

2015

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Recommended Citation

Tanya M. Washington, *Jurisprudential Ties that Blind: The Means to Ending Affirmative Action*, 2015 Harv. J. Racial & Ethnic Just. Online 1.

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JURISPRUDENTIAL TIES THAT *BLIND*: THE MEANS TO END AFFIRMATIVE ACTION

*Tanya Washington**

INTRODUCTION

For the past twenty-five years, policies and practices designed to address obstacles to educational opportunities, resulting from this nation's rich history of racial discrimination, have been losing popular appeal and legal ground.¹ The promise of equal educational opportunity as a protected civil right that grounded the decision in *Brown v. Board of Education*² has been encumbered by subsequent holdings that frustrate and foreclose its realization.³ In its 2013 decision in *Fisher v. Texas*,⁴ the Supreme Court established a more exacting constitutional test for race conscious admissions practices, signaling the Court's abdication of its role in promoting and securing the promise of

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¹ Casey S. McKay, *Recent Decision: Fishin' with Fisher: Determining the Depth of Deference Does Not Demand Damning Deference to a Dastardly Death*, 83 MISS. L.J. 951, 968 (2014) ("While the principles, guidelines, and boundaries concerning a courts application of strict scrutiny and deference were seemingly well defined after *Bakke*, *Grutter*, and *Gratz*, Justice Kennedy's recent narrow interpretation of deference—which both adds unprecedented substance to the analysis and completely ignores many important aspects of a university's judgment—may prove fatal to both deference and race-based affirmative action plans."); Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 317 (2013) ("[R]ace-based affirmative action likely will not be upheld. Again, consider that from 1990 to 2003, federal courts invalidated 73% of all democratically enacted laws discriminating on the basis of race."); Robert A. Parrish, *How Quickly We Forget: The Short and Undistinguished Career of Affirmative Action*, 65 S.C. L. REV. 503, 503 (2013) ("Affirmative action initiatives have been under attack since their very inception, and they now sit teetering on the brink of being declared unconstitutional after the United States Supreme Court's decision in *Fisher v. University of Texas at Austin*.").

² *Brown v. Bd. of Educ. of Topeka, Kan.*, 347 U.S. 483 (1954).

³ Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 708 (2004) ("Underlying the doctrinal shift, I argue, are three currents that run through the Court's retreat from *Brown*: impatience with remedial intervention, skepticism toward the ability of schools to affect individuals and society, and indifference to the social context in which education's purpose and importance are embedded. These currents not only depart from *Brown*, but also form an unlikely backdrop for the Court's opinion in *Grutter*"); Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 483 (2000) ("Thomas's critique of affirmative action turned *Brown*'s 'feeling of inferiority' language on its head by recalling the language of *Plessy*: 'These programs 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.' Although neither Thomas nor Scalia specifically cited Harlan's dissent in *Plessy*, the Court's two leading originalists are trying to recast *Brown* and the Fourteenth Amendment according to Harlan's supposedly color-blind vision.").

⁴ *Fisher v. Univ. Texas at Austin*, 133 S.Ct. 2411 (2013).

substantive equality that animates the Equal Protection Clause.⁵ Its 2014 decision in *Schuette v. Coalition to Defend Affirmative Action*⁶ offers a tacit invitation to state electorates to vote to prohibit race-conscious state action that promotes racially diverse educational environments. Given the temper of the times, it is an invitation that is likely to be accepted *en masse*.⁷

This dismal backdrop and affirmative action's indeterminate future was the subject of a conference at Harvard Law School, convened by the Harvard Journal on Racial and Ethnic Justice in the spring of 2014. This essay, developed from a talk delivered at the conference, highlights how the Supreme Court's equal protection jurisprudence predestines the use of race for constitutional invalidation. In light of this reality, the piece questions the capacity of affirmative action efforts to ensure educational equity and racial diversity. Beginning with the Court's determination of the limited purpose and power of the Equal Protection Clause in *Plessy v. Ferguson*,⁸ the essay examines several jurisprudential inversions the Supreme Court has deliberately devised and drawn upon to recast the central covenant of the Equal Protection Clause as racial neutrality, rather than racial equality. The essay concludes that this reading of the Clause renders affirmative action efforts largely rhetorical.

⁵ The race conscious program in *Fisher* sought to produce racial diversity and is therefore distinguishable from race conscious efforts focused on remediation, integration and desegregation. See Tanya Washington, *The Diversity Dichotomy: The Supreme Court's Reluctance to Give Race A Capital "R"*, 72 U. CIN. L. REV. 977 (PIN CITE) (2004) (criticizing the majority in *Grutter* for failing to adequately distinguish remedial affirmative action from racial diversity in light of their distinct aims, purposes and animating principles.). Despite their differences, however, racial diversity, which requires a critical mass of students of color, shares with remedial affirmative action a preoccupation with inclusion as a constituent aspect of educational equality. See *Grutter v. Bollinger*, 539 U.S. 306, 331–332 (2003) (“This Court has long recognized that ‘education . . . is the very foundation of good citizenship (citation omitted).’ For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity . . . Effective participation by all members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized . . . All members of our heterogeneous society must have confidence in openness and integrity of the educational institutions that provide this [leadership] training.”).

⁶ *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

⁷ David G. Savage, *Supreme Court Upholds Michigan Ban on Affirmative Action*, L.A.TIMES, (Apr. 22, 2014), <http://www.latimes.com/nation/la-na-court-affirmative-action-20140423-story.html#page=1>, archived at <http://perma.cc/7YW8-AQVU>; Puneet Kollipara, *The Supreme Court Deals a Blow to Affirmative Action*, WASH. POST WONKBLOG (Apr. 23, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/04/23/wonkbook-the-supreme-court-deals-a-blow-to-affirmative-action>, archived at <http://perma.cc/73BG-63JG>.

⁸ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

Part I of the essay analyzes the Court's narrow definition of the *kind* of equality that falls within the authority of the Equal Protection Clause to address, remediate and secure. This section addresses the Court's imprecise distinction between societal and legal discrimination in *Plessy* and considers how the Court's reliance on it in subsequent cases places injurious forms of discrimination beyond the constitutional reach of remedial, race-conscious state action authorized by the Fourteenth Amendment.⁹ This borderless distinction informs the Court's determination that the constitutional use of race for remedial purposes is limited to targeting *de jure* discrimination, not *de facto* discrimination, without acknowledging the latter as a natural and inevitable consequence of the former.¹⁰ Part II of the essay examines the origins of the dubious distinction between *de jure* and *de facto* discrimination and its adverse impact on state efforts to remediate the harms caused by racial discrimination and to achieve educational equity.¹¹

The focus of Part III is on the Supreme Court's recent decision in *Fisher* that further tapers the strict scrutiny test making it exceedingly challenging for any use of race to clear constitutional hurdles.¹² In view of the Court's reading of the Equal Protection Clause, in *Fisher*, as codifying racial neutrality rather than racial equality, Part IV considers the prospects and wisdom of using several proposed race-neutral measures designed to achieve educational equity and racial diversity.¹³ The essay's conclusion forecasts the categorical prohibition of the consideration of race as an inevitable consequence of the Court's contemporary equal protection jurisprudence. And, in light of the one step forward, two steps back advance of affirmative action efforts, it suggests

⁹ See discussion *infra* Part I.

¹⁰ See discussion *infra* Part II.

¹¹ See discussion *infra* Part II.

¹² See discussion *infra* Part III.

¹³ See discussion *infra* Part IV.

the need for a new approach to achieving racial diversity and substantive educational equality.¹⁴

I. AN ENDURING DIVIDE: DISCRIMINATING BETWEEN DISCRIMINATION

The Thirteenth,¹⁵ Fourteenth¹⁶ and Fifteenth¹⁷ Amendments comprise a constitutional trinity, which in the aggregate were intended to cure the deprivations inherent in the institution of slavery that persisted in America for more than three hundred years.¹⁸ Hindsight confirms that the constitutional provisions were insufficient to eviscerate pervasive racial discrimination in slavery's wake. Though the protections and freedoms they were devised to secure may have enjoyed some success,¹⁹ in many respects they have fallen short of achieving their intended aims.²⁰ Among the Civil War

¹⁴ Professor Robin West provides a lucid explanation of the difference between formal and substantive equality, as defined within the context of equal protection. She instructs,

Modern courts and commentators have identified two dramatically different meanings the equal protection clause of the fourteenth amendment might have: a substantive meaning (or "substantive equality") and a formal meaning (or "formal equality"). The formal meaning of equality, or of "equal protection," is that legislators must treat like groups alike, and the laws they make must reflect this mandate by being "rational (citation omitted)." Thus, if two groups are alike in some relevant respect, a law may not prescribe different treatment of them. Put somewhat differently, to meet the formal criterion of equality, the distinctions a law creates must be rationally related not only to a legitimate end but also to preexisting differences between the affected groups. If a law fails to meet this standard, then the state has denied "equal protection of the law." The substantive meaning of equality, or of equal protection, is that legislators must use law to insure that no social group, such as whites or men, wrongfully subordinates another social group, such as blacks or women (citation omitted). Thus, if one group wrongfully dominates another -- whether economically, physically, socially or sexually -- then the legislature must at least attempt to use legal means to bring an end to that wrongful relation of domination and subordination. For a state to fail to do so is to "deny" the subordinated group "equal protection of the law."

Robin West, *Symposium on Statutory Interpretation: The Meaning of Equality and the Interpretive Turn*, 66 CHI.-KENT. L. REV. 451, 469-70 (1990).

¹⁵ U.S. CONST. amend. XIII.

¹⁶ U.S. CONST. amend. XIV.

¹⁷ U.S. CONST. amend. XV.

¹⁸ See generally Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law From 1619 To 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD WORLD L.J. 207, 226 (2006).

¹⁹ See generally Mary E. Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 HOW. L.J. 1, 17 (2006); Meredith L. Bryant, *Combating School Resegregation through Housing: A Need for a Reconceptualization of American Democracy and the Rights it Protects*, 13 HARV. BLACKLETTER L.J. 127 (1997).

²⁰ The mass incarceration of black men and boys; arrest, conviction and sentencing disparities; racial profiling and the proliferation of disenfranchisement laws provide compelling examples of the failures of the Thirteenth Amendment, which abolished involuntary servitude, and the Fifteenth Amendment, which guaranteed the right to vote. See Michael D. Shear, *Obama Starts Initiative for Young Black Men, Noting His Own Experience*, N.Y. TIMES, Feb. 27, 2014, http://www.nytimes.com/2014/02/28/us/politics/obama-will-announce-initiative-to-empower-young-black-men.html?_r=0, archived at <http://perma.cc/CKM2-WNRK> ("He called the challenge of ensuring success for young men of color a 'moral issue for our country' as he ticked off the statistics: black boys who are more likely to be suspended from school, less likely to be able to read, and almost certain to encounter the criminal justice system as either a perpetrator or a victim."); Genevieve Saul, *A Perfect Storm: The Negative Effects of Felony Voting Laws and the Repeal of Section 4 of the Voting Rights Act on Minority Americans*, 9 Mod. Am. 35 (2014); Ian F. Haney López, *Post-Racial Racism: Racial*

Amendments designed to guarantee equality for those newly inducted into American citizenship, the Equal Protection Clause of the Fourteenth Amendment²¹ protects against the discriminatory infringement of specified rights, and targets the limited category of state licensed inequality.²² The Equal Protection Clause (“Clause”) controls the constitutional analysis of legislation that draws classifications based on race.

The *Slaughter-House Cases*²³ afforded the Supreme Court its first opportunity to address the proper construction of the Equal Protection Clause; however, the decision neither addressed race nor specified the rights the Clause was intended to secure.²⁴ Twenty-three years later, in *Plessy v. Ferguson*, the Court was presented with a dispute centered squarely on race, and it defined the substantive scope of the Clause and the rights falling within its protective sphere.²⁵ The central issue in *Plessy* was the constitutionality of a Louisiana law that required that all railway passenger cars be segregated by race. The plaintiff challenged the statute as contravening Thirteenth and Fourteenth Amendment protections and rights, and he argued that his quantum of white blood (seven-eighths) entitled him to ride in the carriage reserved for whites.²⁶ The Court did not resolve Plessy’s claim regarding his entitlement to the privileges secured by his

Stratification and Mass Incarceration in the Age of Obama, 98 CALIF. L. REV. 1023 (2010); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010). This essay’s focus is the failure of the Fourteenth Amendment to create or accommodate meaningful educational equity and racial diversity.

²¹ U.S. CONST. amend. XIV, § 1.

²² See *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (explaining that the Equal Protection Clause was “designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it should be denied by the States”).

²³ 83 U.S. 36 (1873) (holding that the Fourteenth Amendment was primarily designed to protect former slaves from laws passed by Congress, not to alter the police power of the state in relation to citizens of that state).

²⁴ See *Plessy*, 163 U.S. at 543 (describing the Slaughterhouse cases as not “call[ing] for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro, to give definitions of citizenship of the United States and of the states, and to protect from the hostile legislation of the states the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the states.”).

²⁵ See *id.* at 544.

²⁶ *Id.* at 541–42. Judge A. Leon Higginbotham, noting the irony of the argument in light of the legacy of the case, observed, “He . . . refused to admit that he was ‘in any sense or in any proportion a colored man.’” A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 112 (1996) (citation omitted). For an in-depth analysis of the power and privilege attendant to whiteness see Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1714 (1993) (“After legalized segregation was overturned, whiteness as property evolved into a more modern form through the law’s ratification of the settled expectations of relative white privilege as a legitimate and natural baseline.”).

“whiteness,” and it characterized racial identity as a question of fact to be determined according to state law.²⁷ The Court rejected Plessy’s Thirteenth Amendment argument, having determined that the law did not “re-establish a state of involuntary servitude,”²⁸ and it focused its analysis on whether the law offended the equality mandate at the heart of the Equal Protection Clause.²⁹

The Court divined a distinction between laws that infringe political rights and promote political inequality and laws that legislate social inequality, according to whether the enactment produces legal inferiority.³⁰ Having determined that the Equal Protection Clause affords no sanctuary for laws that facilitate political inequality,³¹ the Court explained that, “[a] statute which implies merely a legal distinction between the white and colored races . . . has no tendency to destroy the legal equality of the two races . . .” and lies beyond the provision’s protective reach.³² The Court’s description of the scope and purpose of the Equal Protection Clause was shaped by its conclusion that the constitutional provision could only address laws that infringe political rights. Justice Brown, writing for the majority, explained:

The object of the amendment was undoubtedly *to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or*

²⁷ *Plessy*, 163 U.S. at 552 (“It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as belonging to the colored race But these are questions to be determined under the laws of each state, and are not properly put in issue in this case.”) (citations omitted).

²⁸ *Id.* at 543. “That [the law] does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or, at least, the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property, and services. . . . ‘It would be running the slavery question into the ground,’ said Mr. Justice Bradley [in the Civil Rights cases] ‘to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theater, or deal with in other matters of intercourse or business.’” *Id.* at 542–43.

²⁹ *Id.* at 542. The Court described the difference between the scope and purpose of the Thirteenth and Fourteenth Amendments, explaining, “[The Thirteenth Amendment] was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern states, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value” *Id.* However, the Court acknowledged the Fourteenth Amendment as having been “devised to meet this exigency.” *Id.*

³⁰ *Id.* at 551–52.

³¹ *See id.* at 544.

³² *Id.* at 543.

*to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.*³³

The derisive doctrine of separate but equal was born.

The Court went on to reject Plessy's argument that the discriminatory treatment imposed by the challenged law infringed rights protected by the Equal Protection Clause, and it explained the limitations on the kind of state-constructed inequality, against which the Constitution could protect. Justice Brown explained:

The [plaintiff's] argument . . . assumes that social prejudices may be overcome by legislation Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.³⁴

The Court's reasoning referenced the frequency with which it had drawn a "distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres, and railway carriages";³⁵ and the Court made clear that the Equal Protection Clause could address political inequality, but was powerless to secure social equality or provide protection against state-sanctioned social inequality. The decision provided no substantive framework for distinguishing between civil/political equality and social equality. However, having

³³ *Plessy*, 163 U.S. at 544 (emphasis added). The reference to a guarantee of "absolute equality" is contravened by the Court's determination that laws that authorize segregated schools were exempt from the protections provided by the Equal Protection Clause. *Id.* ("[T]he establishment of separate schools for white and colored children . . . ha[s] been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced."). In a similar vein, anti-miscegenation laws which the Court acknowledged "may be said in a technical sense to interfere with the freedom of contract" were also considered to provide another example of racially discriminatory laws "universally recognized as within the police power of the state." *Id.* at 545 (citation omitted).

³⁴ *Id.* at 551–52.

³⁵ *Id.* at 545.

divined a distinction that limited the power of the constitutional provision, the Court's determination that the right infringed by the Louisiana law constituted a "social prejudice" strategically placed it beyond the protective pale of the Equal Protection Clause.

In his dissenting opinion in *Plessy*, Justice Harlan questioned the legitimacy of the distinction between social and political equality, and he characterized the right infringed by the challenged law as a civil right falling within the ambit of guarantees secured by the Equal Protection Clause.³⁶ Justice Harlan's dissent expressed considerable concern that the majority's holding issued an invitation to the states "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens. . . ."³⁷

The majority's analysis in *Plessy* makes plain that the Equal Protection Clause was not intended to ensure social equality for Blacks. However, the decision fails to provide a clear way to define social inequality and distinguish it from the kind of political or legal inequality that falls within the competency of the Clause to proscribe or promote. The majority's vagary regarding the distinction between rights and equality secured by the Equal Protection Clause, and rights and equality that do not enjoy such protection, is not without constitutional consequence. It set the stage for current affirmative action jurisprudence and the wholesale rejection of eliminating societal discrimination and promoting social equality as constitutionally permissible goals.³⁸ Justice Marshall, in his

³⁶ *Id.* at 561 (Harlan, J., dissenting) (dismissing the majority's "suggestion that social equality cannot exist between the white and black races in this country" as an "argument scarcely worthy of consideration.").

³⁷ *Id.* at 563. (Harlan, J., dissenting)

³⁸ *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. 1*, 551 U.S. 701, 731 (2007) ("The sweep of the mandate claimed by the district is contrary to our rulings that remedying past societal discrimination does not justify race-conscious government action.");

dissent in *Regents of the University of California v. Bakke*, described how the Court’s analytic sleight of hand in *Plessy* delivered the “ultimate blow to the Civil War Amendments and to the equality of Negroes. . . .” and he referenced the “bankruptcy of the Court’s reasoning.”³⁹

In its 1977 decision in *Bakke* the Court struck down the affirmative action program employed by the Medical School of the University of California at Davis, which set aside 16 of 100 available seats for minority admits. A white student, who was denied admission to the University twice, challenged the admissions practice as infringing his equal protection rights. The University proffered four goals as compelling justifications for its race-conscious admissions program:

- (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession
- (ii) countering the effects of societal discrimination
- (iii) increasing the number of physicians who will practice in communities currently underserved; and
- (iv) obtaining the educational benefits that flow from an ethnically diverse student body.⁴⁰

Only the diversity rationale was recognized as a compelling state interest.⁴¹

Reverberations of the *Plessy* majority’s determination that social equality is not a guarantee secured by the Equal Protection Clause are apparent in the Court’s rejection of

Grutter v. Bollinger, 539 U.S. 306, 323 (2003); *City of Richmond v. Croson*, 488 U.S. 469, 505 (1989) (“To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group. . . . We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.”). See also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (distinguishing between societal discrimination and the kind of discrimination that supports race-conscious relief, Justice Powell opined, “[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (“[T]he purpose of helping certain groups whom the faculty . . . perceived as victims of ‘societal discrimination’ does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admission program are thought to have suffered.”).

³⁹ *Bakke*, 438 U.S. at 392

⁴⁰ *Id.* at 306

⁴¹ *Id.* at 314–15 (“the interest of diversity is compelling in the context of the university’s admissions program”). Powell’s recognition of educational diversity, of which racial diversity is one aspect, was not without controversy. In the wake of the *Bakke* decision a question persisted in the Federal Circuit Courts about whether the determination that diversity constituted a compelling interest commanded a majority of the votes on the Court and whether it should be considered binding precedence. Compare *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001), and *Hopwood v. Texas* 78 F.3d 932 (5th Cir. 1996) (deciding diversity is not a compelling interest), with *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000) (recognizing diversity as a compelling interest). See *Grutter*, 539 U.S. at 325, (resolving the dispute among the Federal Circuit Courts and affirming the status of educational diversity as a constitutionally compelling state interest.) (“[W]e endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). *Id.*

the University's goal of remediating societal discrimination as a compelling justification for its use of race in the *Bakke* decision. Justice Marshall remarked in his dissenting opinion, "had the court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma [of continued racial discrimination] in 1978."⁴² Justice Powell, writing for the majority in *Bakke*, explained the limited capacity of law to remedy societal discrimination:

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. . . . We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations (citations omitted). . . . Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims or illegality. . . . Hence, the purpose of helping certain groups whom the faculty . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admission program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.⁴³

On the heels of the *Bakke* decision, Justice Powell reinforced rejection of societal discrimination as a permissible constitutional aim in *Wygant v. Jackson Board of*

⁴² *Bakke*, 438 U.S. at 401. See generally Theresa M. Beiner, *Shift Happens: The U.S. Supreme Court's Shifting Antidiscrimination Rhetoric*, 42 U. TOL. L. REV. 37, 92–93 (2011) ("[T]he Court's functional abandonment of presumptions of discrimination, as well as its failure to acknowledge and account for societal discrimination in its modern antidiscrimination jurisprudence, leaves race . . . discrimination plaintiffs without remedies and tells a story that fails to acknowledge their lived experiences.").

⁴³ *Bakke*, 438 U.S. at 307–310. For a thoughtful discussion about how cries of reverse discrimination perpetuate inequality and protect privilege, see William M. Carter, Jr., *The Paradox of Political Power: Post-Racialism, Equal Protection, and Democracy*, 61 EMORY L.J. 1123, 1144 (2011) ("[W]hen racial minorities exercise their political power to level the playing field, they often do so in ways that create visible, individual white 'victims' who are perceived as paying the price for something that is not their fault. Subordination of racial minorities, however, is often accomplished in ways that render individual victims invisible. Accordingly, when racial minorities use the political process to interrupt the perpetuation of white privilege, we falsely see a world in which a politically dominant group (racial minorities) is discriminating against discrete and identifiable victims (individual whites). By contrast, because the continued subordination of racial minorities is often systemic and its causes are often invisible, it is seen as being 'just the way things are.'").

Education.⁴⁴ At the heart of the dispute in *Wygant* was an agreement forged between the Board of Education (“Board”) and the teachers’ union designed to protect recent gains in the hiring of black teachers from erosion by economically induced layoffs. The agreement provided for an exception to the policy that layoffs would be determined exclusively by seniority and ensured that there would never be a greater number of minority faculty laid off than the current percentage of minority personnel employed at the time of the layoffs. The practical effect of the policy was that some non-minority teachers with greater seniority were terminated in lieu of retaining minority teachers with less seniority. The articulated purpose for the race-conscious layoff provision was to provide role models for minority school children. The Board conceded that it had presented no evidence of prior discriminatory hiring practices at trial, but it attributed racialized hiring disparities to societal discrimination.

The Court reversed the lower courts’ decisions upholding the layoff provision⁴⁵ and in his opinion, on behalf of the majority, Justice Powell buttressed the determination in *Bakke* that societal discrimination is a constitutionally deficient justification for the government’s use of race. He explained,

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . There are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind. In fact, there is no apparent connection between the two groups. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing

⁴⁴ 476 U.S. 267 (1986).

⁴⁵ *Id.* at 289 (O’Connor, J., concurring) (“The courts below ruled that a particularized, contemporaneous finding of discrimination was not necessary and upheld the plan as a remedy for ‘societal’ discrimination, apparently on the assumption that in the absence of a specific contemporaneous finding, any discrimination addressed by an affirmative action plan could only be termed ‘societal.’”).

discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.⁴⁶

It is now axiomatic that the Equal Protection Clause affords no refuge against pervasive, societal inequality, which is sometimes acknowledged,⁴⁷ but determined to be beyond the constitutional competency of the law to remediate.⁴⁸ The more remote overt legal discrimination becomes, the more effectively it can be disguised in the sheep-like garb of societal discrimination, and the more the distinction forecloses governmental uses of race.⁴⁹ As the signposts of racial discrimination disappear from plain view, discrimination, like gravity, continues to operate notwithstanding its invisibility, creating conditions of inequality insulated from remedial state action.⁵⁰

⁴⁶ *Id.* at 276.

⁴⁷ *Id.* (“No one doubts that here has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”); *Gratz v. Bollinger* 539 U.S. 244, 298–300 (2003) (Ginsburg J., dissenting) (observing, “the effects of centuries of law sanctioned inequality remain painfully evident in our communities and schools.”); *Grutter*, 539 U.S. at 333 (“[R]ace unfortunately still matters.”); *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring) (“The enduring hope is that race should not matter; the reality is that too often it does.”); *Schuetz*, 134 U.S. at 1676 (2014) (Sotomayor, J., dissenting) (“Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities.”).

⁴⁸ *Grutter*, 539 U.S. at 373–74 (Thomas, J., dissenting) (“[T]he Court has soundly rejected the remedying of societal discrimination as a justification for governmental use of race.”); *Parents Involved*, 551 U.S. at 2758 (Chief Justice Roberts remarked, “[R]emedying past societal discrimination does not justify race-conscious government action.”).

⁴⁹ *Parents Involved*, 551 U.S. at 2773 (Thomas, J., concurring) (“Although racial imbalance can result from de jure segregation, it does not necessarily, and the further [sic] we get from the era of state-sponsored racial separation, the less likely it is that racial imbalance has a traceable connection to any prior segregation.”). See also *Grutter*, 539 U.S. at 342–43 (“We take the law school at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable (citations omitted). . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

⁵⁰ See *supra* note 20. See also Jasmine A. Williams, “Unemployed (and Black) Need Not Apply”: A Discussion of Unemployment Discrimination, Its Disparate Impact on the Black Community, and Proposed Legal Remedies, 56 *HOW. L.J.* 629, 631 (2013) (“The unemployment disparity between the black community and the general community is not surprising because it reflects the status quo existing long before the recession began. Several factors, such as racial discrimination and access to education, are offered to explain the gap.”); Karen K. Harris and Kathleen Rubenstein, *Eliminating The Racial Wealth Gap: The Asset Perspective*, 45 *CLEARINGHOUSE REV.* 74, 79 (2011) (“Although racial discrimination is no longer legal, de facto discrimination still exists in terms of government and social priorities, principles, and social norms. Housing discrimination, unequal educational systems, disparate treatment in the realm of criminal justice, and disparate employment opportunities all continue. . . .”); Beverly Moran, *Wealth Redistribution and the Income Tax*, 53 *HOW. L.J.* 319, 333 (2010) (“There is no doubt that slavery betrayed American political ideals by denying millions of people the ability to obtain wealth and confer that wealth to future generations. These restrictions on the ability to accumulate and pass on wealth did not end with slavery. Instead, a series of government programs reinforced the wealth disparities between those citizens that arrived by migration and those who arrived in chains.”); Kevin Outterson, *Disentangling Fact From Fiction: The Realities of Unequal Health Care Treatment: Article: Tragedy and Remedy: Reparations for Disparities in Black Health*, 9 *DEPAUL J. HEALTH CARE L.* 735, 748 (2005) (“Disparities in Black health arose in the context of slavery and were reinforced by state action in segregation and discrimination.”).

The exclusion of societal discrimination from the category of inequality eligible for state remediation erects a constitutional obstacle that is increasingly more challenging to clear, as discrimination takes on more clandestine forms.⁵¹ The distinction, first divined in *Plessy*, between societal inequality, which the law cannot remediate, and legal discrimination, which the law is equipped and authorized by the Equal Protection Clause to address, casts a long shadow over the Court’s consideration of the constitutionality of governmental uses of race in the educational context. The *Plessy* majority’s construction of a constitutionally relevant distinction between societal and legal discrimination justifies a cramped interpretation of the Equal Protection Clause, and it has spawned an equally dubious and disruptive distinction of its own—the distinction between *de jure* and *de facto* discrimination. It is to the contours of that constitutional convention that the essay turns.

II. *DE FACTO* AND *DE JURE* DISCRIMINATION: AN ARTIFICIAL DIVIDE OF CONSTITUTIONAL CONSEQUENCE

The Supreme Court formalized the constitutional significance of the distinction between *de jure* and *de facto* discrimination in *Milliken v. Bradley*.⁵² *Milliken* concerned a federal district court order directing the desegregation of Detroit’s nearly all black school district, an urban island surrounded by a sea of nearly all white suburban school districts. The order was made pursuant to the court’s determination that government action at multiple levels conspired to produce and maintain a pattern of residential segregation throughout the city of Detroit that resulted in the segregation of its schools.

⁵¹ Marguerite A. Driessen, *Toward a More Realistic Standard for Proving Discriminatory Intent*, 12 TEMP. POL. & CIV. RTS. L. REV. 19, 32 (2002) (“The Court went from a strident acknowledgment of not only the dangers of racial bias, but also of the ease with which it can be hidden and the difficulty involved in proving it, to a blase requirement that all applicants at the equal protection bar first prove that bias.”).

⁵² 418 U.S. 717, 744–45 (1974).

The issue before the Court was the constitutionality of a plan that mandated interdistrict busing to desegregate the metropolitan school district. Without regard for the practical reality that the Detroit public school district could only be desegregated by governmental action that involved both the suburban and metropolitan districts, a majority of the Court held that the remedy selected extended beyond the scope of the constitutional violation it was designed to cure. It observed, “the record . . . contains evidence of de jure segregated conditions only in the Detroit schools . . . and the remedy must be limited to that system.”⁵³ Though the Court acknowledged the segregated state of schools within the Detroit school district, it did not attribute the segregation to official discrimination by the state or by the surrounding school districts, and it therefore concluded that it was unconstitutional for the state to impose an inter-district remedy.⁵⁴

In his dissenting opinion in *Milliken*, Justice Douglas chastised the Court for creating a distinction that justified a holding “likely [to] put the problems of blacks and our society back to the period that antedated the ‘separate but equal’ regime of *Plessy v. Ferguson*.”⁵⁵ He challenged the constitutional relevance and the *legitimacy* of the distinction between *de jure* and *de facto* discrimination, and he criticized the Court for characterizing the racialized state action that produced Detroit’s segregated school district as *de facto* discrimination, thereby placing it beyond the competency of the law to remediate.⁵⁶ He observed,

[T]here is, so far as the school cases go, no constitutional difference between de facto and de jure segregation. . . . Restrictive covenants maintained by state action or inaction build black ghettos. It is state action

⁵³ *Id.* at 746.

⁵⁴ *Id.* at 745–47.

⁵⁵ *Id.* at 759 (Douglas, J., dissenting).

⁵⁶ *Id.* at 770 (“I am even more mystified as to how the Court can ignore the legal reality that the constitutional violations, even if occurring locally, were committed by governmental entities for which the State is responsible and that it is the State that must respond to the command of the Fourteenth Amendment.”).

when public funds are dispensed by housing agencies to build racial ghettos. Where a community is racially mixed and school authorities segregate schools, or assign black teachers to black schools or close schools in fringe areas and build new schools in black areas and in more distant white areas, the State creates and nurtures a segregated school system just as surely as did those States involved in *Brown v. Board of Education*, when they maintained dual school systems. . . . It is conceivable that ghettos develop on their own, without any hint of state action. But since Michigan, by one device or another, has, over the years, created black school districts and white school districts, the task of equity is to provide a unitary system for the affected area where, as here, the State washes its hands of its own creations.⁵⁷

Justice Marshall issued a scathing dissent refusing to subscribe to what he described as the *Milliken* majority's "emasculat[i]on of our constitutional guarantee of equal protection of the laws."⁵⁸ Noting the outcome determinative characterization of the government action that produced Detroit's segregated school district as *de facto* discrimination, Justice Marshall contended,

[T]he evidence . . . showed that Negro children had been intentionally confined to an expanding core of virtually all-Negro schools immediately surrounded by a receding band of all-white schools. . . . The constitutional violation found here was not some *de facto* racial imbalance, but rather the purposeful, intentional, massive, *de jure* segregation of the Detroit city schools, . . . and justifies 'all-out desegregation'. . . . [I]nterdistrict relief was seen as a necessary part of any meaningful effort by the State of Michigan to remedy the state-caused segregation within the city of Detroit.⁵⁹

Thirty-three years later, the Court's invocation of the *de jure/de facto* distinction in *Parents Involved v. Seattle School District No. 1*,⁶⁰ dictated the determination that the race-conscious school transfer plans used to desegregate Seattle's and Louisville's public schools were unconstitutional because the "racial imbalance" in the schools was not a

⁵⁷ *Id.* at 761–62 (citations omitted) (emphasis added).

⁵⁸ *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

⁵⁹ *Id.* at 785–89.

⁶⁰ *Parents Involved*, 551 U.S. at 735.

consequence of governmental discrimination.⁶¹ Citing *Milliken*, Chief Justice Roberts explained, “The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations,” and he chided the dissenting Justices for “elid[ing] this distinction between *de jure* and *de facto* segregation. . . . thus alter[ing] in fundamental ways not only the facts presented here but the established law.”⁶²

For his part, Justice Thomas devoted a great deal of attention in his concurring opinion to highlighting *de jure* discrimination as a constitutional prerequisite for race-conscious state action and to distinguishing it from racial imbalance resulting from *de facto* discrimination. He noted,

Because this Court has authorized and required race-based remedial measures to address *de jure* segregation, it is important to define segregation clearly and to distinguish it from racial imbalance. In the context of public schooling, segregation is the deliberate operation of a school system to ‘carry out a governmental policy to separate pupils in schools solely on the basis of race.’ . . . Racial imbalance is the failure of the school district’s individual schools to match or approximate the demographic make-up of the student population at large. Racial imbalance is not segregation. Although presently observed racial imbalance might result from past *de jure* segregation, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices. . . . [R]acial imbalance without intentional state action to separate the races does not amount to segregation. . . . [W]ithout a history of state-enforced racial separation, a school district has no affirmative legal obligation to take race-based remedial measures to eliminate segregation and its vestiges. . . . Seattle has no history of *de jure* segregation; therefore, the Constitution did not require Seattle’s plan As for Louisville, its slate was cleared by the District Court’s 2000 dissolution decree, which effectively declared that there were no longer any effects of *de jure* discrimination in need of remediation.⁶³ (citations omitted).

⁶¹ *Id.* at 721 (“We have emphasized that the harm being remedied by mandatory desegregation plans is the harm that is traceable to segregation, and that the ‘Constitution is not violated by racial imbalance in the schools, without more.’”) (quoting *Milliken v. Bradley*, 433 U.S. 167, 280 n.14 (1977)).

⁶² *Parents Involved*, 551 U.S. at 736.

⁶³ *Id.* at 749–55 (Thomas, J., concurring).

Though Justice Kennedy joined the plurality in recognizing the constitutional relevance of the distinction between *de jure* and *de facto* discrimination, he acknowledged the challenge inherent in discerning between the two. He observed,

The distinction between government and private action . . . can be amorphous both as a historical matter and as a matter of present-day finding of fact. Laws arise from a culture and vice versa. Neither can assign to the other all responsibility for persisting injustices. Yet like so many other legal categories that can overlap in some instances, the constitutional distinction between *de jure* and *de facto* segregation has been thought to be an important one.⁶⁴

After echoing Justice Kennedy's acknowledgment of the nebulous nature of the *de jure/de facto* distinction,⁶⁵ Justice Breyer's dissenting opinion criticized the majority's misapplication of and reliance upon the delineation in the context of voluntary state action targeting school segregation. He explained,

The plurality tries to draw a distinction by reference to the well-established conceptual difference between *de jure* segregation ('segregation by state action') and *de facto* segregation ('racial imbalance caused by other factors'). But that distinction concerns what the Constitution requires school boards to do, not what it *permits* them to do. The opinions cited by the plurality to justify its reliance upon the *de jure/de facto* distinction only address what remedial measures a school district may be constitutionally *required* to undertake. As to what is *permitted*, nothing in our equal protection law suggests that a State may right only those wrongs that it committed. No case of this Court has ever relied upon the *de jure/de facto* distinction in order to limit what a school district is voluntarily allowed to do. . . . [S]ignificant as the difference between *de jure* and *de facto* segregation may be to the question of what a school district *must* do, that distinction is not germane to the question of what a school district *may* do.⁶⁶ (citations omitted).

⁶⁴ *Id.* at 795 (Kennedy, J., concurring).

⁶⁵ *Id.* at 819–20 (Breyer, J. dissenting) ("The plans in both Louisville and Seattle grow out of . . . earlier remedial efforts. Both districts faced problems that reflected initial periods of severe racial segregation, followed by such remedial efforts as busing, followed by evidence of resegregation, followed by a need to end busing and encourage the return of, *e.g.*, suburban students through increased student choice. . . . The histories also make clear the futility of looking simply to whether earlier segregation was *de jure* or *de facto* in order to draw firm lines separating the constitutionally permissible from the constitutionally forbidden use of 'race-conscious' criteria.").

⁶⁶ *Id.* at 843–44.

Determining discriminatory action to be benign and beyond the reach of constitutional uses of race by labeling it *de facto* reflects circuitous reasoning and as Justice Breyer admonished in *Parents Involved*, “doom[s] the plurality’s endeavor to find support for its views in that distinction.”⁶⁷ Adherence to the *de jure/de facto* distinction ignores the reality that state sanctioned discrimination provoked, perpetuated and facilitated *de facto* discrimination, and, as Justice Kennedy observed in *Parents Involved*, “an injury stemming from racial prejudice can hurt as much when the demeaning treatment based on race identity stems from bias masked deep within the social order as when it is imposed by law.”⁶⁸

Conditioning the constitutionality of governmental uses of race upon nebulous differences between *de jure* and *de facto* discrimination erects an evidentiary obstacle that insulates inequality from legal remediation. The distinction represents a refined and expanded version of the enduring divide between societal and legal discrimination divined in *Plessy*, with the added advantage of imposing an evidentiary prerequisite for the government’s use of race.⁶⁹ Therefore, it imposes a more impervious barrier to state efforts to cure racial disparities and exclusion, but the *de jure/de facto* distinction shares with its predecessor a narrow conception of the power and purpose of the Equal Protection Clause, by eliminating integration as a constitutional aim within the competency of the Clause to effect.⁷⁰

⁶⁷ *Id.* at 806.

⁶⁸ *Parents Involved*, 551 U.S. at 795 (Kennedy, J., concurring).

⁶⁹ *Milliken*, 418 U.S. at 756 n.2 (Stewart, J., concurring) (“The Constitution simply does not allow federal courts to attempt to change [segregated schools] unless and until it is shown that the State, or its political subdivisions, have contributed to cause the situation to exist. . . . [I]t follows that the situation over which my dissenting Brothers express concern cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.”).

⁷⁰ Integration and desegregation are not constitutionally synonymous. Desegregation provides a constitutional justification for the use of race where sufficient evidence of state discrimination is present. Integration is considered to target societal discrimination and is traced to *de facto* discrimination. Accordingly, in *Parents Involved* the Court refers to racial integration as substantively indistinguishable from racial balancing and rejects it as a constitutionally permissible end. Chief Justice Roberts observed, “The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from ‘patently

III. AFFIRMATIVE ACTION FATIGUE: A POUND OF FLESH FOR RACIAL DIVERSITY

In *Bakke* the Court identified educational diversity as the sole constitutional justification for the use of race in admissions,⁷¹ in the absence of “identified discrimination;” thereby calcifying the constitutional significance of the *de jure/de facto* distinction.⁷² Justice Powell’s selection of the most exacting level of review to test the constitutionality of the University’s race-conscious admissions program⁷³ would be confirmed as the controlling test in *Croson*, where the Court held that strict scrutiny applies whether the State’s use of race is to discriminate, to remediate *de jure* discrimination, or to achieve educational diversity.⁷⁴ The entrenchment of *de jure* discrimination as a constitutional prerequisite for state action, and the treatment of state

unconstitutional’ to a compelling state interest simply by relabeling it ‘racial diversity.’ While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoiding racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.” *Parents Involved*, 551 U.S. at 732. *But see* Justice Kennedy’s concurrence in *Parents Involved* where he suggests the continued viability of integration as a constitutional goal served by the State’s consideration of race. Referring to the goal of avoiding racial isolation, he observed, “This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue.” *Id.* at 797 (Kennedy, J., concurring).

⁷¹ *Bakke*, 438 U.S. at 311–12.

⁷² *Id.* (“The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education.”). Limiting the kind of discrimination that qualifies as a constitutionally appropriate target for state remedial action, Justice Powell noted, “The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination . . . [A] governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination;” *Id.* at 307–09. The majority opinion made clear, that “there was no judicial determination of constitutional violation as a predicate for the formulation of a remedial classification;” *Id.* at 301, to which Justice Marshall responded in his dissent, “it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. . . . Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.” *Id.* at 398.

⁷³ *Id.* at 305 (explaining why strict scrutiny is the applicable constitutional test, Justice Powell stated, “We have held that in ‘order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is ‘necessary . . . to the accomplishment’ of its purpose or the safeguarding of its interest.”).

⁷⁴ *Croson*, 488 U.S. at 493 (Explaining the rationale for treating racial discrimination and remedial uses of race as constitutionally asymmetrical and therefore subject to strict scrutiny, the majority opines, “[T]here is simply no way of determining what classifications are in fact ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics . . .”). Justice Marshall laments in his dissenting opinion, “Today for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection review of race-conscious remedial measures (citation omitted). . . . This is an unwelcome development. A profound difference separates governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism.” *Id.* at 551–52 (Marshall, J., dissenting). The perpetuation justification has disappeared from the Court’s affirmative action jurisprudence; *But see generally* Ian Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717 (2000) (arguing that racialized institutional practices become entrenched in structures in ways that permit their reproduction without conscious intent to discriminate); For an exhaustive examination of how federal courts are applying strict scrutiny to government sponsored minority business program *see* Derek M. Alphan, *Proving Discrimination After Croson and Adarand: “If It Walks Like a Duck,”* 37 USF L. REV. 887 (2003).

remedial and state discriminatory action as constitutionally symmetrical, turn the Equal Protection Clause on its head. Instead of the Clause operating as a tool to address and eliminate inequality, it becomes a weapon that frustrates and forecloses the use of race to ensure equality.

Strict scrutiny requires that the end served by the use of race be compelling in nature and that the means employed be narrowly tailored to the goal.⁷⁵ The *Bakke* decision narrowed the category of constitutionally sanctioned uses of race, in the absence of *de jure* discrimination, by universities to a class of one—educational diversity, of which racial diversity is a part.⁷⁶ The required means-end fit has been assessed in light of available race-neutral alternatives to achieve diversity.⁷⁷ However, prior to the Court’s recent decision in *Fisher v. University of Texas*, a required showing of the absence of workable race-neutral alternatives never commanded a majority of the Court.⁷⁸ This constitutional predicate renders state efforts to produce racial diversity the latest casualty of jurisprudential machinations that frustrate affirmative action efforts.

The constitutional status of educational diversity was affirmed in *Grutter*;⁷⁹ however, the Court’s decision nine years later in *Fisher* severely circumscribed the means by which it can be constitutionally obtained. At issue in *Fisher* was the constitutionality of the University of Texas’ undergraduate admissions program, which considered race in order to achieve the educational benefits that result from a racially

⁷⁵ *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (“[T]he means chosen to accomplish the [state’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.” (quoting *Wygant*, 476 U.S. at 280 (1986))); *Croson*, 488 U.S. at 493 (“[T]he means chosen [must] ‘fit’ [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”).

⁷⁶ *Bakke*, 438 U.S. at 314–15.

⁷⁷ *Grutter*, 539 U.S. at 339 (“Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”); *Croson*, 488 U.S. at 507 (“[I]t is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination . . . [T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting.”); *Wygant*, 476 U.S. at 280 n.6 (narrow tailoring “may be used to require consideration of whether lawful alternative and less restrictive means could have been used.”).

⁷⁸ *See Grutter*, 539 U.S. at 339 (2003); *Wygant*, 476 U.S. at 280 n.6 (1986).

⁷⁹ *Grutter*, 539 U.S. at 325; *See supra* note 41 for discussion of controversy surrounding whether educational diversity’s constitutional status as a compelling state interest was a controlling holding of the Court.

heterogeneous class. The University of Texas had a unique history with respect to its use of race in admissions. After the *Bakke* decision, the University like many institutions invoked Powell’s recognition of educational diversity as a constitutionally permissible goal, and it implemented a program that relied upon an Academic Index (“AI”)⁸⁰ and considered race as a “plus factor” in admissions decisions. In 1996 the United States Court of Appeals for the Fifth Circuit held in *Hopwood v. Texas* that the University of Texas’ use of race furthered no compelling interest and ruled the program unconstitutional.⁸¹

The next iteration of the University’s admissions program was designed to comply with the Fifth Circuit’s prohibition of the consideration of race and to obtain a racially diverse student population. To this end, the University eliminated the consideration of race from the admissions calculus and adopted the Personal Achievement Index (“PAI”). The PAI was a holistic metric which considers a variety of factors relevant to a student’s background and capacity to contribute to educational diversity, but race was not a factor.⁸² In addition, the Texas Legislature adopted the Top Ten Percent Law, which grants automatic admission to any public, state institution, to all students who graduate in the top 10% of their high school class. The University of Texas’ post-*Hopwood*, recalibrated admissions process, which consisted of the use of the AI, the PAI and the admission of students under the Top Ten Percent Law, was designed to ensure a racially diverse student population. Following Supreme Court’s decisions in

⁸⁰ The Academic Index reflected a student’s test scores and high school academic performance.

⁸¹ 78 F.3d at 944 (5th Cir. 1996) (refusing to recognize the precedential value of Powell’s recognition of educational diversity as constituting a compelling interest).

⁸² The Personal Achievement Index was designed to consider “a student’s leadership and work experience, awards, extra-curricular activities, community service, . . . [and other factors, such as] growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student’s family;” *Fisher*, 133 S. Ct. at 2415–16 (2013).

Grutter and Gratz v. Bollinger,⁸³ the University returned to the explicit use of race as a plus factor in its admissions processes, by including it as a consideration in the PAI.

Abigail Fisher, a white student who was denied admission to the University of Texas, filed suit and she argued that the use of race as part of the school's admissions process violated the Equal Protection Clause. The District Court granted the University's motion for summary judgment and the Fifth Circuit affirmed that decision. On appeal, the Supreme Court did not disturb diversity's status as a compelling interest, nor did it decide the constitutionality of the means employed by the University of Texas to achieve that interest. However, the Court held that the lower court erred by presuming the University's consideration of race to have been executed in good faith and that it failed to apply the correct standard of strict scrutiny.⁸⁴ The Court remanded the case back to the Fifth Circuit to determine "whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity,"⁸⁵ and the Court instructed that the narrowly tailored requirement requires a showing of no workable race-neutral alternatives to achieve racial diversity.⁸⁶ Justice Kennedy, writing for the majority, opined,

[S]trict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." *See Grutter*, 539 U.S. at 339-340, 123 S.Ct. 2325 (emphasis added). . . . *The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.* If " 'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,'" *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n.6 (1986) (quoting Greenawalt, *Judicial Scrutiny of "Benign" Racial Preferences in Law School Admissions*, 75 *Colum. L.Rev.* 559, 578-579 (1975)), then the university may not consider race. . . . *[S]trict scrutiny imposes on the*

⁸³ *Gratz*, 539 U.S. at 244 .

⁸⁴ *Fisher*, 133 S. Ct. at 2421.

⁸⁵ *Id.*

⁸⁶ *Id.* at 2420.

*university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.*⁸⁷

An examination of controlling Supreme Court cases reveals negligible support for the *Fisher* majority's novel⁸⁸ and exceedingly strict interpretation of what the narrow tailoring requirement demands. In *Wygant*, Justice Powell addressed the requirement's meaning in a footnote, explaining, "The term 'narrowly tailored,' so frequently used in our cases, has acquired a secondary meaning. More specifically, as commentators have indicated, the term *may* be used to require consideration of whether lawful alternative and less restrictive means could have been used."⁸⁹ Justice Powell references several law review articles⁹⁰ but cites no case law in support of the existence of a *potential*, secondary meaning of the requirement.⁹¹

The Court's decision in *Grutter* expressly rejects an interpretation of the narrow tailoring test as requiring exhaustion of all race-neutral alternatives.⁹² In *Grutter* the Court considered the constitutionality of the University of Michigan Law School's admissions program, which considered applicants' race as a plus factor in the context of an individualized assessment of each prospective admittee. Rejecting the petitioners'

⁸⁷ *Id.* (emphasis added) (citation omitted).

⁸⁸ Some commentators describe the Court's acknowledgment of the relevance of race-neutral action by the University's seeking to achieve racial diversity as clarifying the narrowly tailored prong of the strict scrutiny test and others characterize it as the adoption of a new rule. See, e.g., Scott Greytak, *New Rules for Affirmative Action in Higher Education: A Practical Guide to Fisher v. University of Texas for Colleges and Universities*, in THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS 64 (Richard D. Kahlenberg, ed., 2014) (higher educational attorney Scott Greytak observed, "Altogether, Justice Kennedy's modifications have either tightened the *Grutter* vice, or established an entirely new standard of review."); Mae Kuykendall and Charles Adside, III, *Unmuting the Volume: Fisher, Affirmative Action Jurisprudence, and the Legacy of Racial Silence*, 22 WM. & MARY BILL RTS. J. 1011, 1064 (2014) ("This effort in *Fisher* to discipline *Grutter*'s looser approach to strict scrutiny is well grounded in the record discussed in *Grutter*, but given low salience by the Court."); Harvard Law Review Association, *Fourteenth Amendment – Equal Protection Clause—Public-University Affirmative Action—Fisher v. University of Texas at Austin*, 127 HARV. L. REV. 258, 267 (2013) (referencing "*Fisher*'s recalibration of the affirmative action strict scrutiny analysis."). See *Fisher v. Univ. of Texas at Austin*, No. 09-50822, 2014 WL 3442449, at *20 (5th Cir. July 15, 2014) (Garza, J., dissenting) ("Fisher effected a change in the law of strict scrutiny . . .").

⁸⁹ *Wygant*, 476 U.S. at 280 n.6 (emphasis added).

⁹⁰ See John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 n. 26 (1974); Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 578–79 (1975); Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–21 (1972).

⁹¹ See generally Richard H. Fallon, Jr. and Paul C. Weiler, *Conflicting Models of Racial Justice*, 1984 S. CT. REV. 1, 58 (1985).

⁹² *Grutter*, 539 U.S. at 339.

argument that the admissions practice failed to satisfy the nexus prong of the strict scrutiny test, Justice O'Connor opined, "Petitioner and the United States argue that the Law School's plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree. *Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative.*"⁹³

Though Supreme Court majority and plurality opinions provide no support for an interpretation of the narrow tailoring test as requiring exhaustion of all race-neutral options before employing race-conscious measures, Justice Kennedy's concurring and dissenting opinions repeatedly reference such a requirement, positioning it to receive the imprimatur of the Court in *Fisher*.⁹⁴ In *Parents Involved*, decided just five years before, he wrote in his concurring opinion,

[W]hen de facto discrimination is at issue our tradition has been that the remedial rules are different. The State must seek alternatives to the classification and differential treatment of individuals by race A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. . . . *Even so, measures other than differential treatment based on racial typing of individuals first must be exhausted.*"⁹⁵

⁹³ *Id.* at 339 (emphasis added). In Justice Kennedy's dissenting opinion he charges the majority with misapplying the strict scrutiny test. He observed, "The Court confuses deference to a university's definition of its educational objective with deference to the implementation of this goal. . . . [D]eference is not to be given with respect to the methods by which it is pursued. . . . Deference is antithetical to strict scrutiny, not consistent with it." *Id.* at 388 – 94 (Kennedy, J., dissenting).

⁹⁴ Judge Patrick Higginbotham of the Fifth Circuit, remarked during a November 2013 hearing of the remanded *Fisher* case:

"What is the unfairness of letting [the University of Texas] go forward under the [Fisher] standard? We obviously—the district court and this court—were seriously mistaken in not following the dissent in *Grutter*, by not having anticipated that it would become [the rule]. Going forward, in fairness perhaps, [the University of Texas] ought to be allowed to meet the standard [in *Fisher*]. One can say, "Well that's always the standard." Well, of course strict scrutiny was always the standard, but it was strict scrutiny as stated by Justice O'Connor to which Justice Kennedy dissented [in *Grutter*]." Greytak, *supra* note 88 at 58.

⁹⁵ *Parents Involved*, 551 U.S. at 796–98 (Kennedy, J., concurring).

Importantly, he cites no authority supporting the constitutional predicate; however, his pronouncement prefaced the recalibration of the nexus prong of the strict scrutiny test in *Fisher*.⁹⁶

Though Justice Kennedy concedes in his opinion in *Fisher* that the *Grutter* decision expressly repudiated an exhaustion requirement as a predicate, his “no workable race-neutral alternatives” requirement clearly echoes the exhaustion test he articulated in *Parents Involved*.⁹⁷ Conspicuously absent from his opinion in *Fisher* is any reference to prior cases by the Court supporting the test as a constitutional requirement, except for a citation to Justice Powell’s reference in *Wygant* to a *possible* alternative interpretation of the narrowly tailored test, proposed in several law review articles.⁹⁸

The Court’s novel construction of narrow tailoring is carefully calibrated to foreclose the use of race in furtherance of racial equality and to facilitate racial neutrality, which Justice Kennedy described as the “driving force of the Equal Protection Clause.”⁹⁹ His confidence, which he expressed in his *Croson* concurrence, “that, in application, the strict scrutiny standard will operate in a manner generally consistent with the imperative of race-neutrality, because it forbids the use even of narrowly drawn racial classifications

⁹⁶ Judge Garza, dissenting from the Fifth Circuit’s affirmance of the District Court’s decision on remand from the Supreme Court, traces the “modifi[ca]tion of] the narrow tailoring calculus” to Justice Kennedy’s dissenting opinions in *Grutter* and in *Parents Involved*. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 665 (5th Cir. July 15, 2014) (Garza, J., dissenting). He noted, “[U]sing racial classifications is permissible only as a ‘last resort to achieve a compelling interest.’” *Id.* at 666; *See also* Greytak, *supra* note 88, at 64 (“Though Justice Kennedy preserves plenty of language from the *Grutter* decision in *Fisher*, including Justice O’Connor’s upper limit, ‘exhaustion’ qualification, his resolution of the *Gratz-Grutter-[Parents Involved]* inconsistency most closely resembles the “last resort” language he introduced in [*Parents Involved*].”).

⁹⁷ *See supra* note 95, at 798.

⁹⁸ *See supra* note 91. Judge A. Leon Higginbotham’s analysis of the majority opinion in *Plessy* expressed an insight relevant to Justice Kennedy’s analytical sleight of hand in *Fisher*. He noted, “As one reads neatly printed Supreme Court opinions, there is a tendency to give some presumption of rationality to the writings because of their format and dignified style. Yet on great issues of public policy, some opinions do nothing more than to mask with civil terminology a justice’s intention to distort the record or to give an imprimatur of logic that does not exist to those familiar with the evolution of the precedential case law. There can be no more deceptive approach than when a Court *improperly* . . . relies upon cases as having precedential significance in determining the case at issue.” JUDGE A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 113 (Oxford University Press 1996).

⁹⁹ *Croson*, 488 U.S. at 518 (Kennedy, J., concurring) (“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause”).

except as a last resort,”¹⁰⁰ foreshadows the Court’s holding in *Fisher*. This colorblind interpretation of the Equal Protection Clause sanctions a constitutional predicate that creates an evidentiary impasse for efforts to promote racial diversity and destines affirmative action efforts for defeat.¹⁰¹ As Justice Blackmun observed in his dissent in *Bakke*, “I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it [be] successful. To ask, that this be so is to demand the impossible.”¹⁰²

IV. RACING TO NEUTRALITY: HEAR NO RACE, SEE NO RACE, SPEAK NO RACE TO ACHIEVE RACIAL DIVERSITY

Employing race-neutral means to create racial diversity may be, as Justice Blackmun intimates, an exercise in futility; however, the Court’s recent decision in *Fisher*, informs that their use is, nevertheless, constitutionally required. On remand, in *Fisher v. University of Texas*, the Fifth Circuit reaffirmed the District Court’s grant of summary judgment to the University of Texas and upheld the constitutionality of its race-conscious admissions program.¹⁰³ The Fifth Circuit’s majority opinion provides a detailed account of the University’s use of race-neutral efforts to achieve racial diversity including the Top Ten Percent Plan and the school’s extensive and coordinated outreach, scholarship and recruitment efforts.¹⁰⁴ The majority described these race-neutral efforts

¹⁰⁰ *Id.* at 519.

¹⁰¹ Greytak, *supra* note 88, at 59 (observing, “*Fisher* represents a deliberate and measured step forward on the path to colorblindness. It is a blueprint for destabilizing race-conscious admissions plans. This is our warning, and we must react accordingly.”).

¹⁰² *Bakke*, 438 U.S. at 407. (Blackmun, J., dissenting).

¹⁰³ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. July 15, 2014) (“With the benefit of additional briefing, oral argument, and the ordered exacting scrutiny, we affirm the district court’s grant of summary judgment.”).

¹⁰⁴ *Id.* at 665 (“Put simply, this record shows that UT Austin implemented every race-neutral effort that its detractors now insist must be exhausted prior to adopting a race conscious admissions program.”).

as insufficient to move enrollment “towards a critical mass of minority students,”¹⁰⁵ and therefore determined the University’s use of race to comply with the Supreme Court’s new constitutional prerequisite of no workable race-neutral alternatives. The court held,

Interlacing the Top Ten Percent Plan, *with its dependence upon segregated schools to produce minority enrollment*, with a plan that did not consider race until it had a universe of applicants clearing a high hurdle of demonstrated scholastic performance strongly supports UT Austin’s assertion that its packaging of the two was necessary in its pursuit of diversity. . . . And *when race enters it is deployed in the holistic manner of Grutter as a factor of a factor*. . . . To reject the UT Austin plan is to confound developing principles of *neutral affirmative action* looking away from *Bakke* and *Grutter*, leaving them in uniform but without command—due only a courtesy salute in passing.¹⁰⁶

The University of Texas’ unique history of race-neutral and race-conscious admissions practices allowed it to satisfy the strictures of the Court’s modified narrowly tailored test.¹⁰⁷ However, as the Fifth Circuit majority conceded, “UT Austin’s efforts to achieve diversity without facial consideration of race, its narrow tailoring of its admission process, in one of the country’s largest states, *offers no template for others*.”¹⁰⁸ This holding does not ensure that other institutions will easily clear the evidentiary hurdle the new test erects. In fact, as the Fifth Circuit majority intimates in its opinion, the efforts by the University of Texas may establish a heightened factual predicate for the quantum and quality of race-neutral efforts necessary to survive strict scrutiny analysis that other schools will struggle to meet. Affirmative action may have survived a battle with the validation of the University of Texas’ race-conscious program, but the Supreme Court’s

¹⁰⁵ *Id.* at 666.

¹⁰⁶ *Id.* at 659–60 (emphasis added).

¹⁰⁷ *Fisher*, No. 09-50822, 2014 WL 3442449, at *21 n5 (5th Cir. July 15, 2014) (Garza, J., dissenting) (“I agree with the majority that *Fisher* represents a decisive shift in the law.”).

¹⁰⁸ *Fisher*, No. 09-50822, 2014 WL 3442449, at *17 (5th Cir. July 15, 2014) (emphasis added). See Greytak, *supra* note 88 at 70–71 (“[I]mportantly, an airtight strategy (short of exhausting every conceivable race-neutral alternative) remains elusive: UT claimed that it experimented with race-neutral alternatives for seven years, and even incorporated SES factors into their admissions calculations (citation omitted). UT also devoted a year to reviewing these policies before adopting its race-conscious plan (citation omitted). Nevertheless, at *Fisher*’s rehearing, the attorney for Abigail Fisher insisted on more. ‘Where’s the study?’ he asked.”).

interpretation of Equal Protection as demanding racial neutrality, signals that affirmative action may ultimately lose the war.

In the wake of the Supreme Court’s decisions in *Parents Involved* and *Fisher*, scholars have cast about for race-neutral measures, with varying capacities for addressing *de facto* segregation and for yielding racial diversity sufficient to produce pedagogical benefits. In the K-12 context, alternatives include: using class or socioeconomic status as a proxy for race,¹⁰⁹ redrawing school attendance zones,¹¹⁰ using zip codes,¹¹¹ creating magnet schools,¹¹² and establishing inter-district programs.¹¹³ Race-neutral efforts in the K-12 context that successfully utilize proxies for race are vulnerable to invalidation pursuant to the Supreme Court’s decisions in *Milliken* and *Parents Involved*, wherein it rejects addressing *de facto* discrimination (i.e., ensuring racial diversity, integration,

¹⁰⁹ Kimberly Jenkins Robinson, *The Constitutional Future Of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 337 (2009) (“Student assignment plans that integrate students based upon socioeconomic status have grown in popularity over the past fifteen years, particularly since 2000, their having been adopted in approximately forty districts that educate 2.5 million students.”). See generally Taryn Williams, Note, *Outside the Lines: The Case for Socioeconomic Integration in Urban School Districts*, 2010 BYU EDUC. & L.J. 435 (2010).

¹¹⁰ Robinson, *supra* note 109, at 339 (“School districts also may seek to promote diversity and avoid racial isolation by drawing attendance-zone boundaries so as to bring together students from a racially mixed group of neighborhoods and to address segregated housing patterns, which represent the primary cause of segregated schools.”). See generally Joseph O. Oluwole & Preston C. Green, *Grating Race-Conscious Student Assignment Plans in the Cauldron of Parents Involved v. Seattle School District*, 56 WAYNE L. REV. 1655 (2010). In his concurrence in *Parents Involved*, Justice Kennedy noted several mechanisms for attracting students of diverse backgrounds. He recommended: “strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.” *Parents Involved*, 551 U.S. at 789.

¹¹¹ Danielle Allen, *Talent is Everywhere: Using Zip Codes and Merit to Enhance Diversity*, in THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS 147 (Richard D. Kahlenberg ed., 2014) (Allen observed, “My suggestion is that the pursuit of geographic diversity in admissions is our best hope of merging the goals of diversity and excellence. This could and should be taken to the level of ZIP codes and, in particular, to the level of the ZIP+4 system, which divides the United States into geographic units as small as a city block or group of apartments. Given current residential patterns—with their extremely high degree of socioeconomic, racial, ethnic and ideological segregation . . . among others—geographic diversity at the level of ZIP+4 address codes should bring other sorts of valuable diversity along with it.”).

¹¹² Robinson, *supra* note 109 at 340 (“Some districts may be able to develop magnet schools to promote diversity and avoid racial isolation. Magnet schools seek to enroll a diverse student population by developing specialized programs, such as a specialized subject matter, theme, or unique pedagogical approach that attracts students away from their private or neighborhood schools.”). But see R. Kenneth Godwin et al., *Sinking Swann: Public School Choice and the Resegregation of Charlotte’s Public Schools*, 23 REV. OF POL’Y RES. 983 (2006) (highlighting the practical effects of race-neutral diversification policy of Charlotte-Mecklenburg schools after 2002).

¹¹³ Robinson, *supra* note 109 at 342 (“Some communities also may adopt interdistrict race-neutral approaches, such as allowing students to transfer between districts. Interdistrict approaches have been adopted in cities such as Hartford, Connecticut; Boston, Massachusetts; and St. Louis, Missouri, and have gained suburban support because of the diversity that such programs bring to white schools.”).

racial balancing and avoiding racial isolation) as a compelling justification for the use of race.¹¹⁴

In the higher-education context, alternatives include percentage plans,¹¹⁵ the use of class or socioeconomic status as a proxy for race,¹¹⁶ the development of minority pipeline programs, aggressive recruitment and outreach efforts, and increasing scholarship awards to students of color.¹¹⁷ Some of these measures may prove successful;¹¹⁸ however, their constitutionally required use ignores the reality of race as a unique, non-fungible aspect of one's experience in America,¹¹⁹ and they ignore the reality

¹¹⁴ *Milliken*, 418 U.S. at 745–47; *Parents Involved*, 551 U.S. at 732.

¹¹⁵ Matthew N. Gaertner and Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 374–75 (2013) (“Texas implemented the first top X percent plan in 1997, announcing that any student graduating from the top ten percent of a Texas high school was guaranteed admission into a state college or university, including the state's flagship institutions. California followed suit with a commitment to guarantee admission to one of the state colleges or universities for students in the top four percent of their in-state high-school class who completed certain coursework. And Florida guarantees admission to the top twenty percent of Florida high-school graduates, provided they complete a college preparatory curriculum.”).

¹¹⁶ See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L. J. 2331, 2332 (2000). For an in depth discussion of class-based affirmative action see Richard D. Kahlenberg, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* (Basic Books 1996). For thoughtful critiques of the use of class as a proxy for race; see generally Deborah Malamud, *Affirmative Action, Diversity and the Middle Class*, 68 U. Colo. L. Rev. 939, 967–87 (1997); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. LAW REV. 1 (1997); Tung Yin, *A Carbolic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213 (1997); see also Sheryll Cashin, *PLACE NOT RACE* 79 (Beacon Press 2014) (citing “[r]ecent research on disadvantage-based affirmative action that considered a complex range of factors beyond parental income, including parental education, language, neighborhood, and high school demographics, found that such programs would raise African American and Latino enrollment nearly as much as race-based affirmative action while also increasing economic diversity (footnote omitted).”).

¹¹⁷ Halley Potter, *Transitioning to Race-Neutral Admissions: An Overview of Experiences in States Where Affirmative Action Has Been Banned*, in *THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS* 75-76 (Richard D. Kahlenberg ed., 2014) (examining ten states—educating nearly 30 percent of the national high school population—that have banned or placed severe restrictions on the use of racial affirmative action and have employed other methods to produce diversity.) Potter highlights several different race-neutral options that have been employed including: spending money to create new partnerships with disadvantaged schools to improve the pipeline of low-income and minority students; providing new admissions preferences to low income and working-class students of all races; expanding financial-aid budgets and increasing targeted scholarship awards to support the needs of economically disadvantaged students; dropping legacy preferences for the generally privileged—and disproportionately white—children of alumni; creating policies to admit students who graduated at the top of their high-school classes; and creating programs designed to facilitate transfer from community colleges to four-year institutions. *Id.* at 77–79.

¹¹⁸ *Id.* at 88 (reporting, “many public universities have feared that this policy change would be devastating to racial and ethnic diversity on their campus. However, for the most part, this has not been the case. Out of 11 flagship public universities in nine states where the use of race in admissions has at one time been eliminated, seven were able, at some point under race-neutral admissions, to meet or exceed the level of enrollment of underrepresented minority students . . . seen in the year prior to the ban taking effect.”). Professor Cashin highlighted the pattern of declining rates of minority enrollment at selective schools in states that have banned the use of race in admissions, but she points to “a recent study of the impact of affirmative action bans in four states (California, Washington, Texas and Florida) [which] found that total enrollment of unrepresented minorities did not change at four-year universities. Cashin, *supra note* 116, at 77.

¹¹⁹ *Fisher*, 2014 WL 3442449, at *15 (“*Bakke* accepts that skin color matters—it disadvantages and ought not be relevant but it is.”); *Grutter*, 539 U.S. at 333 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”); David Leonhardt, *If Affirmative Action is Doomed, What Next?*, N.Y. TIMES, June 17, 2014, http://www.nytimes.com/2014/06/17/upshot/if-affirmative-action-is-doomed-whats-next.html?_r=0&abt=0002&abg=0 (“The biggest downside to these class-based approaches is that they don't acknowledge the role that race plays in American society. If you somehow found otherwise identical white and black students — living in the same neighborhood, with the same income, wealth and structure — the black student would still probably have to do more just to keep up. Racism is not dead, as social-science research makes clear.”).

that using non-racial means to approximate race is ultimately untenable.¹²⁰ Furthermore the required, reductionist use of race as “a factor of a factor” and the reformulation of affirmative action as “neutral affirmative action” to satisfy the demands of strict scrutiny, limit affirmative action efforts’ capacity to produce racial diversity.¹²¹

Many race-neutral measures (percentage plans and use of zip codes) are plagued by the reality that they are race-neutral in name only, as they rely upon racial segregation to produce racial diversity.¹²² Describing this phenomenon, the Fifth Circuit observed in *Fisher*,

The sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system. The de facto segregation of schools in Texas (citation omitted) enables the Top Ten Percent Plan to increase minorities in the mix While [it] boosts minority enrollment by skimming from the tops of Texas high schools, it does so against this backdrop of increasing resegregation in Texas public schools (citation omitted), where over half of Hispanic students and 40% of black students attend a school with 90%-100% minority enrollment.¹²³

Arguably, the construction of percentage plans as race-neutral positions them at cross purposes with efforts to desegregate K-12 schools, because if elementary and secondary schools were integrated percentage plans would be less effective tools for creating racial diversity.¹²⁴ Moreover, empirical data suggest that race-neutral methods do not yield a measure of racial diversity sufficient to produce enhanced educational outcomes.¹²⁵

See also Neil Gotanda, *A Critique of ‘Our Constitutions Is Colorblind*, 44 STAN. L. REV. 1, 28–29, 47–48 (1991) (charging the Court with employing analysis in its decisions that disassociate racial identity and racial experience).

¹²⁰ *Bakke*, 438 U.S. at 407 (Blackmun, J., dissenting). See Greytak, *supra* note 88 at 69 (“Simply put, if a college or university’s goal is to enroll a certain proportion of black or Latino students, there is simply no more efficient way to achieve this goal than to use race-conscious admissions. A strict efficiency standard, therefore, would render all race-neutral strategies unworkable.”).

¹²¹ *Fisher*, 2014 WL 3442449, at *18.

¹²² As Justice Ginsburg observed in her dissent in *Fisher*, “I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious (citations omitted) Texas’ percentage plan was adopted with racially segregated neighborhoods and schools front and center state.” *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting).

¹²³ *Fisher*, 2014 WL 3442449, at *10–*11. See generally Jeffrey Selinger, *What States Aren’t Saying About the XPercent Solution*, 46 CHRON. HIGHER ED. A31, A32 (2000).

¹²⁴ Danielle Holley & Delia Spencer, *The Texas Ten Percent Plan*, 34 HARV. C.R.-C.L. L. REV. 245, 277 (1999).

¹²⁵ In Justice Sotomayor’s dissent from the majority opinion in *Schuetz v. Coalition to Defend Affirmative Action*, she provides a detailed account of the harmful impact of state legislation in Michigan and California on racial diversity at colleges and universities in those states. *Schuetz*, 134 S. Ct. 1623 at 1676–82 (Sotomayor, J., dissenting). See also Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*,

Pipeline programs, outreach, scholarship awards, and recruitment efforts require that universities maintain a theoretical commitment to racial diversity, as having educational value, and make a financial commitment to producing it.

Another, more controversial proposed race-neutral measure is for universities to reduce their reliance on standardized test scores and to redefine merit and qualifications in ways that would increase the admission of students of color.¹²⁶ The majority opinion in *Grutter* rejects the idea that the consideration of race, as one of many factors relevant to admission decisions, is incongruent with the retention of a school's reputation as an academically rigorous institution.¹²⁷ On that point Justice O'Connor opined, "We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission."¹²⁸ Chiding the majority for allowing the University of Michigan Law School to have its cake and diversity too, Justice Thomas remarked,

The Law School believes both that the educational benefits of a racially engineered student body are large and that adjusting its overall admissions standards to achieve the same racial mix would require it to sacrifice its elite status. If the Law School is correct that the educational benefits of "diversity" are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law School's

72 N.Y.U. L. REV. 1, 18–22 (1997) (presenting data supporting the view that affirmative action is necessary in maintaining racially diverse schools).

¹²⁶ See Tomiko Brown-Nagin, *Elites, Social Movements and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1441–42 (2005) ("The Gutter majority tacitly accepted the premise . . . that, by virtue of better than average performance on the relevant admissions criteria, the plaintiffs were more qualified for—and hence more deserving of admission to—the law school than were the affirmative action admits . . . Hoping to draw attention to the issue of discrimination, the intervenors . . . asserted that affirmative action was justified as a remedy for the university's reliance on discriminatory admissions criteria. . . . The claim of credential bias was met with silence, even in concurrences by Justices Ginsburg, Souter, Stevens, and Breyer, Ginsburg." (citation omitted)). See also JOHN BRITAIN & BENJAMIN LANDY, *Reducing Reliance on Testing to Promote Diversity*, in THE FUTURE OF AFFIRMATIVE ACTION: NEW PATHS TO HIGHER EDUCATION DIVERSITY AFTER FISHER V. UNIVERSITY OF TEXAS 160, 173 (Richard D. Kahlenberg ed., 2014) ("Wake Forest is just one of many colleges and universities that are leading the way in proving that reduced reliance on standardized testing can increase diversity without sacrificing academic quality. They are also helping to redefine merit as based on years of achievement in the classroom, not innate (or coached) aptitude for a single, four-hour test."); William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 21, n.92 (2000) (highlighting LSAC warnings and recommendations for appropriate use and limitations of test scores).

¹²⁷ *Grutter*, 539 U.S. at 340.

¹²⁸ *Id.*

reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.¹²⁹

In light of the foregoing analysis, the use of race-neutral measures to produce racial diversity and to address *de facto* segregation affords affirmative action little constitutional footing when considered within the context of the Court's increasingly pinched equal protection jurisprudence. The Court's contemporary reading and application of the Equal Protection Clause positions desegregation and racial diversity efforts between a constitutional rock and a jurisprudential hard place and may motivate even the most optimistic observers to admit that affirmative action's days are numbered.¹³⁰ Moreover, even if some race-neutral methods prove successful, it is prudent to consider whether the end (i.e., producing some racial diversity), justifies the means (i.e., satisfying the increasingly strict requirements of the Equal Protection Clause and acquiescing to racial neutrality, rather than racial equality, as its central command).¹³¹

¹²⁹ *Id.* at 356 n.4 (Thomas, J., dissenting). Justice Scalia expressed agreement with Justice Thomas' critique of the majority opinion in this regard. He observed, "I find particularly unanswerable [Justice Thomas'] central point: that the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from the fabled 'critical mass' of minority students, but rather Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities." *Id.* at 347 (Scalia, J., dissenting). For insight into the meaning of this portion of Justice Thomas' dissent in *Grutter*, see Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Clarence Thomas?: The Grutter v. Bollinger Opinion* 7 U. PA. J. CONST. L. 787, 800 (2005) ("Justice Thomas seized upon what he viewed as the twisted nature of the University's argument: the choice between 'selectivity' and 'diversity' was one of its own making. But for the University's heavy reliance upon discriminatory admissions criteria as a sorting mechanism, the aspirations for diversity and selectivity would not be in tension.").

¹³⁰ Greytak, *supra* note 88, at 71–72 ("Though *Fisher's* full impact remains to be seen, it has introduced a novel, and potentially viable, means of dismantling race-conscious admissions policies through its quiet reformation of the *Grutter* standard. . . . For while many in higher education believe that pursuing racial and ethnic diversity is a beneficial and just endeavor, they nevertheless serve their communities best when they make preparations for the worst.").

¹³¹ Professor Michelle Alexander explains the importance of resisting the temptation to engage in race neutral reform efforts in the criminal justice context that is instructive to considerations of the utility and wisdom of employing race neutral methods to achieve racial diversity in the education context. She cautions, "[O]pportunities for challenging mass incarceration on purely race-neutral grounds have never been greater. . . . This is tempting bait . . . but racial justice advocates should not take it. The prevailing caste system cannot be successfully dismantled with a purely race-neutral approach. . . . Even if fairly dramatic changes were achieved while ignoring race, the results would be highly contingent and temporary." MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 226–27 (2010). See also Greytak, *supra* note 88 at 59 ("I do not support an admissions system that purges race from the admissions process in the name of political expediency. While 'class-based affirmative action' is a praiseworthy contingency plan for a world where race-conscious affirmative action has been outlawed, I believe it exists today as an unfortunate byproduct of our lingering inability to comprehend America's ongoing struggle with racism.").

CONCLUSION: AFFIRMATIVE ACTION’S PRECARIOUS PROSPECTS IN A COLORBLIND COURT

In a poignant indictment of the American criminal justice system, Professor Michelle Alexander makes an insightful observation relevant to the ambivalence that surrounds affirmative action’s contemporary relevance to the quest for educational equity and racial diversity. She noted,

A new civil rights movement cannot be organized around the relics of the earlier system . . . if it is to address meaningfully the racial realities of our time. Any racial justice movement, to be successful, must vigorously challenge the public consensus that underlies the *prevailing* system of control.¹³²

In the education context the prevailing public consensus that manufactures inequality and exclusion is the belief that blindness is the appropriate response to the “meaningless illusion” of race. This perspective informs the Court’s affirmative action jurisprudence and it is reflected in Court opinions saturated with references to color blindness as a constitutionally required ideal.¹³³ There is a profound difference between closing one’s eyes and being blind. The Supreme Court has consistently done the former and claimed

¹³² ALEXANDER, *supra* note 131, at 211.

¹³³ “[T]he Court’s current colorblind jurisprudence has been described as ‘an approach to constitutional equality under which *actual outcomes are largely irrelevant* Therefore, rather than representing an idyllic vision of equality, color-blindness represents nothing more than a laudable goal elevated, to protect the racial status quo, into a formal rule of law.’” Daniel Steuer, *Another Brick in the Wall: Attorney’s Fees for the Civil Rights Litigant after Buckhannon*, 11 GEO. J. ON POVERTY L. & POL’Y 53, 68 (2004) (citation omitted) (quoting DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* 136 (4th ed. 2000)). Justice Harlan’s reference to our colorblind constitution, *see Plessy v. Ferguson*, 163 U.S. 537, 559 (1896). (Harlan, J., dissenting), has been invoked by the Court on numerous occasions in support of arguments against a reading of the Equal Protection Clause as accommodating efforts to remediate racial discrimination. However, Justice Brennan rejoined in his dissenting opinion in *Bakke*, “[N]o decision of this court has ever adopted the proposition that the Constitution must be colorblind.” *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 336 (1978) (Brennan, J. concurring in part and dissenting in part). Justice Brennan explained, “The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be ‘constitutionally an irrelevance’ summed up by the shorthand phrase ‘[o]ur Constitution is color-blind,’ has never been adopted by this Court as the proper meaning of the Equal Protection Clause.” *Id.* at 355 (citation omitted).

the latter.¹³⁴ As Professor Alexander has observed, “The new caste system, unlike its predecessors, is officially colorblind. We must deal with it on its own terms.”¹³⁵

The Court’s affirmative action jurisprudence invokes colorblindness as the central mandate of the Equal Protection Clause; thereby, “constitutionalizing its wishful thinking.”¹³⁶ Against this backdrop, as we consider the rumors of affirmative action’s demise, which seem far more accurate than exaggerated, we should also consider whether it is worth preserving. The query is not provoked by ambivalence as to the continued salience of substantive educational equity or the pedagogical value of racial diversity. Rather, it responds to the reality that affirmative action, in its current condition – weakened by the Court’s consistent calibration of constitutional rules to foreclose meaningful progress, may not be adequate for the task at hand.¹³⁷ Colorblindness as ideology and doctrine holds educational equality and racial diversity hostage and renders affirmative action efforts, operating as they must within an increasingly binding (and blinded) jurisprudential framework, ineffectual. Unless and until colorblindness is excised from the collective consciousness and the Equal Protection Clause is liberated from the Supreme Court’s myopic view of its mandate, affirmative action is relegated to rearranging inequality rather than ensuring equality.¹³⁸

The unanimity that produced the *Brown* decision was short lived. The jurisprudential inversions addressed in this essay emerge from splintered opinions issued by an increasingly divided Supreme Court, in the wake of the *Brown* decision and assume

¹³⁴ See *Croson*, 488 U.S. at 558 (Marshall, J., dissenting) (“the majority closes its eyes to . . . constitutional history and social reality.”).

¹³⁵ ALEXANDER, *supra* note 20, at 211.

¹³⁶ *Croson*, 488 U.S. at 552 (Marshall, J., dissenting).

¹³⁷ Professor Alexander conducts an even more severe examination of the utility of affirmative action, asking, “[T]o what extent has affirmative action helped us remain blind to, and in denial about, the existence of a racial undercaste? And to what extent have the battles over affirmative action distracted us and diverted crucial resources and energy away from dismantling the structures of racial inequality.” ALEXANDER, *supra* note 20 at, 234.

¹³⁸ Professor Alexander charges diversity-driven affirmative action programs with “creat[ing] the appearance of racial equity without the reality and . . . without fundamentally altering any of the structures that create racial inequality in the first place.” *Id.* at 236.

precedential and preemptive force. The Court's relentless adherence to an interpretation of the Equal Protection Clause as mandating racial neutrality has provided the drum beat that accompanies the steady retreat from *Brown's* promise of educational equality.¹³⁹ The conception of equality embraced by many on the Supreme Court informs that affirmative action's constitutional standing is in grave jeopardy and reduces equality to a mere platitude. So, where do we go from here?¹⁴⁰

It is beyond the scope of this essay to address jurisprudential solutions to the problem of the educational inequality that continues to characterize the American education system, particularly in light of its conclusion that the Equal Protection Clause forecloses, rather than facilitates, the way forward.¹⁴¹ For all of its limitations, affirmative action has afforded educational opportunities to many who may have otherwise been denied access, due to racial discrimination and racial bias.¹⁴² Beneficiaries of affirmative

¹³⁹ As Professor West insightfully observes, "*Brown v. Board of Education* can readily be read, perhaps must be read, as embracing a substantive account of the Equal Protection Clause: separate and unequal educational facilities produce unequal educational opportunities, contributing directly to the subordination of blacks and dominance of whites in an already white-dominated society (citation omitted) . . . however, the meaning of both the Equal Protection Clause and *Brown* [would change] dramatically. . . . [T]he substantive, antisubordinationist meaning of *Brown* [would begin] to erode as it came to be possible to read the clause as conveying only a formal, antidiscrimination meaning." ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT 91 (1994) (citation omitted). See generally, Gotanda, *supra* note 119.

¹⁴⁰ This profound question was the title of the last book authored by Dr. Martin Luther King before his assassination. MARTIN LUTHER KING JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? (1967).

¹⁴¹ See Lia Epperson, *Equality Dissonance: Jurisprudential Limitations and Legislative Opportunities*, 7 STAN. J.C.R. & C.L. 213, 237–38 (2011) (Professor Epperson recommends "[s]ubstantial legislative innovations" in addition to enforcement mechanisms and accountability structures to remedy educational inequities and she identifies "Congressional power in this realm . . . [as] a mechanism for ensuring that the promise of equality is realized for all."); Sheryll Cashin, *Place, Not Race: Affirmative Action and the Geography of Educational Opportunity*, 47 U. MICH. J.L. REFORM 935, 959–65 (2014) (Professor Cashin proposes that universities resist using the term "affirmative action" because of its loaded meanings and embrace the initiative of "diversity practice." She supports an explicit reference to diversity as a goal in university mission statements and the redefinition of merit, for admission and financial aid purposes, to include criteria that reflect a commitment to diversity. She suggests increasing admissions staff to ensure each applicant receives "careful, holistic consideration", and she recommends that the term "low-opportunity neighborhood" replace references to race during the admissions process, as a strategy for achieving educational equity.); John V. Wintermute, *Remedying Race-Based Decision-Making: Reclaiming the Remedial Focus of Affirmative Action after Fisher v. University of Texas at Austin*, 44 SETON HALL L. REV. 557, 593 (Professor Wintermute advocates for the adoption of a race-conscious remedial policy to counter intentional discrimination and proposes a three step process for doing so: 1) identify forms of race-based decision-making in the public school system; 2) identify quantifiable disparities resulting from such discrimination; and (3) present a "strong basis in evidence" that remedial action is necessary to alleviate the harms caused by racial discrimination.).

¹⁴² See Brown-Nagin, *supra* note 126, at 1441 ("[H]oping to draw attention to the issue of discrimination, the intervenors . . . asserted that affirmative action was justified as a remedy for the university's reliance on discriminatory admissions criteria. "); Deirdre M. Bowen, *American Skin, Dispensing with Colorblindness and Critical Mass in Affirmative Action*, 73 U. PITT. L. REV. 339, 342–47 (2011) (presenting results of survey data of over 370 underrepresented minority students reflecting that the "majority of underrepresented students of color do report increased racial understanding in a diverse classroom." The author observes that achieving critical mass in affirmative action based institutions creates the opportunity for diversity and decreases racial stigma; however she notes in order to facilitate "functional diversity" institutions must adopt a color-conscious approach "to create a kind of racial understanding that eliminates stigma caused by racial stereotyping.").

action, including this essayist, must remember that the fact that we have navigated the playing field with some degree of success does not mean that the landscape is level or fair.¹⁴³ As we work to expose, dismantle and disrupt racial discrimination, we must take affirmative action and use our positions of privilege to expand and increase access to opportunities for those in our communities who fall within judicial, legislative and societal *blind spots*. The exigency of the need and our individual capacity to operate effectively in ways that mitigate the harm resulting from pervasive color blindness should not be underestimated.¹⁴⁴ As the late, great Judge A. Leon Higginbotham, Jr. reminds us, “there is no more time for foolishness.”¹⁴⁵

¹⁴³ See Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1331 n.14 (1986) (“The advancement registered by members of the black middle class is not necessarily evidence that old-fashioned discrimination has been eradicated. Often, this advancement proceeds despite the presence of continuing prejudice and is made possible precisely because of the lift provided by affirmative action.”).

¹⁴⁴ The author believes that creating and participating in mentoring programs, college and graduate school readiness programs, and exam prep programs; volunteering in under-resourced public schools, and committing time and energy to helping students enrolled in colleges and universities achieve academic success are important and effective strategies for holding the doors of opportunity open for students of color and helping them walk through those doors. It is to these efforts that the author has devoted much time, energy and passion as an educator and which she regards as the most rewarding aspect of her career. See generally Eunyoung Kim & Demond T. Hargrove, *Deficient or Resilient: A Critical Review of Black Male Academic Success and Persistence in Higher Education*, 82 J. NEGRO EDUC. 300, 300–11 (2013); Erin Kimura-Walsh et al., TOWARDS A BRIGHTER TOMORROW: COLLEGE BARRIERS, HOPES AND PLANS OF BLACK, LATINO/A AND ASIAN AMERICAN STUDENTS IN CALIFORNIA (2009); Mary B. Walpole, *Emerging From the Pipeline: African American Students’ Socioeconomic Status, and College Experiences and Outcomes*, 49 RES. HIGHER EDUC. 237, 237–55 (2008); David D. J., *Access to Academe: The Importance of Mentoring to Black Students*, 58 NEGRO EDUC. REV. 217, 217–31 (2007); William G. Tierney, Zoe B. Corwin, & Julia Colyar, PREPARING FOR COLLEGE: NINE ELEMENTS OF EFFECTIVE OUTREACH (2005); Jean E. Girves, Yolanda Zepeda & Judith Gwathmey, *Mentoring in a Post-Affirmative Action World*, 61 J. SOC. ISSUES 449, 449–79 (2005); Amy E. Barlow & Merna Villarejo, *Making a Difference For Minorities: Evaluation of an Educational Enrichment Program*, 41 J. Res. Sci. Teach 861, 861–81 (2004); Yvette Gulat & Wendy Jan, HOW DO PRE-COLLEGIATE ACADEMIC OUTREACH PROGRAMS IMPACT COLLEGE-GOING AMONG UNDERREPRESENTED STUDENTS (2003).

¹⁴⁵ Judge A. Leon Higginbotham Jr., Address at the Final Law Clerk Reunion (May 2, 1998) (transcript on file with the *Loyola of Los Angeles Law Review*).