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# Foreword: Diversity in the Legal Academy After *Fisher II*

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## INTRODUCTION

The United States Supreme Court recently weighed in again with respect to race-conscious admissions decisions at institutions of higher education.<sup>1</sup> Time will tell the precedential value of this latest pronouncement on affirmative action but the Court highlighted the *sui*

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\* Copyright © 2018 Steven A. Ramirez. Professor of Law, Director, Business Law Center, Loyola University Chicago School of Law. The articles published in this symposium arose from a call for papers issued by the Association of American Law Schools (“AALS”), Committee on Retention and Recruitment of Minority Law Teachers and Students. Professor Bryan Fair acted as Chairperson of the Committee in connection with planning and organizing a conference at the AALS annual meeting in January of 2017. The authors presented each of the papers featured in this symposium at that conference. That conference was entitled *Making Room for More: Theorizing Educational Diversity and Identifying Best Practices in the Age of Fisher*. A number of articles from the conference addressing best practices and related pedagogical issues will appear in the *Journal of Legal Education*. This symposium focuses on barriers to achieving greater diversity in the legal academy and the *Fisher II* opinion. Many thanks to Bryan Fair and the entire Committee for making this symposium possible. All views expressed in this symposium are the views of the authors and not the Committee or the AALS.

<sup>1</sup> *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2205, 2205-08 (2016) (holding that consideration of race to further diversity at state university must pass “strict scrutiny”; may only proceed in accordance with “educational benefits” to the university; and must be “narrowly tailored” to achieve such educational benefits).

*generis* nature of the case, which involved the University of Texas.<sup>2</sup> As such, the Court's decision does not operate to open the door to more aggressive efforts to diversify universities through efforts that use race as a factor in admission.<sup>3</sup>

Yet, the legal academy languishes in its efforts to achieve diversity.<sup>4</sup> According to the 2010 United States Census, the American population consists of 16.3% Latinos/as, 12.6% African Americans, and 4.8% Asian Americans.<sup>5</sup> Non-Hispanic whites constitute 64% of the population.<sup>6</sup> At about the same time, Hispanic matriculates made up only 5.1% of the incoming law school class and African Americans made up 7.9% of the class.<sup>7</sup> Moreover, in terms of law school faculty, whites constituted over 85% of tenured faculty and over 82% of all full time faculty.<sup>8</sup> Such glaring racial disparities cannot be justified given that race is a social construct<sup>9</sup> and the legal prohibition of

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<sup>2</sup> *Id.* at 2208 (“The University’s program is *sui generis*. Unlike other approaches to college admissions considered by this Court, it combines holistic review with a percentage plan.”). The Court noted that because the University admits students graduating in top 10% of their high school class, the plaintiff failed to qualify for three out of four available slots for the freshman class. *Id.* at 2209.

<sup>3</sup> Indeed, in 2013, the Court remanded the case for additional fact-finding to assure that the University’s program could withstand “strict scrutiny” through a showing of a “compelling interest” that is pursued through a “narrowly tailored” means. *Fisher v. Univ. of Tex. (Fisher I)*, 133 S. Ct. 2411, 2415-17 (2013) (citing *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978) (opinion of Powell, J.)).

<sup>4</sup> The American Bar Association accreditation standards applicable to law schools mandate that law schools take “concrete action” to pursue faculties and students that are “diverse with respect to gender, race, and ethnicity.” AM. BAR ASS’N, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 12-13 (2017), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017\\_2018\\_standards\\_chapter2\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABASStandardsforApprovalofLawSchools/2017_2018_standards_chapter2_authcheckdam.pdf).

<sup>5</sup> U.S. CENSUS BUREAU, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010, 2010 CENSUS BRIEFS 4 (2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. 2.5% of Latinos/as identify as African American. *Id.* at 6.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> Tamar Lewin, *Law School Admissions Lag Among Minorities*, N.Y. TIMES (Jan. 6, 2010), <http://www.nytimes.com/2010/01/07/education/07law.html>. More recent data shows that the first-year class entering in the fall of 2013 included only 8.5% African Americans and 9% Latinos/as. *Statistics, Ethnic/Gender Data*, AM. BAR ASS’N, [https://www.americanbar.org/groups/legal\\_education/resources/statistics.html](https://www.americanbar.org/groups/legal_education/resources/statistics.html) (last visited Oct. 14, 2017).

<sup>8</sup> AM. BAR ASS’N, *supra* note 7.

<sup>9</sup> Of course, science already comprehends what law does not: that race is a social construct with no biological nor genetic meaning. *See, e.g., Statement on Race*, AM. ASS’N ANTHROPOLOGISTS (May 17, 1998), <http://www.americananthro.org/ConnectWithAAA/>

discrimination in higher education,<sup>10</sup> employment,<sup>11</sup> and voting occurred over 50 years ago.<sup>12</sup>

This symposium, entitled *Diversity in the Legal Academy After Fisher II*, seeks to take stock of diversity in the legal academy and the barriers that impede law schools' efforts to achieve diversity in their student bodies and faculties. The symposium assesses the benefits of enhanced diversity in the legal academy. It also seeks to highlight the institutional barriers to diversity at play in the legal academy. Finally, the symposium highlights the external political and legal realities that operate to assure that only limited diversification of the legal academy will occur. This Foreword will summarize the symposium and attempt to draw important lessons from the symposium in the conclusion.

### I. THE IMPORTANCE OF DIVERSITY IN THE LEGAL ACADEMY

In *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, Professor Barry Sullivan laments the Court's lack of emphasis placed on the need to train lawyers and judges to serve clients and the public purpose of law with an understanding of the racial and ethnic diversity of the society they will serve.<sup>13</sup> He notes, for example, that in the *Grutter* decision, Justice O'Connor seemed intent to focus on the general educational benefits of diversity in the classroom with little appreciation of the unique role played by lawyers and judges in our society.<sup>14</sup>

Professor Sullivan astutely teases out of the *Bakke* decision a more thorough appreciation of professional obligation to achieve a fulsome understanding of a client/patient's circumstances and reality. In *Bakke*,

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Content.aspx?ItemNumber=2583 (stating that the social construction of race renders racial disparities "products of historical and contemporary social, economic, educational, and political circumstances"); Angela Onwuachi-Willig, *Race and Racial Identity Are Social Constructs*, N.Y. TIMES (Sept. 6, 2016), <https://www.nytimes.com/roomfordebate/2015/06/16/how-fluid-is-racial-identity/race-and-racial-identity-are-social-constructs> ("More than 50 years ago, Congress enacted the most comprehensive antidiscrimination legislation in history, the Civil Rights Act of 1964. Half a century later in 2015, the same gaps in racial inequality remain or have grown deeper.").

<sup>10</sup> See 42 U.S.C. § 2000d (2018).

<sup>11</sup> Title VII—Equal Employment Opportunity, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e (2018)).

<sup>12</sup> See 52 U.S.C. § 10101 (2018).

<sup>13</sup> Barry Sullivan, *The Power of Imagination: Diversity and the Education of Lawyers and Judges*, 51 UC DAVIS L. REV. 1105, 1113-15 (2018).

<sup>14</sup> *Id.* at 1113; see also *Grutter v. Bollinger*, 539 U.S. 306, 330-33 (2003) (upholding affirmative action at University of Michigan Law School).

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the Court linked the diversity within the U.S. population to a medical education enriched by diversity.<sup>15</sup> As Professor Sullivan sees it:

The most important problems that lawyers and judges face normally do not come with self-evident solutions; they are not logical puzzles, but questions of real life that require the application of professional imagination and judgment. Among other things, lawyers and judges must be able to understand and appreciate the significance of problems as they appear to persons whose perspectives differ from their own. That is not a talent that comes naturally to us, but it is something that can be learned and it is essential both to successful judging and to successful legal practice.<sup>16</sup>

Professor Sullivan suggests that Justice O'Connor's opinion in *Grutter* could have expounded upon the *unique* benefits of diversity in the legal academy:

Justice O'Connor could have emphasized the special importance of diversity in preparing men and women for careers as lawyers and judges . . . . She did not call attention to the specific kinds of topics that are discussed in law school classrooms or the importance to those discussions of being able to draw upon a variety of perspectives. And while she emphasized the importance of diversity to citizen formation in a multicultural society — and on the important leadership roles played by elite lawyers and graduates of other divisions of elite institutions — she made no argument based directly on the demands of the professional work that most lawyers and judges actually do, on how diversity in legal education might relate to that work, or on how diversity might contribute to the way in which lawyers and judges are educated.<sup>17</sup>

Professor Sullivan maintains that the background of law students and judges matters, and that the law school in fact operates as a vital locus of professional development and, ultimately, the professional imagination of the judiciary.<sup>18</sup> Legal education, therefore, distinctively requires gender and racial diversity to fulfill the obligations of the legal

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<sup>15</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-14 (1978).

<sup>16</sup> Sullivan, *supra* note 13, at 1113-14 (citations omitted).

<sup>17</sup> *Id.* at 1129-30 (citation omitted).

<sup>18</sup> *See id.* at 1139-47.

profession to society and the obligations of the judiciary within the framework of a democratic society.<sup>19</sup>

Particularly with respect to the power of judicial review and how that power affects society, other scholars echo Professor Sullivan's concerns.<sup>20</sup> America continues to suffer from a racial hierarchy<sup>21</sup> under law and the judiciary necessarily plays a central role in this outcome.<sup>22</sup> Instead of any vision of racial justice, the U.S. judiciary frustrates political pressure for racial reform.<sup>23</sup> The judicial imagination that Professor Sullivan emphasizes seemingly fails today to imagine an Equal Protection jurisprudence applying strict scrutiny to the

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<sup>19</sup> *Id.*

<sup>20</sup> See ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 293-94 (2014) (concluding that institutionally, the Court operates to protect the interests of dominant political and economic elites, and that these outcomes reflect the background of the justices).

<sup>21</sup> See U.N. Human Rights Council, Report of the Working Group of Experts on People of African Descent on Its Mission to the United States of America, U.N. Doc. A/HRC/33/61/Add.2, at 18 (2016), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/183/30/pdf/G1618330.pdf?OpenElement> (finding a “persistent gap in almost all the human development indicators, such as life expectancy, income and wealth, level of education, and even food security, between African Americans and the rest of the United States population . . .”); Jamil Dakwar, *UN Issues Scathing Assessment of US Human Rights Record*, ACLU (May 15, 2015, 4:30 PM), <https://www.aclu.org/blog/speak-freely/un-issues-scathing-assessment-us-human-rights-record> (“This report sends a strong message of no-confidence in the U.S. human rights record . . . [I]t offers a critical opportunity to shape the [nation’s] human rights legacy, especially in the areas of racial justice, national security, and immigrants’ rights.”).

<sup>22</sup> See, e.g., Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1442 (2016) (arguing that criminal law and procedure operates by design to “reinforce[] racial hierarchy and white supremacy”); Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 587 (2003) (arguing that the Court’s emphasis on intentional discrimination risks preserving “existing racial hierarchies [that] are products of past discrimination and that a level-playing-field approach today could help those hierarchies perpetuate themselves indefinitely”); see also Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1552-55 (2016) (arguing that governing elites deploy incarceration as well as deportation as tools to control and marginalize minority populations including Latinos and African Americans).

<sup>23</sup> The Supreme Court’s role in preserving our racial hierarchy holds more importance today than in the recent past, in light of emerging political pressure for reform. A recent poll showed that a majority of Americans believe more needs to be done to address racism — including 53% of whites. GAIL C. CHRISTOPHER, W.K. KELLOGG FOUND. & NE. UNIV. SCH. OF JOURNALISM, *META-ANALYSIS OF RECENT POLLING DATA ON THE IMPACT OF RACISM ON AMERICAN SOCIETY TODAY 2* (2016), <https://www.wkcf.org/resource-directory/resource/2016/01/meta-analysis-of-recent-polling-data-on-the-impact-of-racism-on-american-society-today>.

mechanisms that perpetuate our racial hierarchy, instead using judicial review to strike down or narrow efforts to deconstruct our racial hierarchy.<sup>24</sup> “*Fisher* and the other affirmative action cases are significant examples of how much the Court is limiting the ability of the government . . . to remedy past discrimination and enhance diversity.”<sup>25</sup>

Professor Sullivan also highlights how diversity allows law students to become effective lawyers. Legal representation of a client base that will include the full diversity of the population as a whole requires that attorneys become “habituated” in thinking beyond their own experiences, for example in imagining a client’s position from the perspective of racial minorities or women.<sup>26</sup> Law graduates will enter a legal profession too often dominated by a single acculturation experience — that of white males.<sup>27</sup>

There are many reasons why judges and lawyers must comprehend diversity. For example, empirical evidence suggests that diverse groups approach compliance, ethics, and risk differently and more effectively than non-diverse groups.<sup>28</sup> Empirical evidence suggests that firms with diverse work forces experience enhanced diversity across the firm when diverse voices and ideas are given sufficient voice.<sup>29</sup>

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<sup>24</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 711 (2007) (striking down desegregation plan of school districts seeking to diversify schools through racial classification); *Adarand Constructors v. Peña*, 515 U.S. 200, 204-05 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486 (1989) (invalidating municipal contract set-aside program); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986) (invalidating collective bargaining provisions requiring race-conscious teacher lay-offs).

<sup>25</sup> CHEMERINSKY, *supra* note 20, at 51-52.

<sup>26</sup> Sullivan, *supra* note 13, at 1145.

<sup>27</sup> 88% of attorneys are white. Deborah L. Rhode, *Law Is the Least Diverse Profession in the Nation. And Lawyers Aren't Doing Enough to Change That.*, WASH. POST (May 27, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm\\_term=.05332c05755d](https://www.washingtonpost.com/posteverything/wp/2015/05/27/law-is-the-least-diverse-profession-in-the-nation-and-lawyers-arent-doing-enough-to-change-that/?utm_term=.05332c05755d) (“The legal profession supplies presidents, governors, lawmakers, judges, prosecutors, general counsels, and heads of corporate, government, nonprofit and legal organizations. Its membership needs to be as inclusive as the populations it serves.”). Women only constitute about 27% of judges, 19.8% of Fortune 1000 general counsel, and 18% of equity partners at large law firms. AM. BAR ASSOC. COMM’N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW JANUARY 2017, at 2-3, 5 (2017), [https://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_january2017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_january2017.authcheckdam.pdf).

<sup>28</sup> See Steven A. Ramirez, *Diversity, Compliance, Ethics & In-House Counsel*, 48 TOL. L. REV. 465, 483 (2017).

<sup>29</sup> Sylvia Ann Hewlett, Melinda Marshall & Laura Sherbin, *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), <https://hbr.org/2013/12/how-diversity->

This all suggests that a diverse legal education generates benefits to the legal profession and therefore the public, beyond the educational and classroom benefits identified in *Grutter*,<sup>30</sup> as Professor Sullivan summarizes.<sup>31</sup>

In terms of economics, the United States faces an enormous challenge that promises to steadily worsen: the corrosive influence of a socially constructed racial hierarchy that leaves millions of young Americans stranded at the margins of our economy and deprives our economy of a rationalized human capital formation function.<sup>32</sup> Our legal and educational system propagates and entrenches this irrational economic reality, and the legal academy plays a central role in this deeply suboptimal economic outcome.<sup>33</sup> Our entire society bears the cost of this challenge in the form of trillions in foregone macroeconomic growth.<sup>34</sup> In addition, our entire society suffers the effects of stunted human capital development and innovation.<sup>35</sup> Law frames and promotes this outcome on a systemic basis, with the Supreme Court non-democratically paving the way towards macroeconomic backwardness.<sup>36</sup> As our society becomes more diverse,

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can-drive-innovation.

<sup>30</sup> *Grutter v. Bollinger*, 539 U.S. 306, 329, 338 (2003).

<sup>31</sup> Sullivan, *supra* note 13, at 1120-22.

<sup>32</sup> Human ingenuity drives all innovation which in turn drives sustainable macroeconomic growth. As such, the nation which maximizes the capacity of its human resources will invariably out-innovate and outgrow nations that allow human resources to wallow in economically oppressive conditions. In the United States today, about 40% of African American and 35% of Latino children suffer from the devastation of possibilities implicit in poverty. See STEVEN A. RAMIREZ, *LAWLESS CAPITALISM: THE SUBPRIME CRISIS AND THE CASE FOR AN ECONOMIC RULE OF LAW* 135 (2013) [hereinafter RAMIREZ, *LAWLESS CAPITALISM*].

<sup>33</sup> The internationally renowned consultancy firm of McKinsey & Company found that GDP in 2008 was \$525 billion lower than it would be if there were no education gap between whites and minorities. Byron G. Auguste et al., *The Economic Cost of the US Education Gap*, MCKINSEY & COMPANY: SOC. SECTOR (June 2009), <http://www.mckinsey.com/industries/social-sector/our-insights/the-economic-cost-of-the-us-education-gap>; see also Steven A. Ramirez, *What We Teach About When We Teach About Race: The Problem of Law and Pseudo-Economics*, 54 J. LEGAL EDUC. 365, 375 (2004) (estimating macroeconomic costs of race to approach \$1 trillion per year).

<sup>34</sup> Impaired macroeconomic growth means we all sell goods and services into a smaller market with less demand. RAMIREZ, *LAWLESS CAPITALISM*, *supra* note 32, at 17-30.

<sup>35</sup> Impaired human capital formation leads to lower innovation and thus less growth. *Id.* at 17-20, 23.

<sup>36</sup> See, e.g., George Mace, *The Antidemocratic Character of Judicial Review*, 60 CALIF. L. REV. 1140, 1149 (1972) (“Since to resist a majority the judiciary must be independent of that majority, the character of judicial review is properly antidemocratic.”).

Professor Sullivan's call for a superior legal and judicial imagination through enhanced diversity in the legal academy will become more compelling.<sup>37</sup>

## II. INSTITUTIONAL BARRIERS TO DIVERSITY IN THE LEGAL ACADEMY

Today's legal academy suffers from institutional realities that impede the delivery of a diverse legal education.<sup>38</sup> Often, diverse students pay a higher cost to attend law school, which ends up subsidizing the tuitions of white students.<sup>39</sup> While data is hard to come by, this result almost surely follows from the emphasis that law schools place on the Law School Admissions Test ("LSAT"), a test that reliably transmits all elements of the social construction of race into the law school admissions process.<sup>40</sup> Disparate socioeconomic status,<sup>41</sup> incarceration

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<sup>37</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 343-44 (2003) (upholding affirmative action plan at the University of Michigan School of Law but suggesting that such programs will not be needed in twenty-five years); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (striking down affirmative action program at the University of California, Davis, School of Medicine).

<sup>38</sup> CAMILLE L. RYAN & KURT BAUMAN, U.S. CENSUS BUREAU: EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2015, at 5 (2016), <http://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf> ("More than one-third of non-Hispanic Whites had a bachelor's degree or higher (36 percent), 22 percent of Blacks had this level of education, as did 15 percent of Hispanics.").

<sup>39</sup> E.g., Deborah J. Merritt, *Race, Debt, and Opportunity*, LAW SCH. CAFÉ (Mar. 10, 2016), <http://www.lawschoolcafe.org/2016/03/10/race-debt-and-opportunity> ("We have also dramatically raised the cost of legal education as our student bodies diversified. And, perhaps most disturbing, we now know that these high costs fall disproportionately on Black and Latino/a students."). Merritt refers to the fact that while high LSAT scores lead to "merit" scholarships, minority students typically end law school shouldering a far heavier debt burden. See AARON N. TAYLOR ET AL., HOW A DECADE OF DEBT CHANGED THE LAW STUDENT EXPERIENCE 12 (2015), <http://ssse.indiana.edu/wp-content/uploads/2016/01/LSSSE-Annual-Report-2015-Update-FINAL-revised-web.pdf>.

<sup>40</sup> The LSAT replicates our racial hierarchy. Aaron Taylor, *The GRE Is No Diversity Tool*, THE NAT'L JURIST (June 7, 2016), <http://www.nationaljurist.com/content/op-ed-gre-no-diversity-tool> ("Overreliance on the LSAT has a tangible and harmful effect on diversity in legal education. The average score for black LSAT-takers is 142 — 11 points lower than the average of 153 among white and Asian test-takers."); Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 ST. JOHN'S L. REV. 41, 73 (2006) ("[F]or those who are — often unconsciously — predisposed to racial stereotypes about competency, the dearth of minority students who survive quantitative review confirms what they believe to be true about racial hierarchy in the natural order of things."); see also Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Law Schools Should Follow Suit)*, 34 UC DAVIS L. REV. 593, 603 (2001) ("SAT and



rates,<sup>42</sup> educational differentials,<sup>43</sup> health conditions,<sup>44</sup> school disciplinary practices,<sup>45</sup> poverty,<sup>46</sup> and a host of other factors combine to create a pipeline to law school that can only be termed oppressive as minority law grads incur massive debt to subsidize the legal education of the most privileged.<sup>47</sup> Once in law school, students from diverse backgrounds too frequently face hostility.<sup>48</sup> The use of the LSAT and fundamentally skewed learning environment therefore assures that

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LSAT scores freeze the advantages one enjoys while living under one's parents' roof, or shortly thereafter, and the disadvantages that poor people and minorities suffer by reason of under-funded schools and lack of college prep courses.”)

<sup>41</sup> Tami Luhby, *The Black-White Economic Divide in 5 Charts*, CNN MONEY (Nov. 25, 2015, 12:43 PM), <http://money.cnn.com/2015/11/24/news/economy/blacks-whites-inequality/index.html>.

<sup>42</sup> E.g., ASHLEY NELLIS, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS 3* (2016) (“African Americans are incarcerated in state prisons at a rate that is 5.1 times the imprisonment of whites.”).

<sup>43</sup> Lindsey Cook, *U.S. Education: Still Separate and Unequal*, US NEWS (Jan. 28, 2015, 12:01 AM), <http://www.usnews.com/news/blogs/data-mine/2015/01/28/us-education-still-separate-and-unequal>.

<sup>44</sup> For example, black males can today expect to live 4.4 years less than white males. Karen Kaplan, *Black Americans Are Closing the Life Expectancy Gap with Whites*, CDC SAYS, L.A. TIMES (Nov. 5, 2015, 9:05 PM), <http://www.latimes.com/science/sciencenow/la-sci-sn-black-white-life-expectancy-gap-20151105-story.html>.

<sup>45</sup> Meredith S. Simons, *Giving Vulnerable Students Their Due: Implementing Due Process Protections for Students Referred from Schools to the Justice System*, 66 DUKE L.J. 943, 959 (2017) (stating that black students suffer 3.8 times more school suspensions and expulsions than white students).

<sup>46</sup> About 38% of African American children and 42% Hispanic children live in poverty. Eileen Patten & Jens Manuel Krogstad, *Black Child Poverty Rate Holds Steady, Even as Other Groups See Declines*, PEW RESEARCH CTR. (July 14, 2015), <http://www.pewresearch.org/fact-tank/2015/07/14/black-child-poverty-rate-holds-steady-even-as-other-groups-see-declines>.

<sup>47</sup> Law schools today largely survive based on wealth transfers from minority students to white students. “Too many law schools are inducing students to take on debt that under no reasonable set of circumstances will they be able to repay.” They are also “heaping scholarships of increasing amounts on the relatively few high-LSAT scorers still applying to law schools. Those beneficiaries are less likely to be black, Latino, or from low socioeconomic backgrounds.” Aaron Taylor, *Are Financially Desperate Law Schools Using a ‘Reverse Robin Hood Scheme’ to Stay Afloat?*, THE CHRON. OF HIGHER EDUC. (Apr. 10, 2016), <http://www.chronicle.com/article/Are-Financially-Desperate-Law/236041>.

<sup>48</sup> See, e.g., Elahe Izadi, *Harvard Law Has ‘Serious’ Racism Problem, Dean Says After Black Professors’ Portraits Defaced*, WASH. POST (Nov. 19, 2015), [https://www.washingtonpost.com/news/grade-point/wp/2015/11/19/defacing-of-black-harvard-professor-portraits-investigated-as-hate-crime/?utm\\_term=.3303a786318e](https://www.washingtonpost.com/news/grade-point/wp/2015/11/19/defacing-of-black-harvard-professor-portraits-investigated-as-hate-crime/?utm_term=.3303a786318e) (stating that the defacing of the portraits of black professors was “part of a larger narrative of black students and students of color not belonging [ ] and being excluded [t]here”).

this critical weigh station to power, money, and economic opportunity operates to perpetuate the American apartheid system.<sup>49</sup> After law school, minority students must necessarily deal with a profession riven with cultural bias in favor of whites.<sup>50</sup>

Even beyond the problems with attaining a diverse student body, law schools face challenges in diversifying their faculties. Law school hiring and promotion decisions necessarily reflect the same racial attitudes that infect the thinking of Americans as a whole.<sup>51</sup> Professor Meera Deo in *Intersectional Barriers to Tenure* investigates the role of implicit bias in impeding the promotion of law professors suffering from dual marginalization, such as black women.<sup>52</sup> Professor Deo begins her analysis with a review of the statistical scarcity of intersectional diversity — only 7% of the professoriate in the legal academy are women of color while 43% are white males.<sup>53</sup> Further, while over 70% of whites receive tenure, only about 37% of women of color in the legal academy successfully navigate the tenure voting process.<sup>54</sup> Men of color receive tenure about 46% of the time.<sup>55</sup>

As Professor Deo highlights, intersectional diversity means that “[b]ecause they face oppression along multiple angles, those who

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<sup>49</sup> Although commentators suggest that reliance on standardized tests, such as the LSAT, is unconstitutional, no court has so held. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 454 (1997).

<sup>50</sup> See Debra Cassens Weiss, *Partners in Study Gave Legal Memo a Lower Rating When Told Author Wasn't White*, ABA J. (Apr. 21, 2014, 12:09 PM), [http://www.abajournal.com/news/article/hypothetical\\_legal\\_memo\\_demonstrates\\_unconscious\\_biases](http://www.abajournal.com/news/article/hypothetical_legal_memo_demonstrates_unconscious_biases) (illustrating through an experiment that partner's criticisms of a memo can be biased based on whether they believe the memo was written by an African American or a white man); see also ARIN N. REEVES, COLORED BY RACE: BIAS IN THE EVALUATION OF CANDIDATES OF COLOR BY LAW FIRM HIRING COMMITTEES 13-14 (2015), <http://nextions.com/wp-content/uploads/2017/05/colored-by-race-yellow-paper-series.pdf> (stating that minorities have additional obstacles in the hiring process such as being considered a flight risk).

<sup>51</sup> Jordan R. Axt et al., *The Rules of Implicit Evaluation by Race, Religion, and Age*, 25(9) PSYCHOL. SCI. 1804, 1806-12 (2014) (using psychological testing to reveal a festering racial hierarchy in the psyche of the U.S. public in which whites reign supreme).

<sup>52</sup> See Meera E. Deo, *Intersectional Barriers to Tenure*, 51 UC DAVIS L. REV. 997, 999 (2018).

<sup>53</sup> *Id.* at 998.

<sup>54</sup> RICHARD A. WHITE, THE PROMOTION, RETENTION, AND TENURING OF LAW SCHOOL FACULTY: COMPARING FACULTY HIRED IN 1990 AND 1991 TO FACULTY HIRED IN 1996 AND 1997, at 13 (2005).

<sup>55</sup> *Id.* Implicit bias also affects the thinking of minorities own likelihood of success. Deo, *supra* note 52, at 1032 (suggesting that men of color are “relatively confident” in receiving tenure but still have some doubts).

endure intersectional marginalization have experiences that differ from not only the norm, but even from the norms attributed to various minority groups.”<sup>56</sup> This necessarily means that such individuals bring richer experiences into the classroom where they act as “skilled facilitators” of a more multicultural discourse.<sup>57</sup> Professor Deo suggests that the values recognized in *Grutter* that support the educational benefits of diversity — breaking down stereotypes, fostering cross-racial understanding, and giving students access to broader cultural perspectives — can be furthered with diverse faculty and the “doubly marginalized” are apt to excel at this.<sup>58</sup>

Unfortunately, Professor Deo convincingly establishes that the legal academy continues the double marginalization of intersectionally diverse professors. Using a survey of professors (The Diversity in Legal Academia (“DLA”) project) Professor Deo uncovered the treacherous path to tenure that women of color, in particular, face.<sup>59</sup> In general, while 100% of surveyed whites found the tenure process satisfactory, only 91% of the men of color agreed.<sup>60</sup> Women of color disagreed that the process was satisfactory at numbers ranging from 57% (multiracial women) to 9.52% (black women).<sup>61</sup>

Professor Deo also interviewed survey respondents. One respondent was denied promotion despite having satisfied all formal requirements.<sup>62</sup> Another was denied without any reason given.<sup>63</sup> Many respondents voiced concerns that their scholarship, often the key variable in tenure and promotion decisions, was discounted:

Many women of color law professors publish articles, essays, or even op-eds involving the interaction of law with race, gender, sexual orientation, socio-economic status, or other identity-related areas. These non-traditional legal fields may be viewed with suspicion by colleagues who, at best, do not understand them, but at worst feel threatened by the work

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<sup>56</sup> Deo, *supra* note 52, at 1007.

<sup>57</sup> *See id.* at 998.

<sup>58</sup> *See id.* at 998, 1007.

<sup>59</sup> *Id.* at 1017 (stating that women of color face the trifecta of obstacles to tenure: teaching barriers, service challenges, and scholarship hurdles).

<sup>60</sup> *Id.* at 1013. *See generally id.* at 1011-14 (highlighting that the tenure process gives professors a high degree of job security and that tenure requires a showing of excellence in teaching, scholarship, and service to the institution).

<sup>61</sup> *Id.* at 1013.

<sup>62</sup> *Id.* at 1017-18.

<sup>63</sup> *Id.* at 1019.

itself — and respond by derailing a junior colleague’s tenure or promotion application.<sup>64</sup>

Women of color also suffer from poor mentoring, excessive service obligations that impinge upon scholarly productivity, and the effects of implicit bias as well as overt racism in their teaching evaluations, which in itself can tank promotion and tenure decisions. “Significant challenges persist, resulting in unfair processes and unequal outcomes for women of color faculty.”<sup>65</sup> Professor Deo argues in favor of “institutions . . . [correcting] for bias related to scholarship, service, and teaching — so that women of color faculty who do excel at all three attain tenure.”<sup>66</sup>

Dean Gregory S. Parks picks up right at the issue of teaching evaluations and implicit bias. In *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, Dean Parks painstakingly shows that law schools must use student teaching evaluations only with a healthy dose of skepticism if they take diversity seriously as an educational value.<sup>67</sup>

Dean Parks begins with evidence that students impose more demands on female professors and typically score professors of color more harshly in their written evaluations.<sup>68</sup> Dean Parks ties these outcomes to robust research showing that Americans harbor a strong collective bias in favor of whites and that this bias is implicit rather than explicit.<sup>69</sup> Thus, in implicit association tests, Americans associate people of color with negative concepts and images.<sup>70</sup> These negative associations can interact intersectionally with gender and age to create even more powerful biases. Therefore, Dean Parks concludes that “black women should expect to have a dysfunctional relationship with the law school environment.”<sup>71</sup>

Dean Parks catalogues the powerful social science evidence that spotlights the mechanisms through which biases infect student evaluations in the legal academy. Whether it be anchoring,

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<sup>64</sup> *Id.* at 1024 (citation omitted).

<sup>65</sup> *Id.* at 1035.

<sup>66</sup> *Id.* at 1036.

<sup>67</sup> See Gregory S. Parks, *Race, Cognitive Biases, and the Power of Law Student Teaching Evaluations*, 51 UC DAVIS L. REV. 1039, 1041-44 (2017) (explaining how teaching evaluations may be susceptible to bias).

<sup>68</sup> *Id.* at 1041-42.

<sup>69</sup> See *id.* at 1045-47 (stating how research shows that people rely on two distinct cognitive systems of judgment which may lead to implicit bias).

<sup>70</sup> *Id.* at 1046.

<sup>71</sup> *Id.* at 1053.

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confirmation bias, the bandwagon effect, or conservatism bias, the cards are stacked in favor of white males and against those who do not comport with traditional notions of what a law professor should traditionally look like.<sup>72</sup> All of this work places the argument that student evaluations transmit implicit biases into tenure and promotion decisions on a solid foundation of empirical scientific evidence.

After establishing the problems with student evaluations, Dean Parks concludes his article with a pointed set of recommendations for professors of color in the legal academy, writing as follows:

Prime students with watermarks of white faces in PowerPoint slides to reduce their level of frustration in class. Prime students with the first names of positively regarded blacks (e.g., Martin) and negative whites (e.g., Adolf) in hypotheticals to reduce levels of implicit race bias. Dress the part; law professors should wear the lawyer's uniform to maintain a look of professionalism. Conform to the teaching styles of the majority of [your] senior, white faculty even if the methods are out of step with research on effective teaching and learning. Students will tend to perceive what older, white males on your faculty do in the classroom as the benchmark. Only be an outlier with respect to your colleagues' teaching methods if research supports the method and you convey that to your students.<sup>73</sup>

Dean Parks' approach enjoys solid empirical support and logic, if the goal is survival for purposes of tenure and promotion for faculty of color. Yet, his prescription for survival and success for individual professors robs their students and institutions of some of the very benefits of embracing diversity within law schools. Dean Parks places primary focus on conformance rather than disruption. To be fair, the second suggestion can disrupt implicit bias and the last suggestion simply reflects sound pedagogy. Nevertheless, the unmistakable message for institutions seeking to diversify is to either mitigate the negative impact of student evaluations upon professors of color or create rational incentives for the diminution of diverse perspectives until after tenure.

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<sup>72</sup> *Id.* at 1054-61.

<sup>73</sup> *Id.* at 1078-79 (citations omitted).

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III. THE POLITICS OF AFFIRMATIVE ACTION, DIVERSITY, AND WHITE SUPREMACY

Recently, the Trump Administration signaled its hostility towards affirmative action and diversity. In early August of 2017, reports indicated that the Department of Justice planned litigation to challenge affirmative action at universities.<sup>74</sup> Later in August, the President himself equivocated with respect to the responsibility of Neo-Nazis and other white supremacist groups for violence erupting in Charlottesville, Virginia,<sup>75</sup> alienating voices across the political spectrum.<sup>76</sup> At the very least, the President's statements lent comfort to the Neo-Nazis and white supremacists.<sup>77</sup> All of this demonstrates that the Trump Administration could lead an historic attack on the racial progress in America.<sup>78</sup> Yet, as previously shown, there remains significant political pressure in favor of further steps to secure racial justice.<sup>79</sup>

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<sup>74</sup> *The Department of Justice Targets Affirmative Action*, *ECONOMIST* (Aug. 3, 2017), <https://www.economist.com/news/united-states/21725823-time-lawsuit-concluded-there-could-well-be-conservative-majority>.

<sup>75</sup> Arit John & Billy House, *Trump Faces Rising Tide of Republican Dismay over Charlottesville Response*, *BLOOMBERG: POLITICS* (Aug. 17, 2017, 12:08 PM), <https://www.bloomberg.com/news/articles/2017-08-17/key-republican-calls-for-radical-changes-in-trump-s-presidency> (“Trump said at a combative news conference on Tuesday that both sides were to blame for the violence and that there were ‘very fine people’ on both sides, including among the neo-Nazi and white-supremacist groups.”).

<sup>76</sup> See Stephen Battaglio, *TV Networks Struggle to Book Pro-Trump Guests Following Statements About Charlottesville*, *L.A. TIMES* (Aug. 19, 2017, 6:00 AM), <http://www.latimes.com/business/hollywood/la-fi-ct-trump-tv-news20170819-story.html> (“CBS News was turned down by 16 Republican members of Congress before finally booking Sen. Tim Scott, R-S.C., to appear on this Sunday’s edition of its Washington discussion show ‘Face the Nation’ . . . . And Scott has been a vocal critic of his party’s president, saying his ‘moral authority has been compromised.’”).

<sup>77</sup> Amy B. Wang, *One Group Loved Trump’s Remarks About Charlottesville: White Supremacists*, *WASH. POST* (Aug. 13, 2017), [https://www.washingtonpost.com/news/post-nation/wp/2017/08/13/one-group-loved-trumps-remarks-about-charlottesville-white-supremacists/?utm\\_term=.fe635eb41b12](https://www.washingtonpost.com/news/post-nation/wp/2017/08/13/one-group-loved-trumps-remarks-about-charlottesville-white-supremacists/?utm_term=.fe635eb41b12) (“Trump’s choice of words — and the silence that preceded them — are being cheered by at least a few groups of people: neo-Nazis and white nationalists.”).

<sup>78</sup> Maya Rupert & Cashuana Hill, *Trump Could Undermine Civil Rights Progress More than Any Other President*, *THE HILL* (Aug. 18, 2017, 3:00 PM), <http://thehill.com/blogs/pundits-blog/the-administration/347126-trump-could-undermine-civil-rights-progress-more-than> (“If left unchecked, he will undermine civil rights progress in this country more than any president in modern history.”).

<sup>79</sup> See CHRISTOPHER, *supra* note 23, at 23-24.

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Professor Juan Perea explains this apparent disconnect in *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*.<sup>80</sup> Professor Perea shows that:

Protections for slavery and for white supremacy determined the outcome of the most recent election. Hillary Clinton lost the election only because we cling to the bizarre electoral college, created simply to bolster the political power of slave owners. And the continued acceptance of state voter suppression laws, including felon disenfranchisement, artificially disqualified millions of otherwise eligible voters, and discouraged many thousands of others from any participation.<sup>81</sup>

With respect to the Electoral College, Professor Perea reviews the structure of the Constitution and quotes James Madison for the proposition that the founders needed to address the problem of maintaining slavery in light of superior popular voting power in the North. The solution was the Electoral College along with the infamous “three fifths of all other Persons” rule assured that the South could maintain slavery.<sup>82</sup>

Moreover:

The electoral college system only makes sense when one considers its original purpose in protecting the interests of slave owners. If the electoral college had any rationality beyond the protection of slave owners' property interests, then it would have been reproduced as a reasonable manner of election somewhere. This is particularly true since the United States has long been considered a leading democracy in the world, modelling democracy for other countries. Yet there is not a single instance of any other democratic government choosing to reproduce the electoral college.<sup>83</sup>

Professor Perea also catalogues the history of voter suppression against racial and ethnic minorities and the current efforts to reinstitute those oppressive measures. Professor Perea traces the history of voter suppression efforts in the United States, including felony disenfranchisement laws, and finds such restrictions too often seem

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<sup>80</sup> See Juan F. Perea, *Echoes of Slavery II: How Slavery's Legacy Distorts Democracy*, 51 UC DAVIS L. REV. 1081 (2018).

<sup>81</sup> *Id.* at 1101.

<sup>82</sup> *Id.* at 1087.

<sup>83</sup> *Id.* at 1089.

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intended to suppress minority votes. “In a democracy we should be highly suspicious of laws whose current functioning excludes people of color nearly as effectively as their more overtly racist forebears intended.”<sup>84</sup>

Beyond these electoral realities lies the Supreme Court. In *Fisher II* the Court upheld a *sui generis* program at the University of Texas with Justice Kennedy providing the decisive fifth vote. Whether measured by the lukewarm acceptance of the Texas program, the continued tenure of Justice Kennedy, or even the original twenty-five-year lifespan for affirmative action in Justice O’Connor’s *Grutter* opinion, affirmative action seems to hold only the most tenuous claim to viability as a mechanism for some semblance of racial justice in America.<sup>85</sup>

The *Fisher II* framework is not promising in terms of diversifying the legal academy. First, *Fisher II* requires a costly holistic review of each diversity candidate’s file.<sup>86</sup> Second, law schools may need to prove that other alternatives for diversity have been exhausted.<sup>87</sup> Finally, law schools seeking to embrace cultural diversity to the maximum extent possible will invariably face steep litigation costs and risks.<sup>88</sup> Consequently, under the Court’s current approach, the nation will not

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<sup>84</sup> *Id.* at 1101.

<sup>85</sup> *Grutter v. Bollinger*, 539 U.S. 306, 310 (2003) (“The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

<sup>86</sup> Indeed, *Fisher II* provides little comfort to any university seeking to embrace diversity because of the very unique circumstances affecting the University of Texas approach. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208-09 (2016) (terming Texas approach “*sui generis*” because it combined holistic review with a percentage plan). The percentage plan requires three-fourths of the slots to be filled by students in the top 10% of their high school class. *Id.* Petitioner would have had a better chance of being admitted if the school used race-conscious holistic review to select its entire incoming class. *Id.*

<sup>87</sup> *Id.* at 2214 (“In short, none of petitioner’s suggested alternatives — nor other proposals considered or discussed in the course of this litigation — have been shown to be ‘available’ and ‘workable’ means through which the University could have met its educational goals, as it understood and defined them in 2008. The University has thus met its burden of showing that the admissions policy it used at the time it rejected petitioner’s application was narrowly tailored.”).

<sup>88</sup> Robert Barnes, *Supreme Court Upholds University of Texas Affirmative-Action Admissions*, WASH. POST (June 23, 2016), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-upholds-university-of-texas-affirmative-action-admissions/2016/06/23/513bcc10-394d-11e6-8f7c-d4c723a2becb\\_story.html?utm\\_term=.66382e54b0e8](https://www.washingtonpost.com/politics/courts_law/supreme-court-upholds-university-of-texas-affirmative-action-admissions/2016/06/23/513bcc10-394d-11e6-8f7c-d4c723a2becb_story.html?utm_term=.66382e54b0e8) (describing *Fisher II* as a “surprising win” for affirmative action and noting that affirmative action challenges enjoy generous funding from conservative think tanks).



enjoy a diverse corps of lawyers, judges, and lawmakers in the foreseeable future.

#### CONCLUSION

*Fisher II* continues the perpetuation of racial injustice and the racial status quo that afflicts the United States, and very likely will continue to afflict the United States far into the future, in large part because of a failure of judicial imagination to comprehend the social costs implicit in our festering racial hierarchy. This reality is exacerbated by the social and institutional realities that remain undisrupted under current law, such as implicit bias and continued racial privilege and disadvantage. Racial hierarchies simply do not retreat on their own, and the Court's Equal Protection doctrine perpetuates rather than disrupts the U.S. racial hierarchy. The political realities in the United States today, combined with the perpetuation of the Electoral College and voter suppression efforts targeting minority voters, do not bode well for any political effort to disrupt our racial hierarchy. The legal academy both exemplifies and reproduces the underlying dynamics that give rise to the perpetuation of our racial hierarchy. It is difficult to imagine how the legal academy can become fully diversified under current legal and institutional realities.