants to programs at the University of Michigan. In both cases, the applicants were denied admission. In both cases, the applicants sued, claiming they were discriminated against because they were white.

i. *Grutter v. Bollinger*

Grutter v. Bollinger fed into the same claims of reverse discrimination as did *Bakke*. In addition, *Grutter* further restricted the ability of institutions of higher education to institute affirmative action policies. *Grutter* reaffirmed that all racial classifications imposed by government “must be analyzed by a reviewing court under strict scrutiny,” meaning “such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.”²²¹ *Grutter* also reaffirmed that the government has a compelling interest in attaining the benefits of a diverse student body in higher education, but not in remedying the effects of racial discrimination.²²² *Grutter* also reaffirmed that the Fourteenth Amendment’s Equal Protection Clause requires that a university’s admissions program 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.²²³

Grutter, however, reduced the scope of permissible means for a university to consider race in admissions. Under *Grutter*, to be narrowly tailored under the Equal Protection Clause of the Fourteenth Amendment, “a race-conscious admissions program cannot use a quota system [or] ‘insulate each category of applicants with certain desired qualifications from competition with all other applicants.’”²²⁴ Rather, “a university may consider race or ethnicity only as a “plus” in a particular applicant’s file,’ without ‘insulating the individual from comparison with all other candidates for the available seats.’”²²⁵ This has the effect of making it

²²¹ *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)).

²²² *Id.* at 328–33.

²²³ *Id.* at 336–39.

²²⁴ *Id.* at 334 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

²²⁵ *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

more difficult for a university to operate a race-based affirmative action program. This is consistent with the reasoning of *Bakke*, but it is not desirable. Further restricting the methods through which a race-based affirmative action program may be implemented naturally limits the ability of such programs to operate as an effective means of achieving diversity. But considering that the Supreme Court's goal may be to do exactly that, because *all* racial distinctions are bad unless they are justified by a compelling governmental interest,²²⁶ *Grutter's* most alarming statement may come as no surprise: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."²²⁷

ii. *Gratz v. Bollinger*

Gratz v. Bollinger, handed down the same day as *Grutter*, also ascribed to the reverse discrimination rationale and limited the way in which institutions of higher education may implement affirmative action programs. *Gratz*, consistent with *Bakke* and *Grutter*, maintained that a university may promote its compelling interest in achieving the benefits of diversity in higher education through affirmative action programs, but that such a program must be executed through narrowly tailored means, and it must be capable of surviving strict scrutiny.²²⁸ This is because any person has the right to demand that any governmental actor justify any racial classification subjecting said person to unequal treatment under the most

²²⁶ See *supra* text accompanying notes 202–206.

²²⁷ *Grutter*, 539 U.S. at 343. This position is ludicrous because it is premised on the belief that racial inequities have been mended, or that they will be, now within the course of eleven years. All one needs to do to find proof as to whether racial inequities and bias have been corrected in American society is to take a cursory view of Donald Trump's 2016 campaign for the American Presidency. See generally Nicholas Kristof, *Is Donald Trump a Racist?*, N.Y. TIMES (July 23, 2016), http://www.nytimes.com/2016/07/24/opinion/sunday/is-donald-trump-a-racist.html?_r=0 [<https://perma.cc/5J85-LSSL>]; Michael Barbaro, *Donald Trump Clung to 'Birther' Lie for Years, and Still Isn't Apologetic*, N.Y. TIMES (Sept. 16, 2016), <http://www.nytimes.com/2016/09/17/us/politics/donald-trump-obama-birther.html> [<https://perma.cc/L77C-MCWQ>]; Charles M. Blow, Opinion, *Why Blacks Loathe Trump*, N.Y. TIMES (Aug. 17, 2016), <http://www.nytimes.com/2016/08/18/opinion/why-blacks-loathe-trump.html> [<https://perma.cc/4KGGH-CTDR>]; Jenée Desmond-Harris, Opinion, *Racism Is Real. Trump Helps Show It.*, N.Y. TIMES (Apr. 29, 2016), <http://www.nytimes.com/2016/05/01/opinion/campaign-stops/the-upside-to-overt-racism.html> [<https://perma.cc/Q63W-R7GJ>]; Jessie Daniels, Letter to the Editor, *The Popularity of Donald Trump's Racism*, N.Y. TIMES (July 26, 2016), <http://www.nytimes.com/2016/07/27/opinion/the-popularity-of-donald-trumps-racism.html> [<https://perma.cc/WM24-7NB5>]; *Full Text: Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), <https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/> [<https://perma.cc/N8AD-VP8X>].

²²⁸ *Gratz v. Bollinger*, 539 U.S. 244, 268–70 (2003).

strict of judicial scrutiny.²²⁹ *Gratz*, however, also invalidated points-based admission systems that consider race.²³⁰

The Court held “the University’s policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program.”²³¹ This is because, based on the flawed reasoning of *Bakke*, “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake,”²³² and the Court feared the points-based system denied applicants individual review.²³³ This is interesting.

Grutter mandates that race may only be considered as a “plus” factor in evaluating a candidate for admission to a university.²³⁴ In *Gratz*, where being a member of an underrepresented minority *literally* operated as a plus factor in evaluating candidates for admission to the university, the use of race was held to be unconstitutional.²³⁵ How can this be? Something cannot be both constitutional *and* unconstitutional at the same time. The *Gratz* Court nonetheless rationalized its decision, explaining that the use of race as a literal plus factor did not allow for “individualized consideration.”²³⁶ Although it is sensible that any candidate for admission to a university should be given individualized consideration, it is not necessarily true that the literal operation of a plus factor denies candidates such individualized consideration. In *Gratz*, for example, there was ample evidence that such individualized consideration was indeed given. Justice Souter pointed out this problem in his dissent.²³⁷

²²⁹ *Id.* at 270.

²³⁰ *Id.* at 270–75 (finding that the policy could not survive the narrow tailoring requirement of strict scrutiny analysis, even though the university had a compelling interest in attaining the educational benefits of diversity in higher education).

²³¹ *Id.* at 270.

²³² *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978)).

²³³ *Id.* at 270–274.

²³⁴ *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003).

²³⁵ *See Gratz*, 539 U.S. at 274 (“But the fact that the ‘review committee can look at the applications individually and ignore the points,’ once an application is flagged . . . is of little comfort under our strict scrutiny analysis. The record does not reveal precisely how many applications are flagged for this individualized consideration, but it is undisputed that such consideration is the exception and not the rule in the operation of the LSA’s admissions program.”).

²³⁶ *Id.* at 271.

²³⁷ *See id.* at 293–94 (Souter, J., dissenting). Souter’s dissent is notable for a variety of its points. One is that individualized consideration was granted to the petitioners:

The plan here, in contrast, lets all applicants compete for all places and values an applicant’s offering for any place not only on grounds of race, but on grades, test scores, strength of high school, quality of course of study, residence, alumni relationships, leadership, personal character, socioeconomic disadvantage, athletic ability, and quality of a personal essay.

Id. at 293–94. Another is that the dissent provides a concise explanation of the law following *Grutter*, which *Gratz* should have been found to satisfy:

Grutter and *Gratz* were losses for proponents of affirmative action, even if affirmative action programs were upheld generally. Taken together, the cases require that a university may consider race in evaluating candidates through its admission program if and only if race is considered merely as a “plus” factor²³⁸ and candidates are given “individualized consideration.”²³⁹ Upholding *Bakke*, the cases also express that quotas may not be used in affirmative action programs. Under this framework, it is still possible to operate a race-conscious admissions program.²⁴⁰ Nonetheless, the cases fail to recognize the false equivalences established by *Bakke*, fundamentally impairing the ability of universities to use affirmative action programs to achieve the educational benefits of diversity, thereby redressing the effects of racial discrimination. Further, the cases perpetuate the ability of white applicants with amorphous or nonexistent injuries to attack affirmative action programs in the federal courts through their false standing.

C. *Schuette v. Coalition to Defend Affirmative Action*

Schuette v. BAMN, though unique, is important to any consideration of the perils of race-based affirmative action programs in the federal courts.²⁴¹ Released between *Fisher I* and *II*, this case reveals the hostile state regulatory environment facing universities with race conscious admission programs.²⁴² *Schuette* held that no authority in the United States’ Constitution would allow the Court to set aside an

The cases now contain two pointers toward the line between the valid and the unconstitutional in race-conscious admissions schemes. *Grutter* reaffirms the permissibility of individualized consideration of race to achieve a diversity of students, at least where race is not assigned a preordained value in all cases. On the other hand, Justice Powell’s opinion in [*Bakke*] rules out a racial quota or set-aside, in which race is the sole fact of eligibility for certain places in a class. Although the freshman admissions system here is subject to argument on the merits, I think it is closer to what *Grutter* approves than to what *Bakke* condemns, and should not be held unconstitutional on the current record.

Id. at 293.

²³⁸ *Grutter*, 539 U.S. at 334.

²³⁹ *Gratz*, 539 U.S. at 271.

²⁴⁰ See, e.g., *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2205, 2214–15 (2016).

²⁴¹ See *Schuette v. Coal. to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equal. by Any Means Necessary*, 134 S. Ct. 1623 (2014) [hereinafter *Schuette v. BAMN*].

²⁴² See *Affirmative Action: State Action*, NAT’L. CONF. OF ST. LEGISLATURES (Apr. 2014), <http://www.ncsl.org/research/education/affirmative-action-state-action.aspx> [https://perma.cc/RV3E-G4V6] (showing various legislative efforts to thwart affirmative action).

amendment to a state's constitution, here, that of Michigan,²⁴³ prohibiting affirmative action in public education, employment, and contracting, which had been adopted by state voters by initiative.²⁴⁴ This case, perhaps better than the rest, shows the Court's potential hostility—or at least unwillingness to intervene—to affirmative action programs on the eve of *Fisher II*.

In dissent, Justice Sotomayor precisely expressed this author's position: "The Constitution does not protect racial minorities from political defeat. But neither does it give the majority free rein to erect selective barriers against racial minorities."²⁴⁵ By permitting the state constitutional amendment to stand in *Schuette*, the Court permitted "the majority to use its numerical advantage to change the rules mid-contest and forever stack the deck against racial minorities in Michigan."²⁴⁶ Traditionally, the federal courts have been protectors of the rights of minorities. But, following *Schuette*, this traditional role of the federal courts was brought into question, at least with regard to state ballot initiatives—this time banning affirmative action: "For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the [*Schuette*] decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government."²⁴⁷ Indeed, there is such a thing as tyranny of the majority.²⁴⁸

²⁴³ Michigan banned the use of affirmative action in the context of higher education by state constitutional amendment. But this has not changed the legal position of the University of Michigan. The University of Michigan filed amici curiae briefs in support of the University of Texas at Austin's race-conscious admissions program twice: both in *Fisher I* and *II*. See Brief for Leading Public Research Universities The University of Delaware, The Board of Trustees of The University of Illinois, Indiana University, The University of Kansas, The University of Michigan, Michigan State University, The University of Nebraska-Lincoln, The Ohio State University, The Pennsylvania State University, and Purdue University as Amici Curiae in Support of Respondents at 6–7, *Fisher v. Univ. of Tex. at Austin* (*Fisher I*), 133 S. Ct. 2411 (2013) (No. 11-345); Brief for the University of Michigan as *Amicus Curiae* in Support of Respondents at 4–5, *Fisher v. Univ. of Tex. at Austin* (*Fisher II*), 136 S. Ct. 2198 (2016) (No. 14-981) [hereinafter Michigan's Brief].

U-M's experience demonstrates that the limited consideration of race, as one factor among many in a holistic and individualized admissions program, is necessary to attain the educational benefits of student-body diversity. And when the Court previously considered this case, the University joined an *amicus* brief arguing that the limited consideration of race in admissions was consistent with equal protection principles. The University continues to believe that is so.

Id. at 4 (citations omitted).

²⁴⁴ *Schuette*, 134 S. Ct. 1623, 1638 (citing *Sailors v. Bd. of Educ.*, 387 U.S. 105, 109 (1967)) ("This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.")

²⁴⁵ *Id.* at 1683 (Sotomayor, J., dissenting).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ See generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Henry Reeve trans., 2002) (1835); JOHN STUART MILL, *ON LIBERTY* (Batoche Books 2001) (1859); THE FEDERALIST NO. 51 (James Madison).

V. *FISHER II*: BACK AT THE COURT

Fisher II was a triumph for proponents of affirmative action programs. The case, however, preserves legal fictions, and the case's potential inconsistency with *Bakke* leaves numerous questions unanswered. This Part of this Note discusses these matters pertaining to *Fisher II* and the case's impact on the law of affirmative action in the context of higher education.

A. *The University of Texas at Austin's Race-Conscious Admissions Program: Facts and Procedural History, Revisited*

As noted in Section I.A., applicants to the University who are not granted admission through the Top Ten Percent Plan must participate in the University's holistic review program. In addition to class-ranks, SAT/ACT scores, and grades, this holistic review program includes the consideration of essays, letters of recommendation, resumes, writing samples, artwork, and any other materials submitted by applicants.²⁴⁹ The University also considers "leadership experience, extracurricular activities, awards/honors, community service, and 'special circumstances.'"²⁵⁰ "Special circumstances" include socioeconomic status, familial responsibilities, whether applicants reside in a single-parent home, their first language, and—finally—race.²⁵¹ Extensive measures are undertaken to ensure candidates are evaluated for admission fairly: "Therefore, although admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus."²⁵²

Abigail Fisher applied for admission to the University's 2008 freshman class.²⁵³ She failed to complete her high school education in the top ten percent of her class, therefore she was not admitted through the Top Ten Percent Program.²⁵⁴ Thus, her application—along with 17,131 others—was considered for one of the remaining 1,216 seats for Texas residents.²⁵⁵ Fisher's application was denied.²⁵⁶

Fisher filed suit in the Western District of Texas, alleging the University's consideration of race in admissions violated the Equal Protection Clause of the Fourteenth Amendment.²⁵⁷ She lost, and the Fifth Circuit affirmed.²⁵⁸ Fisher

²⁴⁹ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2206 (2016).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 2207 (quoting *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009)).

²⁵³ *Id.*

²⁵⁴ *See id.*

²⁵⁵ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014).

²⁵⁶ *Fisher II*, 136 S. Ct. at 2207.

²⁵⁷ *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

²⁵⁸ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011).

sought a rehearing en banc, and her petition was denied.²⁵⁹ Fisher then appealed to the Supreme Court, which granted certiorari.²⁶⁰ Without making a judgment as to the constitutionality of the admissions program of the University, the Supreme Court vacated the judgment of the Fifth Circuit and remanded the case.²⁶¹ The Fifth Circuit again upheld the judgment of the district court.²⁶² As a result, Fisher sought another rehearing en banc, which was again denied.²⁶³ Fisher appealed to the Supreme Court, and certiorari was granted.²⁶⁴ Finally, Fisher lost.²⁶⁵

B. Outcomes: Fisher I Meets Fisher II

i. Exasperated Determination

Placing weight on the University's "*sui generis*" admissions program, the Supreme Court first noted "[t]he component of the University's admissions policy that had the largest impact on petitioner's chances of admission was not the school's consideration of race under its holistic-review process but rather the Top Ten Percent Plan."²⁶⁶ Indeed, "[b]ecause petitioner did not graduate in the top 10 percent of her high school class, she was categorically ineligible" for a large majority of the seats available at the University.²⁶⁷ Nonetheless, presumably because the Top Ten Percent Plan does not facially consider race, Fisher never challenged it—leaving an evidentiary gap in the case that could not be adequately filled.²⁶⁸ Further, the Top Ten Percent Plan was a statutory scheme over which the University had no control, and kept little records of, thus it proved impossible for the Court to have a clear image of the total number of individuals potentially adversely affected by the University's race-conscious admissions plan.²⁶⁹ Determining it was too late to correct these flaws in the record, the Court limited its decision to "whether, drawing all reasonable inferences in her favor, petitioner has shown by a preponderance of the evidence that she was denied equal treatment at the time her application was rejected."²⁷⁰

²⁵⁹ Fisher v. Univ. of Tex. at Austin, 644 F.3d 301, 303 (5th Cir. 2011).

²⁶⁰ Fisher v. Univ. of Tex. at Austin, 565 U.S. 1195, 1195 (2012).

²⁶¹ Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411, 2421–22 (2013).

²⁶² Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 637 (5th Cir. 2014).

²⁶³ Fisher v. Univ. of Tex. at Austin, 771 F.3d 274, 275 (5th Cir. 2014).

²⁶⁴ Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888, 2888 (2015).

²⁶⁵ Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198, 2214–15 (2016).

²⁶⁶ *Id.* at 2208–09.

²⁶⁷ *Id.* at 2209. This is the only occasion the Supreme Court directly addressed Fisher's lack of credentials. "It seems quite plausible, then, to think that petitioner would have had a better chance of being admitted to the University if the school used race-conscious holistic review to select its entire incoming class, as was the case in *Grutter*." *Id.*

²⁶⁸ *Id.*

²⁶⁹ *See id.*

²⁷⁰ *Id.* at 2210.

ii. Refutation of Abigail Fisher

Fisher alleged four primary arguments against the judgment of the Fifth Circuit. First, Fisher argued the University failed to articulate a compelling governmental interest in considering race in its admissions program.²⁷¹ Second, Fisher argued the University had “no need to consider race because it had already ‘achieved critical mass.’”²⁷² Third, Fisher argued “considering race was not necessary because such consideration has had only a “minimal impact” in advancing the University’s compelling interest.”²⁷³ Finally, Fisher argued race-neutral means could achieve the University’s compelling interest in the educational benefits of diversity.²⁷⁴

a. *Compelling Interest*

Fisher maintained that the University should have alleged the precise number of minority students that would have constituted a critical mass.²⁷⁵ This was effectively a trap designed by Fisher to ensnare the University in an unconstitutional quota system.²⁷⁶ The Supreme Court recognized this, stating a university may only “institute a race-conscious admissions program as a means of obtaining ‘the educational benefits that flow from student body diversity.’”²⁷⁷ Further, “[i]ncreasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers.”²⁷⁸ Because the University set forth “precise goals”—identifying the values the University sought to achieve through a diverse student body and why the University sought to achieve those values for its students— “[p]etitioner’s contention that the University’s goal was insufficiently concrete is rebutted by the record.”²⁷⁹

²⁷¹ *Id.*

²⁷² *Id.* at 2211 (quoting Brief for Petitioner at 46, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 5261568).

²⁷³ *Id.* at 2212 (quoting Brief for Petitioner at 46, *Fisher v. University of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016) (No. 14-981); see also Oral Argument at 22:25–23:16, *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016) (No. 14-981), <https://www.oyez.org/cases/2015/14-981>; *Id.* at 24:17–25:2; *Id.* at 25:24–26:16).

²⁷⁴ *Fisher II*, 136 S. Ct. at 2212.

²⁷⁵ *Id.* at 2210.

²⁷⁶ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (holding the use of a racial quota system to be unconstitutional).

²⁷⁷ *Fisher II*, 136 S. Ct. at 2210 (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2419 (2013)).

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 2211.

b. Critical Mass

Fisher argued the University had no reason to consider race in its admissions program because the University had already attained a “critical mass” of minority students.²⁸⁰ While Fisher was correct that a university demonstrating race-neutral alternatives will not suffice in a university’s pursuit of attaining the educational benefits of diversity, the University had pursued such race-neutral alternatives, and the alternatives failed.²⁸¹ Indeed, “[b]efore changing its policy the University conducted ‘months of study and deliberation, including retreats, interviews, and review of data,’ and concluded that ‘the use of race-neutral policies and programs had not been successful”²⁸²

The Court noted the “significant evidence, both statistical and anecdotal, in support of the University’s position” existed.²⁸³ The Court quoted demographic data, noting:

In 1996, for example, 266 African-American freshmen enrolled, a total that constituted 4.1 percent of the incoming class. In 2003, the year *Grutter* was decided, 267 African-American students enrolled—again, 4.1 percent of the incoming class. The numbers for Hispanic and Asian-American students tell a similar story. Although demographics alone are by no means dispositive, they do have some value as a gauge of the University’s ability to enroll students who can offer underrepresented perspectives.²⁸⁴

The Court then went on to quote further numeric data from 2002, when the University still relied on its race-neutral *Hopwood* regime,²⁸⁵ considering the percentages of classes with minorities represented versus those without.²⁸⁶ The Court sided with the University, acknowledging the University’s careful consideration of the *quotient* of minority students versus white students enrolled

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.* (citation omitted) (quoting app. 446a; Supplemental Joint Appendix at 25, *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016) (No. 14-981)).

²⁸³ *Id.* at 2212.

²⁸⁴ *Id.* (citing Supplemental Joint Appendix at 43, *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016) (No. 14-981)).

²⁸⁵ *Hopwood* invalidated the consideration of race in college admissions throughout the Fifth Circuit. *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996). *Hopwood* was implicitly overruled by *Grutter* and *Gratz* in 2003. *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Fisher II*, 136 S. Ct. at 2212. In 2003, the University of Texas at Austin altered its admissions program in compliance with *Grutter* and *Gratz*. *Id.* at 2205–06.

²⁸⁶ *Fisher II*, 136 S. Ct. at 2212.

when race was not considered in admissions.²⁸⁷ This careful consideration of quotients, in addition to “evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation,” supported the University’s decision to consider race through its holistic review program.²⁸⁸

c. *Minimal Impact*

Fisher also claimed the University’s consideration of race was unnecessary because it had only a small impact in increasing diversity at the University.²⁸⁹ To rebut this claim, the Court cited additional quotients:

In 2003, 11 percent of the Texas residents enrolled through holistic review were Hispanic and 3.5 percent were African-American. In 2007, by contrast, 16.9 percent of the Texas holistic-review freshmen were Hispanic and 6.8 percent were African-American. Those increases—of 54 percent and 94 percent, respectively—show that consideration of race has had a meaningful, if still limited, effect on the diversity of the University’s freshman class.²⁹⁰

Regardless, the Court mandated that a university’s race-conscious admission program is overly broad if it does not follow from the fact that a university’s consideration of race impacts only a small number of admissions decisions.²⁹¹ Indeed, “[t]he fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring.”²⁹²

d. *Race-Neutral Means*

Fisher’s final argument in support of her general proposition that the University’s race-conscious admissions program violated the Equal Protection Clause was that the University should have relied solely upon race-neutral means of achieving diversity.²⁹³ But the University *already had* implemented a number of race-neutral means—“the University spent seven years attempting to achieve its

²⁸⁷ See *id.* (“In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student. In other words, only 21 percent of undergraduate classes with five or more students in them had more than one African-American student enrolled. Twelve percent of these classes had no Hispanic students, as compared to 10 percent in 1996.”).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.* (internal citations omitted).

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See *id.*

compelling interest using race-neutral holistic review”—all of which failed.²⁹⁴ And Fisher failed “to offer any meaningful way in which the University could have improved upon them.”²⁹⁵ Fisher did argue in favor of uncapping the statutory Top Ten Percent Plan, but she overlooked “the fact that the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment. Percentage plans are ‘adopted with racially segregated neighborhoods and schools front and center stage.’”²⁹⁶ The Top Ten Percent Plan is not a race-neutral means; “[c]onsequently, petitioner cannot assert simply that increasing the University’s reliance on a percentage plan would make its admissions policy more race neutral.”²⁹⁷

C. Impact: The Meaning of Fisher II for Race-Based Affirmative Action

Fisher II confirmed the meaning of *Fisher I*, noting the central tenets of the case included “[r]ace may not be considered by a university unless the admissions process can withstand strict scrutiny;” and that “the decision to pursue ‘the educational benefits that flow from student body diversity’ . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper.”²⁹⁸ Thus, once a reasonable explanation is given for the consideration of race in admissions, deference must be given to the university for the decision. But “no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals.”²⁹⁹ A university, *Fisher I* explained, bears the burden of proving a “‘nonracial approach’ would not promote its interest in the educational benefits of diversity” nearly as well and at reasonable cost.³⁰⁰

Aside from providing clarity to the meaning of *Fisher I*, *Fisher II* left many open questions. For instance, what is the impact of *Fisher II* on false standing? The case highlights the merit objection, and calls out legacy preferences, but what does this mean? Most important for purposes of this Note, however, what is the impact of *Fisher II* on the problem of false equivalences? This Section of this Note discusses these questions, and such questions’ positive and negative implications.

i. Merit, False Standing, and Legacy Preferences

Fisher II rebutted the merit objection to affirmative action.³⁰¹ In rebutting Fisher’s suggestion that academic credentials should be accorded higher value than

²⁹⁴ *Id.* at 2213.

²⁹⁵ *Id.*

²⁹⁶ *Id.* (quoting *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting)).

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 2208 (quoting *Fisher I*, 133 S. Ct. at 2418, 2419).

²⁹⁹ *Id.* (citing *Fisher I*, 133 S. Ct. at 2419–20).

³⁰⁰ *Id.* (quoting *Fisher I*, 133 S. Ct. at 2420).

³⁰¹ See *id.* at 2213–15.

other unique qualities of a person, the Court, echoing Randall Kennedy, expounded:

A system that selected every student through class rank alone would exclude the star athlete or musician whose grades suffered because of daily practices and training. It would exclude a talented young biologist who struggled to maintain above-average grades in humanities classes. And it would exclude a student whose freshman-year grades were poor because of a family crisis but who got herself back on track in her last three years of school, only to find herself just outside of the top decile of her class.³⁰²

This is not the first time the Court has shown venom toward the merit objection,³⁰³ although it is the most direct. This statement provides great encouragement to proponents of affirmative action programs who have long objected that test scores are not a sufficient measure of a student's ability to make a meaningful contribution to a university's student body. Unfortunately, however, neither the mismatch nor the stigma objection was rebutted.

Fisher's lack of standing to challenge the University's race-conscious admissions program was an issue throughout the case.³⁰⁴ Although the Court never resolved the matter,³⁰⁵ the Court may have made a sly reference to the controversy in its final disposition of the case. Indeed, it was the opinion of the Court that *Fisher* "has been litigated on a somewhat artificial basis."³⁰⁶ *Bakke*, the source of the false standing doctrine,³⁰⁷ though not repudiated by this statement, may now be weakened. In any event, the door may now be open to more directly challenge the "artificial" standing of affirmative action opponents. Although it is possible that affirmative action opponents might have their injuries categorized as "capable of

³⁰² *Id.* at 2213.

³⁰³ *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003) (noting percentage plans "may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university").

³⁰⁴ *See, e.g.*, Brief for Respondents at 16 n.6, *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief for Respondents at 17–24, *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198 (2016) (No. 14-981).

³⁰⁵ *See Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2415 (2013); *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2207 (2016).

³⁰⁶ *Fisher II*, 136 S. Ct. at 2209.

³⁰⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307–09 (1978); *see supra* Subsection III.B.i.; *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–62 (1992) (discussing the requirements of Article III standing in federal court).

repetition, yet evading review,³⁰⁸ this is unclear, because it is not certain that rejected applicants have standing to challenge such a rejection to begin with.³⁰⁹

Though perhaps misplaced,³¹⁰ Justice Alito's dissent, joined by Chief Justice Roberts and Justice Thomas, brought up a valuable point: legacy preferences.³¹¹ The University's legacy system is opaque³¹² and secretive³¹³. Under the unspoken legacy program, university officials override the "normal holistic review to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT officials and faculty—to get family members and other friends admitted to UT, despite having grades and standardized test scores substantially below the median for admitted students."³¹⁴ Although the existence of the University's legacy program was denied by counsel for the University,³¹⁵ there is no question that a legacy program does, in fact, operate at the University.³¹⁶

The existence of the covert legacy program is cited by Justice Alito as evidence of bad faith on the part of the University.³¹⁷ While the University's efforts to conceal the program throughout the course of litigation of the *Fisher* cases may implicate bad faith—*are we surprised?* Legacy programs exist throughout the United States.³¹⁸ And it is indisputable that legacy programs provide an advantage to the privileged, whether the precise details of the programs, or their existence, are made public or not.³¹⁹ Nonetheless, it is pleasing to see the questionable nature of

³⁰⁸ See *S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911).

³⁰⁹ *Fisher* claimed standing under the Equal Protection Clause of the Fourteenth Amendment. This was opposed throughout the litigation. See *Fisher II*, 136 S. Ct. at 2207–08; *supra* text accompanying notes 218–220; see also *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950) (rejected applicants do not have standing under the Due Process Clause of the Fifth Amendment).

³¹⁰ See *Fisher II*, 136 S. Ct. at 2211–12 (“At no stage in this litigation has petitioner challenged the University’s good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to.”); see also *id.* at 2240 (Alito, J., dissenting).

³¹¹ *Fisher II*, 136 S. Ct. at 2240 (Alito, J., dissenting).

³¹² *Id.* at 2240 (Alito, J., dissenting) (citing UNIVERSITY OF TEXAS AT AUSTIN—INVESTIGATION OF ADMISSIONS PRACTICES AND ALLEGATIONS OF UNDUE INFLUENCE 43 (Feb. 6, 2015), <https://www.utsystem.edu/sites/utsfiles/documents/outside-reports/investigation-admissions-practices-and-allegations-undue-influence/investigation-admissions-practices-kroll-2015-02.pdf> [<https://perma.cc/7HA6-CZTY>]).

³¹³ See Bobby Blanchard & Christy Hoppe, *Influential Texans Helped Underqualified Students Get Into UT*, DALL. MORNING NEWS (July 2015), <http://www.dallasnews.com/news/education/2015/07/20/influential-texans-helped-underqualified-students-get-into-ut> [<https://perma.cc/XK9J-9GPJ>].

³¹⁴ *Fisher II*, 136 S. Ct. at 2240 (Alito, J., dissenting).

³¹⁵ *Id.*

³¹⁶ UNIVERSITY OF TEXAS AT AUSTIN—INVESTIGATION OF ADMISSIONS PRACTICES AND ALLEGATIONS OF UNDUE INFLUENCE 29 (Feb. 6, 2015), <https://www.utsystem.edu/sites/utsfiles/documents/outside-reports/investigation-admissions-practices-and-allegations-undue-influence/investigation-admissions-practices-kroll-2015-02.pdf> [<https://perma.cc/7HA6-CZTY>] [hereinafter Kroll Report].

³¹⁷ *Fisher II*, 136 S. Ct. at 2240 (Alito, J., dissenting).

³¹⁸ See KAHLLENBERG, *supra* note 147, at 1.

³¹⁹ See *id.*

legacy programs brought to light in the *Fisher* litigation. If the white privileged opponents of affirmative action are granted false standing to challenge affirmative action in court, it is appropriate, at a minimum, that white-privileging legacy programs are criticized too.

ii. Quotas and False Equivalences

Fisher II upheld the consideration of race in college admissions, and the case provided guidance on the manner in which race may specifically be considered. In so doing, however, the Court may have blurred the constitutional law on the matter.³²⁰ *Bakke* determined racial preferences, essentially, quotas, may not be supported even if the motivation is to remedy past discrimination.³²¹ This gave rise to the false equivalences problem, discussed in Section IV.A. of this Note. The *Fisher II* Court maintained that quotas may not be considered, noting “the University is prohibited from seeking a particular number or quota of minority students.”³²² Nonetheless, the Court discussed quotients, numeric data, and statistical evidence throughout the majority opinion.³²³ Does this mean universities are now free to consider quotas? Probably not, or at least not exclusively. The quotients considered by the *Fisher II* Court were not directed at any specific numeric goal and the quotients were considered along with a host of other information such as “anecdotal evidence.”³²⁴

The real concern with the Court’s consideration of the numeric data is that it promotes a legal fiction. *Quotient* is defined by Merriam-Webster as “the number resulting from the division of one number by another,” or “the magnitude of a specified characteristic or quality.”³²⁵ It is axiomatic that student-body diversity, especially when *measured*, considering factors such as the racial and sexual demographics of the student body, necessarily involves some consideration of numbers and the way such numbers relate to one another. No matter how the Court chooses to characterize these numbers, as a “critical mass” or otherwise,

³²⁰ Quotas may not be considered under *Bakke*, which was adopted as a constitutional standard under *Grutter*. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 315–17 (1978)). Nonetheless, the *Fisher II* Court considered quotients and a vast array of numeric and statistical data in support of the University of Texas at Austin’s consideration of race in college admissions. See, e.g., *Fisher II*, 136 S. Ct. at 2212. Does this mean quotas may be considered? “[T]he University is prohibited from seeking a particular number or quota of minority students.” *Id.* at 2210.

³²¹ See *Bakke*, 438 U.S. at 307.

³²² *Fisher II*, 136 S. Ct. at 2210.

³²³ See *supra* text accompanying notes 275–287.

³²⁴ *Fisher II*, 136 S. Ct. at 2212.

³²⁵ *Quotient*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/quotient> [<https://perma.cc/E3ZN-V3RV>] (last visited Mar. 25, 2017).

quotients will be considered. Any question as to the truth of this statement is resolved by a cursory review of *Fisher II*.³²⁶

The inability of universities to *explicitly* consider quotas, however, is damaging. No matter the Court's stance on the matter, strict scrutiny aside, it is simply *not true* that racial distinctions are always bad.³²⁷ Indeed, mandating that racial distinctions are always bad—perpetuating false equivalences between positive and negative racial distinctions—limits the manner in which universities may use positive racial preferences to ameliorate the effects of racism, which, stated or not, is *in fact* one of the educational benefits of diversity.

Racial diversity on-campus fosters the educational benefits of diversity in classrooms.³²⁸ Permitting universities to consider a flexible numerical target for the admission of minority students, whether that target is met each academic year or not, would be an enormously effective means of obtaining a diverse student body. Indeed, there is a plethora of evidence demonstrating that such numeric calculations are already considered.³²⁹ Such calculus need not deprive candidates of holistic review.³³⁰ And racial quotas have been approved of in other contexts.³³¹

Fisher II gave the Court a platform to expand the means by which a university might consider numeric data along with race for purposes of college admission. The Court punted on quotas, but delivered on deference: “Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”³³² Considering that universities “serve as ‘laboratories for experimentation,’” it is likely that the deference provided by the Court will only serve to further mask the legal fiction that universities do not consider quotas through their affirmative action programs.³³³ Because in fact, they do.³³⁴

³²⁶ See *Fisher II*, 136 S. Ct. at 2212 (“In 2002, 52 percent of undergraduate classes with at least five students had no African-American students enrolled in them, and 27 percent had only one African-American student.”).

³²⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 245–46 (1995) (Stevens, J., dissenting). Justice Thomas, ever the contrarian, maintains his view that racial distinctions are always unconstitutional. See *Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting).

³²⁸ See *Fisher II*, 136 S. Ct. at 2211–12.

³²⁹ See, e.g., *id.* at 2212; see also Andrew Lam, *White Students' Unfair Advantage in Admissions*, N.Y. TIMES (Jan. 30, 2017), <https://mobile.nytimes.com/2017/01/30/opinion/white-students-unfair-advantage-in-admissions.html> [<https://perma.cc/GGM6-JVCK>].

³³⁰ See *Gratz v. Bollinger*, 539 U.S. 244, 293–94 (2003) (Souter, J., dissenting).

³³¹ See, e.g., *United States v. Paradise*, 480 U.S. 149 (1987).

³³² *Fisher II*, 136 S. Ct. at 2214.

³³³ *Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring)); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³³⁴ See Lam, *supra* note 329.

CONCLUSION

Regents of the University of California v. Bakke was decided thirty-nine years ago.³³⁵ Since then, much has changed, but some things have not. The makeup of the Supreme Court is completely different and may be even more different by the time this Note is published.³³⁶ Nonetheless, for now, race may still be considered in college admissions, subject to the legal fiction of false equivalences established by *Bakke*. And, though recently upheld, the positive consideration of race in college admissions remains vulnerable to attack. We can thank *Bakke* for that, too.

Although it is unclear when the next Supreme Court challenge will arise—other matters are currently at center stage³³⁷—it will come, and scholars, as well as practitioners, must be prepared. It is hoped that this Note will contribute to that preparation and encourage the Court to finally recognize the damaging legal fictions promoted by *Bakke* and its progeny. If the Supreme Court is serious about equal justice under law, then the Court must be willing to recognize the potential power of affirmative action to counteract invidious discrimination. It is time for the Court to eliminate the harmful legal fictions enveloping the law of affirmative action and explicitly provide universities the discretion to use flexible quotients as a part of a holistic scheme to achieve the educational benefits of diversity on all our campuses.

³³⁵ See 438 U.S. 265, 265 (1978).

³³⁶ See Jonathan H. Adler, *How Scalia-esque Will Donald Trump's Supreme Court Nominee Be?*, WASH. POST (Jan. 26, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/26/how-scalia-esque-will-donald-trumps-supreme-court-nominee-be> [<https://perma.cc/9639-BYLF>]; Julie Hirschfeld Davis & Mark Landler, *Trump Nominates Neil Gorsuch to the Supreme Court*, N.Y. TIMES (Jan. 31, 2017), https://www.nytimes.com/2017/01/31/us/politics/supreme-court-nominee-trump.html?_r=0 [<https://perma.cc/JL3A-MG8K>].

³³⁷ See, e.g., Jeremy W. Peters, *Trump on Their Side, Conservatives See Hope in Lengthy Abortion Fight*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/us/politics/democrats-republicans-planned-parenthood.html> [<https://perma.cc/B22Z-6599>].

