

# RACE-CONSCIOUS ADMISSIONS PLANS: AN ANTIDOTE TO EDUCATIONAL OPPORTUNITY HOARDING?

STACY HAWKINS\*

## *Abstract*

*In spite of the most recent victory for diversity in higher education handed down by the Supreme Court in Fisher v. Texas, there seems to be no end in sight to the legal assault on race-conscious admissions plans. Rather than attempt to defend race-conscious admissions plans on the disputed legal terms, this article instead asks whether the opposition demand for race-neutral “meritocratic” admissions is itself legitimate. This article suggests that the insistence on “meritocracy” in admissions implicates an historical pattern and practice by certain advantaged racial groups of perpetuating the systemic educational disadvantages experienced by subordinate racial groups while further entrenching their own educational advantages. Recognizing this, the demand for race-neutral “meritocratic” admissions in higher education ought to be rejected as incompatible with the guarantee of equal educational opportunity first recognized in Brown v. Board of Education. At the same time, race-conscious admissions plans can be viewed as an effective antidote to this practice of educational opportunity hoarding and a critical means of disrupting the process of categorical racial inequality that has long marked the history of education in America.*

## **Introduction**

Race-conscious admissions plans (“RCAPs”) in higher education have had a fraught legal history.<sup>1</sup> Supreme Court cases adjudicating RCAPs have often been decided by razor-thin margins; and despite the Court’s now repeated approval of the use of race in college and university admissions, the possibility of reversal always seems imminent.<sup>2</sup> Author Vernon Francis chronicles this tortured history in his article *Living with Uncertainty: Fisher v. University of Texas and Race-Conscious College Admissions*.<sup>3</sup> The most recent episode in this ongoing saga is the Supreme

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\* Associate Professor, Rutgers Law School.

1 See generally Vernon Francis, *Living with Uncertainty: Fisher v. University of Texas and Race-Conscious College Admissions*, 43 J.C. & U. L. 124 (2018).

2 *Id.* at 125 (observing that even “majorities seemed vulnerable to reconsideration and reversal”); see also Vinay Harpalani *Victory is Defeat: The Ironic Consequence of Justice Scalia’s Death for Fisher v. University of Texas*, 164 U. PENN. L. REV. ONLINE 155, 160 (2016) (observing even in advance of the Court’s decision that regardless of the outcome, “[t]here is little prospect for an affirmative action victory” in *Fisher* because even with a favorable outcome, the future of RCAPs “would be tenuous at best.”)

3 *Id.* Since the decision in *Fisher II*, the final case addressed by Francis, two new cases are making their way through the federal courts challenging RCAPs, and the Department of Justice recently announced an investigation into Harvard University’s use of race in admissions. See *infra* n. 17 and 21.

Court's 2016 decision in *Fisher v. Texas* ("*Fisher II*").<sup>4</sup> Although the Supreme Court once again upheld the use of race in higher education admissions, the outlook remains uncertain.<sup>5</sup>

Francis rightly observes that Justice Ginsburg is almost certainly mistaken in her post-*Fisher* prediction that, "we're [not] going to see another affirmative action case ... at least in education."<sup>6</sup> Justice Ginsburg's optimism belies the deep internal tensions that have long divided the Supreme Court over this issue, which Francis deftly analyzes.<sup>7</sup> In particular, Francis identifies lingering uncertainty over the evidence colleges and universities will need to proffer in support of RCAPs in order to survive future constitutional challenges.<sup>8</sup> Social scientists Liliana Garces, Patricia Marin, and Catherine L. Horn also investigate this evidentiary quagmire in their article, *The U.S. Supreme Court's Use of Non-Legal Sources and Amicus Curie Briefs in Fisher v. University of Texas*.<sup>9</sup> Both articles offer helpful guidance on how colleges and universities can meet their evidentiary burdens in future cases even as they acknowledge that the legal uncertainty surrounding RCAPs is likely to persist.<sup>10</sup> Perhaps more important than this legal uncertainty over RCAPs, Justice Ginsburg's optimism about the finality of *Fisher II* overlooks the larger public debate that continues to rage over whether to permit the consideration of race in deciding whom to admit to the nation's most selective colleges and universities.<sup>11</sup> This national debate over RCAPs focuses more heavily on the practical rather than the legal consequences of allowing race and ethnicity to be considered in deciding whom to admit to the nation's most selective colleges and universities.<sup>12</sup> Rather than emphasizing the need for constitutional colorblindness as legal challenges often do,<sup>13</sup> this practical opposition suggests that RCAPs betray a commitment to

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4 136 S. Ct. 2198, 579 U.S. \_\_\_ (2016). The Court issued an earlier decision which did not reach the merits of the case. *Fisher v. Texas*, 133 S. Ct. 2411, 570 U.S. 297 (2013) ("*Fisher I*").

5 *Fisher II*, 136 S. Ct. 2198, 2215; see *supra* n. 2.

6 See Francis, *supra* n. 1 at 125. Justice Ginsburg made these comments in an interview with *The New York Times* Supreme Court reporter, Adam Liptak, just a month after the decision in *Fisher II*. Adam Liptak, *Ruth Bader Ginsburg, No Fan of Donald Trump, Critiques Latest Term*, THE NEW YORK TIMES (July 10, 2016).

7 See *supra* n. 1.

8 *Id.* at 147.

9 43 J.C. & U. L. 167 (2018).

10 See Francis, *supra* n. 1 at 148; see also Garces, Marin and Horn, *supra* n. 9 at 191.

11 Public opinion polls on the use of race in college and university admissions reveal disparities in response not only on the basis of political affiliation, but also on the basis of race, with minorities (particularly blacks and Hispanics) favoring RCAPs at a rate much higher than other racial or ethnic groups. See Scott Jaschik, *White Perceptions of Affirmative Action*, INSIDE HIGHER EDUC. (Oct. 30, 2017). Notably, responses also vary considerably depending on how the question is phrased, with respondents expressing much greater support for "affirmative action" generally than when asked whether race should be considered in college admissions. *Id.*

12 RCAPs are largely used by selective colleges and universities. See *infra* n. 56 and accompanying text.

13 Despite judicial aspirations for constitutional colorblindness, the Court has never actually imposed a colorblind standard. Instead, the Court has accommodated various racial considerations as a matter of constitutional law, and the interest in student body diversity is only the most recent

principles of meritocracy.<sup>14</sup> The problem with this opposition argument is that the demand for race-neutrality in college and university admissions may be less about the espoused principles of meritocracy than an unwitting cover for opportunity hoarding of scarce educational resources.<sup>15</sup> If this is true, then rather than frustrating our egalitarian ideals as legal challengers suggest, RCAPs may actually help further the constitutional guarantee of equality by ensuring that underrepresented minorities have equal access to elite institutions of higher education.<sup>16</sup> Instead of focusing on the disagreement over the legal standards permitting colleges and universities to adopt RCAPs, this article explores the practical implications of the opposition's demand for race-neutral admissions. In particular, the article considers whether the insistence on race-neutral admissions is less about meritocracy than an attempt at educational opportunity hoarding, and if so whether RCAPs can serve as an effective antidote to this problem.

### I. The "Meritocracy" Challenge to RCAPs

Justice Ginsburg's post-*Fisher* statement was not only wrong as a predictive matter, it was wrong as a matter of fact. Even at the time she uttered the words, new cases had already been filed challenging RCAPs.<sup>17</sup> Shortly after *Fisher I* was affirmed on remand to the Fifth Circuit, Roger Clegg, the person responsible for litigating *Fisher*, filed suit against both the University of North Carolina–Chapel Hill ("UNC") and Harvard University ("Harvard"), alleging that both schools use race in admissions in ways that violate the constitutional guarantee of equal protection.<sup>18</sup> Although the suit against UNC, much like *Fisher* before it, challenges RCAPs on behalf of white applicants denied admission, the suit alleges that both white and Asian American<sup>19</sup> applicants are harmed by RCAPs that presumptively favor

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of these racial considerations. See e.g. Andrew Kull, *THE COLORBLIND CONSTITUTION* (1992) (concluding that the Supreme Court has continuously rejected an absolutist rule on constitutional colorblindness, instead acceding to strict judicial scrutiny of racial classifications); Michelle Adams, *Racial Inclusion, Exclusion and Segregation in Constitutional Law*, 28 *CONST. COMMENT.* 1, 23 (Spring 2012) ("A constitutional vision which ... demands a kind of constitutional blindness [ ] a majority of the Court has not countenanced."). Thus, constitutional colorblindness is not required as a matter of law.

14 See discussion *infra*, 154-155.

15 See *infra*. n. 43 and accompanying text.

16 See discussion *infra*, 164-165.

17 See *Students for Fair Admission, Inc. v. University of North Carolina, et al.* Complaint, 1:14-CV-954 (Schroeder, J.) (M.D. N.C. 2014) (hereafter "*SFA v. UNC* Complaint"); *Students for Fair Admission, Inc. v. Harvard College, et al.* Complaint, 1:2014CV14176 (Casper, J.) (D. Mass. 2014) (hereafter "*SFA v. Harvard* Complaint").

18 *Id.* The litigation of these cases, which had been stayed pending the decision in *Fisher II*, has since resumed. See Felicia Bailey, *UNC's affirmative action lawsuit moves forward with Supreme Court ruling*, *THE DAILY TARHEEL* (Nov. 20, 2016); William S. Flanagan and Michael Exio, *Court rejects Harvard's dismissal of admissions lawsuit*, *THE HARVARD CRIMSON*, (June 8, 2017).

19 The terms "Asian American" and "Asian" are used interchangeably throughout to refer to an admittedly broad, diverse and in many ways unspecified group. See Vinay Harpalani, *Why I am not Asian and other reflections on Asian American Identities*, <http://lawprofessors.typepad.com/racelawprof/2017/07/why-i-am-not-asian-and-other-reflections-on-asian-american-identities.html>. I acknowledge the complications inherent in using the term "Asian" interchangeably with "Asian American," see

black and Hispanic applicants.<sup>20</sup> The suit challenging Harvard's RCAP was, for the first time, filed on behalf of Asian American applicants and similarly argues that Harvard's use of race in admissions benefits black and Hispanic applicants at the expense of Asian American applicants denied admission under RCAPs.<sup>21</sup>

What both these suits have in common is an opposition to RCAPs grounded in a theory of meritocracy.<sup>22</sup> These suits, much like the broader public opposition to RCAPs, rely on differences between the academic credentials of the white and Asian challengers denied admission and the academic credentials of black and Hispanic students who were admitted by the defendant schools to demonstrate that race was used impermissibly by these colleges and universities in selecting students for admission.<sup>23</sup> According to this theory, the larger the disparity in the academic credentials between admitted white and Asian students on the one hand and admitted black and Hispanic students on the other, the greater the presumptive influence of race, rather than "merit," on the admissions decision and the more presumptively unconstitutional the use of race in admissions.<sup>24</sup> The Supreme Court has often endorsed this meritocratic argument against RCAPs by similarly analyzing

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*id.*, but chose to use the term "Asian" when referring to comparative racial/ethnic groups, including specifically white, black, Hispanic, and Asian students, while using the term "Asian American" when not used comparatively. Indeed, these other racial/ethnic designations also refer to equally broad, diverse, and unspecified groups and suffer from similar definitional complexities. *See e.g.* Cedric Gordon, *When Diversity for Diversity's Sake is Enough: Should Black Immigrants Receive the Benefit of Affirmative Action to the Detriment of Native Blacks*, 1 IND. J. L. SOC. EQUALITY 185 (2013) (referring to the differences between native born blacks and other Caribbean or African students included within the designation "black") and Scott B. Astrada and Marvin L. Astrada, *Being Latino in the 21st Century: Reexamining Politicized Identity and the Problem of Representation*, 20 U. Penn. J. L. Soc. Change 245 (2017) (contesting the term "Latino" as ineffectual in describing the broad, racially and ethnically diverse groups included within it). Nevertheless, this is the common nomenclature when referring to these racial and ethnic groups.

20 Despite proceeding only on behalf of the white applicant denied admission, the suit alleges that UNC's RCAP grants "racial preference for each underrepresented minority student" that operates to the disadvantage of both white and Asian applicants. *SFA v. UNC* Complaint at 4. Blacks and Hispanics are considered underrepresented minorities in higher education and, therefore, are presumed to be the beneficiaries of RCAPs designed to increase student body diversity. *SFA v. Harvard* Complaint at 4.

21 *Id.* The suit against Harvard also suggests that white applicants may receive favorable treatment in admissions relative to Asian Americans. *Id.* at 44 (describing "admissions penalty" for Asian Americans relative to whites). Following Clegg's lead, the Department of Justice also reopened an investigation into Harvard's RCAP. *See* Susan Svriuga and Nick Anderson, *Justice Department investigating Harvard's affirmative action policies*, THE WASHINGTON POST (Nov. 21, 2017).

22 For an extended discussion of the meritocracy argument, *see* Robert Paul Wolff and Tobias Barrington Wolff, *The Pimple on Adonis's Nose: A Dialogue on the Concept of Merit in the Affirmative Action Debate*, 56 HASTINGS L. J. 379 (2004-5).

23 *SFA v. Harvard* Complaint at 44 (describing "admissions penalty" for Asian Americans in terms of differences in SAT scores); *SFA v. UNC* Complaint at 19 (pointing to differences in the average high-school GPA and SAT scores of Asian and white students admitted and black, Hispanic and Native American students admitted to prove UNC uses race in admissions impermissibly).

24 The prevailing constitutional standard applicable to the use of race in college and university admissions requires that the consideration of race be no greater than necessary to achieve the stated educational goals. *Fisher II*, 136 S. Ct. at 2212 (observing that the nominal use of race is the "hallmark" of constitutionality).

disparities in academic credentials between the challengers who were denied admission and those admitted minority students believed to benefit from RCAPs.<sup>25</sup>

Despite its intuitive appeal, this meritocracy argument suffers from two rhetorical flaws. First, it misapprehends the nature of admissions decisions by selective colleges and universities, which rely on a constellation of factors in deciding what students to admit, only one of which is academic credentials and none of which are wholly dispositive in the admissions process.<sup>26</sup> Accordingly, the conclusion that applicants with higher academic credentials ought to *ipso facto* be guaranteed admission over those applicants with lower academic credentials, regardless of other considerations, is simply in error.<sup>27</sup> Second, and more to the point, the idea of “merit” reflected in this argument is loaded. “Merit” in this sense is defined narrowly to include only academic credentials, and it relies most heavily on a single metric that has proven wholly inadequate to the task of predicting students’ academic ability or subsequent performance.<sup>28</sup> In addition, this narrow measure of merit obscures systemic racial inequities that often impede equal educational opportunities for certain underrepresented minority students.<sup>29</sup> The demand

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25 For instance, in the first challenge to RCAPs to be decided by the Supreme Court, Alan Bakke argued that he was more “qualified” for admission than many of the black and Hispanic students admitted to the UC Davis Medical School under the RCAP at issue in that case. *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 277 (1978). Barbara Grutter made a similar argument in her case against the University of Michigan Law School, *Grutter*, 539 U.S. at 306, as did the challenger in the companion case against the University of Michigan undergraduate school, *Gratz v. Bollinger*, 539 U.S. 245 (2003).

26 See Peter Arcidiacono, Thomas Espenshade, Stacy Hawkins and Richard Sander, *A Conversation on the Nature and Effects of Affirmative Action Programs in Higher Education*, 17 U. PENN. J. CONST. L. 683, 693-694 (2014) (describing the process of holistic review in the higher education admissions context). For a more theoretical rebuttal to this narrow conception of “merit,” see Wolff and Wolff, *supra* n. 22 (suggesting that using “merit” to allocate educational opportunities is not justified on either moral or utilitarian grounds).

27 The most common counter example are legacy admissions, but there are numerous considerations for admission that might trump academic credentials, including athletics, geography, or declared major to name just a few. See Arcidiacono, *et al.*, *supra* n. 26 at 693-694.

28 The two most common measures of “merit” used in college admissions are high school grade point average and standardized test scores, such as the SAT and ACT. Challenges to RCAPs and appeals to meritocracy focus most heavily on disparities in standardized test scores. *Id.* at 684-685 and 702-703 (measuring racial preferences in terms of disparities in SAT scores between racial/ethnic groups); see also *SFA v. UNC Complaint*, 27-31 and 37-38 (discussing the gap in SAT scores between Asian and white students and black and Hispanic students) and *SFA v. Harvard Complaint*, 44-48 and 60-66. For a discussion of the limited utility of standardized test scores in predicting academic ability and performance, see Alfie Kohn, *Two cheers for an end to the SAT*, CHRONICLE OF HIGHER EDUCATION, B12 (Mar. 9, 2001); see also Joseph Soares, *More colleges than ever have test-optional admissions policies—and that’s a good thing*, THE CONVERSATION (Jan. 10, 2018). Soares points out that high school grade point average is by far the most predictive measure of students’ academic ability and the SAT/ACT adds at most one to four percentage points to any predictive model. *Id.* Even together, however, these academic credentials (grade point average and standardized test scores combined) predict only thirty-one percent of students’ academic performance in college, leaving nearly seventy percent unpredicted, thereby making admissions decisions “more art than science.” *Id.*

29 Numerous studies have shown how standardized test scores in particular are more heavily associated with students’ socioeconomic status than with their individual aptitude. See e.g. Peter Sacks, *Standardized testing: Meritocracy’s crooked yardstick*, 29 CHANGE 25-31 (1997). In fact, due at

to abandon RCAPs for these ostensibly race-neutral considerations of “merit” would likely reinforce these existing educational disparities, result in educational opportunity hoarding by certain advantaged groups, and lock-in systemic racial inequality.<sup>30</sup> This is contrary to our egalitarian ideals for equal educational opportunity. Instead, we ought to consider whether RCAPs can further our egalitarian ideals by ensuring that all students have an equal opportunity to attend selective colleges and universities.

## II. Educational Opportunity Hoarding

Education has long been prized as the most important rung on the ladder of socioeconomic opportunity.<sup>31</sup> Because of its importance, education is treated as a valuable public resource and its most coveted elements are often reserved for advantaged social groups.<sup>32</sup> Indeed, education in America has been marked, for most of our history, more by racial inequality than racial equality.<sup>33</sup> Beginning with the *de jure* segregation of public education that prevailed until the Supreme Court’s 1954 decision in *Brown v. Board of Education*,<sup>34</sup> to the persistent patterns of residential segregation that have led to the current *de facto* racial segregation of public education, the American public education system has always been and largely remains a racially segregated enterprise.<sup>35</sup> Added to the inferiority of minority children denoted by this racial segregation in public education as recognized in *Brown*,<sup>36</sup> are disparities in funding between urban minority school districts and white suburban schools and a persistent racial achievement gap that all combine to perpetuate separate and unequal systems of public education notwithstanding

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least in part to their lack of predictive value and high correlation with race and socioeconomic status, over 1,000 colleges and universities to date, including both the elite private schools and large public universities that most often use RCAPs, have abandoned these standardized tests as a prerequisite for admission. See Soares, *supra* n. 28.

30 See discussion *infra* II.B.

31 See JIM SIDANIUS AND FELICIA PRATTO, SOCIAL DOMINANCE 178 (1999) (“In many hierarchical societies, education has been a key element in social mobility.”); see also Richard V. Reeves and Kimberly Howard, *The Glass Floor: Education, Downward Mobility, and Opportunity Hoarding*, BROOKINGS INSTITUTE, BROWN CENTER CHALKBOARD at 6 (November 2013) (finding a correlation between education and social mobility).

32 See SIDANIUS and PRATTO, *supra* n. 31 at 178.

33 Aside from the brief period of court-ordered desegregation during the 1970’s and 80’s, public education has either been entirely segregated (pre-*Brown*) or increasingly re-segregated. For a compelling account of the history and present state of school segregation, see Nikole Hannah-Jones, *Segregation Now*, PROPUBLICA (Apr. 16, 2014) (describing the resegregation of public schools since the decision in *Brown*). There have been more recent improvements in school integration, but this progress is tempered by the fact that even as white students have become less racially isolated in public schools, black and Hispanic students have become more racially isolated. See Richard Fry, *The Changing Racial and Ethnic Composition of U.S. Public Schools*, PEW RESEARCH CENTER (Aug. 30, 2007), available for download at <http://www.pewhispanic.org/2007/08/30/the-changing-racial-and-ethnic-composition-of-us-public-schools/>.

34 347 U.S. 483 (1954).

35 See *supra* n. 33.

36 See *Brown*, 347 U.S. at 494 (acknowledging that racial segregation in public education denotes the inferiority of black schoolchildren).

the decision in *Brown* guaranteeing equal educational opportunity on behalf of minority students.<sup>37</sup> This racial segregation and associated inequality that persists in public education is neither an isolated nor an arbitrary phenomenon. Sociologists have long documented racial segregation in education as part of a broad pattern of social norms and practices designed to entrench racial inequality across the social, economic, and political domains of American life.<sup>38</sup>

### A. What is Opportunity Hoarding?

Sociologist Charles Tilly coined the phrase “categorical inequality” to describe the “remarkably durable” process by which scarce resources are allocated unequally across social groups.<sup>39</sup> It occurs whenever “those in power enact policies and practices to ... offer competitive advantages to certain classes ... invest more in the human capital of certain groups ... and systematically channel social and cultural capital to certain categories of people.”<sup>40</sup> Categorical inequality is achieved through mechanisms of social closure, most notably exploitation and opportunity hoarding.<sup>41</sup> The practice of exploitation occurs when an advantaged group extracts value from a disadvantaged group without allowing the disadvantaged group to realize the full benefit of the extracted value.<sup>42</sup> Opportunity hoarding occurs when advantaged groups restrict access to scarce and valuable resources to in-group members through processes of exclusion and other means of monopolistic control.<sup>43</sup> The race-based system of chattel slavery and the ensuing period of *de jure* Jim Crow represent some of the most extreme and effective processes of exploitation and opportunity hoarding in our nation’s history.<sup>44</sup> These practices laid the foundation for the prevailing system of categorical racial inequality in America, of which our racially segregated and unequal system of public education is but a piece.<sup>45</sup> What makes this categorical inequality “durable,” according to

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37 See SIDANIUS and PRATTO, *supra* n. 31, 182-183 (discussing how the funding of public schools through local property taxes results in wide funding disparities); see also Logan Casey and Elizabeth Mann, *New Survey on minorities adds dissenting view to public satisfaction with schools*, THE BROOKINGS INSTITUTE, BROWN CENTER CHALKBOARD (Jan. 11, 2018) (noting that blacks and Hispanics and even Native Americans have more negative views of public education than whites and Asians owing to systemic differences in public schools that correlate with both race and income).

38 DOUGLAS S. MASSEY, *CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM* 25 (2007) (“The lack of access to high-quality education continues to be a major engine of stratification in the United States.”); *id.* at 37 (“No cleavage looms larger in U.S. history than the chasm of race.”).

39 *Id.* at 7.

40 *Id.* at 23. These phenomena are also explained by social dominance theory, which posits that group-based social hierarchies are endemic to the human condition as a sociological, psychological, and evolutionary fact and are perpetuated through a series of socialization processes at both the individual and institutional/societal levels. See SIDANIUS and PRATTO, *supra* n. 31 at 31.

41 See MASSEY, *supra* n. 38 at 6.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

sociologist Douglas Massey, is that it is “reproduced across time and between generations.”<sup>46</sup>

Categorical inequality in the United States is, among other things, racialized in ways that defy both norms of human behavior and our own normative commitments. Although social categorization and the resulting stratification among social groups are inevitable facts of the human condition<sup>47</sup>, the identity and relative position of groups in the social hierarchy are context-dependent, cultural phenomenon.<sup>48</sup> In other words, all societies are separated into social groups and these groups experience some level of stratification. However, the fact that race is a salient social construct in the United States or that there are gross inequalities across racial groups is a phenomenon that is not inevitable. This racial inequality is, in fact, expressly abjured in the United States.<sup>49</sup> Consequently, practices or processes of exploitation and opportunity hoarding that aid in the maintenance of categorical racial inequality ought to be condemned as inconsistent with our constitutional guarantee of equal treatment on the basis of race.<sup>50</sup> It was this guarantee that led the Supreme Court to first denounce racial segregation in public education as “inherently unequal” in *Brown*, particularly to those minority students denoted as inferior by the exclusion of racial segregation.<sup>51</sup> Michelle Adams, relying on the work of Massey, argues that the Supreme Court has been especially concerned with racial segregation in education precisely because it constitutes a “type of resource lock-up.”<sup>52</sup> To the extent that the demand for race-neutral admissions by challengers of RCAPs is mere educational opportunity hoarding on behalf of certain educationally advantaged racial groups, namely whites and Asians, masquerading as meritocracy, we ought to reject these exclusionary practices and instead promote RCAPs as a means to disrupt our racially segregated system of education.

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46 *Id.* at 26.

47 *Id.* at 1.

48 See SIDANIUS and PRATTO, *supra* n. 31 at 33 (explaining that while social hierarchies based on gender and age are universal, race-based status group hierarchies are context-dependent and culturally specific).

49 U.S. CONST., ART. XIV. Given our unique racial history, our constitutional guarantee of equal protection has been interpreted to provide special solicitude for racial inequality. See *The Slaughterhouse Cases*, 83 U.S. 36, 71-72 (1873) (describing the guarantee of equal protection as inuring specifically to the benefit of the newly emancipated slaves, but acknowledging possible application to other subordinated racial groups.)

50 Daria Roithmayr explains the practice of racial opportunity hoarding as “anti-competitive exclusion” and likens it to cartel behavior in commercial markets. See Daria Roithmayr, *Racial Cartels*, 16 MICH. J. RACE & L. 45 (2010). She suggests that anti-discrimination law can serve an anti-trust function to disrupt these anti-competitive practices. *Id.* Although she situates her analysis in the context of the housing market and voter disenfranchisement, it is equally applicable to the educational context. *Id.* at 63 (“White racial cartels may well have used internalized social norms around identity to create anti-competitive barriers to entry in key markets like labor, housing, and education.”).

51 347 U.S. at 495.

52 Adams, *supra* n. 13, 5 and 22.

## ***B. Race-Neutral “Meritocratic” Admissions as a Form of Opportunity Hoarding***

Although we have long provided a universal system of K-12 public education, these educational opportunities are not all created equally.<sup>53</sup> The kind or quality of the educational experience can make it a scarce educational resource.<sup>54</sup> This differentiation is even more acute in post-secondary education.<sup>55</sup> Competition for the relatively scarce resource of higher education is most intense among highly selective colleges and universities, which not coincidentally are also the schools most likely to employ RCAPs.<sup>56</sup> Opportunity hoarding is a mechanism for advantaged racial groups, such as whites and Asians, to monopolize access to these prized educational resources.<sup>57</sup> Empirical data show how ostensibly race-neutral admissions practices, focused on academic credentials, operate as a

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53 Universal public education emerged during the nineteenth century and included high school by the early twentieth century. NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF MERITOCRACY* at 8 (1999). But it has always been marked by inequality. See MASSEY, *supra* n. 38 at 25 (“The lack of access to high-quality education continues to be a major engine of stratification in the United States.”).

54 Adams, *supra* n. 13, 5-9 (describing various cases from *Sweatt v. Painter*, 339 U.S. 629 (1950) to *U.S. v. Virginia*, 518 U.S. 515 (1996), in which the Supreme Court found that the kind or quality of the education provided by the subject school made it a particularly valuable, thus scarce, educational resource that could not be allocated on the basis of race or gender).

55 See LEMANN, *supra* n. 53 at 9; see also Arcidiacono, *et al.*, *supra* n. 26 at 690 and 699 (classifying the selectivity of colleges and universities into tiers).

56 Race-conscious admissions is practiced largely by the most selective institutions of higher education, which educate a comparatively small fraction of students pursuing higher education. See MICHAEL K. BROWN, ET AL., *WHITE-WASHING RACE: THE MYTH OF A COLORBLIND SOCIETY* at 114 (2003). According to the National Association of College Admissions Counseling, more than two-thirds of colleges reported that race has “no influence” on admissions decisions, and only 3.4% say that it has “considerable influence.” See Melissa Clinedinst, Anna-Maria Koranteng, and Tara Nicola, *State of College Admission*, NATIONAL ASSOCIATION OF COLLEGE ADMISSIONS COUNSELING at 21 (2015). To put this in proper context, forty percent of students attend community colleges, which have open enrollment, while only 0.4% of students attend one of the most highly selective ivy league schools. See *Almanac of Higher Education*, THE CHRONICLE OF HIGHER EDUC. (2011). However, this is not just “much ado about nothing.” It is not the number of schools employing RCAPs that makes them the object of ongoing challenge, it is the type of schools employing them that makes them the target of these challenges. It is precisely because they are selective, and therefore offer a coveted educational experience, that makes them ripe for opportunity hoarding. See *supra* n. 32 and accompanying text.

57 Both whites and Asians enjoy educational advantages by attending well-resourced, suburban schools at a much higher rate than black and Hispanic students, who tend to be concentrated in poorer, urban schools. See Erica Frankenberg, Chungmei Lee and Gary Orfield, *A Multiracial Society with Segregated Schools: Are We Losing the Dream?*, THE CIVIL RIGHTS PROJECT 4-5 and 35 (Jan. 2003) (describing Hispanic students as the most segregated and Asians as the most integrated, further describing black schools as largely urban and the least well-resourced, and noting the concentration of poverty in black and Hispanic schools as twice the rate of that in Asian schools); see also Casey and Mann, *supra* n. 37 (describing a survey where whites and Asians perceived their local schools as “better than others” while blacks and Hispanics perceived their local schools as “worse than others,” and where Asians were the most likely group to say “the quality of their local public school is ‘better’ than in other places.”). Moreover, given the “model minority” myth ascribed to Asians, some scholars have argued that Asians enjoy an “honorary white” racial status in America. See IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* at 152 (1996) (“Asians have long been racialized as non-White in the United States as a matter of law and social practice . . . the model minority myth and professional success have combined to free some Asian Americans from the most pernicious negative beliefs regarding their social character . . . increasingly find themselves functioning as White. . .”).

form of opportunity hoarding in favor of white and Asian students and to the disadvantage of black and Hispanic students.<sup>58</sup> Often these practices result in the disproportionate admission of white and Asian students and the disproportionate exclusion of black and Hispanic students from the elite schools that employ them.<sup>59</sup> For example, Hunter College High School in New York City, an elite school by many measures, uses a race-neutral “merit” based system of admission, and as a consequence in 2013 the student body was forty-nine percent Asian in a public school system that is seventy percent black and Hispanic.<sup>60</sup> At the Thomas Jefferson High School for Science and Technology, a magnet school in Virginia, the result is even more stark; according to recent data their race-neutral “merit” based admissions system resulted in an “entering fall class [that] is sixty-six percent Asian [ ].”<sup>61</sup> Data similarly show that when race-neutral “meritocratic” admissions are employed by colleges and universities they also result in disproportionate admission of white and Asian students and disproportionate exclusion of black and Hispanic students.<sup>62</sup> In 2013, the California Institute of Technology, which is prohibited from using RCAPs by state law, enrolled a 2013 entering class that was 42.5% Asian and less than 2% black.<sup>63</sup> By comparison, in 2013 Harvard’s RCAP enrolled an entering class with 18% Asian students and 6% black students.<sup>64</sup>

As if these stark differences in admission rates across racial and ethnic groups were not disquieting enough, what is most troubling about this practice of “meritocratic” admissions is that the research and literature almost uniformly rejects this singular focus on academic credentials generally, and on standardized test scores in particular, as a reliable predictive measure of students’ academic ability or performance.<sup>65</sup> With respect to higher education admissions specifically,

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58 See *infra* n. 60-64 and accompanying text.

59 *Id.*

60 *SFA v. Harvard* Complaint at 55. The Complaint contained no data for white, black or Hispanic student enrollment, but public sources suggest the racial composition of the school in 2009 was three percent black, one percent Hispanic, forty-seven percent Asian, and forty-one percent white, with the other eight percent of students identifying themselves as multiracial. Sharon Otterman, *Diversity Debate Convulses Elite High School*, THE NEW YORK TIMES (Aug. 4, 2010). This is compared to the New York public school system as a whole, which is seventy percent black and Hispanic. *Id.* Despite faculty calls to abandon the standardized test used to determine admission to the school, administrators, parents, and alumni balked at the suggestion. *Id.*

61 *SFA v. Harvard* Complaint at 55.

62 *Id.*, 53-55; See also Thomas Espenshade and Chang Chung, *The Opportunity Cost of Admissions Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 298 (2005) (describing the dramatic decline in black and Hispanic enrollment that would result from colleges and universities moving from RCAPs to race-neutral admissions).

63 *Id.*; see also California Institute of Technology Undergraduate Ethnic Diversity Breakdown, <https://www.collegefactual.com/colleges/california-institute-of-technology/student-life/diversity/chart-ethnic-diversity.html>.

64 *SFA v. Harvard* Complaint at 55.

65 See Reeves and Howard, *supra* n. 31, 3-4 (“Merit is ... not reducible to a single test at a single point in time. There is no essential essence of merit ... The best we can hope for is ... a robust [ ] set of measures ... both cognitive and non-cognitive ... since both are important in determining [ ] outcomes.”). Although high school grades are known to be the best predictor of academic performance in college, see Soares, *supra* n. 28, most of the challenges to RCAPs focus heavily on

high school grades predict less than a third of students' academic performance in college, and adding SAT/ACT scores to the model increases the predictive value by only 1-4 percentage points, leaving nearly seventy percent of students' academic performance unexplained by either of these academic credentials.<sup>66</sup> In other words, "meritocratic" admissions focused intensively on standardized test scores is not demanded for selective admissions to elite institutions as an empirical matter. But as elite institutions have acknowledged this fact and sought to expand the selection mechanisms used to determine admissions, while also seeking to diversify their student bodies, those white and Asian students historically favored by the practice of "meritocratic" admissions have pushed back vociferously.<sup>67</sup> Given the lack of empirical support for the educational value of race-neutral meritocratic admissions, and the disproportionate benefit incurred for the most advantaged racial groups and disproportionate harm incurred for those already disadvantaged, it is important to consider whether this demand for race-neutral, meritocratic admissions operates as a mechanism of opportunity hoarding of scarce educational resources.<sup>68</sup> If so, it should give us pause about the legitimacy of the demand for race-neutral "meritocratic" admissions.

In addition to the conception of merit employed in the arguments against RCAPs being artificially narrow and empirically unsupported, merit itself is as much a social construction as it is an objective fact.<sup>69</sup> Opportunity hoarding has long been used by advantaged groups to secure their access to valuable scarce resources while simultaneously denying access to these resources to disadvantaged groups.<sup>70</sup> One way groups hoard opportunities is by adopting and perpetuating beliefs that justify the exclusion of some and inclusion of others.<sup>71</sup> For instance, the academic achievement gap between white and Asian students on the one

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differences in standardized test scores. *Id.*

66 See Soares, *supra* n. 28.

67 See *supra* n. 60 (describing opposition by parents to efforts to change the admissions policy at Hunter College High School in New York); see also *SFA v. Harvard* Complaint, *supra* n. 17 and accompanying text and *SFA v. UNC* Complaint, *supra* n. 17 and accompanying text.

68 Massey acknowledges that the history of categorical inequality and practices of exploitation and opportunity hoarding apply to other social identity groups as well, including class and gender. However, race has had a particularly pernicious history in America insofar as categorical inequality is concerned, and blacks and Hispanics have suffered comparatively greater systematic disadvantage than other racial groups. MASSEY, *supra* n. 38 at 49.

69 See *SIDANIUS AND PRATTO*, *supra* n. 31 at 26 ("merit[ ] is not simply a matter of objective truth . . . It is often a socially constructed truth that is both defined by, and serves in the interest of, the ruling elite themselves.")

70 *Id.*

71 See *BROWN, ET AL.*, *supra* n. 56 at 18 (detailing a number of practices indicative of opportunity hoarding, including the adoption of beliefs that denigrate the excluded group(s) and justify their exclusion); see also *ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION* at 9 (2010) (explaining that "[a]s categorical inequality spreads, people explain and legitimate it by inventing stories about supposed inherent differences between their groups. . . groups are deprived of experiences that would qualify them for access to the goods in question, and that deprivation is turned into a rationale for continued deprivation.")

hand, and black and Hispanic students on the other, is a widely observed fact.<sup>72</sup> But it is not axiomatic that this academic achievement gap should signal the lack of academic ability on the part of the latter groups.<sup>73</sup> Rather, both conventional wisdom and empirical research suggest that this academic achievement gap is more predictive of differences in socioeconomic status than differences in academic ability.<sup>74</sup> However, this academic achievement gap provides convenient cover for those who would seek to hoard scarce educational resources by constructing beliefs about academic ability that emphasize academic achievement over other known predictors of academic performance.<sup>75</sup> As explained by philosopher Elizabeth Anderson in describing the process by which advantaged groups effectuate and then rationalize their hoarding of valuable social, political and economic resources, “[i]deologies of inherent group difference misrepresent the effect of group inequality as its cause.”<sup>76</sup> Thus, having perpetuated systemic educational inequalities that produce systematic disadvantage for certain racial groups and systematic advantage for others, those advantages and disadvantages then become the basis for further exclusion.<sup>77</sup> If the demand for race-neutral, meritocratic admissions does nothing more than facilitate opportunity hoarding of scarce educational resources for the benefit of the white and Asian challengers, and to the detriment of the black and Hispanic students who are harmed by these practices, we ought to reject these challenges to RCAPs as illegitimate and contrary to the guarantee of equal educational opportunity promised in *Brown*.<sup>78</sup>

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72 For data on the black-white and Hispanic-white achievement gap, see National Association of Educational Progress statistics, available at <https://nces.ed.gov/nationsreportcard/studies/gaps/>. For data on the achievement gap between Asian students and other ethnic minority groups, see Center on Education Policy statistics, available at <https://www.cep-dc.org/displayDocument.cfm?DocumentID=351>; see also Casey and Mann, *supra* n. 37.

73 Much research instead suggests that these achievement gaps arise from differences in socioeconomic status and related educational opportunities rather than inherent ability. See *supra* n. 29.

74 *Id.*

75 See *infra* n. 77.

76 ANDERSON, *supra* n. 71 at 9.

77 Although the mastermind behind standardized testing in higher education admissions, James Bryant Conant, intended for it to disrupt the then prevailing system of hereditary privilege in determining college admission, and instead to construct a system of college admission based on intellect and ability (the rise of “meritocracy”), elites have nevertheless found a way to exploit this system to their advantage. See LEMANN, *supra* n. 53 at 85; see also; Andrew S. Belasco, Kelly O. Rosinger and James C. Hearn, *The Test Optional Movement at America’s Selective Liberal Arts Colleges: A Boon for Equity or Something Else*, Vol. 37 No. 2 EDUC. EVAL. & POLICY ANALYSIS, 206-223 at 208 (June, 1, 2015). Indeed, although perhaps not designed for the purpose of opportunity hoarding, standardized testing is now most highly correlated with wealth rather than some measure of ability, making it highly susceptible to (and perhaps evidence of) manipulation by those seeking to lock-in their advantaged social position through the hoarding of scarce educational resources. See Sacks, *supra* n. 29. There is even some early indication that the abandonment of standardized tests as a prerequisite to college admissions has not had the racial and socioeconomic leveling effect that was intended due to continued manipulation that preserves the status quo. See Belasco, Rosinger and Hearn, *supra* at 221.

78 Claims of “harm” figure prominently in the opposition to RCAPs. Opponents assert that white and Asian students are “harmed” by their denial of admission, see *SFA v. Harvard Complaint* and *SFA v. UNC Complaint*, *supra* n. 17; see also BROWN, ET AL., *supra* n. 55, 114-115, and even that black and Hispanic students are “harmed” by their admission because of the stigma, racial balkanization,

### *C. The Problem(s) With Educational Opportunity Hoarding*

Hoarding access to elite institutions of higher education by white and Asian students not only impairs the immediate educational prospects for the black and Hispanic students disproportionately excluded from these elite institutions, it also impedes these students' long-term prospects for social mobility.<sup>79</sup> Opportunity hoarding is not an isolated phenomenon; its impact is not limited to the domain in which it operates.<sup>80</sup> It is a mechanism of categorical inequality at the societal level and is designed to ensure its durability across time and space.<sup>81</sup> Denying access to selective colleges and universities to black and Hispanic students under these race-neutral "meritocratic" admissions plans does not just limit their educational opportunities, it limits their life prospects.<sup>82</sup> Blacks and Hispanics already suffer from gross disparities in well-being across a range of social, economic, and health indicators.<sup>83</sup> Higher education, and in particular an elite education, allows students to step up the ladder of opportunity and provides a range of associated benefits for their social, economic and personal well-being.<sup>84</sup>

Moreover, in addition to depriving black and Hispanic students of the opportunity to move up the socio-economic ladder, the advantage given to whites and Asians provided disproportionate access to these elite educational institutions

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and academic "mismatch" that accrue from RCAPs. *See id*; *see also* Arcidiacono, *et al*, *supra* n. 26, 697-698. However, these arguments rarely acknowledge the harm accrued to black and Hispanic students who are disproportionately excluded from elite colleges and universities when RCAPs are abandoned in favor of race-neutral meritocratic admissions. *Id.* at 690 ("[black and Hispanic students] are already concentrated in the lowest tiers of academic institutions. Eliminating [RCAPs] would only exacerbate this concentration. This is not only bad for students and schools, but also bad as a matter of educational policy. The cruel irony of discontinuing [RCAPs] by selective colleges and universities is that further concentrating [black and Hispanic students] in the lowest tier(s) of our higher education hierarchy would serve to reinforce the stigma that [they] are academically inferior, rather than countering it.") Adams argues that even race-neutral actions can be condemned under equal protection when they are designed to segregate and conversely that race-conscious actions may be tolerable if their purpose is to achieve integration. Adams, *supra* n. 13 at 25.

79 *See* Reeves and Howard, *supra* n. 31 at 6 (demonstrating that a college degree provides the single greatest boost in upward social mobility for those at the bottom of the income distribution and the best hedge against downward mobility for those at the top); *see also* SIDANIUS AND PRATTO, *supra* n. 31 at 105 (observing that attempts to abolish affirmative action or RCAPs in higher education enforce existing status hierarchies "because it can be demonstrated that it will generally be perceived as impeding the upward mobility of subordinated groups" and suggesting that opposition to RCAPs are themselves mere mechanisms of enforcing racial status hierarchies).

80 *See* MASSEY, *supra* n. 38 at 6 (describing opportunity hoarding as part of the larger social process of categorical inequality).

81 *Id.*

82 *See generally* WILLIAM G. BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998) (finding that underrepresented minorities attending elite colleges and universities are more likely to graduate and to report greater long-term career satisfaction than their peers who did not attend elite schools); *see also* BROWN, ET AL., *supra* n. 70 at 128 ("the legal and political struggle over affirmative action at select colleges is deadly serious, but it is not about upholding 'standards.' It is about money, rewards, and who gets what in the future.")

83 *See* BROWN, ET AL., *supra* n. 70, 13-15.

84 For a discussion of these benefits, *see generally* BOWEN and BOK, *supra* n. 82.

unfairly insulates them against downward mobility.<sup>85</sup> This manipulation of opportunity to provide unfair advantage to some and unfair disadvantage to others is precisely how categorical inequality is made durable.<sup>86</sup> The guarantee of equal protection ought to include disrupting the processes and practices that create and sustain these systems of categorical inequality.<sup>87</sup>

### III. RCAPs As An Antidote to Educational Opportunity Hoarding

Although the challengers to RCAPs suggest that even other, less “meritocratic” but still race-neutral alternatives, such as percentage plans and socioeconomic considerations, would be preferable to RCAPs, these arguments ring hollow because they ignore the race-conscious nature of these alternatives, which are expressly designed to increase the number of underrepresented minority students admitted to selective colleges and universities.<sup>88</sup> Moreover, the suggestion that socioeconomic considerations would be preferable to RCAPs belies the challengers’ intense focus on the disparities in academic credentials between those white and Asian students denied admission under RCAPs and those black and Hispanic students admitted, as well as their insistence that colleges and universities should instead admit only those students with the highest academic credentials, who also happen to be disproportionately white and Asian.<sup>89</sup> Given this, it seems unlikely that if percentage plans and socioeconomic considerations adopted in lieu of RCAPs produced the same increased level of

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85 A recent study by researchers at the Brookings Institute concluded that 43% of those in the top income quintiles who were otherwise predicted to fall down the socioeconomic ladder based on their low aptitude and abilities, but who were nonetheless given access to a college education, were able to remain at the top of the socioeconomic ladder in spite of their own diminished aptitude and abilities. Reeves and Howard, *supra* n. 31 at 6. Conversely, only 8% of those in the bottom income quintiles who were otherwise predicted to remain at the bottom of the socioeconomic ladder based on their low aptitude and abilities actually made it to the top of the socioeconomic ladder. *Id.* For those predicted to rise to or stay at the top of the socioeconomic ladder based on their high aptitude and abilities, 71% of those in the top income quintiles stayed at the top, while only 40% of those in the bottom income quintiles rose to the top as predicted. *Id.*, 5-6.

86 See MASSEY, *supra* n. 38 at 6.

87 Many constitutional scholars argue this reflects the anti-subordination principle of equal protection, which disrupts and unsettles existing racial hierarchies in society. See e.g. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2003-2004). I have defined this as the pluralist principle of equal protection, which ensures that all groups participate equally in the institutions and mechanisms of democracy, of which public education is a cornerstone. See Stacy Hawkins, *Diversity, Democracy & Pluralism: Confronting the Reality of Our Inequality*, 66 MERCER L. REV. 577 (2015).

88 See *SFA v. Harvard* Complaint, 72-76 (suggesting that Harvard abandon its RCAP in favor of socioeconomic preferences); *SFA v. UNC* Complaint, 22-26 (suggesting that UNC abandon its RCAP in favor of socioeconomic preferences or a percentage plan similar to that employed by the University of Texas and unchallenged in *Fisher*). According to Justice Ginsburg, “[o]nly an ostrich could regard the supposedly neutral alternative [percentage plan] as race unconscious.” *Fisher I*, 133 S. Ct. at 2433.

89 The major thrust of the challengers’ argument, and their supporting evidence in opposition to RCAPs, is that their credentials are higher than those of the black and Hispanic students admitted under RCAPs. The challengers submit pages of argument including numerous data, tables, and figures to demonstrate this credentials gap as proof of the impropriety of RCAPs. See *SFA v. Harvard* Complaint, 43-48 and 65-66; *SFA v. UNC* Complaint, 19-20.

black and Hispanic enrollment, with the same disparities in academic credentials between these students and those white and Asian students denied admission, these challengers would abandon their claims for “meritocratic” admissions or concede that these alternatives are acceptably race-neutral.<sup>90</sup>

If challenges to RCAPs are only nominally about “meritocracy” and more conspicuously about securing for those already advantaged by systemic educational inequalities further advantage, while locking in educational disadvantage for others, then these challenges ought to be rejected as contrary to the guarantee of equal protection. On the other hand RCAPs, viewed in this light, can be seen as an opportunity, as Justice O’Connor acknowledged in *Grutter v Bollinger*, to demonstrate that elite institutions of higher education are indeed “visibly open to talented and qualified individuals of every race and ethnicity.”<sup>91</sup> Rather than demand that admissions be race-neutral in service to some false meritocratic ideal, the Supreme Court ought to continue to permit college and universities to adopt RCAPs in an effort to ensure that the systemic inequalities that exist throughout our society, and especially in public education, are not perpetuated in the realm of higher education. Higher education is uniquely positioned to provide an opportunity for individuals to break free of the systems of categorical inequality that create and maintain disadvantage for certain racial groups and preserve unfair advantages for others.<sup>92</sup> RCAPs can help colleges and universities disrupt the practice of educational opportunity hoarding and ensure the more equitable distribution of the scarce resource of an elite education, thereby helping to realize *Brown’s* promise of equal educational opportunity, at least in the realm of higher education.

#### IV. Conclusion

Contrary to Justice Ginsburg’s post-*Fisher* prediction, we are continuing to see challenges to RCAPs in higher education, and fundamental legal questions about the constitutionality of any governmental uses of race are likely to continue to divide both the Court and litigants in these cases. Perhaps the question we ought to be asking is not whether RCAPs are constitutionally permissible, but whether as both a practical and legal matter the insistence on race-neutral “meritocratic” admissions in higher education can be justified. Or, whether the demand for race-neutral admissions is less about meritocracy and more about the hoarding of scarce educational resources by those who are already advantaged, while propounding harm to those who are already disadvantaged by the existing system of racially segregated and unequal education in America. If the meritocracy argument is

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90 *Id.* Evidence that the opposition to RCAPs is more about opportunity hoarding than concerns for meritocracy can also be found in survey data showing that white respondents favored meritocratic admissions more when they believed they would largely benefit from them and less when they believed Asian students would benefit disproportionately from them. See Jaschik, *supra* n. 11. Massey explains this phenomenon as follows: “People naturally favor boundaries and framing that grant them greater access to material, symbolic, and emotional resources, and they seek to convince others to accept their favored version of social reality.” MASSEY, *supra* n. 38 at 15.

91 *Grutter*, 539 U.S. at 332; see also Adams, *supra* n. 13, 29-30 (describing the Supreme Court’s focus as “accessibility and inclusion” by allowing “otherwise impermissible racial classifications” to undermine racial segregation).

92 See BOWEN and BOK, *supra* n. 82; see also Reeves and Howard, *supra* n. 31.

nothing more than a subterfuge for perpetuating categorical racial inequalities in education specifically and society more generally, it cannot be countenanced. Instead, RCAPs can serve as an effective antidote to the problem of educational opportunity hoarding by disrupting the disparate allocation of advantages and disadvantages based on race that have long defined education in America.