

# BUFFALO LAW REVIEW

VOLUME 62

APRIL 2014

NUMBER 2

## The Fraudulent<sup>1</sup> Case Against Affirmative Action—The Untold Story Behind *Fisher v. University of Texas*

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The Wisdom of the Past:

*“In order to get beyond racism, we must first take account of race. There is no other way.”*<sup>2</sup>

—Justice Harry Blackmun

*“By virtue of our Nation’s struggle with racial inequality, [underrepresented minority students] are both likely to have experiences of particular importance to [a university’s] mission,*

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1. “False representation of a matter of fact—whether by words or by conduct, by false or misleading allegations, or by concealment of what should have been disclosed—that deceives and is intended to deceive another so that the individual will act upon it to her or his legal injury.” 4 WEST’S ENCYCLOPEDIA OF AMERICAN LAW 487 (2005). Paul Krugman has similarly referred to the “culture of fraud” among certain economists willing to lend their credibility to the agenda of a political campaign. Paul Krugman, *Culture of Fraud*, N.Y. TIMES BLOG (Aug. 10, 2012, 5:10 PM), [http://krugman.blogs.nytimes.com/2012/08/10/culture-of-fraud/?\\_php=true&\\_type=blogs&\\_r=0](http://krugman.blogs.nytimes.com/2012/08/10/culture-of-fraud/?_php=true&_type=blogs&_r=0).

2. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., dissenting).

*and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”*<sup>3</sup>

—Justice Sandra Day O'Connor

The New Mantra:

*“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”*<sup>4</sup>

—Chief Justice John Roberts

*“The University’s professed good intentions [in support of race-conscious admissions] cannot excuse its outright racial discrimination any more than such intentions justified the now denounced arguments of slaveholders and segregationists.”*<sup>5</sup>

—Justice Clarence Thomas

## INTRODUCTION

John Roberts and Clarence Thomas are among the foremost prosecutors of the case against affirmative action<sup>6</sup> and, indeed, any race conscious effort to alleviate the effects of long-standing discrimination. Roberts authored the Court’s opinion in *Parents Involved*, striking down voluntary school desegregation plans that employed racial classifications to achieve their goals. Clarence Thomas has for years insisted that consideration of race in the interest of a more diverse workplace or student body is little different than the pernicious *de jure* segregation of the Jim Crow era, and so must be judged by the very same exacting standards of strict scrutiny.<sup>7</sup> As historical analogies go, this rates among the most bizarre. Thomas goes so far, as noted above, to accuse his colleagues who disagree on this point of

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3. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

4. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No.1*, 551 U.S. 701, 705 (2007).

5. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2430 (2013) (Thomas, J., concurring).

6. As used here, the term refers to race or gender preferences, as compared with less controversial practices such as outreach or mentoring.

7. See *Fisher*, 133 S. Ct. at 2428-29 (Thomas, J., concurring); *Parents Involved*, 551 U.S. at 748 (Thomas, J. concurring); *Grutter*, 539 U.S. at 370-71 (Thomas, J., dissenting).

resorting to the discredited arguments pitched by the defenders of segregation in *Brown v. Board of Education*.<sup>8</sup>

Another central tenet of the critique of affirmative action is that it sacrifices “merit” to preferential treatment, elevates the deserving over the undeserving, and “lowers the standards.”<sup>9</sup> Karen Torre, lawyer for the successful white plaintiffs in the 2009 reverse discrimination case against the New Haven Fire Department (“N.H.F.D.”),<sup>10</sup> was quoted on the courthouse steps describing the case as “a ‘symbol’ for millions of Americans who are ‘tired of seeing individual achievement and merit take a back seat to race and ethnicity.’”<sup>11</sup> Such is the over-heated rhetoric of our day.

In fact, “merit” and “standards” are often code for the collection of dubious practices that have reserved for white males a large slice of society’s goodies. In this category, we must put the 100-question multiple-choice test of the ability to memorize a fire manual, which propelled Torre’s client Frank Ricci to appointment as captain in the N.H.F.D.<sup>12</sup> Birmingham firefighter Kenny Wilks, lead plaintiff in another reverse discrimination case discussed below,<sup>13</sup> captured the sophistication of such personnel selection: “You take the same test I take. If I beat you, I get [the job].

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8. See *Fisher*, 133 S.Ct. at 2428-29; *Parents Involved*, 551 U.S. at 772-78 (comparing the dissenter’s arguments to the segregationist’s arguments in *Brown v. Board of Education*).

9. Sonia Sotomayor, a Puerto Rican child of the South Bronx, recalls her days at Princeton: “*The Daily Princetonian* routinely published letters to the editor lamenting the presence on campus of ‘affirmative action students,’ each one of whom had presumably displaced a far more deserving affluent white male . . . .” SONIA SOTOMAYOR, *MY BELOVED WORLD* 145 (2013).

10. *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009).

11. Lani Guinier & Susan Storm, *Trial by Firefighters*, N.Y. TIMES, July 11, 2009, at A19.

12. See Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 211-12 (2011) [hereinafter Brodin, *Triumph of White Privilege*].

13. See discussion *infra* notes 110-18 and accompanying text.

If you beat me, you get it. *That's what the merit system is all about.*"<sup>14</sup>

The case against affirmative action is built, in sum, upon gross distortions of history and current reality.<sup>15</sup> Yet, in the public mind, diversity preferences have become the antithesis of fair play.

We of course have always had (with nary a complaint) "affirmative action" for certain privileged groups. In higher education, these include athletes (especially those on the coach's recruiting list),<sup>16</sup> "legacies" (dubbed "affirmative action for rich white people"),<sup>17</sup> "development cases,"<sup>18</sup> oboe

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14. Karen Schneider, *U.S. Battle Brews on Job Laws: Affirmative Action Advocates Fight Back*, TORONTO STAR, Feb. 26, 1990, at A15 (emphasis added).

15. A third misconception is what one writer calls "the causation fallacy"—the mistaken notion that when white applicants are rejected and minorities with equal or lesser qualifications are admitted, the likely cause is affirmative action. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002). Yet "the reflexive tendency to blame affirmative action" for one's rejection at work or school stubbornly persists. *Id.* at 1078.

16. See generally WILLIAM G. BOWEN & SARAH A. LEVIN, *RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES* (2003).

17. DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 6 (2006); see also Daniel Golden, *An Analytic Survey of Legacy Preference, in AFFIRMATIVE ACTION FOR THE RICH: PREFERENCES IN COLLEGE ADMISSIONS* 71, 89 (Richard D. Kahlenberg ed., 2010) [hereinafter Golden, *An Analytic Survey*]; Gene Nichol, *Race, Legacy and Affirmative Action*, THE PROGRESSIVE POPULIST, Oct. 15, 2012, at 20. According to Richard Kahlenberg's research, over 90% of top American universities grant preferences to children of alumni, worth on average a boost of 160 points (out of 1600) on the SAT score. Richard D. Kahlenberg, *Introduction to AFFIRMATIVE ACTION FOR THE RICH: PREFERENCES IN COLLEGE ADMISSIONS*, *supra*, at 1-2, 6. Legacy admits, overwhelmingly white and affluent, often come in with significantly lower profiles than their classmates. The seats they occupy have a disparate impact on students of color. *Id.* at 10. "If affirmative action is aimed at opening the doors to excluded minorities, legacy preferences were designed to slam those doors shut." John Brittain & Eric L. Bloom, *Admitting the Truth: The Effect of Affirmative Action, Legacy Preferences, and the Meritocratic Ideal of Students of Color in College Admissions*, in *AFFIRMATIVE ACTION FOR THE RICH: PREFERENCES IN COLLEGE ADMISSIONS*, *supra*, at 123, 136.

18. Golden, *An Analytic Survey*, *supra* note 17, at 98-99.

players, applicants from farm states, children of faculty, etc. As Justice Blackmun put it in *Bakke*:

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 up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.<sup>19</sup>

Legacy admits are particularly troublesome because, as one observer notes, “it’s hard to think of a more base rejection of egalitarian, merit-based decision-making than legacy preference—admission by bloodline.”<sup>20</sup> Evidence that such admissions boost financial resources of universities, one of its oft-stated justifications, is weak at best.<sup>21</sup> Legacy admits outnumber affirmative action admits at the nation’s most elite schools.<sup>22</sup> And legacy preference puts increased pressure on college admission officers to rely on affirmative action to achieve a “diverse student population.”<sup>23</sup> Yet, legal challenges to legacy preference have been rare and unsuccessful.<sup>24</sup>

Notwithstanding the prevalence of these *non-merit* preferences, any nod to a candidate’s race, ethnicity, or gender is likely to bring an outcry,<sup>25</sup> with little if any

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19. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 404 (1978) (Blackmun, J., dissenting).

20. Nichol, *supra* note 17.

21. Kahlenberg, *supra* note 17, at 7-9; Golden, *An Analytic Survey*, *supra* note 17, at 101-21.

22. Golden, *An Analytic Survey*, *supra* note 17, at 124.

23. *Id.* at 132.

24. Kahlenberg, *supra* note 17, at 11-12.

25. See, e.g., Brooks H. Spears, “*If the Plaintiffs Are Right, Grutter Is Wrong*”: *Why Fisher v. University of Texas Presents an Opportunity for the Supreme Court to Overturn a Flawed Decision*, 46 U. RICH. L. REV. 1113, 1117 (2012) (referring to acceptance of “minority students with below-average credentials,” and the “relax[ing of] standards to admit more minorities”). Few legal issues, Justice William Brennan observed forty years ago, “have stirred as much

thought as to whether the traditional selection procedures (often standardized tests) themselves represent a fair and reliable way to select among applicants.<sup>26</sup>

The courts have certainly played their part in perpetuating the myth of *merit* vs. *affirmative action*. In *Ricci v. DeStefano*,<sup>27</sup> Justice Kennedy simply took for granted that the multiple-choice examination could reliably identify those firefighters who should be promoted to lieutenant and captain, *and in the precise order*, despite compelling expert evidence to the contrary.<sup>28</sup> Such exercises in memorization of material that can be learned quickly on-the-job favor those, usually white applicants, with friends or relatives already working in the department who can be valuable resources in learning how to play the civil service game.<sup>29</sup>

The untold story is that the use of more reliably predictive methods of selection, such as those used by the military,<sup>30</sup> would go far in obviating the need for affirmative action in the first place.

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debate." *DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting).

26. *See, e.g.*, Spears, *supra* note 25, at 1127. Referring to UT's admissions process, Spears contrasts the traditional profile of SAT results and GPA values which are "merit-based and noncontroversial" with the personal achievement score which "involves the holistic review of a number of qualitative factors including the applicant's leadership qualities, work experience, socioeconomic status, and race." *Id.* The author dismisses Judge Higginbotham's characterization of the personal achievement score as "designed to recognize qualified students whose merit as applicants was not adequately reflected by their [academic record]." *See id.* at n.97.

27. *See* 129 S. Ct. 2658 (2009). *See generally* Brodin, *Triumph of White Privilege*, *supra* note 12.

28. *Ricci*, 129 S. Ct. at 2678-81. Even "liberal" justices seem to have an abiding faith in our ability to weigh "individual merit or achievement." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

29. In one notable example, a buildings trade union set up "cram courses" for the sons and nephews of present union members in order to prepare them for the entrance tests," thus assuring their success over minority applicants. *See E.E.O.C. v. Local 638*, 532 F.2d 821, 826 (2d Cir. 1976).

30. Brodin, *Triumph of White Privilege*, *supra* note 12, at 228.

The media has contributed greatly to the public misunderstanding, often dubbing any race-conscious action a *quota*, while any testing device, no matter how dubious, as a *merit-selector*.<sup>31</sup> Typical are headlines in the *New York Post* condemning the federal district judge who has been critical of the tests used for hiring and promotion in the fire department: *It's Time to Fire the Judge Who Rewards Failure*<sup>32</sup> and *Drop the FDNY Quotas*.<sup>33</sup> In fact, Judge Nicholas Garaufis has neither ordered the hiring of unqualified firefighters nor established quotas.<sup>34</sup>

A Gallup poll question sets up the false dichotomy:

Some people say that to make up for past discrimination, women and minorities should be given preferential treatment in getting jobs and places in college. Others say that *ability, as determined by test scores*, should be the main consideration. Which point of view comes closer to how you feel on the subject?<sup>35</sup>

Not surprisingly, upwards of 80% selected “ability.”<sup>36</sup> As we know after decades of highly successful public relations campaigns, the framing of the issue and the choice of labels are central to the public’s perception.<sup>37</sup> The anti-affirmative

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31. *See id.* at 163 n.16.

32. Letter to the Editor, *It's Time to Fire the Judge Who Rewards Failure*, N.Y. POST (Mar. 15, 2012, 4:00 AM), <http://nypost.com/2012/03/15/its-time-to-fire-the-judge-who-rewards-failure/>.

33. *See* Op-Ed, *Drop the FDNY Quotas*, N.Y. POST (Aug. 9, 2010, 4:00 AM), <http://nypost.com/2010/08/09/drop-the-fdny-quotas/>.

34. *See* *United States v. City of New York*, 717 F.3d 72 (2d Cir. 2013). His order, requiring the City to develop new testing procedures for firefighters that did not have the disparate impact on black and Hispanic applicants of the previous exams, was affirmed. *Id.* at 95-99.

35. RAYMOND WOLTERS, *RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS* 4 (1969) (emphasis added).

36. *Id.*

37. *See generally* FRANK I. LUNTZ, *WORDS THAT WORK: IT'S NOT WHAT YOU SAY, IT'S WHAT PEOPLE HEAR* (2006); Jill Lepore, *The Lie Factory: How Politics Became a Business*, NEW YORKER, Sept. 24, 2012, at 50, 53, 56-58 (detailing how the first political public relations firm sank progressive Upton Sinclair's 1934 run for governor of California, and went on to defeat Governor Earl Warren's plan for compulsory health insurance for the state and President Truman's similar plan for the nation by portraying them as “socialized medicine”). It is interesting to note that affirmative action is known as “positive discrimination”

action effort has thus achieved impressive results in the political arena, with several states outlawing its use by ballot initiative or executive order, beginning with California, Florida, and Washington in the 1990s, and more recently extending to Arizona, Michigan, Nebraska, New Hampshire, and Oklahoma.<sup>38</sup>

For those who extol standardized tests and condemn so-called “holistic” approaches as benefitting the *unqualified*,<sup>39</sup> one might ask if that is the way they choose their own doctors, lawyers, or accountants? Do they ignore matters of character, dependability, judgment, commitment, or personal affability, in favor of a singular focus on academic record and test scores? As Chief Justice Warren Burger recognized, “[h]istory is filled with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees.”<sup>40</sup>

Thomas Jefferson’s admirable ideal of a “natural aristocracy” based on “virtue and talent” rather than wealth or ancestry<sup>41</sup> leaves open the perplexing question—*how do we reliably identify virtue and talent?*

“Affirmative action” and “quota” have become slurs for attacking any innovative approach designed to give minorities or females a fair chance at success by untangling the matrix of “color-blind” criteria that are anything but. To paraphrase one of the earliest ruminations on the subject: any deviation from “the usual method” of selection will of

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in the United Kingdom and as “employment equity” in Canada and elsewhere. See Marjorie Cohn, *Affirmative Action and the Equality Principle in Human Rights Treaties: United States’ Violation of Its International Obligations*, 43 VA. J. INT’L L. 249, 267-70 (2002).

38. Nelson D. Schwartz & Michael Cooper, *Racial Diversity Efforts Ebb for Elite Careers, Analysis Finds*, N.Y. TIMES (May 27, 2013), <http://www.nytimes.com/2013/05/28/us/texas-firm-highlights-struggle-for-black-professionals.html>.

39. See WOLTERS, *supra* note 35, at 170-72.

40. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433 (1971).

41. 1 THOMAS JEFFERSON, MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 232 (Thomas Jefferson Randolph ed., 1829).

course “appear unjust to those who are accustomed” to succeeding by those methods.<sup>42</sup>

*Fisher v. University of Texas*,<sup>43</sup> a challenge to the very modest weighing of race in admissions at the University of Texas, is only the most recent vehicle for reigning in efforts towards inclusion.<sup>44</sup> Its begrudging acceptance, at least for the time being, of the concept of affirmative action (but setting an exceedingly high bar for its defense) implicitly accepts the new paradigm of white victimhood, where one’s disappointments can be blamed simplemindedly on affirmative action. But, in truth, the fault often lies not in the stars, but in themselves.<sup>45</sup>

At stake in *Fisher* is nothing less than a traditional gateway into politics, government, business, and the professions—the great American public university<sup>46</sup>—and thus the very opportunity for social mobility.<sup>47</sup> The dramatic reversals of minority representation at the institutions that have abandoned affirmative action because of court orders

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42. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 723 n.3 (1974) (quoting Thomas Nagel, *Equal Treatment and Compensatory Discrimination*, 2 PHIL. & PUB. AFF. 348, 360 (1973)).

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

44. *Fisher* was followed the next day by *Shelby County, Alabama v. Holder*, declaring unconstitutional a key provision of the Voting Rights Act of 1965, which had brought millions of African Americans into the voting booth for the first time since Reconstruction, was reauthorized several times by overwhelming majorities in Congress, and had been upheld by the Court on each prior occasion. *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612, 2619-21, 2651 (2013).

45. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act I, sc. ii; *see infra* note 144.

46. In their classic study, William G. Bowen and Derek Bok document the extent to which the elite universities position graduates in the “pipeline” for entry into these endeavors. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 280-86 (1998).

47. For the marked decrease in upward mobility and disturbing upturn in inequality of wealth, see NAT’L URBAN LEAGUE, *THE STATE OF BLACK AMERICA, REDEEM THE DREAM* 12-59 (2013) and JACOB S. HECKER & PAUL PIERSON, *WINNER TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS* 15-33 (2010). The gap between black and white family income and wealth remains staggering. *See* CHRISTOPHER HAYES, *TWILIGHT OF THE ELITES: AMERICA AFTER MERITOCRACY* 61-62 (2012).

or voter initiatives<sup>48</sup> will long reverberate throughout the society.

This paper traces the political evolution of affirmative action from its origins in the Kennedy and Johnson Administrations through its despised status during the Reagan years, and the Supreme Court's parallel path from enthusiasm to outright hostility. Defying predictions that race-conscious selections would be strictly prohibited by the Roberts Court,<sup>49</sup> *Fisher v. University of Texas* will likely nonetheless achieve the same result by its application of the severest standards of judicial scrutiny, anachronistically borrowed from cases challenging segregation and pernicious discrimination. The article contests this false equivalency between practices that utilize race *to include* and those that do so *to exclude*. It also challenges the contention of its opponents that affirmative action means sacrificing merit to special preference by confronting the myths and misconceptions surrounding "merit," and particularly the stubborn reliance upon standardized testing.

### I. THE RISE AND FALL OF "AFFIRMATIVE ACTION"<sup>50</sup>

The phrase "affirmative action" originated with President John F. Kennedy,<sup>51</sup> but was greatly expanded

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48. See William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 28-36 (2003); David B. Oppenheimer, *Color-Blindness, Racism-Blindness, and Racism-Awareness: Revisiting Judge Henderson's Proposition 209 Decision*, 13 BERKELEY J. AFR.-AM. L. & POL'Y 229, 242-48 (2011).

49. The Chief Justice similarly defied predictions a year before when he authored the opinion upholding the Affordable Health Care Act, but with the poison pill proclaiming that Congress had exceeded its power under the Commerce Clause, the underpinning of most social legislation. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2566-93 (2012).

50. For an extensive history of affirmative action, see BOWEN & BOK, *supra* note 46, at 1-14.

51. See Exec. Order No. 10925, 26 Fed. Reg. 1,977 (Mar. 8, 1961). President Johnson followed with the more elaborate Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965). Every president from Nixon to Carter supported similar efforts. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 828-29 (2007) (Breyer, J., dissenting).

upon by his successor, Lyndon B. Johnson. Originally, it meant simply reaching out to recruit and assist minorities after years of discriminatory treatment.<sup>52</sup> President Johnson explained the rationale:

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, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe you have been completely fair.

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This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and as a result.

For the task is to give 20 million Negroes the same chance as every other American to learn and grow, to work and share in society, to develop their abilities—physical, mental and spiritual, and to pursue their individual happiness.

To this end equal opportunity is essential, but not enough, not enough. Men and women of all races are born with the same range of abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family that you live with, and the neighborhood you live in—by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.<sup>53</sup>

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For a comparison of affirmative action policies and laws in other jurisdictions, see DAVID B. OPPENHEIMER, SHEILA R. FOSTER, & SORA Y. HAN, *COMPARATIVE EQUALITY AND ANTI-DISCRIMINATION LAW* 234-308 (2012).

52. An early example in the academic context was Harvard Law School's "special summer program," initiated in 1965, that brought forty African-American college students from the South to Cambridge for an introduction to the legal profession. Kidder, *supra* note 48, at 11.

53. President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), in 2 *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON* 635-40 (1966).

No doubt “affirmative action” implicitly recognizes the dilemma of a “discrete and insular minority” with limited political and economic clout.<sup>54</sup> It also was aimed, as Shelby Steele has observed, at “the restoration of legitimacy” to American institutions:

[T]he original goal of affirmative action was to achieve two redemptions simultaneously. As society gave a preference to its former victims in employment and education, it hoped to redeem both those victims and itself. When America—the world’s oldest and most unequivocal democracy—finally acknowledged in the 1960s its heartless betrayal of democracy where blacks were concerned, the loss of moral authority was profound. In their monochrome whiteness, the institutions of this society—universities, government agencies, corporations—became emblems of the very evil America had just acknowledged.<sup>55</sup>

By the 1970s and 1980s, in the face of the intransigence of many governmental (particularly municipal) employers, minority plaintiffs, together with the U.S. Justice Department, brought civil rights lawsuits all across the country that were often resolved by consent decrees providing for racial preferences in hiring or promotion. *Local No. 93, International Association of Firefighters v. City of Cleveland*<sup>56</sup> upheld such a decree over the Title VII and constitutional objections of the firefighters union.<sup>57</sup> The City and plaintiffs had agreed to the consent order after the district judge found evidence of a historical pattern of racial

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54. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). It remains to be seen whether the election of Barack Obama in 2008, in the unique circumstances of a severe economic crisis, and his reelection in 2012, make African Americans less of an “out-group.” Cf. Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239 (2012).

55. Shelby Steele, *Affirmative Action Is Just A Distraction*, WASH. POST, July 26, 2009, at B4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/24/AR2009072402090.html>.

56. 478 U.S. 501 (1986).

57. *Id.* at 515. For the somewhat different legal standards applied in constitutional equal protection cases (for public actors) and Title VII challenges, see generally SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION LAW* 225-54 (4th ed. 2012); see also *Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616 (1987).

discrimination in promotions in the fire department.<sup>58</sup> As was typical of such decrees, only those deemed *qualified* by virtue of the civil service test were eligible for the racial preference,<sup>59</sup> a point the Sixth Circuit emphasized when it affirmed the decree,<sup>60</sup> but often lost in the media coverage<sup>61</sup> as well as by Justice White in his dissent.<sup>62</sup>

*Local No. 93* stood in a long line of cases in which the Court, while forbidding strict quotas, left ample room for minority preference in both public employment and university admissions. *Regents of the University of California v. Bakke*<sup>63</sup> struck down an inflexible set-aside of sixteen out of one hundred seats for minorities at the medical school, but Justice Lewis Powell's influential swing opinion green-lighted the consideration of race as a "plus" factor in the admissions process.<sup>64</sup> *Wygant v. Jackson Board of Education*<sup>65</sup> held unconstitutional a minority preference in lay-offs for public school teachers that displaced white teachers with more seniority; but hiring goals were deemed permissible.<sup>66</sup> *City of Richmond v. J.A. Croson Co.*<sup>67</sup> and

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58. *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C v. City of Cleveland*, 478 U.S. 501, 511-12 (1986).

59. *Id.* at 510.

60. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 485 (6th Cir. 1985).

61. *See, e.g., Al Larkin and William Doherty, Civil Service Chief May Appeal Order Easing Blacks into Police List*, BOSTON GLOBE, Mar. 29, 1973, at 5 (quoting a state official as saying, "We could end up with an illiterate person or even a blind man on the police force.").

62. White decried the "leapfrogging [of] minorities over senior and better qualified whites." *Local No. 93*, 478 U.S. at 534 (White, J. dissenting). The dissenters accepted on faith that the civil service tests could actually identify not only those *qualified* for promotion, but those *better qualified* among that group.

63. 438 U.S. 265 (1978).

64. *Id.* at 317, 319-20. The Court seemed in no hurry to tackle the issue of affirmative action, having just four years before dismissed as moot a similar challenge to the minority admissions program at the University of Washington Law School. *DeFunis v. Odegaard*, 416 U.S. 312, 319-20 (1974).

65. 476 U.S. 267 (1986).

66. *Id.* at 282-84. Justice Powell wrote:

*Adarand Construction, Inc. v. Pena*<sup>68</sup> effectively struck down strict set-asides for minority contractors,<sup>69</sup> but *Johnson v. Santa Clara Transportation Department*<sup>70</sup> extended the limited license for preference under Title VII from race to gender when it permitted the public employer to promote a woman over a man who scored higher on the civil service list, pursuant to its affirmative action plan.<sup>71</sup>

The Court was equally open to voluntary race-conscious efforts in the private sphere.<sup>72</sup> *United Steelworkers of America, AFL-CIO-CLC v. Weber*<sup>73</sup> recognized that employers needed to have flexibility to diversify their workforces, particularly to avoid imminent lawsuits. Kaiser Aluminum Corp. was facing litigation with only five African Americans among 273 skilled craftworkers (a scant 1.83%

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[I]n order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of the Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible."

*Id.* at 280-81 (quoting *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 777 (1976)).

Justice Stevens emphasized the compelling public interest in diversity:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land.

*Id.* at 315 (Stevens, J., dissenting).

67. 488 U.S. 469 (1989).

68. 515 U.S. 200 (1995).

69. *Id.* at 235-39; *J.A. Croson Co.*, 488 U.S. at 507-08.

70. 480 U.S. 616 (1987).

71. *Id.* at 641-42.

72. The Court's rhetoric has consistently recognized "the value of voluntary compliance" in the area of civil rights. See, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring).

73. 443 U.S. 193 (1979).

compared with a surrounding workforce in Gramercy Louisiana that was 39% black).<sup>74</sup> The Court upheld a provision in the collective bargaining agreement reserving for black employees 50% of the openings in the plant's craft-training program until parity was reached.<sup>75</sup> Rejecting Brian Weber's claim that the provision discriminated against him as a white man in violation of Title VII, Justice Brennan observed:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long" constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.<sup>76</sup>

In cases where employers or labor unions stubbornly resisted court orders requiring non-discriminatory selection, courts have mandated their own minority preferences. In *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*,<sup>77</sup> for example, the district court, frustrated with the Union's years of "bad faith attempts to prevent or delay" the admission of minority members, imposed a remedial goal of 29% nonwhite membership, based on the representation of minorities in the local workforce.<sup>78</sup> Rejecting the argument pressed by President Reagan's Solicitor General Charles Fried that Title VII forbade preferential relief to anyone but an actual identifiable victim of past discrimination,<sup>79</sup> Justice Brennan ruled that race-conscious relief was both necessary and appropriate in such a case.<sup>80</sup> He underscored that the preference did not extend to anyone *not qualified* for membership in the Union,<sup>81</sup> and that *group relief* was

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74. *Id.* at 198-99.

75. *Id.* at 197.

76. *Id.* at 204 (quoting 110 CONG. REC. 6552 (1964) (remarks of Sen. Humphrey)).

77. 478 U.S. 421 (1986).

78. *Id.* at 431-32.

79. *Id.* at 440.

80. *Id.* at 476-79, 482-83.

81. *Id.* at 447-49.

justified by long-standing mistreatment of the *group*, and was realistically the only meaningful remedy in the circumstances.<sup>82</sup>

Similarly, *United States v. Paradise*<sup>83</sup> presented the courts with a defiant public employer—the Alabama Department of Public Safety had engaged in four decades of exclusion of minorities from its state trooper promotional ranks, followed by twelve years of persistent resistance to the trial court’s remedial decrees.<sup>84</sup> When the district court finally ordered that one black candidate be promoted for each white candidate to the extent that *qualified* black candidates were available, and only until the Department implemented “an acceptable promotion procedure,”<sup>85</sup> the Supreme Court upheld the order by a 5-4 vote.<sup>86</sup> Again, there was no sacrifice of “standards”—the order stipulated that all blacks appointed be on the eligible list.<sup>87</sup>

This latitude for restrained race-sensitivity played itself out in the contrasting results in *Gratz v. Bollinger*<sup>88</sup> and *Grutter v. Bollinger*,<sup>89</sup> *Fisher*’s predecessors. Applying the “stringent”<sup>90</sup> criteria that minority preferences must be justified by compelling governmental interest<sup>91</sup> and be narrowly tailored so as to not unnecessarily displace non-

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82. Brennan took pains to point out that court-ordered affirmative relief is only permissible to remedy the effects of past discrimination, and not “simply to create a racially balanced work force.” *Id.* at 475.

83. 480 U.S. 149 (1987).

84. *Id.* at 167-71. In a related case, U.S. District Judge Frank Johnson found that the state had passed over forty-nine black candidates for clerical positions who were at the top of their civil service list in order to appoint whites below them. *United States v. Frazer*, 317 F. Supp. 1079, 1086 (D. Ala. 1970).

85. *United States v. Paradise*, 480 U.S. 149, 153 (1987). None of the entry-level or promotional exams administered had been validated. *Id.* at 173 n.3.

86. *Id.* at 165-66.

87. *Id.* at 155.

88. 539 U.S. 244 (2003).

89. 539 U.S. 306 (2003).

90. The description originates with Justice O’Connor in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 286 (1986) (O’Connor, J., concurring).

91. It is not necessary that there be a specific finding of past discrimination, as that would undermine the incentive to act. *See id.* at 289-92.

minorities,<sup>92</sup> *Gratz* struck down that portion of the undergraduate admissions process at the University of Michigan that awarded a decisive twenty extra index points based purely on race, which had assured the admission of virtually all minimally qualified minority applicants.<sup>93</sup>

*Grutter*, on the other hand, permitted the nuanced weighing of race as a plus-factor in the “highly individualized, holistic review”<sup>94</sup> of law school applicants, as per *Bakke*. Maintenance of a diverse student body was, Justice O’Connor found, “at the heart of the Law School’s proper institutional mission,” and thus a compelling interest.<sup>95</sup> Diversity, she concluded, promotes cross-racial understanding and the breaking down of racial stereotypes, better prepares students for an increasingly diverse work force in the global marketplace, and opens the path to leadership to talented individuals of every race and ethnicity.<sup>96</sup>

Race-conscious programs thus continued to meet with Supreme Court approval as of 2003. But Sandra Day O’Connor would soon be replaced by Samuel Alito, who got his start in the archconservative Reagan Justice Department, personally opposed racial preferences, and even reportedly was a member of the Concerned Alumni of Princeton, which vigorously opposed the university’s affirmative action program.<sup>97</sup> Alito would join Chief Justice John Roberts, his former colleague at Justice, Clarence Thomas, another Reagan alumnus, as well as Antonin Scalia and Anthony Kennedy, both Reagan appointees. They would bring to fruition the anti-civil rights agenda

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92. *Grutter*, 539 U.S. at 326.

93. *Gratz*, 539 U.S. at 273-76. As Justice Souter pointed out, non-minority students could also be awarded twenty points for athletic ability or socioeconomic disadvantage. *Id.* at 294-95 (Souter, J., dissenting).

94. *Grutter*, 539 U.S. at 337.

95. *Id.* at 329.

96. *Id.* at 330-32.

97. See Brodin, *Triumph of White Privilege*, *supra* note 12, at 180 n.138; see also SOTOMAYOR, *supra* note 9, at 145.

that had been initiated twenty years before by the 40th President of the United States.

## II. THE "REAGAN REVOLUTION"<sup>98</sup>

Ronald Reagan's election as President in 1980 dramatically changed the national conversation about civil rights and race, and the demise of affirmative action can clearly be traced to his Administration. Symbolically, he had launched his campaign in Philadelphia, Mississippi, site of the infamous killing of three civil rights workers in the summer of 1964, and there promised that, if elected, he would restore "states' rights."<sup>99</sup>

Dubbed the "Great Communicator," Reagan was adept at portraying "color-blindness" as the only truly American course: "The promise in the Declaration of Independence, that we are endowed by our creator with certain inalienable rights, was meant for all of us. It was not meant to be limited or perverted by special privilege, or by double standards that favor one group over another."<sup>100</sup> Reagan's Justice Department accordingly abruptly switched sides in the affirmative action cases.

Articulating a novel vision in which white males are the *real victims* of societal discrimination, and minorities and women the unjust beneficiaries, Attorney General Edwin Meese targeted the preferences established in decades of federal court litigation that had finally resulted in significant increases in non-white representation in public employment (particularly public safety) around the nation.<sup>101</sup> William Bradford Reynolds, chief of the Civil

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98. The phrase is taken from Solicitor General Charles Fried's memoir. CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* (1992).

99. See Jack White, *Lott, Reagan, and Republican Racism*, TIME, (Dec. 14, 2002), <http://content.time.com/time/nation/article/0,8599,399921,00.html>.

100. Ronald Reagan, Speech to the American Bar Association, *quoted in* WOLTERS, *supra* note 35, at 2.

101. See Mark S. Brodin, *Reflections on the Supreme Court's 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 19 n.99 (1989).

Rights Division, initiated an aggressive campaign to undo the hundreds of consent decrees that had been negotiated by his predecessors, sending letters to municipalities warning that race-conscious preference had to be strictly limited to *actual identifiable victims* of discrimination, meaning of course an end to the concept of affirmative action.<sup>102</sup>

In city after city, the Justice Department joined with white firefighters and police officers to reverse the gains made by their minority competitors. In Boston, it supported five white police officers in their unsuccessful challenge to the promotion of a black officer who scored lower than they did on the civil service exam.<sup>103</sup> In Birmingham, Buffalo, Chicago, Cleveland, Detroit, and Washington D.C., the Government's lawyers weighed in against long-standing goals and timetables for minority and female advancement.<sup>104</sup> When they appeared in Indianapolis, the Republican Mayor complained bitterly in a letter to Attorney General Meese that "[t]he Justice Department's actions have sown the seeds of discord and contributed to creating a condition of racial tension and strife where none existed before."<sup>105</sup>

The new position was pressed upon the Supreme Court by Reynolds, Solicitor General Fried, and his deputy Samuel Alito, who joined with the white-dominated unions in opposing preferences in *Local No. 93, International Association of Firefighters, AFL-CIO C.L.C v. City of Cleveland*, noted above, and *Firefighters Local Union No.1784 v. Stotts*.<sup>106</sup> *Stotts* was the first successful challenge

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102. WOLTERS, *supra* note 35, at 239-42; Brodin, *Reflections, supra* note 101, at 23 & n.113; Howard Kurtz, *Judge Repulses U.S. Attempt to Undo Affirmative Action*, WASH. POST, Dec. 22, 1985, at A4.

103. Robert Pear, *Repercussions Seen in Affirmative Action Cases*, N.Y. TIMES, July 4, 1986, at A7.

104. *Id.*

105. *Id.*

106. For *Stotts*, Reynolds provided support on the brief. Two years later, Reynolds argued *Local No. 93* for the United States as *amicus curiae* with support on the brief from Fried and Alito. *Local No. 93, Int'l Ass'n of*

to a minority preference against layoff designed to preserve the gains made under a prior consent decree, but which interfered with seniority rights of white incumbents.<sup>107</sup>

*New York Times* columnist Tom Wicker lamented that the Justice Department had “flatly reversed the policy on ‘affirmative action’ that had been developed by predecessor departments under two Republican and two Democratic Presidents.”<sup>108</sup> Reagan’s appointee to chair the Equal Employment Opportunity Commission (“EEOC”), Clarence Thomas, fell in line with the Administration’s new “reverse bias” agenda.<sup>109</sup>

The campaign culminated in Birmingham, Alabama, a majority-black city dubbed “Bombingham” because of its fierce and violent resistance to civil rights protests in the 1950s and 1960s.<sup>110</sup> In December 1985, Government lawyers went to trial in federal district court in support of white male Birmingham firefighters who challenged the department’s affirmative action decree.<sup>111</sup> It mattered not that the goals for advancement of blacks and women had

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Firefighters, AFL-CIO C.L.C v. City of Cleveland, 478 U.S. 501 (1986); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984).

107. *Firefighters Local Union No. 1784*, 467 U.S. at 583. Memphis, facing a court challenge to its nearly all-white fire department in a city 37% African American, had entered into the decree (modeled on an earlier one negotiated by the Justice department in 1974) setting an interim goal of filling 50% of fire department vacancies with qualified minorities. *Id.* at 566-67. Budgetary cuts in 1981 forced layoffs. *Id.* Under the City’s last hired-first fired seniority system, the district court found the proposed layoffs “would have a devastating and retrogressive effect on minority employment,” and it enjoined the layoffs. *Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 549 (6th Cir. 1982), *rev’d* 467 U.S. 561 (1984). The Supreme Court overturned the order, applying the seniority proviso of Title VII, §703(h), which immunizes seniority systems from challenge absent proof of intentional discrimination. *Firefighters Local Union No. 1784*, 467 U.S. at 577; see also Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 944-49 (1984).

108. Tom Wicker, *One Voice, in Retreat*, N.Y. TIMES, Apr. 22 1983, at A31.

109. See CLARENCE THOMAS, *MY GRANDFATHER’S SON* 148-49 (2007).

110. See DIAN MCWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMATIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* (2001).

111. Associated Press, *U.S. Opens Its Case in Favor of Promoting White Firemen*, N.Y. TIMES, Dec. 17, 1985, at A22.

been written by their predecessors just four years before. It was a new day—Reagan’s campaign theme “Morning in America.” Playing to the backlash of “angry white men” had become a winning political strategy.<sup>112</sup>

When the Supreme Court ultimately sided with the Reagan Administration in 1989,<sup>113</sup> one newspaper account poignantly noted: “It was heavy with symbolism for blacks striving for a place in a department recalled for turning fire hoses on civil rights protestors.”<sup>114</sup> *Martin v. Wilks* signaled a turning point in the narrative of race preference, most notably opening final decrees *already on the books* to collateral challenge by disgruntled whites, in blatant contradiction of finality doctrine that had been so vigorously championed by the same conservative justices, particularly Chief Justice Rehnquist, author of the opinion.<sup>115</sup> No longer need incumbents intervene to preserve their privileged status in the workplace—they could now sit out the original discrimination case and then, without any time limits, file their “reverse discrimination” action attacking the remedy instituted.

Justice Scalia even offered them an open invitation in another case decided that Term: “An intervenor of the sort before us here is particularly welcome, since we have stressed the necessity of protecting, in Title VII litigation,

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112. Some attributed the Republican sweep of the congressional election in 1994 to the backlash of white male voters, particularly regarding the affirmative action programs of the Clinton Administration. See Linda Chavez, *From Unequal Opportunity to Equal Results*, WASH. POST, Aug. 18, 1996 (reviewing ROBERT ZELNICK, *BACKFIRE: A REPORTER’S LOOK AT AFFIRMATIVE ACTION* (1996)). Senator Jesse Helms, Republican of North Carolina, ran a successful campaign for reelection in 1990 against an African-American opponent by running the infamous TV advertisement showing the hands of a white man opening and then crumpling a rejection letter. The voice-over: “You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is.” A. Leon Higginbotham, Jr. et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593, 1598 (1994).

113. *Martin v. Wilks*, 490 U.S. 755 (1989).

114. Frank J. Murray, *Supreme Court Declines to Upset No-Quotas Ruling: Whites Beat Affirmative Action*, WASH. TIMES, Apr. 18, 1995, at A1.

115. See Brodin, *Reflections*, *supra* note 101, at 22 n.111.

'the legitimate expectations of . . . [white] employees innocent of any wrongdoing.'"<sup>116</sup>

One civil rights lawyer observed that *Martin v. Wilks* made "it extremely difficult to litigate, much less conclude, employment discrimination lawsuits, because [bringing in all potentially affected parties, the new mandate placed upon plaintiffs] is not really feasible in the real world in many of these cases and that is the only avenue that the court will accept for precluding subsequent litigation of the same issue."<sup>117</sup> Additionally, the Court had removed the incentive for employers to enter consent decrees, as they no longer would conclusively resolve the litigation.<sup>118</sup>

Although the collateral attack opening was later overturned by Congress,<sup>119</sup> *Martin v. Wilks* precipitated an immediate onslaught of "reverse discrimination" challenges to carefully-worked out consent decrees long in effect in Atlanta, Boston, Chicago (five lawsuits), Cincinnati, Memphis, Oakland, Omaha, San Francisco, and elsewhere.<sup>120</sup> The *Washington Post* regretted "the chaos of interminable litigation" engendered by the decision.<sup>121</sup> With the assistance of the Justice Department, the white firefighters in Birmingham ultimately prevailed, overturning the 1981 consent decree that had begun to

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116. *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 764 (1989) (quoting *Int'l Bhd of Teamsters v. United States*, 431 U.S. 324, 372 (1977)).

117. Al Kamen, *Bias Suits By Whites Bolstered; Split Court Eases Way For Challenges To Affirmative Action*, WASH. POST, June 13, 1989, at A1, A4 (quoting Benna Ruth Solomon).

118. *Id.*

119. Congress limited the rights of non-parties to challenge consent decrees by barring litigants who knew of the proposed decree or who were adequately represented by the original parties. Civil Rights Act of 1991, Pub. L. No. 102-166, § 108, 105 Stat. 1071, 1076-77 (codified as amended at 42 U.S.C. § 2000e-2(n) (1994)).

120. See WOLTERS, *supra* note 35, at 279; Robert Pear, *1989 Ruling Spurs New Tack in Civil Rights Suits*, N.Y. TIMES, Oct. 15, 1990, at A1, A16.

121. Editorial, *Setback By A Slim Majority*, WASH. POST, June 14, 1989, at A22.

integrate the ranks in the fire department.<sup>122</sup> The Mayor complained that his city had spent “more than a million dollars in lawyers’ fees” in its unsuccessful defense.<sup>123</sup>

“There was a time,” a *St. Petersburg Times* editorial on *Martin v. Wilks* read:

when those Americans who had been denied basic human rights supposedly guaranteed under our Constitution looked to the Supreme Court as the ultimate protector of their aspirations. There was even a time when the Republican Party was a symbol of equal rights for every American. Those traditions are being systematically trashed by a politicized court whose emerging majority was chosen for the express purpose of providing a false legitimacy to a reactionary social agenda.<sup>124</sup>

Benjamin Hooks, head of the NAACP, regretted “the unraveling of [civil rights] gains we thought were secure,” calling the decision “another reminder of the Reagan legacy [that] will haunt this nation for years.”<sup>125</sup>

Indeed, since the mid-1980s, the restriction of affirmative action by an increasingly conservative federal judiciary has been relentless, anachronistically equating race-conscious remedial action with the most egregious forms of *actual* discrimination from our Nation’s past. As Clarence Thomas, leader of the charge, put it in his concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>126</sup> striking down voluntary school desegregation plans in Seattle and Louisville:

Disfavoring a colorblind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by

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122. *In re Birmingham Reverse Discrimination Employment Litigation*, 20 F.3d 1525 (11th Cir. 1994). The Supreme Court denied review. 514 U.S. 1065 (1995).

123. Pear, *supra* note 120, at A16.

124. Editorial, *Civil Rights in Reverse*, ST. PETERSBURG TIMES, June 15, 1989, at A16.

125. Charles Mohr, *Minority Advocates Fear Gains Will Be Lost*, N.Y. TIMES, June 13, 1989, at B5.

126. 551 U.S. 701 (2007).

the segregationists in *Brown v. Board of Education*, 347 U.S. 483 (1954). This approach is just as wrong today as it was a half century ago. . . .

. . . .

Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories. [citing *Dred Scott v. Sandford*].<sup>127</sup>

Incongruously, it is deemed “irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”<sup>128</sup> Two of our most distinguished circuit court judges, neither a liberal, have taken sharp issue with this proposition. Both Alex Kozinski and Michael Boudin have stated the obvious, i.e., that bona fide affirmative action programs are not “aimed at oppressing” anyone, do not “seek to give one racial group an edge over another,” and are “far from the original evils at

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127. *Id.* at 748, 780-81 (Thomas, J., concurring). Thomas is fond of invoking the *Brown v. Board of Education* analogy, as in *Grutter v. Bollinger* when urging the Court to show the same courage in ending affirmative action that it did when prohibiting segregated schools. 539 U.S. 306, 370-71 (2003) (Thomas, J., concurring in part and dissenting in part). He ramps up the rhetoric in *Fisher*, as we will see below.

Other Justices signed on to the equation. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (O'Connor, J., plurality opinion) (stating the Equal Protection Clause requires strict scrutiny of any racial classification, regardless of “the race of those burdened or benefitted”); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 273 (1986) (Powell, J.) (“[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.”); see also Brodin, *Triumph of White Privilege*, *supra* note 12, at 164.

Justice Scalia has gone a step further, asserting that the disparate impact prohibition of Title VII, mandating that employers avoid utilizing unnecessary barriers to minority or female employment opportunities with non-job-related requirements, violates the equal protection rights of white employees. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681-83 (2009) (Scalia, J., concurring); Brodin, *Triumph of White Privilege*, *supra* note 12, at 180.

128. *Parents Involved*, 551 U.S. at 759 (Thomas, J., concurring) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995)). This view can actually be traced to Justice Powell’s singular opinion in *Bakke*. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298-99 (1978).

which the Fourteenth Amendment was addressed.”<sup>129</sup> Justices Stevens, Breyer, Souter and Ginsburg have been perplexed and disturbed by the refusal of their colleagues to see this distinction, as emphasized in their dissents in *Parents Involved*.<sup>130</sup>

Breyer, recognizing the obvious “constitutional asymmetry between that which seeks to *exclude* and that which seeks to *include* members of minority races,” feared the decision would spur a “disruptive round” of litigations challenging other efforts at integration.<sup>131</sup> He soundly rejected the “cruel distortion” to compare Jim Crow segregation, “a caste system rooted in the institutions of slavery and 80 years of legalized subordination,” with remedial race-conscious efforts.<sup>132</sup>

The simple-minded view that any racial classification is *per se* harmful and thus illegal, no matter the motivation, can only prevail if one totally ignores the markedly different context between racially-hostile conduct and race-conscious

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129. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1*, 426 F.3d 1162, 1193-95 (9th Cir. 2005) (Kozinski, J., concurring), *rev'd*, 551 U.S. 701 (2007) (quoting *Comfort v. Lynn Sch. Comm*, 418 F.3d 1, 27-29 (1st Cir. 2005) (Boudin, C.J., concurring)).

130. Justice Stevens took particular umbrage at the “cruel irony” of the Chief Justice relying on *Brown v. Board of Education* to strike down *desegregation* plans. *Parents Involved*, 551 U.S. at 798-99 (Stevens, J., dissenting). He lamented his “firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.” *Id.* at 803.

Stevens had begun the debate years earlier when he asserted:

There 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. 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.

*Adarand*, 515 U.S. at 243 (Stevens, J., dissenting).

131. *Parents Involved*, 551 U.S. at 803, 830 (Breyer, J., dissenting); see also *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”).

132. *Parents Involved*, 551 U.S. at 867 (Breyer, J., dissenting).

curatives,<sup>133</sup> as well as the profound difference in the psychological effect of each on the "victims." Can it seriously be contended that turning away a white male because of a preference in favor of diversity carries the same baggage as rejecting a black or female applicant because of offensive stereotypical views about their demographic? The "stigma of inferiority" associated with white-on-black discrimination is, of course, absent in the reverse context.<sup>134</sup> Concededly, the rejected white candidate may feel a sense of *unfairness*, but the ugly legacy of Jim Crow is not dredged up and relived.

The sensible dichotomy exemplified by Sandra Day O'Connor's distinction between classifications that are "benign" and "remedial" and those that are "in fact motivated by illegitimate notions of racial inferiority or simple racial politics"<sup>135</sup> has given way to a cynical false equivalency. It would be like equating a physician's amputation of a gangrenous finger to save the patient with a torturer's slashing it off to inflict pain; or equating Lawrence Olivier's torturous drilling of Dustin Hoffman's teeth ("Is it safe?") in the 1976 suspense film *Marathon Man*<sup>136</sup> with the routine filling of cavities.

The opponents of race-conscious efforts at inclusion are fond of invoking civil rights icons Thurgood Marshall and Martin Luther King to support their notion of a "color-blind"

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133. Professor Ely aptly refers to such remedial efforts as "benign' discrimination," where motivation is not suspect. See Ely, *supra* note 42, at 724. Any minority preference will, of course, reduce the number of spaces for non-minorities in a zero-sum game, and thus in that sense is not benign for those displaced. See *DeFunis v. Odegaard*, 416 U.S. 312, 333 (1974) (Douglas, J., dissenting). But Ely argues that it is not "suspect" in a constitutional sense for the white majority to discriminate against itself in favor of the black minority, and thus "special scrutiny" is not appropriate. Moreover, the clear purpose of the Fourteenth Amendment was to protect blacks from discrimination by whites, and not the other way around. Ely, *supra* note 42, at 727-28.

134. See Ely, *supra* note 42, at 730 n.36.

135. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

136. *MARATHON MAN* (Paramount Pictures 1976).

Constitution,<sup>137</sup> but to do so they must wrench the statements from their historical context.

Another favorite theme is that affirmative action stigmatizes the very persons it is designed to benefit, by identifying them as “affirmative action” hires or admits, and it reinforces in them self-doubt about their worth. “These programs,” Clarence Thomas asserts, “stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are ‘entitled’ to preferences.”<sup>138</sup> Professor Stephen Carter agrees that black professionals come with a “WARNING! AFFIRMATIVE ACTION BABY! DO NOT ASSUME THAT THIS INDIVIDUAL IS QUALIFIED!”<sup>139</sup> Yet Carter acknowledges that he would not have accomplished what he has in his career without the benefit of some preference at the outset.<sup>140</sup>

Finally, critics argue that beneficiaries of admissions preferences become its victims as “mismatches” placed at highly competitive institutions they are unprepared for, and cannot succeed at.<sup>141</sup> The empirical and anecdotal data refutes this.<sup>142</sup>

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137. See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (Thomas, J., concurring) (“[M]y view [of the color-blind Constitution] was the rallying cry for the lawyers who litigated *Brown*.”).

138. *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting) (internal citation omitted). Early on during his college years, Thomas concluded that preferential policies caused him great harm. See THOMAS, *supra* note 109, at 56-57. At Yale Law School, he felt he was being judged below par as an apparent affirmative action admit. *Id.* at 74-75. Thomas thus turned vehemently against such programs. See *id.*; ANDREW PAYTON THOMAS, CLARENCE THOMAS: A BIOGRAPHY 142 (2001). For a collection of similar critical views of affirmative action, see WOLTERS, *supra* note 35, at 188-93.

139. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 2 (1991).

140. *Id.* at 5, 11.

141. See *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2432 (2013) (Thomas, J., concurring); *Grutter*, 539 U.S. at 371-72 (Thomas, J., dissenting).

142. See BOWEN & BOK, *supra* note 46, at 59-68, 114-15, 142-44, 258-65. “It is time, therefore, to abandon the idea that well-intentioned college and university admissions officers have somehow sacrificed the interests of the black students whom they have admitted [regarding graduation rates, advanced degrees, and subsequent earnings].” *Id.* at 216.

This is the past as prologue<sup>143</sup> to the decision in *Fisher v. University of Texas*, in which seven members of the Court align themselves with the new paradigm that subjects good faith efforts towards inclusion to the same exacting judicial scrutiny as malevolently motivated acts of subordination. Purporting to merely remand, the decision more likely will close the circle on “affirmative action,” at last achieving the “Reagan Revolution” agenda.

### III. FISHER V. UNIVERSITY OF TEXAS

Abigail Fisher fit the pattern of many reverse discrimination plaintiffs in that it is not at all clear that she was the victim of affirmative action so much as her less-than-stellar record.<sup>144</sup> Graduating eighty-second in a high school class of 674 (and thus not admitted under Texas’s Top Ten Percent Law), and with an 1180 (out of 1600) on her SATs (below the 80th percentile),<sup>145</sup> Fisher was unlikely

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143. WILLIAM SHAKESPEARE, *THE TEMPEST*, act 2, sc. 1.

144. Barbara Grutter’s 3.8 GPA and 161 LSAT would likely have gotten her rejected in any event. See *Grutter*, 539 U.S. at 326. Jennifer Gratz was also probably rejected because of her admissions numbers. See Liu, *supra* note 15, at 1073.

Similarly neither the rejections of Marco Defunis nor Alan Bakke, plaintiffs in the earlier cases, can be clearly tied to minority preference. See HOWARD BALL, *THE BAKKE CASE: RACE, EDUCATION, AND AFFIRMATIVE ACTION* 39, 54-56 (2000). The University of California, Davis inexplicably conceded at the Supreme Court its inability to prove Bakke would not have been admitted even in the absence of the special admissions program. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 (1978). Despite Bakke’s impressive GPA and MCAT scores, the chairman of the admissions committee who interviewed him reported he was “‘rather limited in his approach’ to the problems of the medical profession.” See Liu, *supra* note 15, at 1052 (quoting *Bakke*, 438 U.S. at 277); Juan F. Perea, *Doctrines of Delusion: Bakke, Fisher and the Case for a New Affirmative Action* 41-42 (Loyola Univ. Chicago Sch. of Law, Paper No. 2013-022), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2312630#%23](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312630#%23). The University’s original position in the trial court was that he would not have been admitted in any event, and the trial court so found. See Liu, *supra* note 15, at 1056-57. Why the University abandoned that defense is unclear. Bakke was also rejected at ten other medical schools to which he applied. *Id.* at 1094.

145. Amended Complaint, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded by* 133 S. Ct. 2411 (2013).

to be admitted. She was one of 16,000 students falling outside the top ten percent group that were competing for a mere 1,216 seats in the class.<sup>146</sup>

The University of Texas (“UT”) argued accordingly that Fisher lacked standing to bring the action, a matter raised by Justices Ginsburg and Sotomayor early in the oral argument.<sup>147</sup> Fisher’s attorney cleverly structured her challenge around the assertion that she had a constitutional right to be judged by race neutral standards, notwithstanding her particular admissions profile.<sup>148</sup> Oddly,

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146. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217, 241 (5th Cir. 2011), *vacated*, 113 S.Ct. 2411 (2013); see Nikole Hannah-Jones, *Race Didn't Cost Abigail Fisher her Spot at the University of Texas*, THE WIRE (Mar. 18, 2013, 4:10PM), <http://www.theatlanticwire.com/national/2013/03/abigail-fisher-university-texas/63247/>; Mike Tolson, *Supreme Court Could Decide Future of Affirmative Action in University of Texas Reverse Discrimination Case*, HOUSTON CHRONICLE (Oct. 10, 2012), <http://blog.chron.com/txpotomac/2012/10/supremem-court-could-decide-future-of-affirmative-action-in-university-of-texas-reverse-discrimination-case/>.

147. Transcript of Oral Argument at 3-6, *Fisher v. Univ. of Tex. at Austin*, 113 S.Ct. 2411 (2013) (No. 11-345). The Fifth Circuit, noting that Abigail Fisher made no class claim, was already enrolled at another institution, and denied any intention to reapply to UT, found she had standing only to challenge her rejection and to seek money damages, but not to seek forward-looking injunctive or declaratory relief. *Fisher*, 631 F.3d at 217.

In *Texas v. Lesage*, 528 U.S. 18 (1999), the Court dismissed for lack of standing an applicant’s similar challenge to a race-conscious Ph.D. preference because he would not have been selected in any event. *Id.* at 21-22. “Simply put, where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury.” *Id.* at 21.

The Court went on, however, to note: “Of course, a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is the inability to compete on an equal footing.” *Id.* (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993)) (internal quotation marks omitted).

148. See Ronald Dworkin, *The Case Against Color-Blind Admissions*, NEW YORK REVIEW OF BOOKS, Dec. 20, 2012, at 42. Chief Justice Rehnquist, an architect of the restrictive standing doctrine established in past decades, had accepted this argument for the Court in *Gratz v. Bollinger* (over the strong dissents of Justices Stevens, Souter, and Ginsburg), conferring standing to sue on a plaintiff *who had not even applied for admission*. *Gratz v. Bollinger*, 539 U.S., 244, 260-63 (2003). The Court’s out-of-character open door policy was also

Justice Kennedy's opinion makes no mention of the standing problem.

In fact there were 168 minority applicants with higher index numbers than Fisher who were also denied admission.<sup>149</sup> Moreover, it is in the nature of competitive university admissions that even high index numbers do not assure admission any more than low numbers automatically disqualify the applicant.<sup>150</sup> The process is far too complex and nuanced to reliably predict results. Indeed, one writer has concluded that statistically, minority preferences and rejection of white applicants "are largely independent events, improperly linked through the causation fallacy."<sup>151</sup>

Yet Fisher considered admission a matter of right, since her father and sister had attended UT, and, as she put it, "I took a ton of AP classes, I studied hard and did my homework—and I made the honor roll. . . . I was in extracurricular activities. I played the cello and was in math club, and I volunteered. I put in the work I thought was necessary to get into UT."<sup>152</sup> Recent Court decisions

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on display in *Northeastern Florida Chapter of Associated General Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993) ("When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.").

No such welcome was shown the media and human rights organizations seeking to challenge the extensive surveillance of electronic communications under the FISA amendments; their case was dismissed because they were unable *to prove* they had been covertly monitored. *Clapper v. Amnesty Int'l*, 133 S.Ct. 1138, 1142-43 (2013).

149. Hannah-Jones, *supra* note 146.

150. *Grutter*, 539 U.S. at 315.

151. Liu, *supra* note 15, at 1049.

152. Tolson, *supra* note 146. Her sentiments are strikingly similar to those of reverse discrimination plaintiff Frank Ricci, who asserted he had earned his promotion in the New Haven Fire Department by virtue of having studied more than ten hours a day and invested \$1,000 in exam preparation materials. See Brodin, *Triumph of White Privilege*, *supra* note 12, at 203.

have encouraged such entitlement thinking among reverse discrimination plaintiffs.<sup>153</sup>

Aided by anti-affirmative action activist Edward Blum, who secured counsel for her,<sup>154</sup> Fisher challenged the admissions policy that UT had adopted after *Hopwood v. Texas*,<sup>155</sup> in which the Fifth Circuit had ruled the explicit application of more lenient Law School Admission Test (“LSAT”) and grade point average (“GPA”) standards for minorities unconstitutional.<sup>156</sup> The years after *Hopwood* had witnessed a dramatic decrease in minority applicants and enrollment at UT.<sup>157</sup> By the time Fisher applied in 2008, UT’s selection process had been re-tailored to comply with the newer regime of *Grutter*.

Complicating the admissions procedure was the Top Ten Percent Law (“TTPL”), which the Texas legislature adopted in 1997 in response to *Hopwood*, granting automatic admission to the state university system to high

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153. Justice Kennedy’s decision in *Ricci v. DeStefano* fashioned an unprecedented entitlement to promotion for the white firefighters who had aced the exam. See Brodin, *Triumph of White Privilege*, *supra* note 12, at 175. Kennedy conveniently overlooked the exam’s stark lack of job relation, as well as prior decisions that had recognized that while incumbent employees like Ricci may not have been perpetrators of the past discriminatory policies of their employers (the New Haven Fire Department had several discrimination findings against it), they were certainly beneficiaries in that their competition was artificially limited to one race and gender. See *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 768 (1976).

154. See Morgan Smith, *One Man Standing Against Race-Based Laws*, N.Y. TIMES, (Feb. 23, 2012), <http://www.nytimes.com/2012/02/24/us/edward-blum-and-the-project-on-fair-representation-head-to-the-supreme-court-to-fight-race-based-laws.html?pagewanted=all>; Hannah-Jones, *supra* note 146. Blum was also the instigator of the successful challenge to Section 5 of the Voting Rights Act, *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2631 (2013); Ari Berman, *Conservatives Take Aim At Voting Rights*, THE NATION, Feb. 25, 2013, at 12. Blum, who has arranged at least a dozen lawsuits challenging race-based policies, “matches local plaintiffs with powerful Washington attorneys, paying the legal fees thanks to generous donations from the biggest funders in the conservative movement [including the Koch brothers].” *Id.* at 14.

155. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

156. *Id.* at 934-35.

157. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223-24 (5th Cir. 2011), *vacated*, 113 S.Ct. 2411 (2013).

school seniors graduating in the top ten percent of their class.<sup>158</sup> Although this program significantly increased minority enrollment, given the segregated nature of many Texas high schools,<sup>159</sup> the University sought a still higher “critical mass” of underrepresented minorities, and in that effort added a “soft variable” component to the review of non-TTPL applicants like Abigail Fisher.<sup>160</sup> In addition to the traditional Academic Index of GPA and SAT, they were also evaluated on a Personal Achievement Index that looked at “special circumstances” such as socioeconomic status<sup>161</sup> and race. Race was an unquantifiable but significant factor in the calculus.<sup>162</sup> There were no quotas, and no automatic

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158. *Id.*

159. *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting). Justice Ginsburg observed that “the only way [the Top Ten plan] works is if you have heavily separated schools. And worse than that, . . . if you want to go to the University of Texas under the 10 percent plan, you go to the low-performing school, you don’t take challenging courses, because that’s how you’ll get into the 10 percent. So maybe the University is concerned that that is an inadequate way to deal with it.” Transcript of Oral Argument, *supra* note 147, at 24.

160. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 593-95, 601-09 (W.D. Tex. 2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded by* 133 S. Ct. 2411 (2013).

161. As Professor Jewel notes:

One of the most resonant criticisms of affirmative action is that it primarily benefits minorities with high SES [(socio-economic status)] and does very little for anyone, minority or majority, from the lower rungs of the social hierarchy. In response to this concern, race-blind affirmative action models that use SES factors to achieve diversity have gained traction.

Jewel, *supra* note 54, at 249.

162. Because an applicant’s race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation. Race in and of itself does not affect the score but is instead used to place the student’s achievements into context and reveal whether she possesses a valuable ‘sense of cultural awareness.’ Used in this manner, it can positively impact applicants of all races, including Caucasian, or may have no impact whatsoever.

*Fisher*, 645 F. Supp. 2d at 597 (W.D. Tex. 2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded by* 133 S. Ct. 2411 (2013). “At no point in the process is race considered individually or given a numerical value.” *Id.* at 608.

predetermined bonus for race;<sup>163</sup> instead, the program was modeled on the one approved of in *Grutter*,<sup>164</sup> which Justice O'Connor famously suggested should be good law for twenty-five years.<sup>165</sup>

The actual number of applicants admitted by virtue of factoring in their race could not be determined with precision, but by any account was modest.<sup>166</sup> For 2008, UT received 29,501 applications, admitted 12,843, and enrolled 6,718. Approximately 58 black and 158 Hispanic students were admitted by way of the holistic review, representing 20% of the total black students admitted and 15% of the Hispanics.<sup>167</sup> The 58 black admittees represented merely merely 0.92% of the enrolling in-state freshman class.<sup>168</sup> It

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163. *Id.* at 235. “Indeed, UT’s policy improves upon the program approved in *Grutter* because the University does not keep an ongoing tally of the racial composition of the entering class during its admissions process.” *Id.*

164. *Fisher*, 645 F. Supp. 2d at 594-95, 609-10.

165. *Grutter*, 539 U.S. at 342-43.

166. The program appears to have doubled the African Americans in the entering class from 165 to 335, Hispanics from 762 to 1,228, and Asian Americans from 1,034 to 1,126. Under the Top Ten Percent Law, African Americans had numbered only 275 and Hispanics 1,024 in the fall class. *Fisher*, 631 F.3d at 226.

The number of positions at issue in many of the major reverse discrimination cases seems hardly worth the long and expensive road to the Supreme Court. In *United States v. Paradise*, 480 U.S. 149 (1987), for example, Solicitor General Charles Fried and Civil Rights Chief William Bradford Reynolds chose to challenge a lower court order for priority hiring even though it meant *eight* blacks instead of *four* would be promoted to corporal in the Alabama Highway Patrol. See WOLTERS, *supra* note 35, at 259. In *DeFunis*, the Law School reported an enrollment of eight black students out of a total of 356, approximately 2.2%, compared to a percentage of blacks in the population of Washington of approximately 2.1%. *DeFunis v. Odegaard*, 416 U.S. 312, 326-27 (1974) (Douglas, J., dissenting).

167. Brief for Respondents at 38, *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3245488, at \*48.

168. For these statistics, see Brief for Petitioner at 39-40, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 1882759, at \*51-52; Brief for Respondents, *supra* note 167. For current UT admissions statistics, see 2013 Freshman Profile, UNIV. TEX. AT AUSTIN, <http://bealonghorn.utexas.edu/whyut/profile/app-to-enroll> (last visited Feb. 15, 2014).

was not possible to isolate the role of race in the individualized decisions.

Ironically, plaintiff Fisher used the fact that UT's program produced "only minimal gains in the enrollment of under-represented minorities" as one of her grounds for challenging it, contending "the outcomes were so small, that there were readily available alternatives."<sup>169</sup> Both the district and circuit courts viewed it instead as evidence that the program was "narrowly tailored" to achieve its diversity purpose.<sup>170</sup> Justice Kennedy tellingly asked during oral argument: "[I]f it's so few [minority admits], then what's the problem?"<sup>171</sup>

Fifth Circuit Judge Emilio Garza, however, questioned whether this small increment in minority enrollment justified the cost of race-conscious decisions, which he viewed as "an evil" in itself.<sup>172</sup> While there are "no *de minimis* violations of the Equal Protection Clause," he asserted, there are *de minimus* benefits against which race-sensitive decisions cannot be justified: "[W]hen government undertakes any level of race-based social engineering, the costs are enormous. Not only are race-based policies inherently divisive, they reinforce stereotypes that groups of people, because of their race, gender, or ethnicity, think

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169. *Fisher*, 645 F. Supp. 2d at 609; *Fisher*, 631 F.3d at 235, 246; Transcript of Oral Argument, *supra* note 147, at 28.

170. *Fisher*, 631 F.3d at 246-47.

171. Transcript of Oral Argument, *supra* note 147, at 22.

172. *Fisher*, 631 F.3d at 264 (Garza, J., concurring). For him, UT's program failed to achieve "its intended goal of increasing racial diversity." *Id.* at 260. By his estimates, the holistic process yielded an additional fifteen African-American and forty Hispanic students, and thus no discernible educational impact. *Id.* at 262.

In her dissent to the denial of an *en banc* rehearing, Chief Judge Edith Jones also emphasized this point: the fact that the racial preference admits "amounted to no more than a couple hundred out of more than six thousand new students" demonstrated that the racial classification was "especially arbitrary" given its minimal impact. This "additional diversity contribution" could hardly be deemed "indispensable" and thus served no compelling interest. *Fisher v. Univ. of Tex.* at Austin, 644 F.3d 301, 306-07 (5th Cir. 2011) (Jones, C.J., dissenting) (denying rehearing).

alike or have common life experiences.”<sup>173</sup> “[N]arrow tailoring requires not only that the preferences not be too large, but also that they not be too small so as to fail to achieve the goals of the relevant compelling government interest.”<sup>174</sup>

Judge Garza also hit on another perceived vulnerability of the UT program: its indefinable goal of achieving a “critical mass” of minorities *at the program and classroom level*.<sup>175</sup> For him, this was “race-based social engineering” at a “level of granularity” that clearly exceeded constitutional parameters, with “no logical stopping point.”<sup>176</sup> Chief Judge Edith Jones elaborated:

The pernicious impact of aspiring to or measuring “diversity” at the classroom level seems obvious upon reflection. Will the University accept this “goal” as carte blanche to add minorities until a “critical mass” chooses nuclear physics as a major? Will classroom diversity “suffer” in areas like applied math, kinesiology, chemistry, Farsi, or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled? [UT] opens the door to effective quotas in undergraduate majors in which certain minority students are perceived to be “underrepresented.”<sup>177</sup>

Notwithstanding these reservations, the Fifth Circuit affirmed the district court’s grant of summary judgment to

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173. *Fisher*, 631 F.3d at 264 (Garza, J., concurring).

174. *Id.* at 259-60 (citation omitted). This “minimal effects” argument had prevailed in the successful challenge to the voluntary desegregation plans in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

175. District Judge Sam Sparks, however, specifically found that UT’s program did *not* seek to achieve diversity in every single class, as that would of course be unworkable. *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 607 (W.D. Tex. 2009), *aff’d*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded* by 133 S. Ct. 2411 (2013).

176. *Fisher*, 631 F. 3d at 254 (Garza, J., concurring). For a description of the classroom focus, see *Fisher*, 645 F. Supp. 2d at 602-03, 607-08.

177. *Fisher*, 644 F.3d at 307 (Jones, C.J., dissenting) (rehearing denied). Justice Scalia questioned how classroom diversity could be measured accurately, given that applicants self-identify themselves as to race, and there is no check. Transcript of Oral Argument, *supra* note 147, at 34-36.

UT,<sup>178</sup> affording “due deference” to the university’s educational judgment that its individualized, flexible, and holistic admissions procedures were supported by a compelling interest in achieving diversity and were narrowly tailored to achieve that purpose.<sup>179</sup> No evidence was found to “call[] into question [UT’s] good faith.”<sup>180</sup> And the Top Ten Percent race-neutral alternative was unable to fully achieve the diversity the University sought.<sup>181</sup> Certiorari review was granted in February 2012.<sup>182</sup>

At oral argument the following October, the justices peppered University counsel with Socratic-law-professor-type questions about how a university would know when it had reached the “critical mass” of minorities, and how “minority” was defined, and what percentage of non-white blood constituted minority status. Counsel answered the first question by proposing “critical mass” was the point at which the minorities no longer felt isolated or reluctant to speak out; the other questions proved more difficult.<sup>183</sup>

But when it decided the case on June 24, 2013,<sup>184</sup> the Court left such matters to the lower courts on a second look. Vacating and remanding, Justice Anthony Kennedy (joined by Roberts, Scalia, Thomas, Breyer, Alito, and Sotomayor)<sup>185</sup> reaffirmed *Grutter* (which no party had challenged), but concluded that the Fifth Circuit had failed to hold UT to the “searching” and “demanding” strict scrutiny mandated by the earlier precedent, particularly regarding the “narrowly

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178. *Fisher*, 631 F.3d at 247 (5th Cir. 2011), *aff’g* 645 F. Supp. 2d at 587, 613, *rehearing en banc denied*, 644 F.3d 301.

179. *Fisher*, 631 F.3d at 231.

180. *Id.* at 245.

181. *See id.* at 239-41.

182. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).

183. Transcript of Oral Argument, *supra* note 147, at 15-16. Chief Justice Roberts was fond of taunting UT’s counsel with questions like “Should someone who is one-quarter Hispanic check the Hispanic box” when self-identifying? “What about one-eighth?” *Id.* at 32-33.

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

185. Justice Kagan recused herself. *Id.* at 2422. The line-up has the look of a delicate compromise worked at in conference.

tailored” standard.<sup>186</sup> The University is entitled to no special deference and no presumption of good faith, the Court held, on its substantial burden to establish that each applicant is evaluated as an individual, that race is not the defining feature of each application, and that no workable race-neutral alternatives would yield the same educational benefits of diversity.<sup>187</sup>

Most significantly, and disturbingly, the Court reaffirmed the equation of efforts to *rectify* discrimination with efforts to *prolong* it:

It is therefore irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions touch upon an individual’s race or ethnic background, he is 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.<sup>188</sup>

Drawing upon precedents including school desegregation cases and prohibitions on interracial marriage, Kennedy bunched together *all* distinctions based on race or ancestry as “by their very nature odious to a free people” and “inherently suspect,” and therefore subject to “the most rigid scrutiny.”<sup>189</sup>

But if the purpose of strict scrutiny is to test the “sincerity” of the reasons advanced in support of a challenged policy and “to remove the possibility that the motive for the classification was illegitimate racial stereotype,”<sup>190</sup> can it be seriously contended that the UT administrators who devised the admissions program were motivated by bigoted stereotypes of white applicants, the way segregationists were regarding black school children?<sup>191</sup>

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186. *Id.* at 2411, 2415, 2419.

187. *Id.* at 2419-21.

188. *Fisher*, 133 S. Ct. at 2417 (internal quotes omitted) (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978)).

189. *Fisher*, 133 S. Ct. at 2418-19 (internal quotes omitted).

190. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 231 (5th Cir. 2011), *vacated and remanded by* 133 S. Ct. 2411 (2013).

Even a dog, the old saying goes, knows the difference between being kicked and being stumbled over.<sup>192</sup>

Justices Scalia<sup>193</sup> and Thomas filed concurring opinions that would overrule *Grutter*, which Thomas characterized as a “radical departure,”<sup>194</sup> and categorically prohibit race-conscious decision-making by the government. Thomas doubled-down on his insistence that the “Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”<sup>195</sup> The “Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.”<sup>196</sup>

To Thomas’s ear, *Grutter*’s claims for the educational benefits of a diverse student body sounded like the discredited rationalizations advanced in support of racial segregation—that race-mixing would destroy the public schools and hurt poor black children the most, or that separate schools for blacks provided more opportunities for their leadership development.<sup>197</sup>

On the broader issue of race preference, Thomas has a simple answer, mocking the “benighted notion that it is

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191. As the late Ronald Dworkin put it, forbidden discrimination occurs when an individual is rejected because “their race is despised or culturally stereotyped as inferior or unsuited.” Dworkin, *supra* note 148, at 42. But “[n]o one could rationally suspect that the University of Texas is prejudiced against the white students who still form almost all of its student body.” *Id.* at 44.

192. This phrase has been attributed to Oliver Wendell Holmes. It can be found in OLIVER WENDELL HOLMES, *THE COMMON LAW* 3 (45th prtg. 1923).

193. Scalia revealed his deep animosity towards any remedial program designed to undue the effects of past discrimination when he famously characterized the Voting Rights Act as a “racial entitlement.” See Transcript of Oral Argument at 47, *Shelby Cnty v. Holder*, 133 S. Ct. 2612 (2013) (No. 12-96), 2013 WL 6908203.

194. *Fisher*, 133 S. Ct. at 2423 (Thomas, J., concurring).

195. *Id.* at 2422 (citation and internal quotation marks omitted).

196. *Id.* at 2428-29.

197. *Id.* at 2425-26.

possible to tell when discrimination helps, rather than hurts, racial minorities.”<sup>198</sup> “The worst forms of racial discrimination in this Nation [including slavery],” he pleads, “have always been accompanied by straight-faced representations that discrimination helped minorities.”<sup>199</sup> UT’s affirmative action program, for him, follows “in [these] inauspicious footsteps.”<sup>200</sup>

Only Ruth Bader Ginsburg explicitly challenged (in a footnote at the very end of her dissent) Thomas’s assertion that “all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of judicial review.”<sup>201</sup> She reprised her theme in *Gratz*: “Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.”<sup>202</sup> Ginsburg found the UT program in conformity with *Bakke* and *Grutter*, and would uphold it without need for remand.<sup>203</sup>

#### IV. WHERE DOES *FISHER V. UNIVERSITY OF TEXAS* LEAVE AFFIRMATIVE ACTION AND RACE-SENSITIVE SELECTION?

Because of its insistence that diversity-conscious measures are to be subjected to the same exacting scrutiny as acts of deliberate discrimination, *Fisher v. University of Texas* may well turn out to be the death knell of affirmative action and race-sensitive policies (at least at public institutions). Although we have come a long way from the explicit reservation of fixed places (a “quota”<sup>204</sup> in anyone’s

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198. *Id.* at 2429.

199. *Id.*

200. *Id.* at 2430.

201. *Id.* at 2433 n.4 (Ginsburg, J., dissenting).

202. *Id.*

203. *Id.* at 2434.

204. Properly understood, a “quota” is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage which must be attained, or which cannot be exceeded, and insulate the

view) in a medical school class for minorities,<sup>205</sup> or a racially-separate admissions process,<sup>206</sup> any more sophisticated and nuanced program is still vulnerable to the intrusive dissection that *Fisher* contemplates, especially given the presumption of illegality raised by the consideration of race itself. It will not be hard for clever attorneys to pick apart any process that takes account of race, much in the manner that Judges Garza, Fine, and Roberts did.

And risk averse university officials may abandon, or at least scale down, their race-sensitivity in order to avoid the considerable expense and unwanted media attention of litigation.<sup>207</sup> *Fisher's* reversal of summary judgment for the university suggests that schools must be prepared for full-blown trials in defense of their programs. A Brandeis official lamented that universities will now be required "to prove a negative," namely that there is no race-neutral alternative [such as the Top Ten Percent Law] that would equally achieve diversity.<sup>208</sup>

In sum, *Fisher's* most perceptive postscript may have come from Abigail Fisher herself, who thanked the justices "for moving the nation closer to the day when a student's race isn't used at all in college admissions."<sup>209</sup>

But the sad reality is that "we are not far distant from an overtly discriminatory past, and the effects of centuries

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individual from comparison with all other candidates for the available seats. In contrast, a permissible goal requires only a good-faith effort to come within a range demarcated by the goal itself, and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate competes with all other qualified applicants.

*Grutter v. Bollinger*, 539 U.S. 306, 335 (2003) (citations omitted).

205. *Regents of California v. Bakke*, 438 U.S. 265 (1978).

206. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

207. See Marcella Bombardieri, *Court Wants High Bar For Affirmative Action*, BOSTON GLOBE, June 25, 2013, at A1 (quoting university officials "puzzling over whether they are truly in compliance with the [C]ourt's standards").

208. *Id.* Race-neutral alternatives have not proven to be effective substitutes. See BOWEN & BOK, *supra* note 46, at 269-74.

209. Quoted in Adam Liptak, *Justices Step Up Scrutiny of Race in College Entry*, N.Y. TIMES, June 25, 2013 at A1.

of law-sanctioned inequality remain painfully evident in our communities and schools.”<sup>210</sup> W.E.B. DuBois’s famous prediction that the problem of the twentieth century would be the problem of the color line has, as John Hope Franklin aptly observed, equal resonance for our own times.<sup>211</sup>

Diversity measures serve many critical societal purposes. In public safety, license to engage in race-conscious selections among qualified candidates allows police and fire departments to reflect a cross-section of the communities they serve, facilitating citizen cooperation and lending legitimacy to the department’s work.<sup>212</sup> At our universities, pathways have been created for minority and female trailblazers, two of whom sit on the Supreme Court. Clarence Thomas and Sonia Sotomayor both acknowledge their debt to affirmative action, although they have drawn dramatically different lessons from their experience with it.<sup>213</sup>

Minority graduates of selective professional schools have formed “the backbone of the emergent black and Hispanic middle class,” “brought greater diversity to the emergency clinics and surgery rooms of leading hospitals, to

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210. *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Ginsburg, J., dissenting). The acquittal of George Zimmerman, admitted killer of unarmed African-American teenager Trayvon Martin, is just one of countless examples. Racist views persist, even among the intelligentsia. *See, e.g.*, DINESH D’SOUZA, *THE END OF RACISM: PRINCIPALS FOR A MULTIRACIAL SOCIETY* 525 (1995) (inferior African-American culture); RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 33 (1992) (undesirable inefficiencies of African-American workers); RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 276-80 (1994) (asserting the lower intelligence of blacks).

211. JOHN HOPE FRANKLIN, *THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY* 5 (1993).

212. *See, e.g.*, *Petit v. City of Chi.*, 352 F.3d 1111, 1114-15 (7th Cir. 2003) (affirmative action in police promotions was justified by the operational need for diversity). *But cf.* *Lomack v. City of Newark*, 463 F.3d 303, 308-10 (3d Cir. 2006) (goal of racial diversity in city’s fire houses did not justify racial balancing program, where imbalances were the result of permitting firefighters to work in their own neighborhoods).

213. Compare the very negative view of THOMAS, *supra* note 109, at 56-57, with Sotomayor’s gratitude for the opening of doors to those with “more talent than opportunity.” SOTOMAYOR, *supra* note 9, at 119, 145-46, 188-91.

government offices and law firms, to corporate hierarchies, and to the practice of entrepreneurship,” and have created their own “networks similar to those that have benefitted the majority white community for many generations.”<sup>214</sup> Minority medical graduates are much more likely to serve traditionally underserved communities, and to have minorities and poor persons among their patients.<sup>215</sup>

Studying with classmates of diverse backgrounds stimulates the learning process, and helps prepare students for the global marketplace and for leadership in a pluralistic society. “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>216</sup> This is why so many “conservative” institutions, in the corporate world as well as the military, have filed amicus briefs in favor of race-sensitive selection processes.<sup>217</sup>

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214. BOWEN & BOK, *supra* note 46, at 116. They are more likely than their white classmates to become involved in civic activities, and to be leaders in them. *See id.* at 155-62, 168-73.

215. *Id.* at 13.

216. *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

217. *See, e.g.*, Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 399056 (citing “the crucial role diversity in higher education plays in preparing students to be the leaders this country needs in business, law, and all other pursuits that affect the public interest”); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 2, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 399096 (“Only a well educated, diverse work force, comprising people who have learned to work productively and creatively with individuals from a multitude of races and ethnic, religious, and cultural backgrounds, can maintain America’s competitiveness in the increasingly diverse and interconnected world economy.”); Consolidated Brief of Lt. General Julius W. Becton, et. al. as Amici Curiae in Support of Respondents at 5, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516), 2003 WL 1787554 (“[A] highly qualified, racially diverse officer corps educated and trained to command our nation’s racially diverse enlisted ranks is essential to the military’s ability to fulfill its principal mission to provide national security.”).

But, opponents say, what about the cost to the “meritocracy” of special preference?

V. THE MYTH OF “MERIT” AND THE LIE OF  
“LOWERING STANDARDS”

The asserted debits of race sensitivity include stigmatization of the beneficiaries,<sup>218</sup> “reverse” discrimination against non-minorities, and the frictions, backlash, and hostilities that can result from overt weighing of race and gender. But most often the other side of the balance against which affirmative action is juxtaposed is “merit selection.”<sup>219</sup> From elementary school on, and into the workplace, this usually means standardized testing.

The blithe equation of merit with test results is so widely accepted that any questioning of it can cause considerable angst. When the student commencement speaker at the highly competitive (and nearly all white or Asian student body) Hunter College High School in Manhattan expressed his guilt “because I don’t deserve any of this. And neither do any of you. We received an outstanding education at no charge based solely on our performance on a [three-hour] test we took when we were eleven-year-olds,” the audience of parents and students was aghast.<sup>220</sup> He continued to press on raw nerves:

If you truly believe that the demographics of Hunter represent the distribution of intelligence in this city, then you must believe that the Upper West Side, Bayside, and Flushing are intrinsically

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218. Justice Thomas makes the point emphatically in *Grutter*, 539 U.S. at 373-74 (Thomas J., concurring in part, dissenting in part), and *Fisher*, 133 S. Ct. 2411, 2432 (2013) (Thomas, J., concurring) that no one can distinguish between students of color admitted on their own merit and those admitted by affirmative action, thus tainting the entire group. Extensive surveys of black students and graduates put Thomas in the minority on this point. See BOWEN & BOK, *supra* note 46, at 264-65.

219. For Bowen and Bok, the word “merit” “has taken on so much baggage we may have to re-invent it or find a substitute.” BOWEN & BOK, *supra* note 46, at 276.

220. HAYES, *supra* note 47, at 31-34. Interestingly, the teachers gave him a standing ovation. *Id.* at 34.

more intelligent than the South Bronx, Bedford-Stuyvesant, and Washington Heights, and I refuse to accept that. . . .

We are deciding children's fates before they even had a chance. We are playing God, and we are losing. Kids are losing the opportunity to go to college or obtain a career . . . . Hunter is perpetuating a system in which children, who contain unbridled and untapped intellect and creativity, are discarded like refuse. And we have the audacity to say they deserved it, because we're smarter than them.<sup>221</sup>

Currently, in a city whose public and charter school population is 71% black and Hispanic, only 12% of the offers for spots at the elite high schools like Hunter went to those demographics.<sup>222</sup>

The genesis of devices like the SAT was laudable—"objective meritocratic" substitutes for the subjective judgments of "character" that had traditionally admitted to the elite universities boys from old-line WASP families, while excluding ethnic applicants.<sup>223</sup> But the Educational Testing Service and its plethora of products have spawned a new elite—the skilled and highly-prepped test-taker.<sup>224</sup> And the correlation between test scores and family income and socio-economic status is now widely documented.<sup>225</sup>

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221. *Id.* at 33.

222. Leonie Haimson and Diane Ravitch, *Unequal Schools*, THE NATION, May 6, 2013, at 41, 42.

223. See generally NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (1999). The origins of civil service testing were equally laudable, but the results equally discriminatory. See Brodin, *Triumph of White Privilege*, *supra* note 12, at 204-06.

224. The prep course for the Hunter High School exam costs \$2,550, and private one-on-one tutoring runs upwards of \$90 an hour. HAYES, *supra* note 47, at 38-39. As Hayes aptly observes, "[t]he playing field may be level, but certain kids get to spend nights and weekend practicing on it in advance of the competition." *Id.* at 40. Frank Ricci, lead plaintiff in the successful reverse discrimination case against the New Haven Fire Department, spent more than \$1,000 on test prep materials and was able to devote eight to thirteen hours a day to studying. Ricci v. DeStefano, 129 S. Ct. 2658, 2667 (2009).

225. Jewel, *supra* note 54, at 245 n.22 (2012); see also Peter Schmidt, *A History of Legacy Preferences, and Privilege*, in AFFIRMATIVE ACTION FOR THE RICH: PREFERENCES IN COLLEGE ADMISSIONS, *supra* note 17, at 33, 46-47; Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847 (1996).

Regarding the persistent gap between black and white test scores, Bowen and Bok point to the differences between the two groups in “resources, environments, and inherited intellectual capital (the educational attainment of parents and grandparents).”<sup>226</sup> High-income families reportedly spend seven times more each year on their children’s education (private tutoring, SAT prep courses, computers, and other activities)—\$9,000 compared to \$1,300—than low-income families.<sup>227</sup> “The advantages that money can buy on tests and college applications have become so great that they threaten to undermine the American ideal of education as the great leveler that enables anyone who works hard to succeed, regardless of income level . . . .”<sup>228</sup>

In sum, what looks like individual achievement may be the product of economic and educational advantage transmitted from parent to child.<sup>229</sup>

Recognition of the limitations and distortions of high-stakes testing is certainly not new. William O. Douglas complained forty years ago:

There was a time when law schools could follow the advice of Wigmore, who believed that “the way to find out whether a boy has the makings of a competent lawyer is to see what he can do in a first year of law studies.” . . . But by the 1920s many law schools found that they could not admit all minimally qualified applicants, and some selection process began. The pressure to use

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226. BOWEN & BOK, *supra* note 46, at 23.

227. Megan Woolhouse, *Wealth Gap Limits Equality of Education*, BOSTON GLOBE, July 5, 2013, at B5 (discussing a report co-authored by MIT economics professor Michael Greenstone).

228. *Id.*

229. See Malamud, *supra* note 225, at 1881 & nn.1303-33. Regarding her Princeton experience, Sonia Sotomayor observed:

Until we would raise kids of our own, no minority students had alumni for parents, and rare indeed were those who had not come from poor communities. The typical undergraduate had been guided to Princeton by relatives, by prep school guidance counselors, or else by teachers savvy about the system. Minority kids, however, had no one but their few immediate predecessors: the first to scale the ivy-colored wall against the odds, just one step ahead ourselves, we would hold the ladder steady for the next kid with more talent than opportunity.

SOTOMAYOR, *supra* note 9, at 146.

some kind of admissions test mounted, and a number of schools instituted them . . . . [I]n 1948 the LSAT was born. It has been with us ever since.

The test purports to predict how successful the applicant will be in his first year of law school, and consists of a few hours' worth of multiple-choice questions. But the answers the student can give to a multiple-choice question are limited by the creativity and intelligence of the test-maker; the student with a better or more original understanding of the problem than the test-maker may realize that none of the alternative answers are any good, but there is no way for him to demonstrate his understanding.<sup>230</sup>

The evidence is quite compelling that these paper-and-pencil tests (both for admissions and personnel selections) are not only often inadequate to their task of selecting the "best" applicants (i.e., they lack validation),<sup>231</sup> but also unfairly biased in their results.<sup>232</sup> On the latter point, one scholar has noted that "the disparate impact of an LSAT-driven definition of merit" has overshadowed many affirmative action programs.<sup>233</sup> It has been reported that in 2011, only forty-seven African-American applicants to law schools had LSATs above 165 and GPAs above 3.5.<sup>234</sup> Does

230. *DeFunis v. Odegaard*, 416 U.S. 312, 327-28 (1974) (Douglas, J., dissenting). Among the first law schools to rely on the LSAT were Ole Miss and Tulane, "likely . . . as a pretense for maintaining segregation." See Kidder, *supra* note 48, at 17. The very notion of "selective admissions" itself at some universities had its origins in a desire to limit the numbers of Jews and other immigrant groups admitted. *Grutter v. Bollinger*, 539 U.S. 306, 369 (2003) (Thomas, J., dissenting).

231. See generally Brodin, *Triumph of White Privilege*, *supra* note 12, at 202-221; U.S. COMM'N ON CIVIL RIGHTS, *THE VALIDITY OF TESTING IN EDUCATION AND EMPLOYMENT* (1993).

232. Brodin, *Triumph of White Privilege*, *supra* note 12, at 222-25. For the persistent difference in scores among demographic groups, see *THE BLACK-WHITE TEST SCORE GAP* (Christopher Jenks & Meredith Phillips eds., 1998); BOWEN & BOK, *supra* note 46, at 19-23; William C. Kidder & Jay Rosner, *How the SAT Creates 'Built-In Headwinds': An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131, 145-55 (2002).

233. Kidder, *supra* note 48, at 27.

234. Erwin Chemerinsky, *The Future of Diversity*, 69 NAT'L LAW. GUILD REV. 193, 196 (2012). In 2000, blacks constituted 11.3% of law school applicants, but only 1% of all applicants that scored 165 or higher on the LSAT. *Grutter*, 539 U.S. at 376 (Thomas, J., dissenting) (quoting LAW SCHOOL ADMISSION COUNCIL, NATIONAL STATISTICAL REPORT (1994)). The black-white gap in SAT scores,

this mean these were *the only* applicants of color who could reasonably be expected to succeed in the profession? Prior to 1968 and the expansion of admissions criteria beyond the usual standard profile numbers, there were about 200 African Americans graduating from law school annually in the entire nation.<sup>235</sup> Were they the only ones in that demographic qualified to practice law?

As Justice Thomas observed in *Grutter*, “no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission test (LSAT).”<sup>236</sup> A critic of both standardized testing and the prevailing definition of “merit,” Thomas complained:

The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to “merit.” For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called “legacy” preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a “true” meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation’s universities.<sup>237</sup>

The SAT, gatekeeper into higher education, has been subject to considerable study which “challenges the conventional wisdom that the SAT accurately measures merit and fairly reflects group differences in educational attainment.”<sup>238</sup> The National Center for Fair and Open Testing concludes that such standardized tests “often produce results that are inaccurate, inconsistent, and harmful to minority, low-income, and female students. . . . [The] tests generally fail to effectively and usefully measure test takers’ achievement, abilities, or skills.”<sup>239</sup> In fact the

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although it has narrowed in recent years, remains significant. *See Liu, supra* note 15, at 1063-64.

235. Kidder, *supra* note 48, at 7.

236. *Grutter*, 539 U.S. at 369 (Thomas, J., dissenting).

237. *Id.* at 367-68.

238. Kidder & Rosner, *supra* note 231, at 134.

239. U.S. COMM’N ON CIVIL RIGHTS, *supra* note 230, at 119-20. Employment tests have similarly often been found unreliable when challenged. In one of the

SAT only marginally predicts college grades, and even less graduation rates,<sup>240</sup> and there is evidence that it particularly under predicts academic performance for females and minorities.<sup>241</sup> For all test takers, the multiple-choice format itself is incapable of measuring higher order thinking skills.<sup>242</sup>

In sum, while the process of admitting university students operates at a level of complexity that defies easy characterization, it is a misconception to set off so-called "merit" criteria against "other considerations," when in truth the traditional measures are hardly reliable predictors of success in school or beyond. One writer contends "objective merit and fairness are attractive concepts with no basis in reality."<sup>243</sup> Professor Stephen Carter thus suggests that we should conceive of affirmative action as *rewriting* the standards for excellence, rather than preparing people to meet them.<sup>244</sup>

Yet test scores and GPA invariably form the basis of cases challenging race-conscious programs, as if they were the gold standard of an applicant's worth.

The Fifth Circuit has recognized that the relative success of minorities "in the face of harmful and widespread stereotypes evidences a degree of drive, determination, and

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early revelations, the evidence demonstrated that persons who scored poorly on the test battery (covering spatial relations, mechanical reasoning, and arithmetic) for building trades apprenticeship programs could actually perform the job *just as successfully* as those who had scored higher. *EEOC v. Local 638*, 401 F. Supp. 467, 480 (S.D.N.Y. 1975), *aff'd* 532 F.2d 821 (2d Cir. 1976). The inability to validate personnel tests has haunted employers since. See cases collected in Brodin, *Triumph of White Privilege*, *supra* note 12, at 208-21.

240. Kidder & Rosner, *supra* note 231, at 135.

241. See Sharif *ex rel.* v. N.Y. Educ. Dep't., 709 F. Supp. 345, 353-54 (S.D.N.Y. 1989); BOWEN & BOK, *supra* note 46, at 74-75, 276-77.

242. See text accompanying note 229.

243. Schmidt, *supra* note 225, at 33, 65 (quoting Debra Thomas & Terry Shepard, *Legacy Preferences Are Defensible, Because the Process Can't Be 'Fair,'* Chron. Higher Educ., Mar. 14, 2003, at B15).

244. CARTER, *supra* note 139, at 27.

merit not captured by test scores alone.”<sup>245</sup> Sonia Sotomayor recalls she “had more ground than most to make up before I was competing with my classmates on an equal footing. *But I worked relentlessly . . .*”<sup>246</sup> She graduated Princeton summa cum laude, Phi Beta Kappa, and went on to serve on the *Yale Law Journal*.<sup>247</sup> Character traits like empathy and altruism, not unimportant in our leaders, similarly escape the attention of tests and GPAs.<sup>248</sup> But “[t]he numbers create an illusion of difference tending to overwhelm other factors.”<sup>249</sup>

Anticipating the trend towards more “holistic” methods of selection, William O. Douglas observed:

A black applicant who pulled himself out of the ghetto into a junior college may thereby demonstrate a level of motivation, perseverance, and ability that would lead a fairminded admissions committee to conclude that he shows more promise for law study than the son of a rich alumnus who achieved better grades at Harvard. . . . There is currently no test available to the Admissions Committee that can predict such possibilities with assurance.<sup>250</sup>

Amid the outcry over “quotas” and “preferential treatment” is lost one salient point—that race-sensitive policies merely encourage employers and universities, when choosing *among the qualified candidates*, to give an edge to minorities and women. Admissions officers obviously seek those applicants whom they deem intellectually capable of

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245. *Fisher v. Univ. of Tex. Austin*, 631 F.3d 213, 238 (5th Cir. 2011), *vacated*, 133 S.Ct. 2411 (2013); *see also DeFunis v. Odegaard*, 416 U.S. 312, 329 (1974) (Douglas, J., dissenting).

246. *SOTOMAYOR*, *supra* note 9, at 191-92 (emphasis added).

247. *Id.* When asked accusingly why she got into Princeton over higher-ranked white classmates, Sonia Sotomayor answered: “Because I work part-time during the school year and full-time during the summers. I may be ranked below them, but I’m still in the top ten, and I *do* much more than the others do.” *Id.* at 119. Referring to her physician brother, she notes: “Affirmative action may have gotten him into medical school, but it was his own self-discipline, intelligence, and hard work that saw him through.” *Id.* at 191-92.

248. *Jewel*, *supra* note 54, at 317 (2012).

249. *DeFunis*, 416 U.S. at 329 (Douglas, J., dissenting).

250. *Id.* at 328-32.

completing the program successfully,<sup>251</sup> and they select from among “the large middle group of applicants who are ‘admissible’ and deemed capable of doing good work in their courses.”<sup>252</sup> Diversity goals invariably include a proviso like that in the University of Washington Law School’s admission program challenged in *Defunis*: “if there are sufficient qualified applicants available.”<sup>253</sup>

Schools are choosing among qualified candidates based on their entire records, and may admit underrepresented applicants despite somewhat less likelihood of success based on the traditional measures, recognizing the limited predictive value and one-dimensional nature of those measures.<sup>254</sup> In fact, when preferences are challenged, it is typically not on the grounds that the minority admits were unqualified.<sup>255</sup>

Consent decrees in employment discrimination cases similarly give preferences to *qualified* minorities and women.<sup>256</sup> A decree entered in 2012 in a gender discrimination suit against the Corpus Christi police department,<sup>257</sup> where the City conceded that its physical ability test (which for years had excluded virtually all female candidates) was not job-related or predictive of success as a police officer, the City agreed to develop new

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251. BOWEN & BOK, *supra* note 46, at 23.

252. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003) (citing *Univ. of Cal. Regents v. Bakke*, 438 U.S. 256 (1977)).

253. *DeFunis*, 416 U.S. at 347.

254. *See, e.g., id.* at 326 (Douglas, J., dissenting).

255. *See, e.g., Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) (no dispute that minority admittees were qualified).

256. An employer . . . is unlikely to have an over-compromising attitude toward affirmative action. Employers recognize . . . that an inequitable or overly zealous affirmative action plan may create racial tension in the workplace. The presence of this tension may create dissension and a general non-productive work climate. This unfortunate, but real potential for non-minority backlash is a potent disincentive which restrains employers from agreeing to “too” sweeping affirmative action.

*Stotts v. Memphis Fire Dept.*, 679 F.2d 541, 555 n.12 (8th Cir. 1982).

257. Second Amended Consent Decree, at 4, 9-12, *United States v. City of Corpus Christi*, No. 2:12-cv-00217 (S.D. Tex. May 15, 2013).

selection devices which would reliably screen applicants. Typically, priority hiring was provided for past victims of the discriminatory practices *who could establish their qualifications* under the revised job-related procedures. The 1981 decree against the Birmingham fire department, the subject of so many years of litigation, stipulated that only *qualified* black or female applicants could be advanced.<sup>258</sup>

Justice William Brennan addressed the contention that affirmative action benefits the unqualified<sup>259</sup> in *Johnson v. Santa Clara Transportation Agency*,<sup>260</sup> where the public employer promoted a female over a male as part of an effort to bring women into supervisory ranks for the first time. The disgruntled male, who had a civil service score just two points higher (75 over 73), alleged he was the victim of reverse discrimination.<sup>261</sup> Rejecting his claim, Brennan observed:

Justice Scalia's dissent predicts that today's decision will loose a flood of "less qualified" minorities and women upon the work force

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258. Howard Kurtz, *U.S. Called Contradictory on Minority-Hiring Stance; Birmingham Finds Ammunition in Justice Dept. Paper*, WASH. POST, Sept. 4, 1985, at A2; see *supra* text accompanying notes 109-14.

259. Carter's *Reflections of an Affirmative Action Baby* includes the following quotation from Ira Glasser:

I am reminded of a conversation I had some years ago with a veteran civil rights litigator who, concerned at charges that affirmative action sometimes results in hiring unqualified candidates, drew a sharp distinction between unqualified and less qualified. An employer, he mused, does not have to hire the best person for the job, as long as everyone is good enough to do the job. Consequently, he reasoned, it is perfectly fine to require employers to hire black applicants who are less qualified than some applicants, as long as the black candidates are capable of doing the job.

CARTER, *supra* note 139, at 51.

Opponents of affirmative of course argue that employers and universities sometimes manipulate the bar of "qualified" to accommodate minorities or women. See, e.g., Chavez, *supra* note 92 (reviewing ROBERT ZELNICK, BACKFIRE: A REPORTER'S LOOK AT AFFIRMATIVE ACTION (1996)). For the charge that affirmative action leads to "the best black syndrome," see CARTER, *supra* note 139, at 47-52.

260. 480 U.S. 616 (1987).

261. *Id.* at 623-25.

. . . . [That speculation] ignores the fact that “[it] is a standard tenet of personnel administration that there is rarely a single, ‘best qualified’ person for a job. An effective personnel system will bring before the selecting official several fully-qualified candidates who each may possess different attributes which recommend them for selection. . . . [F]inal determinations as to which candidate is ‘best qualified’ are at best subjective.”<sup>262</sup>

This case provides an example of precisely this point. “Any differences in qualifications between Johnson and Joyce,” Brennan observed, “were minimal, to say the least.”<sup>263</sup>

The plan challenged in *Johnson* set modest short-term goals in recognition of the limited number of minorities and women who possessed the qualifications for certain of the job classifications.<sup>264</sup> Thus, for skilled craft workers, the goal was a mere three women among the 55 expected openings, or 6%. It was stipulated that hiring was conditioned upon “the qualifications of female applicants for particular jobs.”<sup>265</sup>

In short, a central tenet of the case against affirmative action—that its beneficiaries get a windfall they do not deserve—is simply not borne out.

Joseph Campbell famously observed that mythology serves as the cultural framework for a society to cope with

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262. *Id.* at 641 n.17.

263. *Id.* Professor Selmi is not alone in characterizing it as “remarkable” that the two-point test score differential could be thought to tell us *anything meaningful* about the qualifications of these candidates. See Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 U.C.L.A. L. REV. 1251, 1253 (1995). Indeed, both were rated as “well-qualified” by the agency. *Johnson*, 480 U.S. at 625. The director testified that he viewed the applicants as “essentially equal in qualification.” Brief for United States as Amicus Curiae Supporting Petitioner, *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (No. 85-1129), 1986 WL 728148, at \*2. Nonetheless, this is the stuff of the “reverse discrimination” narrative.

264. *Johnson*, 480 U.S. at 635. The Agency’s Plan emphasized that the long-term goals were not to be taken as quotas for individual hiring decisions, but as benchmarks. Indeed, if a plan failed to take qualifications into account, Brennan observed, it “would dictate mere blind hiring by the numbers,” and thus “its validity could fairly be called into question.” See *id.* at 635-36.

265. *Id.* at 637.

its various challenges.<sup>266</sup> The myths surrounding affirmative action and preference have permitted its opponents to wrap themselves in the high-moral ground rhetoric of a color-blind meritocracy.

### CONCLUSION

*“A law school is not bound by any legal principle to admit students by mechanical criteria which are insensitive to the potential of such an applicant which may be realized in a more hospitable environment.”*<sup>267</sup>

In the face of all the heated controversy, we may have lost sight of affirmative action’s original purpose—to simply provide opportunity for persons from underrepresented groups who would not otherwise be included in, but have good prospects to make a meaningful contribution to, the endeavor. As Professor Stephen Carter notes and our own experiences teach, drive and motivation may well trump paper qualifications.<sup>268</sup> Teachers witness this in their classes, employers in their workplaces. And, in truth, paper qualifications are just that—a flat assessment of a complex human being by way of questionable (and sometimes biased) measurements.

UT did just what it was supposed to do—it sought to measure the whole applicant, to weigh in the mix the prospect of a candidate contributing to the racial and ethnic diversity of a vibrant student body and ultimately to their chosen profession. As Thurgood Marshall observed, public actors (like UT) should not be dragged into court for such admirable efforts, but rather commended for having taken to heart the Court’s long-standing admonitions to finally eliminate the effects of past racial discrimination “root and branch.”<sup>269</sup>

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266. JOSEPH A. CAMPBELL & BILL MOYERS, *THE POWER OF MYTH* 14 (1988).

267. *DeFunis v. Odegaard*, 416 U.S. 312, 340 (1974) (Douglas, J., dissenting).

268. See CARTER, *supra* note 139, at 85.

269. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 305 (1986) (Marshall, J., dissenting).

Judged by an appropriate legal standard drawn from *Bakke* and *Grutter*, and not by the same "searching and exacting" scrutiny applied to the miscreants of old who were segregating black school children and criminalizing interracial marriage, affirmative action programs adopted in good faith for the purposes those decisions found so compelling should be left to work their laudable goal of a more just and inclusive society.