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How Quickly We Forget: The Short and Undistinguished Career of Affirmative Action

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**HOW QUICKLY WE FORGET:
THE SHORT AND UNDISTINGUISHED CAREER OF AFFIRMATIVE ACTION**

Robert A. Parrish*

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I. INTRODUCTION

Diversity initiatives in higher education, also known as affirmative action, are nearing their nadir.¹ This should come as little surprise for those who have been closely following the jurisprudence and the progression of events in this area. Affirmative action initiatives have been under attack since their very inception, and they now sit teetering on the brink of being declared unconstitutional after the United States Supreme Court’s decision in *Fisher v. University of Texas at Austin*.²

Beginning with its 1978 decision in *Regents of the University of California v. Bakke*,³ the Supreme Court has gradually and consistently whittled away higher education diversity programs, leaving them in a vulnerable and legally precarious position.⁴ The Court’s recent decision in *Fisher*⁵ marks the culmination of its jurisprudential move away from even a reluctant endorsement of higher education diversity programs to what will likely amount to an outright prohibition of such programs on the grounds that they are unconstitutional and violate equal protection under the law.⁶

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1. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2421 (2013). In *Fisher*, the Court required the University of Texas to present “sufficient evidence” that their application system was narrowly tailored. *Id.* Additionally, the Court appeared unconvinced by the argument that diversity is a compelling state interest that would satisfy strict scrutiny. See *id.* at 2419. As discussed below, it now appears unlikely that race-conscious admissions schemes would meet this high burden. See *infra* Part II.

2. 133 S. Ct. 2411.

3. 438 U.S. 265 (1978).

4. See *id.* at 271 (affirming the judgment of a state court declaring the University of California’s special admissions program unlawful).

5. See *Fisher*, 133 S. Ct. at 2422.

6. See *infra* Part II.

Two subtle but important problems arise with such a turn in the Court's jurisprudence. The first problem is one of definition: the Court's definitions of equal protection under the Fourteenth Amendment and equal opportunity provided by the Civil Rights Act of 1964 have become unmoored from their historical origins and purposes.⁷ While both provisions were designed to permit individuals from historically marginalized groups (typically racial minorities) greater opportunity for full participation in American society⁸—thereby fostering more successful outcomes for members of those groups—the current definitions of these provisions more often benefit individuals who are not members of minority groups to the detriment of the marginalized groups. Thus, ironically, by defining the aim of these provisions to promote a “colorblind” society,⁹ these definitions have only served to further marginalize the original groups the Fourteenth Amendment and Civil Rights Act of 1964 were intended to assist.¹⁰

An additional problem, which will serve as the focus of this Essay, is the practical and sociological effects such a shift away from affirmative action will cause. In the current era of increased globalization and competition for jobs, it is incumbent upon those seeking to enter the middle class to attain a college education.¹¹ A college degree has become a prerequisite for all but the most menial jobs.¹² Thus, any restriction on the ability of minority students to gain access to university education and training will also limit the number of minorities who will gain entry into middle-class American society.¹³ Such

7. See, e.g., *Bakke*, 438 U.S. at 398 (Marshall, J., concurring in part and dissenting in part) (noting the purpose of the Fourteenth Amendment and the Civil Rights Act was to remedy the effects of past discrimination).

8. See *id.*

9. See *Bakke*, 438 U.S. at 289–90 (“The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not afforded the same protection, then it is not equal.”).

10. See *supra* notes 7–8 and accompanying text (noting that the Fourteenth Amendment and Civil Rights Act of 1964 were enacted for the benefit of minority groups); see also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 784 (1985) (noting that the passage and consideration of race-conscious provisions—such as the 1864 and 1865 Freedmen’s Bureau bills, the 1866 Freedmen’s Bureau Act, the 1867 Relief Legislation for African-Americans, as well as legislation passed by the Freedmen’s Bureau between 1868 and 1870—alongside the Fourteenth Amendment, demonstrate an intent for the constitutional provision to permit race-conscious, ameliorative measures and ensure the constitutionality of the provisions); CONG. GLOBE, 39TH CONG. 1ST SESS. 2459 (1866) (statement of Rep. Stevens) (introducing the Fourteenth Amendment in the House of Representatives and characterizing its purpose as “the amelioration of the condition of the freedmen”).

11. See THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK 75 (2011) (quoting DAVID H. AUTOR & LAWRENCE F. KATZ, GRAND CHALLENGES IN THE STUDY OF EMPLOYMENT AND TECHNOLOGICAL CHANGE: A WHITE PAPER PREPARED FOR THE NATIONAL SCIENCE FOUNDATION 1, available at http://www.aeaweb.org/econwhitepapers/white_papers/David_Autor.pdf (2010)) (stating that today’s “labor market . . . greatly rewards workers with college and graduate degrees but is unfavorable to the . . . less-educated”).

12. See *id.*

13. See *id.*

restrictions on minorities would create a paradoxical result: the very constitutional and legislative tools meant to provide marginalized groups with greater access to education—and, by extension, upward mobility—will be the means by which these groups remain mired in a position at the bottom rungs of the socioeconomic ladder.¹⁴ Furthermore, the colorblind society that the conservative wing of the United States Supreme Court seeks to construct through its jurisprudence in this area will produce a society that is anything but colorblind.¹⁵ Membership in a racial minority group will, in large part, again become a significant determinant of one's place within the larger society.

Part II of this Essay identifies the roots of the Supreme Court's jurisprudential shift in the area of affirmative action and traces the evolution of its philosophy on creating a colorblind society. Part III of this Essay examines some of the actual sociological consequences of this evolution in the realm of college admissions and extrapolates what these shifts will mean for minorities as they attempt to enter the workforce and middle class. To conclude, this Essay suggests a means for reaffirming affirmative action in a manner that comports with its original aims.

II. THE SLOW ONSET OF BLINDNESS

Since the late 1970s, the Supreme Court has been intent on slowly dismantling affirmative action programs in higher education.¹⁶ In *Bakke*, the Court took its first steps to limit affirmative action programs by concluding that, with regard to the Equal Protection Clause, colorblindness of the law has supplanted any need to redress past discriminatory practices or provide an effective path of entry for minorities to elite colleges and universities.¹⁷ The result, however, is that what was once a tool for the greater integration of the races has become the principal means for facilitating their separation.

14. See *supra* notes 7–8 and accompanying text (noting that the Fourteenth Amendment and Civil Rights Act of 1964 were passed for the benefit of minority groups).

15. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan, J., dissenting) (“[C]laims that law must be ‘color-blind’ or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality. . . . [One cannot] let color blindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”).

16. See *id.* at 320 (affirming the invalidity of the University of California's special admissions program and stating that “when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest”); *Grutter v. Bollinger*, 539 U.S. 306, 336–37 (2003) (holding that universities must “engage[] in a highly individualized” review of each applicant).

17. See *Bakke*, 438 U.S. at 320 (“But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest.”).

The *Bakke* Court held that, although student body diversity was a compelling state interest, such measures must be narrowly tailored and cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.”¹⁸ However, the Court approved the consideration of race as a “‘plus’ in a particular applicant’s file. . . .”¹⁹

Roughly twenty-five years after deciding *Bakke*, the Court further restricted the methods by which race may be used in making admissions decisions at institutions of higher education in *Grutter v. Bollinger*.²⁰ After *Grutter*, schools could no longer use “plusses” or “bonuses” on the basis of one’s membership in a racial or ethnic minority; instead, schools must engage “in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”²¹ However, the Court again recognized in *Grutter* that “student body diversity is a compelling state interest that can justify using race in university admissions.”²²

While the majority in *Grutter* predicted, and hoped quite optimistically, that such racial preferences would no longer be necessary in the twenty-five years following its decision,²³ Justice Thomas artfully interpreted the majority’s statement in his dissent as a holding that provided a twenty-five year life span for such programs before they would become illegal.²⁴ Thus, such race-conscious initiatives would seemingly be up for reconsideration by the Court in twenty-five years, and the clock was set for their ultimate demise in 2028—at which time they would either be deemed no longer necessary or patently illegal.²⁵

Accordingly, the Court’s decision in *Fisher v. Texas* is all the more alarming and telling, given that the Court had seemingly granted such race-conscious admissions initiatives a reprieve only ten years earlier.²⁶ A cursory reading of *Fisher* illustrates how the membership of the Court has changed since its last review of a diversity program.²⁷ Further, the trajectory of its jurisprudence in

18. *Id.* at 315.

19. *Id.* at 317.

20. 539 U.S. 306.

21. *Id.* at 337.

22. *Id.* at 325.

23. *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”).

24. *Id.* at 351 (Thomas, J., concurring in part and dissenting in part) (“I agree with the Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years.”).

25. *See supra* notes 23–24 and accompanying text.

26. *See Grutter*, 539 U.S. at 343 (holding that universities may consider race in admissions decisions if such use is narrowly tailored); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2013) (holding that the university has the burden under strict scrutiny to show that its admissions process is narrowly tailored).

27. In terms of Court demographics, the composition of the Court has shifted quite dramatically since *Grutter*. Gone from the Court’s plurality upholding the University of Michigan Law School’s diversity initiatives are Justice O’Connor—who wrote the controlling opinion—

this area has shifted to such a degree that the Court may finally outlaw these measures.²⁸ The result in *Fisher* should come as no surprise, however, as it was presaged by the Court's decisions in *Grutter* and *Parents Involved in Community Schools v. Seattle School District No. 1*²⁹—another case involving educational diversity, but at the primary and secondary levels.³⁰

The first clues may be found in Justice Thomas's leading dissent in *Grutter*, in which he noted that while he wished "to see all students succeed whatever their color" and was sympathetic to "those who sponsor the type of discrimination advanced by the University of Michigan Law School," he refrained from supporting the diversity initiative under review.³¹ According to Justice Thomas, the Constitution neither "tolerate[s] institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination . . . [n]or does [it] countenance the unprecedented deference the Court gives to [higher educational institutions in] an approach inconsistent with the very concept of 'strict scrutiny.'"³² Justice Thomas also attacked the *Grutter* decision as something far less than a cogent legal analysis, and merely a response "to a faddish slogan of the cognoscenti."³³

The thrust of Justice Thomas's critique—and one echoed throughout the other dissenting opinions in *Grutter*³⁴—is that "[a] close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: [institutions of higher education have] a 'compelling interest in securing the educational benefits of a diverse student body.'"³⁵ Indeed, Justice Thomas argued that the Court had made "[n]o serious effort . . . to explain how

Justice Stevens, and Justice Souter. They have been replaced by Justices Alito, Kagan, and Sotomayor, respectively. Chief Justice Rehnquist, who cast his vote with the minority in *Grutter*, has been replaced by Chief Justice Roberts. Thus, Justice O'Connor's swing vote has been replaced with a more consistently conservative vote by Justice Alito. Further, due to her former role as Dean of Harvard Law School, Justice Kagan recused herself from *Fisher*. See *Fisher*, 133 S. Ct. at 2422. Therefore, even a superficial analysis of the Court's composition should put any person advocating for diversity initiatives in higher education—specifically, initiatives that take race into consideration—on alert to the real possibility that the Court, as it stands now, is poised to severely limit or do away with such programs in the very near future.

28. See *Fisher*, 133 S. Ct. at 2421. Although the Court did not explicitly forbid the use of race-conscious admissions systems in higher education with its ruling in *Fisher*, it is clear that the Court's requirement—that "sufficient evidence" must be presented to show a narrowly tailored admissions system—is a standard that, in the current Court's eyes, may be impossible to meet. *Id.*

29. 551 U.S. 701 (2007).

30. *Id.* at 710–11.

31. *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part).

32. *Id.*

33. *Id.* Further, Justice Thomas concluded quite forcefully that diversity itself "is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue." *Id.* at 354 n.3. Therefore, the institutional interest in diversity, according to Justice Thomas, is merely "aesthetic" and differs little from other choices, such as "the shape of the desks and tables in its classrooms," that these institutions might make. *Id.*

34. See generally *id.* at 346–95 (citations omitted).

35. *Id.* at 356.

these benefits [of diversity] fit with the state interests the Court has recognized or rejected as compelling.”³⁶

Ensnarled within the web of his own logic, Justice Thomas also insisted that “there is no pressing public necessity in maintaining a public law school at all and, it follows, certainly not an elite law school. Likewise, marginal improvements in legal education [on the basis of a diverse student body] do not qualify as a compelling state interest.”³⁷ Justice Thomas identified only two broad circumstances in which the state would have a compelling interest in using race-conscious criteria.³⁸ First, a state would have a compelling interest in remedying past discrimination for which the government itself is responsible.³⁹ In the eyes of Justice Thomas, the second category—which appears quite cataclysmic—would include “measures the State must take to provide a bulwark against anarchy, or to prevent violence.”⁴⁰

What is most troubling about *Fisher*—but predictable given the Court’s demographics—is that what once stood as a dissenting opinion expressing skepticism as to whether diversity could be considered a compelling state interest in *Grutter* now stands as a concurring opinion in *Fisher*.⁴¹ Thus, a majority of the Court is now unconvinced that diversity is a compelling state interest that would satisfy constitutional review under strict scrutiny.⁴² After *Fisher*, it seems unlikely that any diversity scheme taking race into account would pass muster under the Court’s current interpretation of the Equal Protection Clause as colorblind, under which all distinctions on the basis of race—whether ameliorative or pernicious—would be outlawed.⁴³ It appears that the only thing preventing the Court from making this pronouncement is the fact

36. *Id.* In his own dissent, Justice Kennedy was equally critical of the Court’s credulity, describing the majority’s review as “nothing short of perfunctory [in its acceptance of] the University of Michigan Law School’s assurances that its admissions process meets with constitutional requirements.” *Id.* at 388–89 (Kennedy, J., dissenting).

37. *Id.* at 357 (Thomas, J., concurring in part and dissenting in part).

38. *Id.* at 351 (“A majority of the Court has validated only two circumstances where ‘pressing public necessity’ or a ‘compelling state interest’ can possibly justify racial discrimination by state actors.”).

39. *Id.* at 351–52 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989)).

40. *Id.* at 353.

41. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422–33 (2013) (Thomas, J., concurring) (reiterating his opinion in *Grutter*).

42. *Id.* at 2419 (noting that although *Grutter* deferred to “a university’s ‘educational judgment that . . . diversity is essential to its educational mission,’” complete judicial deference was inappropriate, and the courts “should ensure that there is a reasoned, principled explanation for the academic decision.” (quoting *Grutter*, 539 U.S. at 328)).

43. See *id.* at 2428–29 (Thomas, J., concurring). Justice Thomas explained the colorblind theory of the Equal Protection Clause in his concurrence in *Fisher*:

The Constitution does not pander to faddish theories about whether race mixing is in the public interest. The Equal Protection Clause strips States of all authority to use race as a factor in providing education. All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination.

Id.

that “the parties [did] not ask the Court to revisit that aspect of *Grutter*’s holding.”⁴⁴ Nevertheless, while the colorblind approach was relegated to the minority in *Grutter*, it gained ascendancy in *Fisher*.⁴⁵ Although the approach has yet to achieve its fullest expression in the context of university admissions, the template for what is to come may be seen in the Court’s *Parents Involved* decision.

In *Parents Involved*, the minority opinion in *Grutter* became the plurality opinion—due to Justice O’Connor’s swing vote being replaced by Justice Alito’s vote—and sought to engrave the colorblind interpretation of the constitution into law.⁴⁶ *Parents Involved* was a consolidated challenge to the race-conscious student assignment plans of Louisville, Kentucky, and Seattle, Washington.⁴⁷ In each school district, students were assigned to schools in a manner that helped to ensure a predetermined, ideal racial balance for each school.⁴⁸

It was perhaps unsurprising that the Court invalidated each of these racial balancing plans, given that each school district sought to achieve such a balance through numerically predetermined percentages of white and non-white children.⁴⁹ And while both the University of Michigan Law School and the University of Texas have been careful to avoid assigning numerical guidelines for their race-conscious admissions policies,⁵⁰ *Parents Involved* sends a subtle, yet threatening message that even their attempts at achieving a “critical mass” may be in jeopardy.⁵¹

Referring to *Grutter* directly, the Court charted its likely path forward in one sentence.⁵² After describing the split nature of the *Grutter* decision, Chief

44. *Id.* at 2419.

45. While Justice Thomas originally espoused the colorblind approach in a dissenting opinion in *Grutter*, he more recently discussed it in a concurring opinion in *Fisher*. See *Fisher*, 133 S. Ct. at 2422–32 (Thomas, J., concurring) (citations omitted); *Grutter*, 539 U.S. at 349–80 (Thomas, J., concurring in part and dissenting in part) (citations omitted).

46. See *Parents Involved in Cmty. Sch. 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.”); see also *id.* (Thomas, J., concurring) (chastising the minority for “[d]isfavoring a colorblind interpretation of the Constitution”).

47. See *id.* at 709–11, 715 (majority opinion).

48. *Id.* at 710.

49. See *id.* at 729–30 (noting that the Court has “many times over reaffirmed that “[r]acial balance is not to be achieved for its own sake” (quoting *Freeman v. Pitts*, 503 U.S. 467, 494 (1992))); see also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (“Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”).

50. See *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2415–17 (2013) (citations omitted) (describing the University of Texas’s admissions criteria and process); *Grutter v. Bollinger*, 539 U.S. 306, 312–16 (2003) (citations omitted) (describing Michigan Law School’s admissions criteria and process).

51. See *Parents Involved*, 551 U.S. at 747–48 (noting that the best way to formulate an admissions policy that does not take into account a student’s race is to “stop assigning students on a racial basis” (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300–01 (1955))).

52. See *id.* at 729.

Justice Roberts concluded that the Court's previous approval of a policy that "work[s] backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a *fatal flaw* under our existing precedent."⁵³ In that seemingly prosaic statement, the Chief Justice not only identified the flaw endemic to the University of Michigan Law School admissions policy and those modeled upon it, but also made it implicit that the Court—with its newly constituted conservative majority—would correct this purported flaw once given the opportunity to do so.⁵⁴

That single sentence written by Chief Justice Roberts likely marks the end of *Grutter* and the race-conscious admissions paradigm.⁵⁵ And now, with the Court's ominous invitation in *Fisher* to challenge whether there is a compelling state interest in achieving diversity at the higher educational level,⁵⁶ the floodgates appear to have finally opened for the Court to continue implementing its colorblind interpretation of the Constitution.⁵⁷ The progression to *Fisher* has been clear, and it provides little doubt of the character of its likely progeny.⁵⁸ Having espoused their colorblind constitutional thesis as a minority position in *Grutter*, and now as the posture of the majority, the conservative members of the Court will be able to claim a complete victory in much less time than they first predicted.⁵⁹

Thus, in the wake of the Court's decision in *Fisher*, it appears incontrovertible that race-conscious admissions will at least be curtailed significantly—but more likely outlawed altogether.⁶⁰ And with that, it seems that the day Justice Brennan warned about will come to pass when "colorblindness [has] become [a] myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."⁶¹ It is this reality of which Justice Brennan spoke that we will wrestle with as a society for generations to come. Two important questions are therefore relevant here: What will be the practical effects of this myopic insistence on colorblindness? And what can be done to revive affirmative action as an effective tool for social advancement? The remainder of

53. *Id.* (emphasis added).

54. *See supra* note 50.

55. *Id.*

56. *See supra* notes 20–22 and accompanying text.

57. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2418 (2013) (noting that the state has a compelling interest in obtaining student body diversity, but only if "[t]he particular admissions process used for this objective is subject to judicial review").

58. *See supra* note 43 and accompanying text.

59. *See Grutter*, 539 U.S. at 343 (predicting that the use of race in the admissions process will no longer be necessary in 25 years).

60. *See Fisher*, 133 S. Ct. at 2421 (noting that the lower court "confined the strict scrutiny inquiry in too narrow a way" and holding that "sufficient evidence" is required to prove that an admissions process is narrowly tailored and meets the requirements of strict scrutiny).

61. *Bakke*, 438 U.S. at 327 (Brennan J., dissenting).

this Essay will explore the first question and will close with a suggestion to address the second.

III. THE VIEW FROM THE COLORBLIND SOCIETY

As noted above, should the Supreme Court decide to place further restrictions on the use of race in university admissions or to fully outlaw such affirmative action programs, the repercussions will likely be far-reaching and immediate. The aforementioned conclusion is derived from two previous instances—one in Texas itself, the other in California—in which affirmative action was outlawed and, as a result, the respective states immediately saw a significant decrease in minority applications and enrollment.

In Texas, the decrease in minority applications and enrollment was precipitated by the Fifth Circuit's decision in *Hopwood v. Texas*,⁶² in which the court held that “any consideration of race or ethnicity by the [University of Texas] law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”⁶³ The effect of the *Hopwood* decision was immediate.⁶⁴ In the span of just one year after *Hopwood* was announced, the number of African-American and Hispanic applicants dropped by nearly a quarter, while the total number of applicants decreased by only 13%.⁶⁵ The court noted that “[c]ompared to 1995, African-American enrollment for 1997 dropped almost 40% (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen).”⁶⁶ By contrast, during that same time period, “Caucasian enrollment increased by 14%.”⁶⁷

To combat this decrease in minority enrollment, the Texas state legislature introduced the Top Ten Percent Law in 1997.⁶⁸ The Top Ten Percent Law is a race-neutral provision that grants all high school seniors graduating within the top ten percent of their class automatic admission into the state's colleges and

62. 78 F.3d 932 (5th Cir. 1996).

63. *Id.* at 944.

64. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223–24 (5th Cir. 2011), *vacated by* 133 S. Ct. 2411 (2013) (citing Office of Admissions, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin*, THE UNIV. OF TEX. AT AUSTIN 1996–2002, at 6 (2003), <http://www.utexas.edu/student/admissions/research/ClassroomDiversity96-03.pdf>; Office of Institutional Studies, *Enrollment by Semester and Gender*, THE UNIV. OF TEX. AT AUSTIN 1989–1999, <http://www.utexas.edu/academic/ima/sites/default/files/SHB98-99Students.pdf>).

65. *Id.* at 224 (citing Office of Admissions, *Diversity Levels of Undergraduate Classes at the University of Texas at Austin*, THE UNIV. OF TEX. AT AUSTIN 1996–2002, at 6 (2003)).

66. *Id.* (citing Office of Institutional Studies, *Enrollment by Semester and Gender*, THE UNIV. OF TEX. AT AUSTIN 1989–1999, <http://www.utexas.edu/academic/ima/sites/default/files/SHB98-99Students.pdf>).

67. *Id.* (citing Office of Institutional Studies, *Enrollment by Semester and Gender*, THE UNIV. OF TEX. AT AUSTIN 1989–1999, <http://www.utexas.edu/academic/ima/sites/default/files/SHB98-99Students.pdf>).

68. See TEX. EDUC. CODE ANN. § 51.803 (West 1997).

universities.⁶⁹ The measure has indeed been successful in improving minority representation within the University of Texas system, increasing “African-American enrollment . . . [at the University of Texas at Austin] from 2.7% to 3.0% and Hispanic enrollment . . . from 12.6% to 13.2%” in the year following its enactment.⁷⁰

Further, the enactment of a race-conscious admissions policy patterned after the one approved in *Grutter* has only served to augment the minority presence on the campuses of the University of Texas system.⁷¹ In upholding the University of Texas admissions policy in *Fisher*, the Fifth Circuit noted that “[i]n an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African-American students doubled from 165 students to 335 students.”⁷² Additionally, it is helpful to compare these numbers with the minority enrollment figures for 2004—the last year before the University of Texas introduced its race-conscious admissions policy—to determine the effects of the policy.⁷³ In 2004, the university’s “fall enrollment included only 275 African-Americans,”⁷⁴ an increase of approximately 22%.

The numbers from Texas demonstrate that removing race as a consideration in university admissions has a significant negative impact on minority enrollment at institutions of higher education.⁷⁵ Specifically, when race may not be considered, African-American matriculation decreases precipitously.⁷⁶ Additionally, it becomes clear from the numbers above that, while race-neutral strategies targeted at increasing minority participation in higher education can have some beneficial effect,⁷⁷ the most effective means of achieving a more diverse student body is to take into consideration the racial or ethnic backgrounds of applicants.⁷⁸

Similarly, California has experienced a dramatic shift in minority enrollment in its public institutions of higher education following a ban on the consideration of race in admissions decisions. The shift in minority enrollment was brought about by California Proposition 209, adopted in 1996,⁷⁹ which prohibits the state from “discriminat[ing] against, or grant[ing] preferential treatment to, any

69. *Fisher*, 631 F.3d at 224.

70. *Id.* at 224.

71. *See id.* (noting that this policy “has produced noticeable results”).

72. *Id.* at 226.

73. *See id.*

74. *Id.*

75. *See supra* notes 71–74 and accompanying text.

76. *See supra* notes 65–66 and accompanying text.

77. *See supra* notes 68–69 and accompanying text.

78. *See supra* notes 71–74 and accompanying text.

79. *See* David Card & Alan B. Krueger, *Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas*, 58 INDUS. & LAB. REL. REV. 416, 420 (2005).

individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”⁸⁰

In the year preceding the adoption of Proposition 209, the three flagship University of California campuses—Los Angeles (UCLA), San Diego, and Berkeley (UC Berkeley)—all admitted minorities at a rate greater than 50%.⁸¹ This figure is significant given the fact that both UCLA and UC Berkeley admitted less than 50% of their applicants that year.⁸²

Nonetheless, “[t]he halting of affirmative action had an immediate impact on minority admissions at the University of California.”⁸³ A significant drop in the admission rates of black applicants promptly followed the introduction of Proposition 209.⁸⁴ Between 1995 and 1997, the “[a]dmission rates of black applicants at the three most selective campuses fell [by] 45[–]55%”⁸⁵ That figure began to improve slightly in the period between 1998 and 2001, during which African-American admissions were only down 20–25% from their pre-Proposition 209 levels.⁸⁶

What becomes evident from even the most cursory survey of the above statistics is that any change in the current law will result in some diminution in the presence of minorities on college campuses.⁸⁷ This result is merely compounded when race-based criteria are outlawed altogether.⁸⁸ When universities are not permitted to use race as a criteria in making admissions decisions, the number of minority applicants—and, consequently, those admitted—decreases at a significant rate.⁸⁹ In this way, colorblindness has a very real and negative impact on racial minorities: it merely produces increased hegemony for those already in the majority.⁹⁰ Most distressing is that, as the path to college and university education for minorities narrows, so too will their opportunities to attain the type of employment that will lead to membership in the middle class.⁹¹

In the twentieth century, “education was a choice not a necessity—[one could] choose to be educated or not, but either way [one could] get a decent job

80. CAL. CONST. art. I, § 31.

81. Card & Krueger, *supra* note 79, at 418 tbl.1 (showing that UCLA, UC San Diego, and UC Berkeley admitted 52.1%, 52.6%, and 53.6% of their minority applicants, respectively).

82. *Id.* (showing that UCLA, UC San Diego, and UC Berkeley admitted 43.1%, 59.5%, and 39.9% of all applicants, respectively).

83. *Id.* at 420.

84. *See id.* at 420–21.

85. *Id.*

86. *Id.* at 421.

87. *See supra* notes 81–86 and accompanying text.

88. *See supra* notes 71–74 and accompanying text.

89. *See supra* notes 62–67, 83–85 and accompanying text.

90. *See supra* notes 62–67, 83–85 and accompanying text.

91. *See, e.g.,* FRIEDMAN & MANDELBAUM, *supra* note 11, at 101–02 (2011) (citations omitted) (discussing middle class wages and the difficulty in attaining these wages without education beyond a high school degree).

and live a decent life.”⁹² However, in the twenty-first century, “education is not an option” and “is [indeed] a necessity for a middle-class standard of living.”⁹³ The correlation between education and earning potential cannot be ignored. Individuals who complete post-secondary education have increasingly outpaced the earning potential of those with only a high school degree or less.⁹⁴ To wit, “[t]he hourly wage of the typical college graduate in the U.S. was approximately 1.5 times the hourly wage of the typical high school graduate in 1979.”⁹⁵ By comparison, in “2009, this ratio stood at 1.95.”⁹⁶

Beyond wages, the level of one’s education has a direct bearing on how likely it is for one to become unemployed during times of economic distress.⁹⁷ According to a Brookings Institute study released in November 2010, “during the Great Recession [of 2009,] employment dropped much less steeply among college-educated workers than other workers.”⁹⁸ In fact, in the two-year period between 2007 and 2009, “[t]he employment-to-population ratio dropped by more than 2 percentage points . . . for working-age adults without a bachelor’s degree, but fell by only half a percentage point for college-educated individuals.”⁹⁹ Thus, it has become clear that we now live in “a labor market that greatly rewards workers with college and graduate degrees but is unfavorable to the particularly less-educated”¹⁰⁰

As demonstrated above, education and employment are inextricably linked, and competition for access to the former will mirror competition for the latter. As more jobs require college degrees, the premium for post-secondary education will only increase. Labor statistics support this point.¹⁰¹

In 1977, Justice Marshall lamented:

92. *Id.* at 101 (quoting Andreas Schleicher, Senior Education Officer, Organization for Economic Co-operation and Development).

93. *Id.*

94. *See id.*

95. *Id.* (quoting DAVID H. AUTOR & LAWRENCE F. KATZ, GRAND CHALLENGES IN THE STUDY OF EMPLOYMENT AND TECHNOLOGICAL CHANGE: A WHITE PAPER PREPARED FOR THE NATIONAL SCIENCE FOUNDATION 1 (2010)) (internal quotation marks omitted), available at http://www.aeaweb.org/econwhitepapers/white_papers/David_Autor.pdf.

96. *Id.*

97. *See id.* at 101–02 (citing Alan Berube, *Degrees of Separation: Education, Employment, and the Great Recession in Metropolitan America*, BROOKINGS INST. 1 (2010), http://www.brookings.edu/~media/research/files/papers/2010/11/05%20metro%20america%20education%20berube/1105_metro_america_education_berube.pdf).

98. *Id.*

99. *Id.* at 102 (quoting Alan Berube, *Degrees of Separation: Education, Employment, and the Great Recession in Metropolitan America*, BROOKINGS INST. 1 (2010), http://www.brookings.edu/~media/research/files/papers/2010/11/05%20metro%20america%20education%20berube/1105_metro_america_education_berube.pdf).

100. *Id.* at 75 (quoting DAVID H. AUTOR & LAWRENCE F. KATZ, GRAND CHALLENGES IN THE STUDY OF EMPLOYMENT AND TECHNOLOGICAL CHANGE: A WHITE PAPER PREPARED FOR THE NATIONAL SCIENCE FOUNDATION 1 (2010), available at http://www.aeaweb.org/econwhitepapers/white_papers/David_Autor.pdf).

101. *See supra* notes 95–99 and accompanying text.

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely \$110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.¹⁰²

According to Justice Marshall, “the relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied.”¹⁰³

The numbers cited by Justice Marshall have only improved marginally over the last thirty years.¹⁰⁴ In fact, “[w]hile about 12 percent of the nation’s working-age population is black, [only] about 5 percent of physicians and dentists in the United States are black—a share that has not grown since 1990. . . .”¹⁰⁵ This holds true for black architects as well, who comprise “3 percent of American architects,” a figure that “has not increased in more than two decades.”¹⁰⁶

The numbers comparing the educational attainment and employment measures of African-Americans to whites are no more encouraging.¹⁰⁷ The percentage of African-Americans attaining college degrees lags far behind that

102. See *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 395–96 (1978) (Marshall, J., concurring in part and dissenting in part) (citing U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS 170 tbl.44 (1978); U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS SERIES P-60, NO. 105, p. 198 tbl.47 (1977); U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT 25 tbl.24 (1977); *id.* at 407–08)).

103. *Id.* at 396.

104. See generally Nelson D. Schwartz & Michael Cooper, *Affirmative Action Ruling Near, Blacks’ Progress Remains Slow*, N.Y. TIMES, May 28, 2013, at A1 (discussing the lack of significant improvement among the black population with respect to higher education and professional careers).

105. *Id.*

106. *Id.*

107. See U.S. CENSUS BUREAU, EDUC. AND SOC. STRATIFICATION BRANCH, PERCENT OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940 TO 2012, at A-2 (2012), available at <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html> (showing 31.3% of whites completed four years of college or more in 2012, compared to 21.2% of blacks in 2012); see also U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: SELECTED YEARS 1977 TO 2013 (2013) (showing an unemployment rate of 13.8% for blacks in 2012, compared to an unemployment rate of 7.2% of whites in the same year).

of white Americans.¹⁰⁸ In 1978, the year the Supreme Court decided *Bakke*, 20.7% of white males twenty-five years of age or older had completed four or more years of college, while the percentage for black males stood at 7.3%.¹⁰⁹ Although these percentages have improved in the last thirty years, the wide margin between the educational attainment of African-Americans and white Americans persists.¹¹⁰ For instance, in 1999, 32% of white males between the ages of twenty-five to twenty-nine had obtained a bachelor's degree or higher, whereas only 13.1% of African-American males in this age range reached this level of educational attainment.¹¹¹

Educational attainment numbers, however, only tell half of the story. When these numbers are coupled with the respective unemployment rates for each group, it becomes clear how closely related educational attainment is to one's ability to find gainful employment and, perhaps, enter the middle class. Nevertheless, what may be gleaned from the data is that the African-American unemployment rates for nearly every year since 1977 have been double the rates for white Americans.¹¹² Further, while the 2011 unemployment rates for African-American males with only a high school degree and those with a college degree were 16.9% and 7.9%, respectively, the unemployment rates for white males were 8.9% and 4.0% in the same categories; thus, it is clear that one's race and educational attainment has a direct bearing on whether one can obtain, and then retain, gainful employment.¹¹³ These numbers also demonstrate that a need for some form of assistance at the higher educational level is still vitally necessary to provide African-Americans an equal opportunity to compete for jobs in the changing economy.

For these reasons, the ever intensifying competition for jobs on the basis of educational attainment, coupled with the Court's abandonment of effective affirmative action for minorities, will likely have far-reaching consequences for

108. See U.S. CENSUS BUREAU, EDUC. AND SOC. STRATIFICATION BRANCH, TABLE A-2, PERCENT OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940 TO 2012, at A-2 (2012), available at <http://www.census.gov/hhes/socdemo/education/data/cps/2012/tables.html> (displaying the percentages of whites and blacks completing four or more years of college from 1940 to 2012).

109. *Id.* (displaying the percentages of whites and blacks completing four or more years of college in 1978).

110. See *id.*

111. See *id.* at A-4.

112. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY: SELECTED YEARS 1977 TO 2013 (2013), available at <http://www.census.gov/hhes/socdemo/education/data/cps/historical/>. For instance, while the annual unemployment rate for African-Americans in 1978 was 12.8%, the annual rate of unemployment for whites was merely 5.2%. *Id.* When the recession of 2009 hit, the African-American unemployment rate spiked up to 16.0% in 2010, while the white unemployment rate hit a ceiling of 8.7% in 2011. *Id.*

113. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY 14-15 tbl.6 (2013), available at <http://www.bls.gov/cps/cpsrace2011.pdf>.

minority groups.¹¹⁴ The irony, however, is that at the historical moment when these types of assistance programs seem to be the most necessary to allow minority group members to compete effectively within the current labor market, they are being dismantled by the federal judiciary under the rationale that they have outlived their usefulness.¹¹⁵

Nevertheless, the matriculation statistics from the University of Texas and University of California systems make it clear that affirmative action programs are not only crucial to maintaining access to university education for minority students, but also serve as a bulwark against majority hegemony at these institutions.¹¹⁶ Further, at this historical moment, these programs must be available to afford minorities an opportunity to compete in the contemporary global labor market¹¹⁷ and avoid the concomitant minority underrepresentation within the professional workforce and the middle class.¹¹⁸

IV. MOVING TOWARDS A REMEDY

This Essay previously intimated that the path to reclaiming and revitalizing affirmative action is one of interpretation.¹¹⁹ The Court's current conservative majority favors a colorblind reading of both the Equal Protection Clause of the Fourteenth Amendment and the equal opportunity mandate of the Civil Rights Act of 1964, in the hopes of creating a more equalized society.¹²⁰

However, the colorblind interpretation is myopic for the prescient reasons Justice Brennan provided nearly forty years ago that remain true to this day.¹²¹ Reading these provisions in the colorblind fashion—which the contemporary majority insists upon—does not recognize the plain reality of American society.¹²² Both historically, and in the present, minority groups have struggled to close the socioeconomic gap between themselves and white Americans.¹²³ A

114. See *supra* notes 55–59, 83–92 and accompanying text.

115. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (citing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (viewing skeptically the idea that diversity is a compelling state interest).

116. See *supra* notes 62–67, 83–85 and accompanying text.

117. See *supra* 91–100 and accompanying text.

118. See, e.g., Schwartz & Cooper, *supra* note 104, at A10 (“While about 12 percent of the nation’s working-age population is black, about 5 percent of physicians and dentists in the United States are black . . .”).

119. See *supra* Part II.

120. See, e.g., *Fisher*, 133 S. Ct. at 2428–29 (Thomas, J., concurring) (“The Equal Protection Clause strips States of all authority to use race as a factor in providing education.”).

121. See *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265, 327 (1978) (Brennan, J., concurring in part and dissenting in part).

122. See, e.g., Schwartz & Cooper, *supra* note 104, at A10 (highlighting the discrepancy between the total African-American population and the percentage of African-Americans in professional jobs such as doctors and architects).

123. See *supra* notes 105–13 and accompanying text.

colorblind reading of these provisions merely serves to widen this gap and close a vital door to minority inclusion in the university and professional ranks.¹²⁴

Additionally, the colorblind approach is out of step with the logic and history behind the passage of the Fourteenth Amendment and the Civil Rights Act of 1964.¹²⁵ When one takes even a cursory appraisal of the historical impetus for the passage of each provision, it seems clear that both provisions were intended to increase the opportunities for minorities to participate as equals within American society.¹²⁶ The irony is that the very provisions meant to assist minority groups in their efforts to ascend the socioeconomic ladder are now the very tools being used to impede that progress.¹²⁷ What is even more ironic is the fact that this result “pervert[s] the intent of the Framers [of the Fourteenth Amendment] by substituting abstract equality for the genuine equality the Amendment was intended to achieve.”¹²⁸

The solution is to return to the original intent of these laws and abandon the aspirational notion of colorblindness until that aspiration is indeed an American reality.¹²⁹ It is time to remind the Court that the purpose of the Fourteenth Amendment and Civil Rights Act of 1964 was not to maintain the status quo, but to actually lay the foundation and framework for a society in which equal protection under the law and equal opportunity actually exist in a real way for the groups for whom these rights had previously been denied.¹³⁰ This can be accomplished through direct challenge by forcing the Court to confront this historical purpose, as well as the contemporary need for an interpretation of the Fourteenth Amendment and the Civil Rights Act of 1964 that permits race to be considered for ameliorative purposes. When the current Court begins to engage with historical and contemporary reality—rather than the world as it wishes it were—we may once again, as a nation, begin to move forward and beyond our difficult racial past.

124. See *supra* notes 120–22 and accompanying text.

125. See *Bakke*, 438 U.S. at 363 (Brennan, J., concurring in part and dissenting in part) (discussing the Supreme Court’s findings in previous cases supporting congressional legislation designed to overcome discrimination’s effects).

126. See, e.g., *Bakke*, 438 U.S. at 398 (Marshall, J., concurring in part and dissenting in part) (citing *Ry. Mail Ass’n v. Corsi*, 326 U.S. 88, 94 (1945)) (noting that the intent of these provisions was to remedy past discrimination).

127. See *id.*; *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (citing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)) (viewing skeptically the idea that diversity is a compelling state interest).

128. *Bakke*, 438 U.S. at 398 (Marshall, J., concurring in part, dissenting in part).

129. See *supra* notes 119–28 and accompanying text.

130. See *Bakke*, 438 U.S. at 398 (Marshall, J., concurring in part, dissenting in part) (noting the purpose of the Fourteenth Amendment and the Civil Rights Act was to remedy the effects of past discrimination).

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