
We Will Turn Back?: On Why *Regents of the University of California* *v. Bakke* Makes the Case for Adopting More Radically Race-Conscious Admissions Policies

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INTRODUCTION

Ain't gonna let nobody
 Turn me round
 I'm gonna keep on walkin'
 Keep on talkin'
 Marchin' onto freedom land

*Ain't Gonna Let Nobody Turn Me Around*¹

Though my way may get rough sometimes,
 No, I won't turn back.
 My heart is fixed, I got a made up mind,
 No, I won't turn back

*I Won't Turn Back*²

The lyrics above are excerpted from religious-infused songs, which were of a kind that were central to student protest activities during the Civil Rights Movement. These songs connected the activists' struggles to those endured by earlier generations of the racially oppressed,³ and signaled the singular determination or persevering nature of the protesters. In particular, the above lyrics suggest that they understood themselves to be on a path from which they would not be moved — a path toward inevitable racial justice.⁴ Student protests were important catalysts to the social and political upheaval within the United States in the 1960s.⁵ During this period, a number of responsive

¹ THE ROOTS, *Ain't Gonna Let Nobody Turn Me Around*, on SOUNDTRACK FOR A REVOLUTION (Urban Inspirational/ Entm't Records 2012). *Ain't Gonna Let Nobody Turn Me Round* and other freedom songs of the Civil Rights Movement were explored in the 2009 documentary, *Soundtrack to a Revolution*. Contemporary artists recorded this song and other movement songs for the soundtrack for the film. See THE ROOTS, SOUNDTRACK FOR A REVOLUTION (Urban Inspirational/ Entm't Records 2012).

² MISSISSIPPI MASS CHOIR, *I Won't Turn Back*, on GOD GETS THE GLORY (Malaco Records 1991).

³ See MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 61 (1964) (such songs were referred to as the soul of the movement and indicated that protestors "sing the freedom songs today for the same reason the slaves sang them, because we too are in bondage and the songs add hope to our determination that 'We shall overcome'").

⁴ As I have written elsewhere, another focus of these songs was the goal of "making it over" to victory, either on earth or in heaven. See Mario L. Barnes, *Reflection on a Dream World, Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 6, 10-11 (2009).

⁵ Organizations such as the Student Non-Violent Coordinating Committee (SNCC) and Congress of Racial Equality (C.O.R.E.), led sit-ins and freedom rides and were part of the planning for the 1964 March on Washington. See FROM SIT-INS TO

antidiscrimination statutes — the Civil Rights Act of 1964,⁶ the Voting Rights Act of 1965,⁷ and Fair Housing Act of 1968⁸ — were enacted. These laws, along with favorable rulings within a string of federal court cases,⁹ were the initial steps toward opening societal opportunities that had been largely unavailable to the descendants of slaves, post-slavery.

As we reflect on *Regents of the University of California v. Bakke*¹⁰ and its aftermath forty years later, it is important to recall this history. In so doing, we are reminded that the limited period during which race-conscious governmental benefits programs were available did not arise out of a spirit of societal beneficence. Rather, these programs arose both out of the largely peaceful civil disobedience of the Civil Rights Movement and some more violent, racial clashes, including those that followed the assassination of Dr. Martin Luther King, Jr.¹¹ The various programs of redress that came to be known as affirmative action,¹²

SNCC: THE STUDENT CIVIL RIGHTS MOVEMENT IN THE 1960s (Iwan Morgan & Phillip Davies eds., 2013). See generally TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65 (1998); JOHN LEWIS AND MICHAEL DORSO, WALKING WITH THE WIND: A MEMOIR OF THE MOVEMENT (1998); CLAYBORNE CARSON, IN STRUGGLE: SNCC AND THE BLACK AWAKENING OF THE 1960s (2d ed. 1995).

⁶ Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241.

⁷ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437.

⁸ Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 73.

⁹ The Court very quickly upheld the prohibition on racial discrimination in public accommodations under Title II of the Civil Rights Act of 1964. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 242-43 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 295 (1964); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971) (interpreting Title VII of the Civil Rights Act of 1964 to prohibit certain workplace requirements that created a disproportionately negative impact on workers of color); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412-13 (1968) (upholding prohibition on racial discrimination in the sale and rental of private property under the Civil Rights Act of 1866, which had become codified as a part of 42 U.S.C. § 1982); *Katzenbach v. Morgan*, 384 U.S. 641, 643-47 (1966) (upholding Section 4(e) of the Voting Rights Act of 1965 — which provided for voting rights for persons receiving a minimum required education in Puerto Rico — as a proper exercise of the powers granted to Congress).

¹⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

¹¹ See, e.g., James Coates, *Riots Follow Killing of Martin Luther King Jr.*, CHICAGOTRIBUNE (Dec. 19, 2017), <https://www.chicagotribune.com/nation-world/chi-chicagodays-kingriots-story-story.html> ; Alan Taylor, *The Riots That Followed the Assassination of Martin Luther King Jr.*, ATLANTIC (Apr. 3, 2018), <https://www.theatlantic.com/photo/2018/04/the-riots-that-followed-the-assassination-of-martin-luther-king-jr/557159/>.

¹² See Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action after Fisher v. Univ. of Texas*, 62 UCLA L. REV. 272, 278-83 (2015) (discussing the origins of

then, were designed to appease the visceral frustrations of marginalized peoples and to commit the country, in earnest, to a more meaningful approach to equality. The lyrics also remind us that despite affirmative action in higher education once again being on the brink of elimination,¹³ perseverance or pressing forward against long odds has always been a hallmark of the struggle for racial equality.

It is arguable that the slow and creeping demise of affirmative action began with Justice Powell's opinion in *Bakke*. Justice Powell's determination that "the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances,"¹⁴ could have laid the groundwork to broadly preserve race-conscious review processes. Considerations of race were, however, allowed as part of a holistic and highly-individualized assessment of diversity and its importance to the exercise of a University's First Amendment rights. This approach failed to consider affirmative action as a meaningful tool for remedying racial disadvantage. As such, Justice Powell's solution rested upon a historically flawed reading of why considering race is necessary within the United States. Though a court can decide it is not interested in disrupting disadvantages arising out of a system of racial classification, it should still be required to acknowledge the truth of that system. In *Bakke*, however, largely absent from Justice Powell's analysis of the

affirmative-action programs within the U.S.).

¹³ Though *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2210 (2016) [hereinafter *Fisher III*] preserved the diversity rationale, other affirmative action cases are making their way toward the Supreme Court. One case involves pending litigation against Harvard University, alleging discrimination in admission against Asian-American students. See Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html> (describing the *Students for Fair Admissions v. Harvard University* litigation) [hereinafter *Does Harvard Admissions Discriminate?*]. In a separate lawsuit, the same plaintiff has also filed suit against the University of North Carolina, alleging that the consideration of race is overweighted for black and Hispanic applicants in admissions. Anemona Hartocollis, *U.N.C. Admissions Lawsuit Brings Another Attack on Affirmative Action*, N.Y. TIMES (Jan. 19, 2019), <https://www.nytimes.com/2019/01/18/us/unc-affirmative-action-lawsuit.html>. For a discussion of both pending cases, see Kim West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. REV. DISC. 590, 621-29 (2017) [hereinafter *Obscuring Asian Penalty*]. Recently, the Department of Justice also announced it is investigating Yale University to determine whether it unlawfully discriminates against Asian-American applicants. See Katie Benner & Erica L. Green, *U.S. Investigating Yale over Complaint of Bias Against Asian-American Applicants*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/yale-asian-americans-discrimination-investigation.html>.

¹⁴ *Bakke*, 438 U.S. at 267.

assessments of race in admissions, were any references to undoing centuries of systemic advantage “locked in”¹⁵ through “transparent” white race privilege.¹⁶ Justice Powell chose instead to focus his attentions on presumptive entitlements, relative merits and deserts. Regrettably, the overreliance on these considerations has persisted within the Court’s contemporary race jurisprudence.

At the time it was decided, it was not obvious that Justice Powell’s concurring opinion in *Bakke* would so overwhelmingly shape future considerations of affirmative action within higher education institutions. The fact that no four judges fully joined Justice Powell’s concurrence resulted in the opinion being dubious in terms of its precedential value.¹⁷ His simultaneous rejection of the UC Davis Medical School’s Special Admissions program but approval of some race-conscious admissions processes seemingly pleased neither wing of the Court. Four Justices (Chief Justice Burger, and Justices Stevens, Stewart, and Rehnquist) voted with Justice Powell to strike down the set aside program at the UC Davis Medical School, with the Justices indicating that they believed it to be a violation of Title VI of the Civil Rights Act. Title VI prohibits discrimination in programs receiving federal funding.¹⁸ These four Justices, however, did not affirmatively adopt the position that race could never be a factor in admissions decisions. It was the California Supreme Court, which found the consideration of race to be unconstitutional.¹⁹

Four other Justices (Brennan, White, Marshall and Blackmun) believed that the consideration of race in the *Bakke* case should have survived strict scrutiny. Hence, they concurred with Justice Powell in

¹⁵ See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (describing how whiteness has historically been the basis of racialized privilege); Daria Roithmayr, *Locked In Inequality: The Persistence of Discrimination*, 9 MICH. J. RACE & L. 31, 38-41 (2016).

¹⁶ See BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* (1998) (transparency refers to a byproduct of white privilege, whereby whites receive the benefits of whiteness but are unlikely to see or describe themselves in terms of race).

¹⁷ See, e.g., Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 22 (1979) (“The first step in such an inquiry must be to determine which, if any, of the six opinions in *Bakke* states the governing legal principles that must guide officials.”).

¹⁸ 42 U.S.C. § 2000d (2018) *et seq.* (Title VI prohibits discrimination “on the ground of race, color, or national origin . . . under any program or activity receiving Federal financial assistance”).

¹⁹ See *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152, 1171-72 (1974), *aff’d in part, rev’d in part*, 438 U.S. 265 (1978).

reversing the portion of the lower court opinion, which enjoined the state from using any consideration of race in admissions.

This split left Justice Powell's opinion as the controlling opinion from the case. The key insight from the case that has survived review in cases such as *Grutter v. Bollinger*²⁰ and *Fisher v. Texas*,²¹ is that universities require the academic freedom to select a student body that will most contribute to a "robust exchange of ideas."²² Under Justice Powell's analysis, race or ethnicity, then, were among a number of factors universities could take into account "in achieving the educational diversity valued by the First Amendment."²³ This interest in diversity was seen as meeting the Court's compelling interest standard, which is the required level of justification for a State to use a racial classification.²⁴

As several commentators have noted, in *Fisher II*, Justice Kennedy became the surprise vote in preserving the academic freedom for universities to consider race in achieving diversity in admissions.²⁵ In an opinion on behalf of a 4–3 majority (Justice Kagan recused herself from the case), he concluded that the University of Texas's race-

²⁰ 539 U.S. 306 (2003).

²¹ 570 U.S. 297 (2013).

²² See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (1943)).

²³ *Id.* at 316. On the importance of the First Amendment argument to upholding race-conscious review, see Matthew W. Finkin, *Some Thoughts on the Powell Opinion in Bakke*, 65 *ACADEME* 193, 194 (1979) ("[I]t is apparent that but for the role of the First Amendment in Powell's analysis, the argument to racial cognizance for the purpose of achieving an educationally sound diversity would scarcely have withstood the 'exacting examination' that the other arguments failed.").

²⁴ See Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 *CONN. L. REV.* 1059, 1077-80 (2011) [hereinafter *Future Equal Protection Doctrine*].

²⁵ See, e.g., Tomiko Brown-Nagin, *A Reversal of Fortune*, *U.S. NEWS* (June 30, 2016, 7:00 AM), <https://www.usnews.com/opinion/articles/2016-06-30/justice-kennedys-fisher-decision-shows-evolution-on-affirmative-action> (discussing *Fisher II* and asking, "What accounts for the court's about-face? More pointedly, what caused Justice Kennedy — the court's swing vote and a vocal skeptic of race-conscious state action until now — to change course?"); Daniel Fisher, *Justice Kennedy Goes from Affirmative-Action Dissenter to Defender in Texas Case*, *FORBES* (June 23, 2016), <https://www.forbes.com/sites/danielfisher/2016/06/23/justice-kennedy-evolves-from-affirmative-action-skeptic-to-supporter-with-texas-case/> (noting that until *Fisher II*, Justice Kennedy had never voted to uphold the use of a race-based classification); Mark C. Long, *Is There a "Workable" Race-Neutral Alternative to Affirmative Action in College Admissions?*, 34 *J. POL'Y ANALYSIS & MGMT.* 162, 164 (2015) ("The *Fisher* decision, which surprised many who expected a more conservative set of justices to overturn the *Grutter* decision and strike down affirmative action in admissions, has yielded a greater degree of legal stability.").

conscious admissions plan did not violate the 14th Amendment of the Constitution.²⁶

It was the first time during his tenure on the Court that Justice Kennedy actually found a race-conscious benefits program to be constitutional.²⁷ One of the current cases challenging race-conscious admissions programs, *Students for Fair Admissions, Inc. v. Harvard*, once again invokes Title VI and accuses the school of unfairly limiting the number of Asian-American students it accepts.²⁸ Should it reach the U.S. Supreme Court, however, it will be decided by a very different panel than the one that decided *Fisher II*. As Justice Scalia was critical of race-conscious benefits programs,²⁹ a similar position being taken by his replacement, Justice Gorsuch, would not upset the number of Justices who oppose such policies. With Justice Kavanaugh replacing Justice Kennedy, however, prognosticators are again predicting the case may signal the death of race-conscious affirmative action in higher education admissions.³⁰

In light of the foregoing, I have two goals for this Essay. First, in Part II, I want to highlight a number of factors within Justice Powell's opinion that have resulted in the continuing vulnerability of considering race in higher education admissions. To my mind, both the terribly bad facts in *Bakke* and Justice Powell's cramped

²⁶ Even though *Fisher II* preserved affirmative action, it still overemphasized connections between race-based affirmative action and reverse discrimination claims. See Kimberly West-Faulcon, *Reversed Protection: A Discrimination Claim Gone Wild in Fisher v. Texas*, 7 UC IRVINE L. REV. 133, 160-64 (2017) [hereinafter *Reversed Protection*].

²⁷ See Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html> ("The decision, by a 4-to-3 vote, was unexpected. Justice Anthony M. Kennedy, the author of the majority opinion, has long been skeptical of race-sensitive programs and had never before voted to uphold an affirmative action plan.")

²⁸ See Hartocollis, *Does Harvard Admissions Discriminate?*, *supra* note 13; see also Complaint, *Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176-DJC, 2014 WL 6241935 (D. Mass. 2014), <https://www.clearinghouse.net/chDocs/public/ED-MA-0002-0001.pdf>.

²⁹ Scalia stated of the University of Michigan Law School's admissions policy in his opinion in *Grutter*, "The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception." *Grutter v. Bollinger* 539 U.S. 306, 349 (2003) (Scalia, J., dissenting in part and concurring in part). In *Fisher*, he reiterates his opinion from *Grutter* and only joins the opinion of the Court because the petitioner did not seek to do something of which he was in favor — overturning diversity as a compelling interest. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 315 (2013) (J. Scalia, J., concurring).

³⁰ See *infra* note 90 and accompanying text.

conceptualization of remediable discrimination have contributed to his bargained solution — the diversity rationale — almost always seeming to be on the brink of collapse.

Second, in Part III, I suggest that the overriding lesson of *Bakke* is that attempting to create racial inclusion through an opaque “third way,” one that is unhinged from the country’s unreconciled racial past and unrelenting racial present, was likely doomed to be unsatisfying. As such, my main point of departure from Justice Powell’s opinion is that whatever strategies arise in the wake of the dilution or collapse of the diversity rationale, should be both historically contextualized and stridently race-conscious. It is not lost on me that such an option may not be politically achievable. If, however, political feasibility was a requirement for seeking racial justice, it is very unlikely that there ever would have been a movement for civil rights in the United States. The lyrics of the songs that began this Essay, then, would have been about hopelessness rather than perseverance. Regrettably, like much of the work that seeks to reimagine equality, this Essay should be understood as privileging approaches and goals for greater inclusion that many racial justice advocates would consider to be right, even if they are not available right now.

I. THE PROBLEMS OF FACT AND ANALYSIS IN JUSTICE POWELL’S PLURARITY OPINION

Turning first to the case, for those committed to antiracism, there are several factors, which made *Bakke* a less than optimal decision upon which to decide the constitutionality of considering race in higher education admissions. First, having two separate four-judge pluralities, each of which Justice Powell joined on a narrow issue, nearly guaranteed that there would be disagreements over what points in the opinion had secured the agreement from at least five Justices.³¹

³¹ See Finkin, *supra* note 23, at 192 (At the time of the decision in *Bakke*, the author opined of Powell’s opinion, “his reasoning on the constitutionality of preferential admissions is shared by none of his brethren; thus, it remains to be seen whether his analysis ultimately will be viewed as an ephemeron or will come to have some lasting value in the law of higher education.”). This question was at least partially addressed in the majority opinion in *Grutter*, 539 U.S. at 307 (adopting Justice Powell’s articulation of the diversity rationale as a compelling interest that could be used to justify the consideration of race in higher education admissions). I have, however, previously argued that the *Grutter* opinion did not provide hope that affirmative action within education would continue to be available. See Mario L. Barnes, “The More Things Change . . .”: New Moves for Legitimizing Racial Discrimination in a “Post-Race” World, 100 MINN. L. REV. 2043, 2088 (2017) (“Though *Grutter* spared affirmative action in higher education admissions, the case has

Second, some of the difficulties arising from the case pertained to the peculiar and particularly bad facts surrounding the story of Alan Bakke and the admissions processes of the UC Davis Medical School. Finally, other issues arose from the cramped and somewhat ahistorical way Justice Powell structured the analysis of race discrimination.

A. *Understanding the Bakke Case Through the Lens of Its “Very Bad” Facts*

Regarding the facts, as a fairly well-credentialed military veteran³² and two-time loser in the medical school admissions context, Allan Bakke’s denial signaled for some that the UC Davis Medical School’s Special Admissions program was, perhaps, too special. Along this valence, there were a few particularly bad facts in the case that laid the groundwork for Justice Powell’s analysis. Consider, for example, that the science GPA and MCAT scores for those admitted through the Special Admissions program were significantly lower than those for the applicants admitted and rejected from the medical school’s regular program. This information was included in the record of the case. However, the record failed to also include other helpful facts related to the students of color admitted through the Special Admissions program or to have a robust discussion about how historical and continuing race bias contributed to that scoring gap between the regular and special admits. Additionally, though many disadvantaged Whites applied to the Special Admissions program — the language of which was race-neutral in the 1973 admissions cycle — none were admitted in 1973. The program then seemed to be only facially open to Whites, without any discussion of why selecting racial minorities was appropriate in light of the historical exclusion of such applicants.³³ Finally, unlike some plaintiffs in recent affirmative action

provided little reason to expect that the Court is committed to consistently interpreting antidiscrimination laws for the benefit of historically oppressed groups.”).

³² Not only was Bakke a former Marine, he had worked as an engineer at a National Aeronautics and Space Administration (NASA) laboratory. See Lou Cannon, *Allan Bakke: Determined to be a Doctor, Not a Test Case*, WASHINGTONPOST (June 29, 1978), https://www.washingtonpost.com/archive/politics/1978/06/29/allan-bakke-determined-to-be-a-doctor-not-a-test-case/b4623f92-bb4a-450c-8b6d-676a639e952f/?utm_term=.085354e4d8c0.

³³ This fact takes on greater significance when one considers the current empirical research suggesting better acceptance for inclusion programs that construct diversity and disadvantage as inclusive of Whites. See, e.g., Kyneshawau Hurd & Victoria C. Plaut, *Diversity Entitlement: Does Diversity Benefits Ideology Undermine Inclusion*, 112 NW. U. L. REV. 1605, 1607-08 (2018); Victoria C. Plaut et. al., “What About Me?” *Perceptions of Exclusion and Whites’ Reactions to Multiculturalism*, 2 J. PERSONALITY &

cases, plaintiff Bakke's file was, in fact, quite strong from a comparative perspective. In fact, Bakke's GPAs and MCAT scores were close to those of those admitted in the regular pool (with perhaps only the lateness of his application resulting in his 1973 denial of admission). Despite the general strength of his file, in neither 1973 or 1974 was Bakke admitted or even placed on the waitlist for admission.

Beyond the facts related to the admissions data, Bakke was also in the enviable position of claiming irregularities in the review of his application. As UCLA Law Dean Emerita Rachel Moran's paper in this symposium discusses in greater detail, Bakke found an advocate in Peter Storandt, the Assistant to the Dean of Admissions, who encouraged him to sue after his second denial of admission.³⁴ As unusual, it is arguable that Dr. George Lowrey, the Chair of the Admissions Committee, directed a measure of personal animus toward Bakke. After Bakke had written to Dr. Lowrey to complain about the Special Admissions program, Dr. Lowrey scored Bakke poorly on his interview and rated him much lower in 1974 than a student interviewer had.³⁵ These relationships — one with an employee who found Bakke's denial to be worthy of litigation and another who appeared to be, perhaps, unfairly antagonistic — were oddly personal for an ostensibly fair admissions process and contributed to the Court's ability to construct a narrative of victimization for Bakke.

Taken together, these facts divorced from any broader discussion of systemic and structural race privilege and disadvantage within society help one to understand Bakke as a sympathetic or at least admissible applicant. These facts are quite different from a case like *Fisher v. Texas*, where plaintiff Abigail Fisher's combined scores were equal to or lower than many applicants of color who were also not admitted to the University of Texas in 2008.³⁶ The "very bad" facts related to

SOC. PSYCHOL. 337 (2011).

³⁴ See Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 UC DAVIS L. REV. 2569, 2574 (2019).

³⁵ Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 277 (1978) (opinion of Powell, J.). Dr. Lowrey also mentioned Bakke's personal viewpoints as a problem to admitting him. *Id.*

³⁶ See Barnes, Chemerinsky & Onwuachi-Willig, *supra* note 12, at 299-300 n.115 (Fisher's scores were equal to or worse than 168 Black and Latina students who were also not admitted.) Additionally, of the forty-two students who were offered provisional admission with numbers equal to or lower than Fisher's, only five were persons of color. *Id.*; see also Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 313 (2015) (noting there should have been no standing for Fisher to sue given that the University proved she would have been rejected under a race neutral process); Anna Merlan, *It Seems Mediocre Grades, Not Ethnicity, Kept Abigail Fisher Out of UT Austin*, DALL. OBSERVER (Mar. 23, 2013),

Bakke's applications helped to construct him as a deserving applicant, who was excluded in an admissions process where race played too large a role in an applicant's success or failure. While these facts ostensibly demonstrate Bakke's denial was problematic irrespective of the existence of the Special Admissions program, the opinion treated the program as a primary barrier to his admission.

B. *The Tie Between "Very Bad" Facts and Justice Powell's "Unhinged" Analysis*

The facts in *Bakke* seemed even more worthy of redress due to the way Justice Powell analyzed the operation of race discrimination. Justice Powell ultimately found diversity to be a compelling interest for which the Special Admissions program was not narrowly tailored to achieve. Justice Powell's analysis, however, discounted several other justifications for considering race in admissions.³⁷ As problematic, his opinion included a number of baffling and ahistorical determinations regarding bias.³⁸ The result, then, was an analysis unhinged from the racial realities of that time or today.

<https://www.dallasobserver.com/news/it-seems-mediocre-grades-not-ethnicity-kept-abigail-fisher-out-of-ut-austin-7122125> (Thirty-seven of the forty-two students who were offered provisional admission to the University of Texas in the year Fisher was rejected were white.) Additional critiques have articulated systemic advantages to Whites in admissions processes. See Devon Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1147-51 (2008) (arguing that race-neutral admissions processes confer advantages upon persons for whom race is presumed not to matter); West-Faulcon, *Reversed Protection*, *supra* note 26, at 142-45 (By discussing Fisher's case through an analysis of data indicating that under UT's race-conscious, holistic review process, West-Faulcon showed that Whites had higher selection rates than Asians and much higher selection rates than Blacks or Latinx applicants.).

³⁷ According to two scholars, "In *Regents of University of California v. Bakke*, Justice Lewis Powell considered and dismissed all but one of several common sense rationales for using a racial classification in admissions." Hurd & Plaut, *supra* note 33, at 1610. They note that Justice Powell rejected the lack of racial balance in the medical profession, countering past discrimination, increasing the number of doctors who would work with underserved populations in favor of his preferred rationale: "obtaining the educational benefits that flow from an ethnically diverse student body." *Id.*

³⁸ The opinion, at once, appeared to preserve affirmative action in higher education, but also undermine a more expansive reading of equal protection doctrine. See, e.g., Adam Harris, *The Supreme Court Justice Who Forever Changed Affirmative Action*, ATLANTIC (Oct. 13, 2018), <https://www.theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938/> ("Powell's opinion would buoy the case for affirmative action in college admissions, but some legal scholars argue that it also transformed the conversation about race and equality in America by altering the meaning of one of the Civil War amendments to the Constitution aimed at ensuring equality for recently freed slaves.").

First, let us consider Justice Powell's analysis of the level of scrutiny to be applied in the case. On the question of whether a level of scrutiny other than strict scrutiny could be warranted based on the fact the UC Davis Medical school's Special Admissions program was designed to benefit rather than harm racial minorities, Justice Powell engaged in an overbroad universalist interpretation of the Equal Protection Clause. He did so by ignoring the historical origins of the 14th Amendment and the past and ongoing societal racial discrimination germane to the differential preparation and qualifications of Special Admissions program applicants.³⁹ In other words, his assessment that strict scrutiny applied was premised on the truism that the language of the Equal Protection Clause protects Whites as well as racial minorities. Left undiscussed was the extent to which the level of scrutiny should be affected by legacies of racial subordination or the advantages gained through intergenerational white privilege. Additionally, very little of the opinion was committed to theorizing, at the time, the contemporary significance of the country's historical racial divides and what kinds of remedies should be constitutionally allowable in light of these histories.

In some sense, Powell's myopic analysis is consistent with the Court's contemporary turn toward universalist applications of the harms of considering race.⁴⁰ While many scholars have criticized the Court's embrace of colorblindness,⁴¹ two other points of analysis

³⁹ In fact, Justice Powell is critical of the notion that there is a continuing need to further address societal discrimination. *Bakke*, 438 U.S. at 307. In the opinion, Justice Powell writes that "remediating of effects of past discrimination of 'society discrimination,' an amorphous concept of injury that may be ageless in its reach into the past"). *Id.*

⁴⁰ In employment and contracting cases following *Bakke*, the Court was similarly disposed in favor of universalist approaches and against seeing benefits programs as benign considerations of race. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 469-70 (1989) (applying strict scrutiny to a case involving minority set asides in contracting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-84 (1986) (applying strict scrutiny to a school board's layoff plan that was preferential to minorities). For a more recent example of this phenomenon, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (Chief Justice Roberts endorses ignoring or failing to account for race as a method to end race discrimination.); see also Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 170 (2017) ("It is no surprise then, that legal analysis of race-conscious policies proceeds from the conclusion that the racial classifications that necessarily underlie such policies are necessarily stigmatizing and harmful, and that the state recognition of identity group membership is inherently undesirable.").

⁴¹ See, e.g., Ian F. Haney-López "A Nation of Minorities": *Race, Ethnicity, and*

struck me as more important in the case. First, using the “very bad” facts discussed above, Justice Powell assesses discrimination in a manner that is highly individualized and thus paints Alan Bakke as an example of a “white innocent.”⁴² Since Bakke, himself, had not discriminated against anyone, he should not be punished merely because UC Davis wished to extend benefits to persons “perceived as victims of ‘societal discrimination.’”⁴³ Framing the analysis in this manner ignores that racial hierarchy is a societal phenomenon that has served to instantiate advantage and disadvantage based on group membership. Additionally, the use of the word “perceived” raises the question as to whether Justice Powell believed persons of color truly warranted any special consideration or remedy based on prior societal discrimination.⁴⁴ This structuring of the affirmative action debate also overly focused the analyses on the stakes for white “victims” rather than those historically disadvantaged by racial classifications. His opinion, then, presumes a “discourse of equivalents”⁴⁵ between a person given a preference under a government’s use of a racial classification, and one who is presumed to be harmed by not receiving that preference.⁴⁶

Justice Powell, however, also appears to simultaneously make two additional moves. First, he espoused a theory of racial remedy that would only find the Special Admissions program permissible if there was proof that UC Davis Medical School had engaged in

Reactionary Colorblindness, 59 STAN. L. REV. 985, 985-86 (2007); Harris, *supra* note 15, at 1768-73; Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. U. J. URB. & CONTEMP. L. 157, 165-71 (1998).

⁴² See *Bakke*, 438 U.S. at 307-10.

⁴³ *Id.* at 310.

⁴⁴ As Legal Historian Anders Walker has theorized, this element of the opinion reflects a complicated understanding of the relationship between law, race, and inequality. Anders Walker, *A Lawyer Looks at Civil Disobedience: Why Lewis F. Powell Jr. Divorced Diversity from Affirmative Action*, 86 U. COLO. L. REV. 1229, 1250 (2015). Based on philosophies Justice Powell espoused in earlier cases and speeches, Walker described him as operating on the premise that “[r]acism may have been forbidden by law, but inequality was not.” *Id.* Such a philosophy would explain how one could acknowledge the ills of race discrimination, but not invest in redistributive remedies to cure resulting disadvantages.

⁴⁵ The phrase was coined by Stanford Law Professor Jane Schacter and used to describe the issues around activists comparing the struggle for gay rights to the quest for racial justice during the civil rights movement. See generally Jane S. Schacter, *The Gay Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994).

⁴⁶ That discourse is represented in the following language from Justice Powell’s opinion: “It cannot be said that the government has any greater interest in helping one individual than in refraining from harming another.” *Bakke*, 438 U.S. at 309.

discriminatory practices. Second, he created a causal connection between Bakke's poor results in the admissions lottery and the separate and not necessarily germane existence of the Special Admissions program.⁴⁷ Justice Powell could have embraced the concept that Bakke was both a strong candidate for admission but that the ultimate decision to deny him admission was not a product of also admitting historically underrepresented applicants. Powell's approach reflected a zero-sum construction of admission. As others have indicated, finding Bakke to be a victim within such a characterization presumed that he was entitled to compete for every single seat in the medical school's class.⁴⁸ This move to make seats in the Special Admissions program available for general competitive admissions seems odd when Bakke never even referenced the numerous white students who were admitted with weaker numbers or with personal connections.⁴⁹ Though he could have raised this point on his own, Justice Powell chose instead to decide that Bakke's denial of admission to the law school was the result of the operation of the law school's affirmative action policy.

Powell's reading of racial discrimination suffers from another issue that has plagued the Court in many of its race cases — he overly focuses on the individual harm he believes the Special Admissions program creates for Bakke but ignores the importance of addressing structural and systemic forms of bias that affect others.⁵⁰ Hence, the

⁴⁷ California Supreme Court Justice and former Berkeley Law Professor Goodwin Liu has used the term “causation fallacy” to describe the mistaken notion that it is the admission of minority applicants that leads to white applicants being denied admission). Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002); see also West-Faulcon, *Obscuring Asian Penalty*, *supra* note 13, at 597-601.

⁴⁸ See, e.g., Harris, *supra* note 15, at 1769.

⁴⁹ See, e.g., M. KELLY CARR, *THE RHETORICAL INVENTION OF DIVERSITY: SUPREME COURT OPINIONS, PUBLIC ARGUMENT, AND AFFIRMATIVE ACTION* 90 (2018) (citing George Lipsitz's observation that “Bakke did not challenge the legitimacy of the thirty-six white students with grade point averages lower than his who secured acceptance to the UC-Davis medical school the year he applied, nor did he challenge the enrollment of five students admitted because their parents had attended or given money to the school”); Harris, *supra* note 15, at 1772-73 (arguing that the case outcome rests on privileging a principle whereby it was acceptable for applicant Bakke to lose out in the admissions process to entitled Whites but not presumptively disfavored minorities).

⁵⁰ Other scholars have pointed out that this emphasis on harm to individuals, adopts an “anticlassification” rather than “antidiscrimination” approach to equality. See Angela Ancheta, *Bakke, Antidiscrimination Jurisprudence, and the Trajectory of Affirmative Action Law*, in *REALIZING BAKKE'S LEGACY: AFFIRMATIVE ACTION, EQUAL OPPORTUNITY, AND ACCESS TO HIGHER EDUCATION* 16-17 (Marin & Horn eds., 2008) (“Anticlassification norms can be characterized by their emphasis on protecting

Court appears incapable of seeing the Special Admissions program or its goals as tied to the ongoing legacy of societal advantages and disadvantages that flow from racial categories. The resulting analysis, then, does not question how race operates to endow some groups' members with privilege and others with a mark of stigma. Justice Powell's particular reading of what race discrimination is and how it works is narrow, ahistorical, and inconsistent with lived experience of race in this country. It is, however, very much consistent with the Court's current jurisprudence on this topic.⁵¹

Not all of the Justices in *Bakke* suffered from Powell's myopic reading of race, history, and discrimination. On the question of race-based set asides, Justice Blackmun provided the following:

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way.⁵²

Justice Powell includes no engagement with this understanding of the value of set-asides. From the opinion, rather than acknowledging that race must be considered to address racial discrimination, Justice Powell espoused beliefs that more closely align with those of Chief Justice Roberts. In the *Parents Involved in Community Schools* case,

individual rights and using the intentional and differential treatment of individuals as the primary measure of inequality.”). On the distinctions between anticlassification and antistatutory approaches, see generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antistatutory?*, 58 U. MIAMI L. REV. 9 (2003); Reva B. Siegel, *Equality Talk: Antistatutory and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

⁵¹ On the demise of remedial arguments in the educational affirmative action cases, see John V. Wintermute, Comment, *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, 559-60 (2014) (arguing that remedial-focused arguments were abandoned by the Court after the decision in *Grutter*); see also *Shelby County v. Holder*, 570 U.S. 529, 551, 556-57 (2013) (arguing that Section 5 of the Voting Rights Act is no longer needed because the ill effects of racial discrimination have been largely overcome); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527-28 (1989) (Scalia, J., concurring) (“Those who believe that racial preferences can help to ‘even the score’ display, and reinforce, a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.”).

⁵² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (Blackmun, J., concurring).

Justice Roberts intimated that racial discrimination can only be achieved by ending considerations of race.⁵³

By contrast, the Justices who believed the UC Davis Medical School Special Admissions program was constitutionally permissible did accept that there was a remedial purpose for affirmative action.⁵⁴ In particular, in his separate opinion, Justice Marshall wrote:

I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.⁵⁵

Justice Marshall's statement makes several points that Justice Powell seemingly finds unpersuasive. First, unlike Powell's universalist analysis of racial categorization as generally harmful, Justice Marshall explicitly acknowledges that the system of racial classification was maintained for the purpose of disadvantaging Blacks. His comment also references the societal nature of that discrimination and that it was constitutionally sanctioned. Finally, he too sees the irony in that

⁵³ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). For an analysis of why Justice Roberts's views of race are acontextual and ahistorical, see JUSTIN DRIVER, *THE SCHOOL-HOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 301-305 (2018) (discussing criticism of Justice Roberts' opinion in *Parents Involved* from attorneys involved in the *Brown* case and legal academics); LAURENCE TRIBE & JOSHUA MATZ, *UNCERTAIN JUSTICE: THE ROBERTS COURT AND THE CONSTITUTION* 20-25 (2014); Ronald Turner, "The Way to Stop Discrimination on the Basis of Race . . .," 11 *STAN. J. C.R. & C.L.* 45, 47 (2015).

⁵⁴ In Justice Brennan's opinion joined by Justices Blackmun, White, and Marshall, he explicitly accepted the remedial rationale. *Bakke*, 438 U.S. at 362 ("Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.")

⁵⁵ *Id.* at 387 (Marshall, J., concurring). As one scholar indicated regarding the Powell decision, "[c]an there be any validity to a conclusion like Justice Powell's that a state may make race-conscious decisions regarding university admissions in order to enrich its academic dialogue, but not to counteract the distributive injustices of three centuries?" Blasi, *supra* note 17, at 21.

actions designed to remedy consequences of the national system of racial spoils is now the thing deemed to be unconstitutional.⁵⁶

Justice Powell chiefly chose not to engage with these concerns. When he did, his approach was to suggest that America was a “Nation of minorities” and that the white majority itself was composed of “various minority groups.”⁵⁷ This articulation, which places white ethnics on par with people of color, at once denies the truth of differentiated racial subordination for people of color and the need for state-enforced racial remedy. Constructing an understanding that Whites are just as likely to be victims of discrimination as people of color are sets a foundation for Powell’s resulting standard that disallows remedy unless one can show that a white person being denied a benefit or the state itself has committed a constitutional violation. It also then explains why Justice Powell asserts within this context that UC Davis Medical school could not justify a preference for one racial group over another.⁵⁸

Given his claims that Whites and people of color are equally affected by discrimination, it is odd that Justice Powell ultimately supported the diversity rationale, which allows for at least a modest form of race-conscious review. And, though many see the diversity rationale standard as the important precedential component of Powell’s opinion, it is his cramped views on bias, intent, violation, and available remedy that have more broadly shaped outcomes in future cases.

II. WE WILL TURN BACK?: BAKKE’S LEGACY AS A JUSTIFICATION FOR ADOPTING MORE RADICALLY RACE-CONSCIOUS ADMISSIONS PRACTICES

As I suggest above, peculiarly slanted facts and Justice Powell’s refusal to connect historical and contemporary societal discrimination to the need for remedy resulted in the diversity rationale being the means through which race could be considered in higher education admissions. The diversity rationale, however, leads to a weak form of race-conscious review. This is so because the approach focuses on

⁵⁶ This is a reference to the Court’s previous jurisprudence, which only used strict scrutiny to assess invidious forms of discrimination; actions in favor of historically disadvantaged racial group members were considered ameliorative or “benign” and applied a lower standard. See *Metro Broad. v. FCC*, 497 U.S. 547, 564 (1990); *United States v. Montgomery Cty. Bd. of Educ.*, 395 U.S. 225, 235-36 (1969); *CARR*, *supra* note 49, at 192-95.

⁵⁷ *Bakke*, 438 U.S. at 292 (opinion of Powell, J.).

⁵⁸ *Id.* at 311 (“Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health-care delivery to deprived citizens.”)

various types of differences and is largely justified based on university autonomy and First Amendment goals,⁵⁹ rather than addressing the consequences of race discrimination.⁶⁰ Forty years of living under this approach, however, should convince us that whatever the virtues of the approach, it does not encourage assessment based on histories of societal subordination.⁶¹ As the approach once more sits on the precipice of curtailment in a now more conservative U.S. Supreme Court, I below suggest that the goal should not be to pull the diversity rationale from the brink one more time. Rather, even if the new litigation against Harvard, the University of North Carolina, or other universities⁶² produces a narrowing or rejection of the diversity rationale, we should consider new ways to justify more racially inclusive higher education admissions. In particular, future approaches to remedying racial disadvantage in access to education

⁵⁹ On this point, the following commentary is instructive:

Under the diversity defense, the relevant legal question for affirmative action is whether a university's right to curate a pedagogically desirable, heterogeneous student body can trump a White person's equal protection right against racial discrimination. The rights of minorities have no place in this constitutional calculus.

Sally Chung, *Affirmative Action: Moving Beyond Diversity*, 39 N.Y.U. REV. L. & SOC. CHANGE 387, 390 (2015).

⁶⁰ See, e.g., *id.* at 389 ("A justification for affirmative action should vindicate minorities' rights and uphold the constitutionality of rectifying racism. The diversity defense does neither."); Michele S. Moses & Mitchell J. Chang, *Toward a Deeper Understanding of the Diversity Rationale*, 35 EDUC. RESEARCHER 6, 9 (2006) ("The ascendancy of the diversity rationale, in this case, weakened the justification for race-conscious admissions based on corrective or distributive justice, a justification that arguably is rooted in a different intellectual foundation."); Sigal Alon, *How Diversity Destroyed Affirmative Action*, NATION (Dec. 16, 2015), <https://www.thenation.com/article/how-diversity-destroyed-affirmative-action/> ("The *Bakke* ruling shifted the rationale for affirmative action from reparation for past discrimination to promoting diversity. This, in essence, made the discourse about affirmative action race-neutral, in that it now ignores one of the key reasons for why we need to give an edge to minorities.").

⁶¹ The former president of the University of Michigan has encouraged the reassociation of diversity to the history of racial struggle in the following way: "Second, our pursuit of diversity would benefit from a greater collective awareness of the relationship between today's concerns and historic events recent enough to have occurred during my lifetime, for without that awareness it is difficult to understand the complexity of race in America." Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281, 281 (2016).

⁶² See sources cited *supra* notes 13 & 28.

should align the goal of providing greater opportunities with addressing legacies of racial oppression.

In 1997, in response to previous attacks on affirmative action, renowned critical scholars Charles Lawrence and Mari Matsuda wrote *We Won't Turn Back: Making the Case for Affirmative Action*.⁶³ The main premise of the text was that affirmative action was a hard-won intervention — one that arose out of a history of protest to address racial inequality and that there would be no turning back from it. The question of turning back that is referenced in this Essay is a bit different but not at odds with the framing premise of that critical text. The query, which is further explicated below, is not about whether we should abandon affirmative action itself. Rather, it asks what should happen if our past becomes our future and the Court essentially returns to a pre-*Bakke* (and post-race) stance on race-based affirmative action. My response is that proponents of the policy should not be wed to the arguments that have propped up the diversity rationale. Rather — even in the face of hostile federal courts — affirmative action advocates should argue for progressive policies, the goals of which are to remedy the longstanding forms of race bias that Justice Powell ignored in his opinion. The turn, then, would be away from employing heavily universalist approaches to evaluating race and educational opportunity. It would be a turn toward tactics to reconcile the ongoing costs of our ostensibly legally corrected but societally reinforced system of racial spoils. In support of that turn, below I present both the difficulties entailed in continuing to support the diversity rationale and benefits arising out of admissions policies adopting more robust approaches to considering race — approaches that more fully prioritize considerations of historical subordination and structural discrimination.

A. *Difficulties with Preserving the Diversity Rationale*

Racial diversity in educational settings imparts important civic and attitudinal lessons that undermine problematic white racial identity performance and enable us to sustain a healthier and more successful democracy. The diversity rationale — the defense of affirmative action policies based on a compelling

⁶³ CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* (1997).

interest in diversity — thus justifies the use of race-conscious policies in pursuit of this worthy goal.⁶⁴

Though I generally agree with the above quoted language and that the concept of diversity can be used to effectively consider race in higher education admissions, the standard also has been significantly criticized.⁶⁵ A common left critique of diversity is that it “frames diversity as much (or more) about utilitarian goals than about moral obligation.”⁶⁶ Those on the right, by contrast, often assert that diversity is divisive, improperly creates reverse discrimination against Whites,⁶⁷ and values inclusion over merit.⁶⁸ Recently, however, academics have offered a more complex set of critiques. For example, University of Southern California Law Professor Stephen Rich has criticized diversity as underserving equality values by deferring to institutional constructions of diversity’s benefits and failing to

⁶⁴ Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 431-32 (2014) [hereinafter *White Like Me*].

⁶⁵ Within months of the issuing of the opinion, published scholarly critiques of the case began to emerge. See, e.g., Symposium, *Regents of the University of California v. Bakke*, 67 CAL. L. REV. 1 (1979). The symposium article published by Critical Race Theory founder Derrick Bell, was particularly representative. See generally Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979) [hereinafter *Minority Admissions*] (arguing that minority interests were not meaningfully represented in the *Bakke* decision). Recent scholarship has also included significant criticism. See, e.g., CARR, *supra* note 49, at 13 (“The majority of *Bakke* analyses attribute the ‘fractured’ decision to the near-fatal weaknesses of affirmative action itself, rather than viewing the decision as one that allows a flexible and polyvalent reading more sustainable with multiple groups than an up-or-down decision.”); Ofra Bloch, *Diversity Gone Wrong: A Historical Inquiry into the Evolving Meaning of Diversity from Bakke to Fisher*, 20 U. PA. J. CONST. L. 1145, 1148 (2018) (noting the diversity rationale has been described as a concept that “has been and still is subject to continuous contestation and development”).

⁶⁶ CARR, *supra* note 49, at 58; see also Derrick A. Bell, Jr., *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) (“Diversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants.”).

⁶⁷ CARR, *supra* note 49, at 59-60 (presenting critiques that argue race consciousness is in anti-democratic approach that leads to “reverse discrimination”). One commentator has described Justice Powell’s opinion as evincing the “immorality of race preference and what [he] thought to be the fraudulence of the ‘diversity defense’ of it.” CARL COHEN, *A CONFLICT OF PRINCIPLES: THE BATTLE OVER AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN* 13 (2014).

⁶⁸ See STEPHEN L. CARTER, *REFLECTION OF AN AFFIRMATIVE ACTION BABY* 51 (1991) (discussing the concept of companies that adopt policies that distinguish between “the best *black* candidates and the best ones,” which reinforces a false dichotomy between diversity and quality) (emphasis added).

distinguish between exploitative and egalitarian uses of diversity.⁶⁹ Former Berkeley Law Professor and current California Supreme Court Associate Justice Goodwin Liu, by contrast, has pointed out that scholars have defended the importance of enrolling diverse classes without sufficiently identifying why as “a matter of legal doctrine” the diversity rationale should qualify as a compelling interest.⁷⁰

Ellen Berrey, a University of Toronto sociologist, has articulated a number of additional criticisms to how the concept of diversity has been used. At the broadest level, Berrey’s research asserts that diversity as a concept has lost any true meaning and has become a catch phrase for signaling empty commitments to equality, while ignoring histories and ongoing examples of racial inequality.⁷¹ With regard to higher education admissions, in particular, her work assesses how the University of Michigan approached diversity after the Supreme Court affirmed Justice Powell’s *Bakke* opinion in *Grutter v. Bollinger*.⁷² According to Berrey, the campus, which had previously extolled the benefits that accrued to in-need communities from returning graduates of color, abandoned that narrative in favor of universalist language that minimized the connection between diversity and racial justice.⁷³ The most unfortunate consequence of the University’s turn away from more stridently race-conscious articulations of diversity’s meaning is that this conduct may have opened the door for the movement that produced Amendment 2 — the state ballot initiative that ended affirmative action in Michigan.⁷⁴

Education law scholars Osamudia James and Kevin Woodson have explored other under-considered hazards of the diversity rationale. Professor James explicitly identified a connection between the approach and white identity formation⁷⁵ and performance.⁷⁶ In

⁶⁹ Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1011 (2016).

⁷⁰ Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381, 383 (1998).

⁷¹ See ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* 258-62 (2016). For a detailed discussion of Berrey’s text, see Mario L. Barnes, Book Review, 52 LAW & SOC’Y REV. 532 (2018). See also Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. OF CIV. RTS. & CIV. LIB. 171, 178 (2005) (“Diversity’s vagueness, combined with its forward-looking orientation, creates another difficulty: it leads people to approach diversity in an a-historical and an a-contextual manner.”)

⁷² BERREY, *supra* note 71, at 10-11.

⁷³ *Id.*

⁷⁴ See *id.*

⁷⁵ Sociologists Michael Omi and Howard Winant have theorized race formation as

particular, she used the *Fisher v. Texas* case to argue that the diversity rationale may, in fact, produce the very type of unhelpful white identity performances that were associated with the filing of the case. This should be unsurprising given that the *Bakke* case structured the diversity conversation around how the concept would serve the educational interests of Whites.⁷⁷ Despite an application with merits that were similar to the profiles of many other denied students,⁷⁸ Abigail Fisher filed her complaint asserting she was disadvantaged by considerations of race in the University of Texas's admissions process. She did so, however, by ignoring the fact that her own educational experience contained examples of race and class privilege.⁷⁹ Referencing the sense of entitlement and failure to see systems of oppression reflected in Fisher's actions, James theorizes that another harm of the diversity rationale: it interferes with Whites' developing an antiracist white identity.⁸⁰

Kevin Woodson focused his assessment of diversity in the post-matriculation space at colleges and universities and built upon Berrey's critique that the concept serves more as a rhetorical device than a tool of inclusion. According to Professor Woodson, the racial segregation that occurs on campuses undermines the stated purposes of diversity. In particular, he argues:

The utilitarian, diversity-based justifications for affirmative action embraced in *Bakke* and *Grutter* rest on a vision of life at

"the sociohistorical process by which racial identities are created, lived out, transformed, and destroyed." MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 109 (3d ed. 2014).

⁷⁶ Performance theory posits that it is not merely ascriptive characteristics alone that shape race bias. Rather, bias becomes a response to whether those marked by ascriptive characteristics will act consistent with or in opposition to stereotypical expectations associated with particular racial groups. See Angela P. Harris, *From Color Line to Color Chart?: Racism and Colorism in the New Century*, 10 *BERKELEY J. AFR.-AM. L. & POL'Y* 52, 59 (2008). For excellent examples of works exploring identity performance, see generally DEVON CARBADO & MITU GULATI, *ACTING WHITE?: RETHINKING RACE IN "POST-RACIAL" AMERICA* (2013); KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black and Why Title VII Should Apply if Lakeisha and Jamal Are White*, 2005 *WIS. L. REV.* 1283 (2005); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 *N.Y.U. L. REV.* 1134 (2004).

⁷⁷ See Hurd & Plaut, *supra* note 33, at 1607-08.

⁷⁸ See sources cited *supra* note 36 (discussing data on University of Texas admissions).

⁷⁹ See James, *White Like Me*, *supra* note 64, at 428.

⁸⁰ *Id.* at 433-34, 507.

selective colleges and universities that is decidedly at odds with the actual state of contemporary campus race relations. Although *Bakke* ushered in a new rhetorical emphasis on the virtues of student body diversity, universities made little discernable progress in ensuring that these benefits were actually realized.⁸¹

With regard to the disconnect between diversity's goals and the limited interracial activity taking place on campuses, Professor Woodson argued the phenomenon occurs for numerous reasons and that "some amount of racial separateness among college students is likely inevitable."⁸² Diversity's unrealized promise creates issues for both proponents and critics of affirmative action.⁸³ Though bringing the goals of diversity to fruition on campuses can be a separate question, it is arguable that the disconnect Woodson identifies between diversity's goal and effects on campuses is at least partially tied to the policy itself. Just as diversity is not necessarily inclusive of the project of racial justice, it is also neither a direct proxy for nor absolutely requires meaningful interracial interactions. This is ironic, of course, because the value of the effects of integration on learning environments was part of the justification for Justice Powell's defense of diversity. The dissociation Woodson locates is another one of the negative consequences that arise from Justice Powell's attempt to preserve considerations of race in a manner that does not require conversations about racial realities or construct diversity as a substantially race-based remedy.⁸⁴

⁸¹ Kevin Woodson, *Diversity Without Integration*, 120 PENN ST. L. REV. 807, 822 (2016).

⁸² *Id.* at 832-33.

⁸³ Opponents argue that "ongoing racial segregation of college life interferes with some of the key preconditions necessary for the diversity benefits of *Grutter* and thereby destabilizes the constitutional legitimacy of affirmative action." *Id.* at 843. For those who support racial equality, however, Woodson claims "segregation also impedes some of the broader racial justice goals that gave rise to affirmative action in the first place." *Id.* But see Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 825-28 (2015) (advocating that it is critical for students to congregate in race-conscious campus spaces that may be majority-minority in character, but still open to Whites).

⁸⁴ Justice Powell essentially constructed a tool that allowed the consideration of race in admissions without meaningful discussions of racial subordination and its consequences. See Bloch, *supra* note 65, at 1160 ("Justice Powell situated diversity as the preeminent justification for upholding race-conscious admissions policies, confining the legal debate and the popular discourse to the interest in diversity.").

Finally, looking to social science data on the operation of the diversity rationale, research findings also support a mixed critique. On the one hand, social science research indicates “the benefits of diversity for improved racial understanding and cross-racial interaction, democratic citizenship and civic engagement, active and complex thinking, academic engagement and motivation, and intellectual and academic skills.”⁸⁵ Despite these positive effects, researchers have also noted a problem identified by legal scholars that most of the assessments of interracial contact have focused on its benefits on Whites.⁸⁶ This again speaks to the universalist leaning of the diversity rationale, which not only privileges Whites but also underserves persons of color in the following way:

The diversity rationale facilitates a diversity-benefits ideology that appeals to egalitarianism and dominance sensibilities such that it feels good, does not upset the status quo, and precludes policy makers from adopting institutional policies that may be better situated to insulate historically unrepresented students from the harms associated with being underrepresented.⁸⁷

Still, other researchers who reviewed the early post-*Bakke* affirmative action literature noted failings within the prevailing legal narratives discussing the diversity rationale. These narratives advanced a story of admissions and race that was devoid of an emphasis on lived experience and was, therefore, only a “partial truth.”⁸⁸ Not surprisingly, they championed the work of critical scholars for their

⁸⁵ Hurd & Plaut, *supra* note 33, at 1613; cf. Justin Pidot, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761, 769-81 (2006) (reviewing the literature associating diversity with positive outcomes). Such findings somewhat push back against Professor Woodson’s claims, but it is possible for there to be benefits of campus diversity, even as there is still not as much interracial activity as one would find it optimal to support the greatest ends of inclusion.

⁸⁶ Hurd & Plaut, *supra* note 33, at 1622 (“The literature on diversity benefits highlights the myriad benefits of interracial contact. However, the prejudice-reduction framework that pervades this literature asserts a hegemony of psychological experience in intergroup contact — a portrayal of contact that is psychologically one-sided and primarily focused on Whites.”).

⁸⁷ *Id.* at 1634.

⁸⁸ Uma M. Jayakumar et al., *Reflections on the Diversity (Rationale) Literature: Examining the Potential and Need for Critical Diversity Research Praxis*, in AFFIRMATIVE ACTION AND RACIAL EQUITY: CONSIDERING THE FISHER CASE TO FORGE THE PATH AHEAD 186 (Uma M. Jayakumar et al. eds., 2015).

attempts to craft counter-stories that reflected the actual experiences and perspectives of students of color.⁸⁹

Taken together, these critiques suggest that the form of individual applicant review Justice Powell endorsed may have been initially useful for preserving the consideration of race under the broader concept of diversity. A problem with this approach, however, is that it has been ill-suited for addressing the many reasons it is important to engage in more explicitly race-conscious admissions evaluations. Both the endorsements and critiques of the rationale, however, may be moot because of the possibility that the Court may abandon the approach should it decide to hear one or more of the pending affirmative action cases. The next section considers how admissions evaluations of race in higher education should be approached, if the diversity rationale does not survive the pending legal challenges to affirmative action.

B. *Turning Back: Toward More Radically Race-Conscious Interventions*

1. The Demise of Race-Based Affirmative Action and What Comes Next?

For better or worse, we are likely once again on the precipice of engaging in intense arguments over what affirmative action should look like in higher education in the United States. Based on recent shifts in the composition of the U.S. Supreme Court, however, that discourse may take place in manner quite different from the way it was carried out in *Grutter* and the two *Fisher* cases. This is so because of the very real possibility that the Court⁹⁰ — at least for the conceivable future — has at least five Justices who believe that racial classifications should very rarely be upheld.⁹¹ It is the fear that a more conservative

⁸⁹ See *id.* at 187.

⁹⁰ Given that Justice Kennedy — the author of the majority opinion preserving race-consciousness in higher education admissions in *Fisher II* — was replaced by Justice Kavanaugh, there is a real possibility that a majority of the Justices no longer support affirmative action. See, e.g., Ann E. Marimow, *Brett Kavanaugh Once Predicted “One Race” in the Eyes of Government. Would He End Affirmative Action?*, CHI. TRIB. (Aug. 7, 2018, 7:29 PM), <https://www.chicagotribune.com/news/nationworld/ct-kavanaugh-supreme-court-civil-rights-20180807-story.html>; David G. Savage, *Justice Kennedy Sometimes Sided with the Supreme Court’s Four Liberals. Don’t Expect that from Kavanaugh*, L.A. TIMES (Oct. 8, 2018, 3:50 PM), <https://www.latimes.com/politics/la-na-pol-kavanaugh-court-20181005-story.html>.

⁹¹ While the beliefs about Justices Gorsuch and Kavanaugh are necessarily speculative, Justices Alito, Thomas, and Roberts, have previously opposed considerations of race in multiple contexts (school integration, voting rights, and

composition of Justices on the Court will result in complete retrenchment from race-based remedy, that has caused many scholars and activists who viewed the approach as flawed to continue to support the diversity rationale. Despite the criticism in this Essay, I too concede that Justice Powell's opinion has been critical to the preservation of affirmative action in higher education. What was gained with Justice Powell's deployment of the diversity rationale was a way to consider race, however opaquely, in admissions processes. What was lost was an ability to perform admission reviews with a strong focus upon the specific work race has done to limit opportunity and negatively shape experiences for people of color. The approach also valorized the holistic review of individuals in a manner that provided no incentive for discussing systemic or institutional forms of bias. Instead, diversity — or difference of life experience itself, irrespective of the conditions that produced it — was primarily understood as a tool for enhancing the educational environment and promoting First Amendment goals.

In jurisdictions where ballot initiatives did not disrupt the ability of States to consider race,⁹² then, one could argue that whatever the shortcomings of the diversity rationale, it was a legally sanctioned tool that many universities employed. The diversity rationale has been beneficial for ensuring greater inclusion, even if the justification for considering race was dissociated from histories of racial oppression.⁹³ Given that diversity is once again under attack, it is at least worth considering what should be done if the diversity rationale falls. To the extent our current moment is one of reconsideration, there is an

affirmative action). See *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., concurring in part & dissenting in part); *Fisher v. Univ. of Tex.*, 570 U.S. 279, 315 (2013) (Thomas, J., concurring); *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2215 (Roberts, C.J., dissenting); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007); *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). On the question of when, if at all, race should be considered, Justice Thomas claimed in his dissenting opinion in *Fisher* that race should rarely if ever be considered. He provided as an example of an exception, situations involving national security. *Fisher*, 570 U.S. at 316-17 (Thomas, J., dissenting) (citing *Korematsu v. United States*, 323 U.S. 214 (1944) as support for this claim).

⁹² For example, California (Proposition 209 (1996)), Washington (Initiative 200 (1998)), Nebraska (Initiative 424 (2008)) and Michigan (Amendment 2 (2006)) all passed laws to limit the consideration of race in employment, admissions and government contracting. For a discussion of these initiatives, see Barnes, Chemerinsky & Onwuachi-Willig, *supra* note 12, at 282-83; Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1075, 1092-93 (2009).

⁹³ See *supra* Part III.A.

opportunity to rethink entirely how race should be evaluated within admission processes. The course of action I will propose, however, is neither likely to be endorsed by the Court nor even politically feasible. What follows is a discussion of a course that is preferred, irrespective of criticisms or concerns speaking to what is viable.

2. Arguments in Favor of Deploying a More Radical Race Consciousness in Admissions?

In American politics, progressives must not only cling to redistributive ideals, but also fight for those policies that — out of compromise and concession — imperfectly conform to those ideals. Liberals who give only lip-service to these ideals . . . or reject the policies as they perceive a shift in the racial bellwether, give up precious ground too easily.

Cornel West⁹⁴

While I have been critical of the limits of the diversity rationale, my goal here has not been to abandon affirmative action due to likely shifting political winds and court determinations. Though I understand the need for “compromise and concession” around redistributive policies,⁹⁵ the primary premise of this Essay is to assert whatever approaches replace the diversity rationale should be stridently more race-conscious. There are many ways one might evaluate the advisability of such a turn in higher education admissions decisions. Within the limits of an Essay-length exploration of the *Bakke* case, I will raise three. First, arguments for adopting stronger forms of race consciousness should be examined against whatever one sets as goals for such approaches, especially given the particular weaknesses of the diversity rationale. Though goals may vary, a primary tension exists between designing approaches that seek to be as palatable as possible to courts and legislatures versus ones that focus on serving the ends of racial justice.⁹⁶ One might argue this was the very trade-off involved in Justice Powell’s compromise in *Bakke*.

⁹⁴ See *Race, Liberalism, and Affirmative Action*, AM. PROSPECT (Spring 1992), <https://prospect.org/article/race-liberalism-and-affirmative-action-0> (providing Cornel West’s response to a Paul Starr essay on the benefits and costs of affirmative action).

⁹⁵ See *id.*

⁹⁶ See Daniel I. Morales, *A Matter of Rhetoric: The Diversity Rationale in Political Context*, 10 CHAPMAN L. REV. 187, 187 (2006) (“Instead of analyzing affirmative action in the shadow of platonic notions of justice, propriety, or fairness, legal academics should consider what race-based remedies are feasible in light of current political leanings . . .”).

As I indicated above,⁹⁷ neither many federal courts nor our current politically-divided U.S. Congress are likely to countenance stronger forms of race-conscious review. Polls, after all, indicate that though support is divided along racial lines, even respondents who generally believe in equality reject affirmative action policies.⁹⁸ Absent, however, a federal prohibition on doing so, states may continue to experiment with considerations of race in admissions, and could adopt evaluation processes that would understand efforts at inclusion as necessarily linked to prior histories of racial injustice.

Second, one might ask, in the world where many would continue to oppose fixed targets for inclusion or a quota system,⁹⁹ whether a greater focus on race-conscious evaluation can actually lead to an increase in admissions from among underrepresented groups. This is an especially relevant question given that scholars were concerned with whether the diversity rationale could achieve the inclusiveness associated with traditional affirmative action programs.¹⁰⁰ Even if one

⁹⁷ See *supra* notes 90–91 and accompanying text.

⁹⁸ See, e.g., Scott Jaschik, *White Perceptions of Affirmative Action*, INSIDE HIGHER ED (Oct. 30, 2017), <https://www.insidehighered.com/admissions/article/2017/10/30/survey-draws-attention-white-perceptions-affirmative-action> (analyzing Gallup Poll data over several years indicating that Non-Hispanic Whites viewed affirmative action programs less favorably than Blacks and Hispanics (data collected between 2002–2013) and race-based admissions to college less favorably than Blacks (data collected between 2004 and 2013)); Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, GALLUP (July 8, 2016), <https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx> (citing to another Gallup poll taken after the *Fisher II* ruling, finding that sixty-five percent of Americans disapproved of the Court's decisions in college admissions cases and half as many Whites as Blacks (twenty-two versus forty-four percent) believed race or ethnicity should be considered in admissions). For a discussion of views on affirmative action and Asians and Pacific Islanders, see W. Carson Byrd, *Most White Americans Will Never Be Affected by Affirmative Action. So Why Do They Hate It So Much?*, WASH. POST (Oct. 18, 2018), https://www.washingtonpost.com/nation/2018/10/19/most-white-americans-will-never-experience-affirmative-action-so-why-do-they-hate-it-so-much/?utm_term=.49251984f34f (discussing the ongoing litigation against Harvard University based on its admissions policies and citing to recent survey data indicating that sixty percent of Asians favored affirmative action, but the numbers were eighty percent for Japanese Americans, thirty-eight percent for Chinese Americans, and that “[a]s a whole, Asians and Pacific Islanders are slightly more likely to have no opinion at all on affirmative action than to think it is a bad thing”).

⁹⁹ Justice Powell and critics of affirmative action were offended by quotas. The practice, however, which is just one approach to achieving inclusion, has not been completely vilified. See BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 11–13, 28–31 (1996) (discussing inclusion goals as “quota-like” but arguing they are defensible all the same).

¹⁰⁰ See Jones, *supra* note 71, at 172 (2005) (posing the question: “Can the diversity argument achieve what traditional affirmative action sought to secure, that is, broad-

excludes firm set-asides as a remedy, in systems employing stronger forms of race-conscious review, measuring group successes can be given greater priority. With a focus on group access, one goal could be that application processes at least yield diversity and inclusion numbers roughly consistent with demographic representation of minority groups within the applicant pool. Overly focusing on group numbers, by contrast, was largely inconsistent with goals of the diversity rationale, where considerations of race were hyper-individualized. Consider, for example, the following data point: “Even with existing race-sensitive admissions practices, black and Hispanic students represent only 6 percent and 13 percent of students in the most selective colleges and universities (they make up 15 percent and 22 percent of the traditional college-age US population).”¹⁰¹ One could argue about the appropriateness of using, local, state, regional or national pools, but with stronger forms of race-conscious review, at least arguments about demographically representative inclusion could be on the table.

Finally, one might question whether more robust forms of race-conscious review will serve the ends of promoting interracial understanding. It is at least arguable that race-conscious evaluation would be helpful for encouraging frank discussions of how race bias does not operate universally. Depending on one’s racial group, forms of bias — explicit and implicit — can work quite differently.¹⁰² Being able to meaningfully explore these important differences in life experiences across race, should result in improved race relations and a better educational environment. For example, in the 1950s, psychologist Gordon Allport, proposed a theory of intergroup contact, the premise of which was under certain conditions, interpersonal contact was one method to assist in reducing prejudice between Whites and minorities and to help members of various racial groups to appreciate different perspectives regarding how they live.¹⁰³ One study also found that people exposed to interracial neighborhoods as

based inclusion of historically underrepresented groups?”).

¹⁰¹ Matthew Chingos & Victoria Lee, *Forty Years After the Bakke Decision, What’s the Future of Affirmative Action in College Admissions?*, URB. INST. (June 28, 2018), <https://www.urban.org/urban-wire/40-years-after-bakke-decision-whats-future-affirmative-action-college-admissions>.

¹⁰² See generally IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., 2012).

¹⁰³ See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (Anchor Book 1958).

children are more inclined to be a part of interracial social groups, to attend multiracial churches, and to marry partners of different races.¹⁰⁴

Other studies of contact theory, however, have suggested mixed results in terms of the benefits of such contact. For example, one recent study found that anticipated increases in diversity also lead to greater feelings of threat.¹⁰⁵ Whether one strongly believes in contact theory or not is ultimately not the question of greatest importance. If interracial contact is to continue to be understood as a benefit of admitting students of color to institutions of higher learning, then doing so with a greater focus on race consciousness—an explicit consideration of differential racial experiences and histories—is much more likely than the diversity rationale to promote the ends of racial understanding.

To be clear, the questions I posed regarding how to assess the benefits of adopting more aggressively race-conscious approaches to admissions could be applied to whatever approach, if any, that will follow the diversity rationale. Even if one is not willing to endorse stronger forms of race-conscious review, I still want to push back against replacing the diversity rationale with other universalist methods of evaluation. Many, for example — whether they have supported the diversity rationale or not — would suggest that affirmative action policies moving forward should be premised upon socioeconomic class. Socioeconomic class is an attractive classification because it is race-neutral but will still disproportionately create opportunities for students of color.¹⁰⁶ Though I have criticized this fact elsewhere,¹⁰⁷ class is also a classification that receives only rational

¹⁰⁴ See Michael O. Emerson et al., *Contact Theory Extended: The Effects of Prior Racial Contact on Current Social Ties*, 83 SOC. SCI. Q. 745, 757-58 (2002).

¹⁰⁵ See Maureen A. Craig et al., *The Pitfalls and Promise of Increasing Racial Diversity: Threat, Contact, and Race Relations in the 21st Century*, 27 CURRENT DIRECTIONS IN PSYCHOL. SCI. 188, 191 (2018).

¹⁰⁶ In support of class-based affirmative action, see RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* 83-120 (1996). *But see* Deborah C. Malamud, *Assessing Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 452 (1997) (maintaining that “class-based affirmative action is likely to be a poor tool for achieving economic equality in higher education”); Tung Yin, *A Carbollic Smoke Ball for the Nineties: Class-Based Affirmative Action*, 31 LOY. L.A. L. REV. 213 (1997) (arguing that “class-based affirmative action, while theoretically justifiable, is empirically doomed and should be rejected regardless of how one feels about race-based affirmative action”); Sherrilyn A. Ifill, *Opinion, Race vs. Class: The False Dichotomy*, N.Y. TIMES (June 13, 2013), <https://www.nytimes.com/2013/06/14/opinion/race-vs-class-the-false-dichotomy.html> (critiquing the idea that “class, not race, should be the appropriate focus of university affirmative-action efforts”).

¹⁰⁷ Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and*

basis review, which means government decisions based on class would be difficult to challenge.¹⁰⁸ Such an approach, however, has several shortcomings. First, though students of color are overrepresented among the poor, the largest number of poor students are white.¹⁰⁹ Second, recent data suggests relying upon class would not, in fact, yield the minimal level of racial diversity colleges and universities desire.¹¹⁰ Finally, the turn toward class would suffer the same deficit as the diversity rationale; it would allow a remedy that should seek to cure the effects of past and current racial discrimination to be applied without addressing the important role race played in structuring opportunity or the lack thereof.¹¹¹ Given the ways that claims about post-race have gained traction in our recent history,¹¹² it is likely considerations of socioeconomic class would be used to minimize any

Class in Constitutional Jurisprudence, 72 LAW & CONTEMP. PROBS. 109, 128-30 (2009).

¹⁰⁸ Barnes & Chemerinsky, *Future Equal Protection Doctrine*, *supra* note 24, at 1076 (“First, the rigid levels of scrutiny mean that unless alleged government discrimination receives heightened scrutiny the odds are overwhelming that the government will prevail.”).

¹⁰⁹ Susan Dynarski, *At Elite Colleges, Racial Diversity Requires Affirmative Action*, N.Y. TIMES (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/business/at-elite-colleges-racial-diversity-requires-affirmative-action.html> (“But this approach can’t do the job of race-based affirmative action for a very simple reason: Most poor people are white. Putting a thumb on the scale for low-income students will help far more white students than black or Hispanic students.”).

¹¹⁰ One recent study led by Sean Reardon of the Stanford Center on Education Policy Analysis found that affirmative action based on parents’ income, education, and occupation could produce results similar to race-based affirmative action only if it were combined with race-targeted recruiting, which would likely be costly. See Sean Reardon et al., *What Levels of Racial Diversity Can Be Achieved with Socioeconomic Based Affirmative Action? Evidence from a Simulation Model*, 37 J. POL’Y ANALYSIS & MGMT. 630, 654 (2018); see also Long, *supra* note 25, at 174 (using proxies for race in university admissions does not work because characteristics that positively correlate with collegiate success negatively correlate with the likelihood of being a member of an underrepresented group); Emily Deruy, *Are There Good Alternatives to Affirmative Action?*, ATLANTIC (June 24, 2016), <https://www.theatlantic.com/education/archive/2016/06/are-there-good-alternatives-to-affirmative-action/488567>.

¹¹¹ In fact, one interpretation of the decision in the *Fisher II* case was that rather than focusing on the goal of remedying effects of historical racial subordination, the University of Texas attempted to justify its admissions policies as a means to ensure its ability to enroll more privileged students of color, or to ensure economic diversity within racial diversity. Eang L. Ngov, *Qualitative Diversity: Affirmative Action’s New Reframe*, 2017 UTAH L. REV. 423, 423 (2017).

¹¹² See, e.g., Mario L. Barnes, Erwin Chemerinsky & Trina Jones, *A Post-Race Equal Protection?*, 98 GEO. L.J. 967 (2010); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589 (2009); Ian Haney-Lopez, *Is the “Post” in Post-Racial the “Blind” in Color-Blind?*, 32 CARDOZO L. REV. 807 (2010); Cedric Merlin Powell, *The Rhetorical Allure of Post-Racial Process Discourse and the Democratic Myth*, 2018 UTAH L. REV. 523 (2018).

claim that race was also salient or otherwise worthy of consideration in application processes.

Our prior history with race-conscious remedies in this country suggests that we should now be proposing some other modest program of race consideration in higher education to stave off the alternative of fully embracing race-neutrality. To seek to once more to construct a vehicle to discuss race and disadvantage in palatable terms, however, would be a backward-focused endorsement of the status quo. Such an approach, I argue, is wrong-headed. In this moment of reconsideration, I hope instead to propel us forward onto a new course and into a new discourse. Within this context, forward involves scholars and activists advocating for more radical forms of race-conscious review in higher education admissions. In these review processes, admission professionals would seek to account for historical racial oppression, evaluate the gaps arising out of present racial hierarchies, and allow students to thoroughly describe within their applications the full experience of “raced” living.¹¹³ Under this approach — which would completely eschew any notion that America is colorblind or post-race — it would be impossible to divorce racial remedies from conversations of racial realities. It would also require us to replace conversations regarding individual blame with considerations of collective responsibility. Slavery, forms of racial and national origin exclusion, and intergenerational transfer of privilege and wealth based on race have all operated pervasively within our society for centuries. It seems inconceivable that we should now ask unhelpful questions about personal responsibility for policies targeting the legacies and present-day manifestations of institutional and structural inequalities. However uncomfortable race-conscious approaches are in terms of forcing people to realize that race still matters and often carries heavy consequences, it is certainly more aligned with the world “that is” than the world that people hope “will come to be.”¹¹⁴

¹¹³ See Barnes, Chemerinsky & Onwuachi-Willig, *supra* note 12, at 288-95 (discussing how admissions processes should allow students to describe the multiple ways in which their lives have been affected by race as way to demonstrate how much they have overcome). On the use of “race” as a verb, see Kendall Thomas, *The Eclipse of Reason: A Rhetorical Reading of Bowers v. Hardwick*, 79 VA. L. REV. 1805, 1806-07 (describing race as a verb and noting, “we are ‘raced’ through a constellation of practices that construct and control racial subjectivities”).

¹¹⁴ Barnes, *supra* note 31, at 2101-02.

I do understand the dangers of embracing stronger forms of race-conscious review.¹¹⁵ If one acknowledges the history and continuing consequences of racism, then more and different types of remedies should logically be placed on the table. Though Justice Powell and many other commentators abhor quotas, this resistance seems misplaced if one acknowledges that gaps in preparation and accomplishment between racial groups can be absolutely traced to societal discrimination of a kind that was often sanctioned by the state. Moreover, fear of quotas presumes a level playing field in higher education admissions. For years, there have been special admissions processes for legacies or persons who possess unique talents in athletics, the arts, or other areas.¹¹⁶ More recently, we have seen a gaming of the system by economically advantaged individuals who have been able to gain admission for their children by subverting typical university processes and rules.¹¹⁷ Even though these examples undermine claims to admissions processes operating in a consistently fair manner, I am fine with schools using flexible rather than hardened targets for minority admission. The literature, however, is clear that effective inclusion requires the enrollment of a critical mass of

¹¹⁵ Though not discussed at length in this Essay, there are certainly legitimate questions that even scholars who support such policies identify as troubling for race-conscious review processes. See, e.g., Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007) (rebutting arguments that the children of black immigrants should not receive similar considerations for affirmative action in university admissions as the descendants of slaves); Mark Nadel, *Retargeting Affirmative Action: A Program to Serve Those Most Harmed by Past Racism and Avoid Intractable Problems Triggered by Per Se Racial Preferences*, 80 ST. JOHN'S L. REV. 324 (2006) (discussing how to structure a race-conscious affirmative program that avoids the problems of using per se racial preferences).

¹¹⁶ On criticism of such policies see Richard D. Kahlenberg, *A New Call to End Legacy Admissions*, ATLANTIC (Feb. 14, 2018), <https://theatlantic.com/education/archive/2018/02/when-affirmative-action-benefits-the-wealthy/553313> ("About three-quarters of *U.S. News & World Report's* top 100 universities give a boost in admissions to the relatives of alumni."); see also Michele Hernandez, *In College Admissions, Athletes Are the Problem*, N.Y. TIMES (Mar. 27, 2015, 4:50 PM), <https://nytimes.com/roomfordebate/2011/11/13/why-do-top-schools-still-take-legacy-applicants/in-college-admissions-athletes-are-the-problem> (describing admission of athletes as a larger problem than legacy admits).

¹¹⁷ See, e.g., Jennifer Medina et al., *Actresses, Business Leaders and Other Wealthy Parents Charged in U.S. College Entry Fraud*, N.Y. TIMES (Mar. 12, 2019), <https://nytimes.com/2019/03/12/us/college-admissions-cheating-scandal.html> (detailing federal racketeering indictments for wealthy parents who engaged in fraud in admissions processes at elite schools by paying to have their children recruited in sports they did not play and falsifying standardized test results).

students of color.¹¹⁸ Quotas are not the only way to achieve critical mass, but we cannot pretend that programs can be successful if they invest in tokenism.

The more realistic review of race advocated for in this Essay is consistent with the type of review that was preferred by the four Justices in *Bakke* that did not find the Special Admissions program to be a violation of Title VI or the Equal Protection Clause. Such an approach would also be consistent with several foundational tenets of Critical Race Theory (“CRT”),¹¹⁹ and there is an important interrelatedness between *Bakke* and the rise of CRT. The case has been described as “the doctrinal marker of the times that shaped this generation of critical race theorists.”¹²⁰ Though the CRT tenets are neither fixed nor finite,¹²¹ an overwhelming goal of the movement was

¹¹⁸ See, e.g., Gregory M. Anderson et al., *The Search for a Critical Mass of Minority Students: Affirmative Action and Diversity at Highly Selective Universities and Colleges*, 14 GOOD SOC'Y 51 (2005); Yuvraj Joshi, *Measuring Diversity*, 117 COLUM. L. REV. ONLINE 54 (Mar. 13, 2017), <https://columbialawreview.org/content/measuring-diversity>.

¹¹⁹ See RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 3 (3d ed. 2017) (“The critical race theory (CRT) movement is a collection of activists and scholars engaged in studying and transforming the relationship among race, racism, and power.”).

¹²⁰ Charles R. Lawrence III, *Foreword* to CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY xiv (F. Valdes et al. eds., 2002). For completeness, a larger portion of that commentary is provided:

Kimberlé Crenshaw locates Critical Race Theory's conception in the late 1980s It was a period of retrenchment, an initial assault against gains made during the Civil Rights Movement. This somewhat younger group of progressive colored law teachers were part of a militant resistance Their political consciousness and intellectual agenda were forged in the activism that opposed visions of race, racism, and the law that were dominant in this post-civil-rights period. The *Bakke* case is the doctrinal maker of the times that shaped this generation of critical race theorists. They were a part of the organic grassroots movement that waged an effective fight against the backlash embodied in *Bakke*.

Id.

¹²¹ The following list includes a number of the foundational commitments of CRT:

Below, we list ten empirical arguments that represent CRT commitments. Although these arguments are not exhaustive of the “truths” that underwrite CRT, they reflect key modernist claims of the theory on which there is consensus among practitioners in the United States.

1. Racial inequality is hardwired into the fabric of our social and economic landscape.

to use law and policy to eliminate the vestiges of racial subordination. Scholarship within this tradition sought to do so in a manner that privileged remedies over claims to colorblindness and post-race. They also endorsed methods that were particularly germane to this debate. For example, critical race scholars have strongly resisted claims related to “neutrality”¹²² and “merit” that are often deployed as a defense against inclusion in affirmative action debates.¹²³ One of the sustaining

2. Because racism exists at both the subconscious and conscious levels, the elimination of intentional racism would not eliminate racial inequality.
3. Racism intersects with other forms of inequality, such as classism, sexism, and homophobia.
4. Our racial past exerts contemporary effects.
5. Racial change occurs when the interests of white elites converge with the interests of the racially disempowered.
6. Race is a social construction whose meanings and effects are contingent and change over time.
7. The concept of color blindness in law and social policy and the argument for ostensibly race-neutral practices often serve to undermine the interests of people of color.
8. Immigration laws that restrict Asian and Mexican entry into the United States regulate the racial makeup of the nation and perpetuate the view that people of Asian and Latino descent are foreigners.
9. Racial stereotypes are ubiquitous in society and limit the opportunities of people of color.
10. The success of various policy initiatives often depends on whether the perceived beneficiaries are people of color.

Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 151 (2014); see also DELGADO & STEFANCIC, *supra* note 119, at 3 (“[C]ritical race theory questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law”); Mario L. Barnes, *Empirical Methods and Critical Race Theory: A Discourse on Possibilities for a Hybrid Methodology*, 2016 WIS. L. REV. 443 (2016) (tracing the origins and evolution of “empirical methods and critical race theory (e-CRT)”).

¹²² See, e.g., Carbado & Roithmayr, *supra* note 121, at 156-58.

¹²³ The following description is representative of the CRT position on merit:

CRT scholars working on the question of merit in American society generally, and at the academic or professional level in particular, are preoccupied with how the concept is socially constructed to serve the dominant group and maintain power structures, while relegating minority groups to subordinate positions. . . . For CRT scholars, merit ends up becoming ‘white people’s affirmative action.’

methods to arise out of CRT is the endorsement of the importance of narratives, counter-stories in particular, to challenge the received wisdom in universalist approaches to evaluating the harms of considering race.¹²⁴ Though applying more aggressively race-conscious practices undermines some “interest convergence” in the admissions space,¹²⁵ it meets so many of the other tenets of CRT.

CONCLUSION

In his path-breaking book *Racism Without Racists*,¹²⁶ Duke Sociologist Eduardo Bonilla Silva explicates how it is that racism persists within the United States, even as most people describe themselves as harboring no race bias and not inclined to engage in discriminatory conduct. To my mind, the diversity rationale fueled the rise of an associated phenomena in higher education admissions — schools being able to consider race as a part of their process without ever acknowledging histories of racial oppression. In other words, what I have described as evaluative processes that have been “race conscious light” could also be thought of as processes that focus on race without racism. Given how race so thoroughly shapes the life experiences of so many in the United States,¹²⁷ it would be shortsighted to suggest there are no benefits to this consideration. The diversity rationale, which structures the consideration of race under the guise of the value of considering multiple forms of difference more generally, is likely the most palatable form of assessment available. It seems odd, then, that the diversity rationale has been continually

MATHIAS MÖSCHEL, *LAW, LAWYERS AND RACE: CRITICAL RACE THEORY FROM THE UNITED STATES TO EUROPE* 64-65 (2014) (citation omitted); see also Nancy Levit, *Critical of Race Theory: Race, Reason, Merit, and Civility*, 87 GEO. L.J. 795 (1999).

¹²⁴ On CRT’s use of narrative and counter-stories, see generally Mario L. Barnes, *Black Women’s Stories and the Criminal Law: Restating the Power of Narrative*, 39 UC DAVIS L. REV. 941, 951-58 (2006); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (examining the use of stories in the struggle for racial reform); Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 LAW & SOC’Y REV. 515, 546 (2010).

¹²⁵ See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (advancing that gains for people of color are more likely when they are produced through approaches that also produce advantages to Whites).

¹²⁶ EDUARDO BONILLA-SILVA, *RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN AMERICA* 1-7, *passim* (5th ed. 2017).

¹²⁷ See Barnes, Chemerinsky & Jones, *supra* note 112, at 982-92 (looking at the impact of race on poverty, income, home ownership, employment, education and criminal justice outcomes in the United States).

under attack since its adoption in *Bakke* and always seemingly one Court decision away from annihilation.

If the current challenges to affirmative action are to, in fact, be the undoing of the diversity rationale, then it is unhelpful to argue for replacing it with other approaches that privilege palatability and inclusion that are devoid of an appropriate historical contextualization of race and racism. As I suggested above, what I have argued for here is very unlikely to be embraced by federal courts. For my purposes, that likelihood is of little consequence. If we are to reset the public debate on justifications for affirmative action, then we should let accountability and audacity, not acceptability, be our guide. In this country, despite hopeful claims regarding equality, race matters; it always has. To deny otherwise is not only to negate a history of struggle, but also to refute that race helps to explain contemporary differences between the haves and have-nots.

If there is to be a disruption in law that seeks to curtail race-conscious reviews in university admissions processes, then arguments in favor of affirmative action should speak truth to power. The stronger form of race-conscious review endorsed here, would reference histories of racial exclusion, define affirmative action as its remedy, and force people to acknowledge that race benefits programs should not be solely gauged in terms of individual merits and deserts. It is unrealistic to expect people who have not benefited from intergenerational race privilege to have achievements that look just like those who have. It is also overly ambitious to expect those that have reaped the typically unacknowledged benefits of race privilege to forgo it without a challenge. Given how race confers privilege and disadvantage, it is problematic to structure admissions decisions around questions of whether a non-selected individual violated anyone's rights. It is equally problematic to only allow states to provide race-conscious benefits where there is smoking gun proof of the states' continuing to explicitly discriminate within that domain. We have known for some time that discrimination now operates in pervasive and largely systemic ways. Just because the Court is not ready to accept the truth of this account, does not mean we should forgo these arguments. However untenable this approach to affirmative action is from a legal perspective, it has significant value from the perspective of racial and social justice. Whatever the approach lacks in efficacy, then, I hope it makes up for in inspiration and indignation.

This Essay began by referencing freedom songs from the Civil Rights Movement. Though many laud the movement for its

accomplishments, for much of it, there was little reason to believe that the struggle would result in the types of significant changes it achieved. The songs encouraged perseverance and the inevitability of justice. At this moment, we need these commitments once more. There is little information on what the next forms of racial benefits programs in education — if they exist at all — will look like. If we look to what has transpired with race benefits programs in employment and contracting,¹²⁸ the likely outcome is that racial consideration will also be severely restricted in assessing access to educational opportunity. Whatever the outcome and however difficult it renders access to higher education for underrepresented students of color, there is value in the struggle. We cannot build that struggle on a halfhearted approach to inclusion. On this moment of anniversary and of potential doctrinal shift, those of us committed to the project of inclusion must refrain from turning toward another ill-suited but palatable solution. We should move forward in a manner that is truthful about the history of racial subordination in this country. The next turn should be toward tactics that include the articulation of current racial struggles and demand atonement for past disenfranchisement. Despite obstacles, we should do so with urgency, once again fueled by the spirit of unseen but inevitable racial justice and the encouraging message found in the lyrics of another freedom song:

Know the one thing we did wrong
Stayed in the wilderness far too long
Know the first thing we did right
Was the day we started to fight
Keep your eye on the prize hold on, hold on

Keep Your Eyes on the Prize¹²⁹

¹²⁸ See *supra* note 40 and accompanying text.

¹²⁹ PETE SEEGER, *Keep Your Eyes on the Prize*, on THE ESSENTIAL PETE SEEGER (Sony Legacy Recordings 2013).