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# THE JOURNAL OF COLLEGE AND UNIVERSITY LAW

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ASSOCIATION OF COLLEGE AND  
UNIVERSITY ATTORNEYS AND  
THE RUTGERS LAW SCHOOL



**RUTGERS**  
Law School



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## ARTICLES

### **Accepting Uncertainty: Fisher v. University of Texas and Race-Conscious College Admissions**

Vernon L. Francis      pg 124

In an article published at the end of the United States Supreme Court's 2015 term, the *New York Times* reported that Justice Ruth Bader Ginsburg characterized the Court's decision in *Fisher v. University of Texas*, its most recent affirmative action case, as "built to last." It took two trips to the Supreme Court for the Justices to reach their final decision in *Fisher*, which focused on a rejected applicant's challenge to the University of Texas at Austin's race-conscious admissions plan. At the conclusion of the case's second round before the Court, seven of the Court's Justices voted 4 to 3 to rebuff the petitioner's challenge to the University's plan, holding it a constitutional exercise of government authority under the Equal Protection Clause of the Fourteenth Amendment. After this result, Justice Ginsburg reportedly observed, "I don't expect that we're going to see another affirmative action case ... at least in education."

### **Race-Conscious Admissions Plans: An Antidote to Educational Opportunity Hoarding?**

Stacy Hawkins      pg 151

Race-conscious admissions plans ("RCAPs") in higher education have had a fraught legal history. 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. Author Vernon Francis chronicles this tortured history in his article *Living with Uncertainty: Fisher v. University of Texas and Race-Conscious College Admissions*. The most recent episode in this ongoing saga is the Supreme Court's 2016 decision in *Fisher v. Texas* ("*Fisher II*"). Although the Supreme Court once again upheld the use of race in higher education admissions, the outlook remains uncertain.

**The U.S. Supreme Court's Use of Non-Legal Sources and *Amicus Curiae* Briefs in *Fisher v. University of Texas***

Liliana M. Garces  
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In February 2012, the U.S. Supreme Court agreed to hear a case that challenged the constitutionality of a race-conscious admissions policy at the University of Texas at Austin (“the university”). In addition to the evidence put forward by the parties, a broad constituency of individuals and organizations on both sides of the debate mobilized to inform the Court of the arguments under consideration. For example, *amici curiae* in support of the university presented research to impress upon the Court the need for postsecondary institutions to be permitted to consider race as one among myriad factors in admissions to fulfill their educational missions. *Amici* in support of *Fisher* also submitted a wide range of sources to support arguments that the university’s race-conscious policy did not meet the requirements of the Equal Protection Clause. Four years later in 2016, the Court ultimately upheld the constitutionality of the policy in a 4-3 decision. Applying the standard of strict scrutiny, the Court’s decision re-affirmed decades of precedent establishing that postsecondary institutions had a compelling interest in furthering a diverse student body and held that, as implemented by the university, the use of race was narrowly tailored to this goal. Justice Kennedy, who for the first time found a race-conscious policy in education to be narrowly tailored, authored the majority opinion in the case.

**To the Rich Go the Spoils: Merit, Money, and Access to Higher Education**

Jonathan D. Glater

pg 195

Financial aid from the federal government helps put higher education within reach of aspiring college students and plays a critical role in determining who has meaningful access to opportunity in the United States. Increasingly, this system works to undermine the success of poorer students and, disproportionately, African American and Latino students who need and receive financial aid. This outcome has occurred not because federal aid policy has failed but because of how it has succeeded: Government-provided credit enables students to finance college. The rising cost of college has led more students to borrow larger amounts and that debt can undermine academic success, career choice, and socioeconomic mobility – the very goals lawmakers sought to promote. Access is less meaningful to the extent that those who use federal aid are constrained to a greater degree than those students who do not. Meaningful access, enabling students to pursue careers regardless of how they finance higher education, is undermined by debt. Growing indebtedness is the product of conflicting legislative efforts, declining direct financial support of public colleges and universities, and corresponding growth in tuition that has exceeded growth in household incomes. This Article identifies distinct models that have guided policy interventions affecting the accessibility of higher education in the United States and develops a critique of their effects.

## BOOK REVIEWS

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# ACCEPTING UNCERTAINTY: FISHER V. UNIVERSITY OF TEXAS AND RACE-CONSCIOUS COLLEGE ADMISSIONS

VERNON L. FRANCIS\*

## *Abstract*

*In Fisher v. University of Texas a 4-3 majority of the United States Supreme Court upheld the University's race-conscious admission program against a challenge from an applicant who claimed that the program violated the Equal Protection Clause of the 14th Amendment. The hope was that this decision would finally bring an end to divisions among the Justices on the issue of affirmative action that have created uncertainty about whether public universities can maintain race-conscious admissions policies without violating the constitution, and what the principles governing such programs would be. This article explores whether a workable consensus on these issues has been reached, or whether divisions that still exist among members of the Court continue to contribute to an atmosphere of uncertainty that has followed the Court's affirmative action jurisprudence from the outset. The paper concludes that the Court appears to have reached consensus on the idea that equal protection "strict scrutiny" should be the standard of review for such programs, and that diversity is the kind of compelling governmental interest that can be furthered by the judicious use of race-conscious admissions criteria. But divisions among the Justices remain on how this standard should be applied in a given case. Two approaches appear to be in competition for the Justices' attention—the more pragmatic but still rigorous approach to strict scrutiny applied by the Fisher majority in upholding the Texas program, and a much less forgiving form of scrutiny proposed by Fisher's dissenters, which seems closer in spirit if not in application to the "strict in theory, fatal in fact" form of review traditionally applied to legislative measures used to institutionalize racial segregation and promote white supremacy. It should be noted, however, that the application of either standard would require a college or university whose plan was subject to challenge to produce the kind of evidentiary record that would support their continuing use of race-conscious criteria, and that would demonstrate that the use of racially neutral criteria would fail to achieve the level of diversity in its student body needed to meet its legitimate educational goals. Public institutions of higher learning must be prepared to live with the uncertainty created by this ongoing doctrinal conflict, and for the challenges the conflict over affirmative action will continue to present.*

## **Introduction**

In an article published at the end of the United States Supreme Court's 2015 term, the *New York Times* reported that Justice Ruth Bader Ginsburg characterized the Court's decision in *Fisher v. University of Texas*,<sup>1</sup> its most recent affirmative action

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\* Partner, Dechert LLP. I would like to thank Georgette Chapman Phillips for her comments on an early draft of this paper

case, as “built to last.”<sup>2</sup> It took two trips to the Supreme Court for the Justices to reach their final decision in *Fisher*, which focused on a rejected applicant’s challenge to the University of Texas at Austin’s race-conscious admissions plan. At the conclusion of the case’s second round before the Court, seven of the Court’s Justices voted 4 to 3 to rebuff the petitioner’s challenge to the University’s plan, holding it a constitutional exercise of government authority under the Equal Protection Clause of the Fourteenth Amendment. After this result, Justice Ginsburg reportedly observed, “I don’t expect that we’re going to see another affirmative action case ... at least in education.”<sup>3</sup>

If Justice Ginsburg’s prediction proves to be accurate, then *Fisher* would be an important milestone in the Court’s over forty-year struggle to determine whether, and when, the use of race-conscious college admissions policies are constitutionally valid. Over the years, the Court’s body of decisions on these programs has been characterized by doctrinal instability and uncertainty—byproducts of continuing disagreements among the Justices over the constitutionality of race-conscious admissions programs under the Equal Protection Clause. From the beginning, basic issues regarding whether, and for what purposes, government entities may use race-conscious policies, and about what standards courts should use to review them, have been debated. The Justices’ disagreements on these issues have been so pronounced, and their divisions so pointed and persistent that even cases decided by Court majorities seemed vulnerable to reconsideration and reversal.

Justice Ginsburg’s remarks can be read to suggest that the Court’s opinions in the *Fisher* case may have altered this pattern. In the second of its *Fisher* opinions (*Fisher II*), a majority of the Court reaffirmed holdings in earlier cases that have allowed institutions of higher education to employ race-conscious admissions policies as long those policies can survive strict scrutiny under the Equal Protection clause. To that extent, the Court in *Fisher II* also can be viewed as having rejected, once again, a theory of strict scrutiny that is “strict in theory, but fatal in fact,” at least when applied to appropriately tailored race-conscious admissions programs. But did *Fisher* really exorcise the shade of uncertainty that has haunted the Court’s affirmative action jurisprudence, at least as it relates to college admissions?

This summary will discuss why a level of doctrinal uncertainty about the future of race-conscious admissions programs is likely to persist despite the *Fisher* result. Two reasons in particular will be suggested. First, although the Court has agreed for quite some time that “strict scrutiny” is the appropriate standard of review for race-conscious admissions plans, significant differences among the Justices remain on *how* the courts should apply this standard. The Court’s differences on the strict scrutiny standard’s application are the result of disparate opinions among the Justices on the level of skepticism with which any race-conscious policy adopted by government should be approached. They are doctrinally significant because their

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1 136 S. Ct. 2198 (2016). *Fisher*’s case came before the Supreme Court twice. For simplicity, the Court’s 2013 opinion, *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013), will be referred to as *Fisher I*, and the 2016 opinion, 136 S. Ct. 2198, as *Fisher II*. The litigation collectively will be referred to as *Fisher*.

2 Adam Liptak, *Ginsburg Has a Few Words About Trump*, N.Y. Times, July 11, 2016, at A1.

3 *Id.*

resolution can affect not only the kind and quantity of proof a college or university will be expected to produce in the event of a court challenge, but also the type and intensity of the administrative effort necessary to create an evidentiary record that can persuade a reviewing court of the institution's good faith.

The second source of continued doctrinal uncertainty is the *Fisher* Court's emphasis of a principle long associated with the use of race-conscious remedies, but in a way that seemed almost new. Specifically, as part of its holding, *Fisher II*'s majority directed state-run institutions of higher education that use race-conscious measures to conduct "periodic reviews" of their admissions policies, in order "to reassess [their] constitutionality and efficacy." In other words, if it was not clear before, the Court made clear in *Fisher II* that institutions employing race-conscious admissions strategies are expected and required to be proactive about ensuring that, over time, their programs operate within constitutional boundaries. These institutions also are required to make sure that any such plan will operate only for as long as it is actually needed, and have been encouraged to view themselves as "laboratories" for the development of racially-neutral strategies for maintaining diverse student populations, in anticipation of a time when such measures presumably would be no longer needed. Figuring out how to incorporate the Court's new emphasis on plan oversight into their admissions strategies may well be the next important challenge state-run institutions must face in this area.

The paper begins with a review of the Court's journey from its first affirmative action case to its rulings in *Fisher*, with an emphasis on the Court's decisions on college admissions programs, to provide background on the issues that have united and divided the Justices. The discussion then turns to the *Fisher* decisions themselves, and to how the results in these decisions incorporate and depart from the Court's precedents on the constitutionality of race-conscious admissions in an effort to explain where the Court's doctrinal fissures remain. The paper concludes with thoughts on where the Court's latest rulings on affirmative action may or may not take future litigation on these issues, and on what changes, if any, to their recruiting programs the Court's directives will require of colleges and universities that still rely on race-conscious recruiting efforts.

## I. Race-Conscious Admissions and Living with Doctrinal Uncertainty

Uncertainty has been a defining characteristic of the Supreme Court's affirmative action jurisprudence from the very beginning. The confusion started with the Court's very first affirmative action case, *DeFunis v. Odegaard*,<sup>4</sup> where the Court declined to reach the merits of a law student's Fourteenth Amendment claim because of mootness. The plaintiff in *DeFunis* was a white law school applicant who challenged the University of Washington's law school admissions policy, claiming that the school's procedures for admitting minority applicants violated his right to Equal Protection.<sup>5</sup> In a *per curiam* decision, the Court dismissed *DeFunis*'s claim as moot because the trial court had ordered the petitioner immediately admitted to the law school, and he was in the last quarter of his final year as a law student

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4 416 U.S. 312 (1974).

5 *Id.* at 314.

when the Supreme Court heard his case.<sup>6</sup> Even then, a forceful dissent by Justice Douglas, who argued that as a general matter the Equal Protection Clause barred the use of racial preferences by government, suggested the depths of the internal divisions the Court would face in attempting to decide these issues.<sup>7</sup>

It was in *Regents of the University of California v. Bakke*<sup>8</sup> that the Supreme Court first addressed the doctrinal challenges raised by race-conscious admissions policies. In *Bakke*, the Court was asked to determine whether the minority admissions plan for the University of California at Davis Medical School, which apportioned a predetermined number of places in each entering class for applicants of color, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution or Title VI of the Civil Rights Act.<sup>9</sup> An opinion by Justice Lewis Powell led a fractured Court to a compromise holding: that race-conscious measures in college admissions were not necessarily prohibited by the Equal Protection Clause in every instance, but that Davis's particular use of racial criteria was unconstitutional.<sup>10</sup> In later decisions, while appearing to accept the core of Justice Powell's approach to reviewing race-conscious government actions, the Court has continued to disagree on what his approach actually requires with regard to judicial review of race-conscious college admissions policies.

#### ***A. Justice Powell Lays a Foundation in Bakke***

The divide Justice Powell sought to bridge with his opinion in *Bakke* arose in part from a split among the Justices on what standard of review under the Equal Protection Clause to apply in cases involving "benign" uses of race-conscious measures. In cases before *Bakke* involving regulations that restricted or granted access to governmental rights or benefits on the basis of racial criteria, the Court had held that the government entity employing the rule was required to meet the demands of strict scrutiny—that is, to demonstrate that the racial classification at issue served a compelling government interest, and that the use of such a measure was necessary to the achievement of that interest.<sup>11</sup> In *Bakke*, the Court was faced with deciding whether strict scrutiny as it had been applied in other cases should be used to evaluate Davis's program, whether a lower level of scrutiny that would have allowed the states more leeway to develop voluntary remedial measures

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6 *Id.* at 319-20.

7 *See id.* at 320-48 (Douglas, J., dissenting). Justice Brennan also filed a dissent in *DeFunis*, which was joined by Justices Douglas, White, and Marshall. Justice Brennan also argued that the case was not moot, and that the majority's decision was an attempt to sidestep resolution of a difficult case. *Id.* at 348-50 (Brennan, J., dissenting).

8 438 U.S. 265 (1978).

9 *Id.* at 277-78. The Equal Protection clause provides that "[n]o state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Under Title VI, "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance." 42 U.S.C. § 2000d.

10 *See Bakke*, 438 U.S. at 316-20.

11 *E.g.*, *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984).

should be applied, or whether Court review of any constitutional issue was required given the circumstances of the case.

The argument that strict scrutiny should be used to review voluntary affirmative action policies posed a doctrinal problem for those who believed in the validity of voluntary affirmative action efforts. Before *Bakke*, observers considered the strict scrutiny applied in Equal Protection cases to be “strict in theory, but fatal in fact.”<sup>12</sup> What this meant was that in most cases, once the Court decided to apply strict scrutiny to a race-conscious measure, it was almost a certainty that the measure in question would be found unconstitutional.<sup>13</sup> This was because, in reviewing the constitutionality of racial restrictions now acknowledged to have been unlawfully repressive to non-whites, the Court found that, “[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.”<sup>14</sup>

Four Justices (Brennan, Marshall, Blackmun and White) concluded in *Bakke* that it made no sense for courts to use the same Equal Protection standard used to break down the system of racial apartheid that had developed in the United States after the Civil War to assess the constitutionality of actions taken by governments to improve the condition of people who were the victims of this oppression.<sup>15</sup> More pragmatically, these Justices also must have been concerned that a rule requiring the application of the “strict in theory, fatal in fact” model of strict scrutiny to race-conscious regulations would either drastically curtail or bring an end to voluntary government efforts to address racial inequality, a fate they found inconsistent with the remedial purposes that motivated passage of the post-Civil War Amendments.<sup>16</sup> The proper response to these concerns, these Justices argued, was the use of a form of intermediate scrutiny (similar to the standard used to review gender-based restrictions) in cases involving benign uses of racial criteria.<sup>17</sup>

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12 *E.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (citation omitted).

13 *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing the Warren Court’s model for Equal Protection review).

14 *Palmore*, 466 U.S. at 432; *accord* *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J. dissenting) (“Our jurisprudence ranks race a ‘suspect’ category, not because [race] is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality.” (emendation in original)).

15 *Bakke*, 438 U.S. at 356-66, 368 (Brennan, J., concurring).

16 “*See id.* at 362-69 (explaining why voluntary efforts by state governments to bring their institutions’ practices into compliance with the Fourteenth Amendment’s protections are constitutional). More recently, Justice Ginsburg has argued that in reviewing race-conscious regulation, courts should be allowed to distinguish between measures intended to remedy lingering inequalities and restrictions meant to perpetuate them, and that the standards of review utilized in equal protection cases should reflect these differences. *Gratz*, 539 U.S. at 301-302 (Ginsburg, J., dissenting).

17 *See Bakke*, 438 U.S. at 359 (Brennan, J., concurring). For a time, a majority of the Court agreed that the intermediate standard championed in Justice Brennan’s *Bakke* opinion should be used to review affirmative action programs enacted by the United States Congress, as opposed to those established by state governments. *E.g.*, *Metro Broadcasting v. FCC*, 497 U.S. 547, 565-66 (1990). The Court abandoned this distinction, however, in *Adarand Constructors v. Peña*, 515 U.S. 200, 226-27 (1995), where it held that all race-conscious governmental action should be subject to strict scrutiny no matter where it originates.

Four other Justices took the position in *Bakke* that the only issue legitimately before the Court was whether Davis's admissions policy violated Title VI. Writing for himself, Chief Justice Burger, and Justices Stewart and Rehnquist, Justice Stevens wrote that it was "perfectly clear that the question whether race can ever be used as a factor in an admission decision is not an issue in this case, and that discussion of that issue is inappropriate."<sup>18</sup> Instead, these Justices concluded that Davis's program violated Title VI's prohibitions on discrimination, and that given the availability of a statutory ground for the Court's decision, the analysis should have ended there.<sup>19</sup>

Justice Powell's opinion in *Bakke* was essentially an attempt to bridge this divide. First, although he agreed that the Fourteenth Amendment did not always preclude uses of racial criteria for remedial purposes *per se*, Justice Powell also concluded that strict scrutiny should apply to all uses of racial criteria by government, whether characterized as benign or not.<sup>20</sup> He believed that the Fourteenth Amendment required the courts to maintain a degree of skepticism about the use of racial preferences for any purpose, and that consistency in constitutional interpretation required the use of the same standard in all cases.<sup>21</sup> Second, and importantly, Justice Powell also concluded that the alleviation of what he called "societal discrimination" was not the kind of compelling state interest that could survive strict scrutiny because it was "an amorphous concept of injury that may be ageless in its reach into the past."<sup>22</sup> After examining all of the justifications offered by Davis for its admissions policy, he determined that the only interest important enough to meet the demands of strict scrutiny was that of attracting and maintaining a diverse student body. The Justice concluded that Davis's interest in enrolling diverse classes of medical students was not only constitutionally protected, but also consistent with the educational missions of institutions of higher education and within their institutional competencies.<sup>23</sup>

Reaching the "means" prong of the strict scrutiny inquiry, Justice Powell concluded that Davis's decision to reserve a specific number of class seats only for students of color was not a "narrowly tailored" means of achieving this constitutionally permissible goal.<sup>24</sup> It was this conclusion that led to what has become one of the few rules of general application to come from the Court's affirmative action cases—namely, that schools are prohibited from using racial "quotas" as a tool for achieving diversity.<sup>25</sup> Citing the undergraduate admissions policy in place at Harvard University as an example, Justice Powell endorsed

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18 *Bakke*, 438 U.S. at 411 (Stevens, J., concurring in part).

19 *See id.* at 411-12, 421.

20 *Id.* at 294-99 (judgment of the court).

21 *Id.* at 294, 296-97, 99.

22 *Id.* at 306-09. Justice Powell expressed a similar sentiment in *Wygant v. Jackson Board of Education* when he called such a goal "too amorphous a basis for imposing a racially classified remedy." 476 U.S. 267, 276 (1986).

23 *Bakke*, 438 U.S. at 311-14.

24 *Id.* at 315, 318-19.

25 *E.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (*citing Bakke*, 438 U.S. at 315).

plans that instead required each application to be considered individually and that treated an applicant's race as but one of several factors potentially relevant to the admissions process.<sup>26</sup> In his view, this individualized consideration of applications would limit the potential damage to the interests of non-minority candidates, while allowing educational institutions to pursue constitutionally legitimate efforts to ensure a diversity of perspectives on campus.<sup>27</sup>

### **B. Grutter Adopts Justice Powell's Reasoning and Sets a Deadline**

Twenty-five years later, the issue of race-conscious university admissions returned to the Supreme Court<sup>28</sup> in the form of two actions brought against separate schools of the University of Michigan: *Grutter v. Bollinger*,<sup>29</sup> an action challenging the constitutionality of the law school's admissions policy under the Equal Protection clause,<sup>30</sup> and *Gratz v. Bollinger*,<sup>31</sup> which raised a similar challenge to the university's undergraduate admissions policy.<sup>32</sup> The Court found the undergraduate school's use of race as a factor to be overly rigid and, therefore, unconstitutional.<sup>33</sup> However, the Court approved the law school's admissions policy, which was modeled on the "Harvard" plan recommended by Justice Powell in *Bakke*.<sup>34</sup>

The Court's decision in *Grutter* followed a period of uncertainty about affirmative action's continuing viability, fueled in part by decisions about government use of race-conscious measures in settings other than college admissions that raised questions about the Court's willingness over the long term to continue to allow states to implement race-conscious remedies.<sup>35</sup> Contributing to these anxieties was the Fifth Circuit's 1996 decision in *Hopwood v. Texas*,<sup>36</sup> which rejected the idea that ensuring classroom diversity could ever be a sufficiently compelling justification

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26 *Bakke*, 438 U.S. at 315-19.

27 *Id.*

28 Another case involving a student challenge to a university's affirmative action plan did reach the Court during the period between its decisions in *Bakke* and *Grutter*, but the Court found the student's claim invalid because he was unable to allege the kind of injury necessary to support a Section 1983 action. *See Texas v. Lesage*, 528 U.S. 18, 20-22 (1999).

29 539 U.S. 306.

30 *Id.*

31 539 U.S. 244 (2003).

32 *Id.*

33 *Id.* at 270-72.

34 *Grutter*, 539 U.S. at 343-44.

35 *See id.* at 344-45 (Ginsburg, J., concurring) (noting that for "at least part of [the] time" that elapsed between *Bakke* and *Grutter*, "the law could not fairly be described as 'settled'"); *see also Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (overruling Supreme Court precedent to hold that strict scrutiny applies in all cases involving judicial review of race-conscious measures, whether the regulations at issue are state or federal); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that local government minority set-aside program violated Equal Protection clause).

36 78 F.3d 932 (5th Cir. 1996).

for the use of race-conscious measures.<sup>37</sup> The *Grutter* majority appeared determined to put these anxieties to rest, at least in the context of college and university admissions. Justice O'Connor's opinion for the Court endorsed Justice Powell's recognition of student diversity as a constitutionally permissible objective.<sup>38</sup> The Court also reaffirmed the constitutionality of individualized review of applicants using race as one factor among many others, as Justice Powell had prescribed.<sup>39</sup>

Justice O'Connor's opinion in *Grutter* was consistent with the approach to Equal Protection strict scrutiny she had articulated in earlier cases involving government use of race-conscious measures. In *Wygant v. Jackson Board of Education*,<sup>40</sup> for example, the Court invalidated a public school plan that would have provided minority teachers a measure of protection in the event of a layoff.<sup>41</sup> In her concurring opinion in *Wygant*, Justice O'Connor expressly "subscribe[d] to Justice Powell's formulation" of strict scrutiny because it "mirror[ed] the standard ... consistently applied" by the Court "in examining racial classifications in other contexts."<sup>42</sup> The Justice also suggested that the differences between strict scrutiny as she would apply it in affirmative action cases and the intermediate standard of scrutiny Justice Brennan advocated in *Bakke* did "not preclude a fair measure of consensus." Rather, she concluded, "[t]he Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant to remedial use of a carefully constructed affirmative action program."<sup>43</sup>

A few years later, in *Adarand Constructors v. Peña*,<sup>44</sup> a case involving a federal program meant to encourage the use of minority contractors, Justice O'Connor again made it clear that, in her view, strict scrutiny should not be viewed as necessarily "fatal in fact" when applied to affirmative action plans:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it ... . When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases.<sup>45</sup>

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37 See *id.* at 944-48.

38 See *Grutter*, 539 U.S. at 328.

39 *Id.* at 340-41.

40 476 U.S. 267 (1986)

41 *Id.* at 270-71, 283-84.

42 *Id.* at 285 (O'Connor, J., concurring in part).

43 *Id.* at 286; see also *id.* at 287 (stating that the Court was "in accord" that a public employer "consistent with the Constitution," may undertake appropriate affirmative action remedies).

44 515 U.S. 200 (1995).

45 *Id.* at 237 (O'Connor, J., concurring) (citations omitted).

In her *Grutter* opinion, Justice O'Connor applied this understanding of strict scrutiny's purpose and of its proper application to the University of Michigan Law School's race-conscious admissions plan. Speaking for the Court, she wrote: "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause"<sup>46</sup> and explained:

Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.<sup>47</sup>

The *Grutter* majority was convinced that the law school's admissions plan should survive this review. In contrast, the majority in *Gratz* just as soundly rejected more rigid applications of criteria that in its view gave undue weight to race-conscious factors.<sup>48</sup> Unlike the law school's admissions plan, the undergraduate school's plan automatically awarded twenty points from a 100 point scale to every candidate for admission from an "underrepresented racial or ethnic minority group."<sup>49</sup> In the Court's view, this plan's automatic award of a substantial number of the points needed for admission to every minority candidate did not provide the kind of individualized consideration of applicants envisioned by Justice Powell in *Bakke*, which meant that the plan could not be considered "narrowly tailored" within the meaning of strict scrutiny.<sup>50</sup> Read together, the results in *Gratz* and *Grutter* cemented the idea that admissions policies employing racial criteria in a manner that, whether intentionally or by operation, guaranteed admission to a defined number of minority students, rather than plans that called for holistic reviews of each individual applicant, would face serious obstacles on review.<sup>51</sup>

Although it voted to allow appropriately tailored uses of race-conscious criteria in the context of college admissions, the *Grutter* majority also appeared to be concerned that without appropriate guidance from the courts, there was a danger that educational institutions would treat racial preferences not as temporary remedial measures, but as permanent entitlements. To address this concern, the Court grafted a requirement onto race-conscious admissions plans that introduced a new source of uncertainty about the future of such programs: the idea that all affirmative action policies should have a "sunset." The Court noted in *Grutter* that

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46 *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003).

47 *Id.*

48 *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (discussing the Harvard-style admissions plan described by Justice Powell in *Bakke* and noting that, "[t]he admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application" (citations omitted)); see also *Grutter*, 539 U.S. at 334 ("To be narrowly tailored, a race-conscious admissions program cannot use a quota system.").

49 *Gratz*, 539 U.S. at 255.

50 *Id.* at 269-75.

51 See *id.* (discussing differences between the University of Michigan undergraduate plan and the Powell plan).

race-conscious admissions programs were never intended to exist in perpetuity, that any such programs “must be limited in time,” and that there was “no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.”<sup>52</sup> In fact, the Court went as far as to suggest what the “logical end point” for race-conscious admissions programs might be, writing: “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”<sup>53</sup>

Incorporated as part of *Grutter’s* “sunset” provision was the admonition that colleges and universities should periodically review their race-conscious admissions programs to determine whether racial preferences remained necessary at any particular point in time before the end of the 25-year “sunset” period.<sup>54</sup> The Court observed that educational institutions in several states already were experimenting with race-neutral alternatives for achieving diversity.<sup>55</sup> Universities in states other than those identified in *Grutter*, the Court cautioned, “can and should draw on the most promising aspects of those race-neutral alternatives as they develop.”<sup>56</sup>

## II. The *Fisher* Decisions

A decade after *Grutter*, the *Fisher* case again raised questions about the viability of race-conscious programs in general, and about how long the use of such measures by colleges and universities should be allowed to continue. The Court’s response followed several years of litigation between Abigail Fisher and the University of Texas at Austin (“UT” or “University”), which had adopted race-conscious admissions procedures to select about a quarter of its incoming classes. After two trips to the Supreme Court, a majority of the Justices held that UT’s admissions policy was constitutional under the Fourteenth Amendment.<sup>57</sup> In so holding, the Court reaffirmed that a degree of race-consciousness was allowable in college admissions, provided that institutions are able to demonstrate that a compelling government interest is being served by the program, and that the program is tailored “narrowly” to achieve the interest. The Court also emphasized a “review” requirement that is sure to pose challenges for race-conscious programs in the future.

### A. *The University’s Admissions Policy and Fisher’s Challenge*

At the time the *Fisher* litigation was commenced, undergraduate admissions at UT involved a two-step process. The first 75 percent of each entering class was admitted under the so-called “Top Ten Percent” rule, a statutorily-imposed

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52 539 U.S. at 341-43.

53 *Id.* at 343.

54 *See id.* at 342.

55 *Id.*

56 *Id.*

57 Only seven Justices decided *Fisher II*. Justice Kagan, who had been responsible for handling the case during her tenure as Solicitor General, did not take part in the decision. Justice Scalia heard oral argument but died in February of 2016, before the Court published its decision in June.

obligation that guaranteed college admission to a state college or university in Texas to all students who graduated in the top 10% of their high school classes.<sup>58</sup> The Texas legislature enacted this provision in 1997 in response to the Fifth Circuit's 1996 decision in *Hopwood*, which had declared any use of race in the college admissions process a violation of the Equal Protection guarantee.<sup>59</sup> A second phase of the admissions process, which UT adopted after the Supreme Court's 2003 opinion in *Grutter*, used a combination of factors to create a score used to rank candidates for the remaining positions in the class. A candidate's race was one of the factors used to calculate a component of this score, along with other factors like the candidate's academic record, the socioeconomic status of the applicant's high school, the applicant's family responsibilities, and the language spoken in the applicant's home.<sup>60</sup>

Petitioner Fisher applied for admission to UT's 2008 freshman class. Because she was not ranked in the top ten percent of her high school class, she had to compete for the relatively limited number of positions available through the post-*Grutter* component of UT's admissions process. Fisher was denied admission and sued, claiming that UT's use of race as a factor in the admissions process violated her right to Equal Protection.<sup>61</sup> Initially, her claim was rejected by the trial and circuit courts,<sup>62</sup> but the Supreme Court reversed, holding that the standard for Equal Protection strict scrutiny had been incorrectly applied by the lower courts.<sup>63</sup> In essence, the Court held that the lower courts had deferred too much to the University's assertions of good faith in determining whether the University's use of racial classifications were in fact necessary.<sup>64</sup>

The Court remanded the case to the Fifth Circuit Court of Appeals and ordered it to reconsider and assess the University's plan "under a correct analysis."<sup>65</sup> Finding that a remand to the district court was unnecessary under the circumstances, the Fifth Circuit re-examined the record considering *Fisher I*'s holding and decided that UT's plan should still be approved.<sup>66</sup>

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58 *See Fisher II*, 136 S. Ct. 2198, 2205 (2016); *Fisher I*, 570 U.S. 297, 305 (2013).

59 *Fisher I*, 570 U.S. at 304-05. A year after *Hopwood* was decided, the University switched to a holistic review process for applications that did not include any consideration of race. The Texas legislature adopted the Top Ten Percent Law, which the University implemented in 1998. Thus, from 1998 to 2003, when *Grutter* was decided, the University first admitted any student who qualified under the Top Ten Percent law, and then filled the rest of the class using a holistic review process that did not include consideration of any applicant's race. *See Fisher II*, 136 S. Ct. at 2205.

60 *See Fisher II*, 136 S. Ct. at 2205-06.

61 *Fisher I*, 570 U.S. at 306.

62 *Id.* at 306-07.

63 *Id.* at 315.

64 *Id.* at 313-15.

65 *Id.* at 314-15.

66 *See Fisher v. Univ. of Texas*, 758 F.3d 633 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016)

## ***B. Rejecting the Per Se Approach to Reviewing Race-Conscious Programs (Again)***

Fisher's petition for review of the Fifth Circuit's decision on remand was granted and, in an opinion authored by Justice Kennedy, a majority of the seven Justices who heard Fisher's case voted to approve UT's plan. They held that strict scrutiny had been properly applied by the circuit court on remand, and discussed and rejected arguments to the contrary.<sup>67</sup> Three of the conclusions reached by the majority in *Fisher II* merit more detailed exposition.

### *1. Rejecting the Per Se Approach to Reviewing Race-Conscious Programs*

First, although it occurred without much discussion, the *Fisher II* majority used its opinion to make clear that the Court's decision in *Grutter* had "overruled" categorical objections to race-conscious admissions plans. In 1996, as noted in the *Fisher* opinions, the Fifth Circuit essentially barred all race-conscious recruiting in *Hopwood*. In that case, considering the validity of what was then the University of Texas's law school admission scheme, the Fifth Circuit held that, "any consideration of race or ethnicity ... for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment,"<sup>68</sup> expressly rejecting Justice Powell's reasoning in *Bakke*. The *Hopwood* court had concluded that Justice Powell's opinion in *Bakke* was not binding precedent because the section of his opinion that discussed the diversity issue was joined by none of the other Justices.<sup>69</sup> Because the Supreme Court declined to hear Texas's appeal in *Hopwood*, the circuit court's decision remained the law of the Fifth Circuit until *Grutter*.<sup>70</sup>

Viewed with this background in mind, Justice Kennedy's statement in *Fisher II* that *Grutter* overruled *Hopwood* should be viewed as something more than a parenthetical aside. The question of whether the Fourteenth Amendment operated as a *per se* prohibition on remedial uses of race by government was not a new issue for the Court. Beginning with the *Bakke* case, Justices in decisions issued before the *Fisher* case had rejected the argument that the Equal Protection Clause categorically barred the use of racial criteria in governmental decision-making.<sup>71</sup> However, during this same period other Justices continued to hold firm to their view that anything other than a color-blind interpretation of the Fourteenth Amendment violated the Equal Protection guarantee.<sup>72</sup> That this division remained intact was

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67 *Fisher II*, 136 S. Ct. 2198 (2016).

68 *Hopwood v. Texas*, 78 F.3d 932, 944 (1996).

69 *Id.* at 944-45.

70 *See Texas v. Hopwood*, 518 U.S. 1033 (1996).

71 In addition to Justice Powell's opinion and that of the four other Justices in *Bakke*, see also Justice O'Connor's opinion for the Court in *Adarand Constructors v. Peña*, 515 U.S. 200, 237 (1995) (disputing the idea that strict scrutiny should always be "fatal in fact").

72 Justice Stewart argued in favor of a color-blind approach to Equal Protection in his dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 522-32. Justices Thomas and Scalia never wavered from their opinion that the Equal Protection clause ordinarily requires governments to refrain from anything but color-blind actions. *E.g.*, *Parents Involved in Community Schools v. Seattle School Dist. No. 1 (Parents Involved)*, 551 U.S. 701, 751-52, 757-58, 772-82 (2007) (Thomas, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 350-54 (2003) (Thomas, J., dissenting); *Adarand Constructors*, 515 U.S. at 239 (Scalia, J., concurring in part); *id.* at 24041 (Thomas, J., concurring in part).

apparent from the dissents in *Grutter*, where Justices Scalia and Thomas continued to maintain that the Equal Protection Clause barred the use of race-conscious measures *per se*.<sup>73</sup> These Justices took the same position in their *Fisher I* opinions.<sup>74</sup>

The Court's opinion in *Fisher I* also contributed to the uncertainty about where it was headed with the "strict scrutiny" inquiry. Having dissented in *Grutter* because he thought the majority's application of strict scrutiny in that case had been overly lenient,<sup>75</sup> Justice Kennedy took the position in his opinion for the Court in *Fisher I* that the lower courts in that case also had given too much deference to UT's professions of good faith and had not conducted a sufficiently searching review of the record.<sup>76</sup> Although Justice Kennedy agreed that strict scrutiny should not necessarily be "fatal in fact" in all cases, he also wrote that the courts' review "of race-conscious admissions plans must not be strict in theory but feeble in fact."<sup>77</sup> This said, however, the Court's opinion was not particularly clear about how much more "stringency" was required. Too lenient a review would not be sufficiently "strict." But, too stringent a review would be tantamount to the "fatal in fact" approach to judicial review the Court had supposedly rejected in *Grutter* and other cases.

The majority's opinion in *Fisher II* answered these concerns by once again rejecting calls for a *per se* prohibition on race-conscious policies in admissions,<sup>78</sup> and applying a strict scrutiny standard that was something more like the approach taken in *Grutter*. In noting expressly that *Grutter* had overruled *Hopwood* and cases like it, *Fisher II*'s majority took a doctrinal dispute that had continued to inject a

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In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), Justice Kennedy also expressed a preference for a *per se* rule against racial preferences, although he joined the majority's application of strict scrutiny because he believed that, properly applied, strict scrutiny would achieve substantially the same result as a *per se* rule. *See id.* at 518-19 (Kennedy, J., concurring in part). *See also* *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 631-38 (1990) (Kennedy, J., dissenting) (characterizing the Court's ruling in favor of the FCC's affirmative action plan as reminiscent of the Court's embrace of the "separate but equal" doctrine in *Plessy v. Ferguson*, and expressing his "regret that after a century of judicial opinions we interpret the Constitution to do no more than move us from 'separate but equal' to 'unequal but benign'").

Chief Justice Roberts took a similar view of the Clause's protections in his opinion for the Court in *Parents Involved*, 551 U.S. at 48 ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). For a discussion of how the Court has been divided on the issue of how Equal Protection strict scrutiny should be applied in the context of affirmative action, see Richard Fallon, *Strict Judicial Scrutiny*, 54 *UCLA L. Rev.* 1267, 1312-15 (2007).

73 *See Grutter*, 539 U.S. at 349, 353-54 (Thomas, J., concurring in part and dissenting in part).

74 Justices Thomas and Scalia continued to insist on a *per se* prohibition on any use of race by governments in their concurring opinions in *Fisher I*. Justice Scalia stated that he was joining *Fisher I*'s opinion for the Court only because the petitioner had not sought *Grutter*'s reversal. 570 U.S. 297, 315 (2013) (Scalia, J., concurring). Justice Thomas described *Grutter* as "a radical departure from our strict-scrutiny precedents," and recommended that the decision be overruled. *Id.* at 315-18 (Thomas, J., concurring).

75 *See Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting).

76 *Fisher I*, 570 U.S. 297, 313-15.

77 *Id.* at 314.

78 *See Fisher II*, 136 S. Ct. 2198, 2205 (2016) (stating that *Grutter* "implicitly overruled *Hopwood*'s categorical prohibition").

degree of uncertainty to the Court's prior affirmative action decisions and signaled it should be put to rest. Indeed, only Justice Thomas wrote separately to argue in his *Fisher II* dissent that virtually any and every use of racially-conscious criteria in university admissions should be considered *per se* unconstitutional.<sup>79</sup>

*Fisher II*'s analysis can be read, therefore, as having accepted and reinforced the view of strict scrutiny that had been articulated and applied in *Bakke* by Justice Powell, and by Justice O'Connor in *Grutter* and other cases. The *Fisher II* majority agreed that although "strict scrutiny" is supposed to be searching and rigorous ("not feeble in fact"), it should not be so inflexible that it cannot be used to distinguish constitutional from oppressive uses of racial criteria by government. With this question addressed, the Court focused its attentions on the main question raised by *Fisher II*, which was whether UT's admissions program could survive strict scrutiny on the basis of the evidentiary record before the Court—a record that was, as a result of the Fifth Circuit's decision on remand, the same record it had reviewed in *Fisher I*.

## 2. What Kind of Showing Does Strict Scrutiny Require?

As stated by the Court in *Fisher II*, UT was required under the strict scrutiny standard to demonstrate "with clarity" that its purpose or interest in using racially-conscious admission criteria was "both constitutionally permissible and substantial," and that its use of such criteria was "necessary ... to the accomplishment of its purpose."<sup>80</sup> In her arguments, Fisher challenged whether UT had stated the interest it claimed in student body diversity with the kind of clarity a court would need to conduct a meaningful review of the constitutionality of its admissions program. She also advanced several reasons why the Court should find that UT had not met its burden of showing that the race-conscious measures it had adopted after the *Grutter* decision were necessary. Because the Court's responses to these arguments will serve as guides for decisions in future cases, they are discussed in more detail below.

### (a.) How Precise Does an Institution's Description of its Goals Have to Be?

Fisher and the dissenting Justices' major complaint about the University's admissions plan was with what they viewed as the lack of specificity in UT's description of the institutional interests it sought to further by the use of race-conscious measures. As part of its post-*Grutter* review of its admissions policies, the University identified four reasons for wanting to increase the diversity of its student body: (1) the destruction of stereotypes; (2) the promotion of cross-racial understanding; (3) preparing its students for an increasingly diverse workforce and society; and (4) cultivating a set of leaders with legitimacy in the eyes of the citizenry.<sup>81</sup> In discussing these goals, the University explained that it wanted an academic environment that would offer students a "robust exchange of ideas,

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79 *See id.* at 2215 (Thomas, J., dissenting). Justice Thomas also joined Justice Alito's dissent with the Chief Justice.

80 *Id.* at 2208 (opinion of the Court) (ellipsis in original) (internal quotation marks omitted).

81 *Id.* at 2211 (citation omitted) (internal quotation marks omitted).

exposure to differing cultures, preparation for the challenges of a diverse workforce, and acquisition of competencies required of future leaders.”<sup>82</sup>

Fisher contended that the University’s articulation of its diversity objectives was legally insufficient. She argued that to demonstrate the kind of “compelling” government interest that would survive strict scrutiny, UT was required to set forth the level of minority enrollment that would constitute a “critical mass” of minority students with greater precision.<sup>83</sup> Without a more specific estimate of what UT’s “ultimate” recruiting goal was, she argued, a reviewing court would not be able to assess whether the University’s program was narrowly tailored to that goal.<sup>84</sup>

In his dissent, Justice Alito agreed with Fisher’s assessment of UT’s justifications, and complained that the University had “not identified with any degree of specificity” the interests that its race-conscious program was supposed to serve.<sup>85</sup> He characterized UT’s “primary argument” as contending that “merely invoking ‘the educational benefits of diversity’ is sufficient and that [the University] need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests.”<sup>86</sup> Justice Alito also complained that whenever the University seemed to have attempted to move beyond this broad statement of its goals, its presentation was “shifting, unpersuasive, and, at times, less than candid.”<sup>87</sup> Indeed, much of Justice Alito’s dissent is devoted to demonstrating why, in his view, the University’s proffered justifications for its race-conscious policy were either too vague to allow for meaningful review or too lacking in credibility or logic to be persuasive.<sup>88</sup>

*Fisher II*’s majority did not accept Justice Alito’s position. It refused to adopt a standard that would require colleges to express the goal of creating a critical mass of minority students in numerical terms: “the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students.”<sup>89</sup> It was enough, in the Court’s view, that UT had articulated a set of “concrete and precise goals” that would be served by greater student body diversity.<sup>90</sup> The Court concluded, moreover, that the goals UT had articulated sufficiently “mirror[ed]” the compelling interest in diversity that had been identified and endorsed by the Court in its previous cases on race-conscious admissions, and that the University had provided a “reasoned, principled explanation” for its decision to pursue the goals it had articulated.<sup>91</sup>

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82 *Id.* (citation omitted) (internal quotation marks omitted).

83 *Id.* at 2210.

84 *Id.*

85 *Id.* at 2215 (Alito, J., dissenting).

86 *Id.*

87 *Id.* at 2215-16.

88 *Id.* at 2222-36.

89 *Id.* at 2210 (opinion of the Court).

90 *Id.* at 2211.

91 *Id.*

(b.) *Had UT Given Adequate Consideration to “Race-Neutral” Alternatives?*

Fisher’s other objections to UT’s plan focused on whether the University had given sufficient consideration to racially-neutral strategies for achieving a diverse student body. The differences between the Justices’ approaches to answering this question provide the clearest indications of how the majority’s application of strict scrutiny would differ from the dissenters’ approach in future cases. Briefly characterized, the majority’s approach, at least as applied in *Fisher II*, would be more pragmatic, focused on the record as a whole. The dissenters’ approach was far more skeptical of the university’s motivations, requiring specific proof of the institution’s intent and reasoning at the time its race-conscious plan was adopted.

At bottom, the issue was whether the University had carried its burden of proving that adopting a race-conscious policy was necessary, given the availability and operation of what Fisher argued were equally effective race-neutral measures. Indeed, Fisher argued that by the time she applied to the University in 2008, UT had no need to utilize race-conscious criteria because it had achieved a desirable level of diversity (that is, a “critical mass” of minority students) by 2003 using its pre-*Grutter* admissions process comprising a combination of the Top Ten Percent plan and a form of race-neutral holistic review.<sup>92</sup>

Judge Alito’s dissent concurred with this argument, accusing the University of having rushed headlong into adopting race-conscious measures after *Grutter* was decided without seriously considering whether there was a case for change.<sup>93</sup> He also accused UT of employing racial criteria “in the most aggressive manner permitted under controlling precedent,” and cited evidence suggesting that the University had reflexively added a race-conscious component to its admissions process despite the fact that, during the period before *Grutter* was decided, it had represented in public statements that the University had managed to attract a student body that was as diverse as it had ever been without the use of race-conscious measures.<sup>94</sup>

As the *Fisher II* majority described UT’s burden on this issue, the University was required to demonstrate that a “nonracial approach” would not have promoted its interests in the educational benefits of diversity “about as well” as a race-sensitive strategy.<sup>95</sup> In other words, if UT had implemented an admissions strategy that did not utilize any racial criteria, and that strategy was doing “about as good” a job of enrolling a diverse class as a race-conscious strategy would have done, then the Constitution would not have allowed UT to employ race-conscious measures. In addition, the Court noted that, “although ‘[n]arrow tailoring does not require

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92 *Id.*

93 *Id.* at 2236-37 (Alito, J., dissenting). Justice Alito’s dissent characterizes UT’s administration as having “leapt at the opportunity to reinsert race” into its admissions process once the results in *Grutter* were announced, noting that “on the same day” the decision came down UT’s President announced that the undergraduate school would adopt a new procedure that combined the Top Ten Percent program with affirmative action programs. *See id.* at 2218.

94 *See id.* at 2217-19.

95 *Id.* at 2208 (opinion of the Court).

exhaustion of every conceivable race-neutral alternative’ or ‘require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to all racial groups,’” UT still had the “ultimate burden” of proving that available and workable race-neutral alternatives would not have served its purposes.<sup>96</sup>

Applying these principles, the Court rejected Fisher’s argument that the changes UT made to its admission policy after *Grutter* were unnecessary. It accepted the University’s judgment that continuing to rely solely on race-neutral efforts would not have produced sufficient racial diversity at the University.<sup>97</sup> The Court noted that this judgment was based on months of study and deliberation by the University, and a self-assessment process that included retreats, interviews and reviews of available data.<sup>98</sup> The Court also relied on what it characterized as “significant evidence, both statistical and anecdotal, in support of the University’s position,” which suggested that before UT implemented a race-conscious component to its program after 2003, its efforts to enroll a critical mass of diverse students had stalled.<sup>99</sup> In the end, the Court determined that the University’s assessment of its needs “appears to have been done with care, and a reasonable determination was made that the University had not yet attained its goals.”<sup>100</sup>

Fisher also argued that the University had failed to try “numerous” other available race-neutral means of achieving a critical mass.<sup>101</sup> The Court rejected this argument as well, finding that the University had intensified its race-neutral efforts to attract minority students during the period that *Hopwood* had barred colleges and universities subject to the Fifth Circuit’s jurisdiction from relying on race-conscious policies, and that these efforts had proven unsuccessful.<sup>102</sup> In particular, the Court rejected Fisher’s argument that UT should “uncap” the number of students it took from the Top Ten Percent Plan, concluding that the strategy would not produce the level of diversity necessary to meet UT’s educational goals, and expressing doubts about whether an admissions system based solely on class rank ever could produce a sufficiently diverse student population.<sup>103</sup>

Both the majority and the dissenters agreed that their review of the evidence was hampered somewhat by the University’s failure to keep records about the diversity of the students who were admitted under the Top Ten Percent plan in the years before *Grutter* was decided.<sup>104</sup> Absent this evidence, the majority admitted, the Court could not determine “how students admitted solely based on their class

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96 *Id.* (emendations in original).

97 *Id.* at 2211-12.

98 *Id.*

99 *Id.*

100 *Id.* at 2212.

101 *Id.* at 2212-13.

102 *Id.* at 2213.

103 *See id.* at 2213-14.

104 *Id.* at 2209; *id.* at 2238 (Alito, J., dissenting).

rank differ[ed] in their contribution to diversity from students admitted through holistic review.”<sup>105</sup> The majority and dissenters disagreed, however, on what effect this lack of evidence should have on the Court’s disposition of the case.

The dissenters believed that to survive strict scrutiny, the University was required to demonstrate how the classes it admitted under the racially-neutral criteria it applied before *Grutter* differed in their contributions to UT’s diversity from the classes UT admitted under its post-*Grutter* race-conscious plan. In the dissenters’ view, the University’s failure to produce evidence needed to perform this comparison should have been fatal to UT’s defense of its plan: “[w]ithout identifying what was missing from the African-American and Hispanic students it was already admitting through its race-neutral process, and without showing how the use of race-based admissions could rectify the deficiency, UT cannot demonstrate that its procedure is narrowly tailored.”<sup>106</sup> Even if the Court decided not to grant Fisher’s relief on the record before it, they argued, the Court should have at least remanded the case to the trial court for additional development of the evidentiary record.<sup>107</sup>

In contrast, the Justices in *Fisher II*’s majority were not deterred by the lack of evidence on the contributions to student body diversity specifically made by the Top Ten Percent students, and held that a remand was unnecessary. They concluded that evidence of the Top Ten Percent procedure’s contributions to the UT’s diversity in the years before 2008 (when Fisher applied for admission) would have “little bearing” on the resolution of the petitioner’s claim.<sup>108</sup> The Court also pointed to other factors that in its view could have explained why it was reasonable for the University not to have kept extensive records on the students admitted through the Top Ten Percent procedure, including what the Court saw as the unique circumstances of the case and the fact that the University would not have had the benefit during this period of *Fisher I*’s guidance on the kind of evidentiary showing necessary to survive strict scrutiny review.<sup>109</sup> The Court also questioned the value that would be added by further development of the record given the passage of time, noting, for example, that the case had already gone on for eight years, and that the petitioner herself had already graduated from college.<sup>110</sup>

The Court did suggest, however, that it might look less favorably on evidentiary deficiencies like these in future cases. It reminded the University that its ruling in *Fisher II* would not relieve the University of its “continuing obligation to satisfy the burden of strict scrutiny in changing circumstances,” or the expectation that the University would continue to collect and examine its enrollment data on a regular basis.<sup>111</sup> “Through regular evaluation of data and consideration of

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105 *Id.* at 2209 (opinion of the Court).

106 *Id.* at 2238 (Alito, J., dissenting).

107 *See id.* at 2238-39.

108 *Id.* at 2209 (opinion of the Court).

109 *Id.* at 2209.

110 *Id.*

111 *Id.* at 2209-10.

student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest.”<sup>112</sup> Thus, as the University goes forward, the Court warned, it will be expected to have gathered and reviewed the data necessary to support its policy choices: “[t]he type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.”<sup>113</sup>

Reviewed as a whole, the majority’s approach to means analysis in *Fisher II* was pragmatic about the record-keeping at educational institutions and the benefits that could accrue from giving educators some leeway in their area of expertise, but with the suggestion that the Court would expect more of these institutions in the future. Adopting the dissenters’ approach, on the other hand, would have required greater skepticism from courts about how institutions explained their decisions to adopt race-conscious measures, focusing on why and how college administrators came to adopt their admissions policies, and on the nature of the evidence offered to support their determinations. Both approaches suggest that in future cases, whether colleges or universities with race-conscious admissions policies can produce records that will explain and, ultimately, justify their decisions to adopt and to continue to utilize such strategies will be important areas of concern for reviewing courts.

(c.) *Can a Race-Conscious Policy Be Too Ineffectual to be Constitutional?*

Fisher also argued that considering the race of applicants was unnecessary because UT’s use of race-conscious criteria to choose a quarter of its entering class had, at best, only a “minimal” impact on UT’s diversity.<sup>114</sup> The relevance of this point was explained by Justice Alito in his dissent: “[w]here, as here, racial preferences have only a slight impact on minority enrollment, a race-neutral alternative likely could have reached the same result.”<sup>115</sup>

As support for this conclusion, the *Fisher II* dissenters cited the Supreme Court’s 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>116</sup> where the Court considered the constitutionality of race-conscious public school student assignment plans in Seattle, Washington, and Louisville, Kentucky. Under the Seattle plan, in situations where students were competing for spaces in over-subscribed high schools, the school system used factors like the race of prospective enrollees and the racial composition of the high schools they wanted to attend in determining where each student would be assigned.<sup>117</sup> Louisville’s school authorities used racial criteria in determining what “clusters” of schools students

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112 *Id.* at 2210.

113 *Id.*

114 *Id.* at 2212.

115 *Id.* at 2237-38 (Alito, J., dissenting) (citing *Parents Involved*, 551 U.S. 701, 733-34 (2007)).

116 551 U.S. 701 (2007).

117 *Id.* at 711-12.

would be allowed to attend; applications to transfer to other school clusters could be affected by racial considerations as well.<sup>118</sup> Parents in each jurisdiction claimed the assignment schemes violated their children’s rights to Equal Protection, and the Supreme Court agreed, holding both plans unconstitutional. In reaching this decision, the Court relied in part on findings that, in both districts, the race-conscious components of their assignment systems accounted for only a small number of the placements actually made under the plans. In the Court’s view, the small number of students actually affected by the plans’ operations suggested that something was amiss: “[w]hile we do not suggest that *greater* use of race would be preferable,” the Court opined, “the minimal impact of the districts’ racial classifications on school enrollment casts doubt on the necessity of using racial classifications.”<sup>119</sup>

*Fisher II*’s majority was not persuaded by this argument. It first rejected the contention as wrong on the facts, finding that UT’s evidence showed that its use of race-conscious measures post-*Grutter* had increased minority matriculation to the point where the program was making a “meaningful, if still limited” impact on campus diversity.<sup>120</sup> But the Court also rejected the argument’s premise:

In any event, it is not a failure of narrow tailoring for the impact of a racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality.<sup>121</sup>

Where one stands on the persuasiveness of this kind of evidence will depend most likely on where one sits with regard to UT’s justifications for adopting a race-conscious policy. The dissenters in *Fisher II* believed that the relatively small number of students admitted under the race-conscious component of the University’s admissions policy provided yet more proof that such a policy was unnecessary, because race-neutral policies appeared to be giving UT “about all” the diversity it needed. For *Fisher II*’s majority, in contrast, the fact that the number of diverse students enrolled through UT’s race-conscious “holistic” process was relatively small but still “significant” proved that UT’s measures were as effective as they should have been if, as required, each application was being reviewed individually, and there were no *Gratz*-like advantages being given automatically to every minority applicant.

(d.) *Did the University’s Plan Treat Everyone’s Interests Appropriately?*

If Justice Alito’s dissent in *Fisher II* can be taken as a guide, two of the objections the courts might see in future cases involving race-conscious admissions are: (1) the argument that some race-conscious admissions policies favor certain racial minority groups over other minority groups; or (2) the contention that such plans

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118 *Id.* at 715-17.

119 *Id.* at 734-35 (emphasis in original).

120 *Fisher II*, 136 S. Ct. at 2212.

121 *Id.*

favor certain members of a particular minority group over other members of the same group. Although these contentions did not take up much space in the majority’s opinion, they were a significant point of focus for the dissenting Justices.

For example, Justice Alito asserted in his *Fisher II* dissent that UT’s race-conscious admissions policy discriminates against Asian-American applicants.<sup>122</sup> In general, the *Fisher II* dissenters questioned whether UT’s admissions plan was related logically to one of its professed diversity-related objectives, namely that of reaching a “critical mass” of diverse students “at the classroom level.”<sup>123</sup> But a more pointed criticism of the plan was the contention that, although UT’s own data “demonstrated that classroom diversity was more lacking for students classified as Asian-American than for those classified as Hispanic,” the University’s plan actually “discriminates *against* Asian-American students.”<sup>124</sup> The dissenters accused UT of not sufficiently valuing the potential contributions of Asian students to the University’s student body diversity, an attitude they found “troubling, in light of the long history of discrimination against Asian Americans, especially in education.”<sup>125</sup> They also accused their colleagues in the majority of “endorsing” UT’s alleged disregard for Asian-American applicants’ rights.<sup>126</sup>

The dissenters also accused the University of preferring more affluent African-American and Hispanic candidates for admission to candidates from these groups who were admitted through the Top Ten Percent program. The dissent accused UT of having adopted the race-conscious part of its plan because it wanted Black and Hispanic candidates from affluent school districts more than it wanted the students from these groups who had been admitted under the Top Ten Percent plan. The dissenting Justices believed that these students were disfavored because many of them had attended schools in economically disadvantaged areas. Justice Alito argued that UT’s alleged preference for the more affluent minority students—which UT denied—was the result of “pernicious” stereotyping of the economically disadvantaged students, and “affirmative action gone wild.”<sup>127</sup>

These arguments were essentially dismissed in *Fisher II*’s majority opinion. The Court concluded that nothing in UT’s plan could be viewed as the kind of “mechanical plus factor” that subordinated the interests of one group of students to facilitate the admission of students from other groups.<sup>128</sup> As support for this conclusion, the Court cited, among other things, the District Court’s finding that *Fisher* had

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122 *Id.* at 2227 (Alito, J., dissenting)

123 *See id.* at 2226-27.

124 *Id.* at 2227 (emphasis in original).

125 *Id.* at 2228.

126 *See id.* at 2227-2228.

127 *Id.* at 2230-35.

128 *See id.* at 2207 (opinion of the Court).

produced no evidence to suggest that members of any racial group, including Asian-Americans, were being excluded from the class by operation of the University's admissions process.<sup>129</sup> But the dissenters' contention that discrimination among minority groups or claims that intra-group discrimination is being facilitated by race-conscious programs are objections the courts are likely to see in future cases, if only because they provide affirmative action opponents with additional support for the more general argument that affirmative action programs are harmful not only to non-minorities, but also to members of the minority groups they are supposed to be helping.<sup>130</sup> To ensure fairness—and presumably to counter these kinds of accusations—reviews of race-conscious admissions plans should be concerned with ensuring that no group potentially affected by the plan's operation suffers unwarranted deprivations.

### *C. Requiring Periodic Review of Race-Conscious Measures*

While *Fisher II* appears to have resolved long-standing questions about the Fourteenth Amendment's scope, the decision introduced a different kind of uncertainty with regard to maintaining race-conscious programs over the longer term by emphasizing the requirement that institutions employing such measures periodically reassess "the constitutionality, and efficacy, of [their] admissions program[s]."<sup>131</sup> *Fisher II* did not introduce the concept of the need for periodic review. Justice Powell's opinion in *Bakke* and the Court's opinion in *Grutter* both stated that race-conscious admissions plans should be "'subject to continuing oversight to assure that [they] will work the least harm possible to other innocent persons'" competing for the benefit at issue.<sup>132</sup> But in *Fisher II*, the Court took the additional step of *emphasizing* both that such reviews were required and that this requirement included the obligation to explore race-neutral alternatives.<sup>133</sup>

The Court's primary motivation in adopting this requirement clearly was its desire to ensure that in administering race-conscious plans, colleges and universities would employ strategies that served legitimate governmental interests while

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129     *See id.*

130     *See, e.g., id.* at 2229 (Alito, J., dissenting) ("By accepting the classroom study as proof that UT satisfied strict scrutiny, the majority 'move[s] us from "separate but equal" to "unequal but benign." (emendation in original) (citation omitted)). Indeed, by the time *Fisher II* was decided, Harvard University was being sued under Title VI for using race-conscious admissions criteria that allegedly discriminated against Asian applicants. *See generally*, Complaint, *Students for Fair Admissions v. President and Fellows of Harvard College*, No. 1:14-cv-14176-DJC (D. Mass), 2014 WL 6241935. The Trump Administration's Justice Department is reportedly investigating the allegations as well. *See* Susan Svrulga & Nick Anderson, *Justice Department investigating Harvard's affirmative-action Policies*, *Washington Post* (Nov. 21, 2017), [https://www.washingtonpost.com/news/grade-point/wp/2017/11/21/justice-department-investigating-harvards-affirmative-action-policies/?utm\\_term=.8bfa8874297a](https://www.washingtonpost.com/news/grade-point/wp/2017/11/21/justice-department-investigating-harvards-affirmative-action-policies/?utm_term=.8bfa8874297a).

131     *See Fisher II*, 136 S. Ct. at 2210.

132     *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308 (1978)).

133     *See Fisher II*, 136 S. Ct. at 2214-15.

inflicting the least possible damage on the rights of non-minority applicants.<sup>134</sup> Such reviews, in the view of the Court, could be expected to protect the rights of non-minority applicants in at least two ways.

First, the *Fisher II* Court appeared to believe that requiring colleges and universities to conduct periodic reviews could help prevent otherwise valid admissions programs from slipping into practices that would amount to no more than “racial balancing.” The Court described the ultimate goal of race-conscious programs as reconciling “the pursuit of diversity with the constitutional promise of equal treatment and dignity.”<sup>135</sup> Justice Kennedy, *Fisher II*'s author, clearly believed that vigorous review of these plans was a key to maintaining the balance between these two objectives. He had made a similar point in his *Grutter* dissent, arguing that mandating strict scrutiny of affirmative action plans was important in part because it would make the state officials responsible for such plans take their duty to monitor them more seriously: “[c]onstant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution.”<sup>136</sup> *Fisher II*'s majority appears to have concluded that requiring ongoing, rigorous, and good faith *internal* reviews of race-conscious programming also should encourage educational institutions to bring the appropriate measure of diligence to maintaining the “sensitive balance” of interests between minority and non-minority applicants a properly functioning race-conscious admissions program is expected to preserve.<sup>137</sup>

Second, *Fisher II*'s monitoring requirement also appears to be meant to nudge educational institutions into more actively preparing for a time when race-conscious admissions programs will no longer be needed to create and maintain diverse learning environments. Viewed from that perspective, the review requirement serves a purpose similar to that which motivated Justice O'Connor to suggest the twenty-five-year “sunset” provision for race-conscious programs in *Grutter*. Colleges and universities, the majority suggests, can and should become “laboratories” for experimenting with race-neutral alternatives to race-conscious admissions schemes. In support of this observation, the Court noted the “special opportunity to learn and teach” the University of Texas had acquired through its experiences with administering race-conscious admissions programs:

[UT] now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-

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134 See *id.* at 2209-10.

135 *Id.* at 2214.

136 *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting). See also *Adarand Constructors v. Peña*, where Justice Ginsburg suggests that “[c]lose review ... is in order” because in some cases, “some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups.” 515 U.S. 200, 276 (1995) (Ginsburg, J., dissenting).

137 See *Fisher II*, 136 S. Ct. at 2214-15.

conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.<sup>138</sup>

The differences between *Fisher II*'s majority and its dissenters on the adequacy of UT's evidentiary support for its claim that race-conscious measures were necessary suggests that this more conscious emphasis on internal review could well be an important battleground for future conflicts over race-conscious admissions policies. In highlighting the requirement that affirmative action plans be periodically reviewed, the Court can be seen as announcing an intention to scrutinize seriously and, if necessary, invalidate plans that, because of changed circumstances, appear to have over-stayed their welcome.<sup>139</sup> Justice Alito's dissent can be viewed as a preview of the kind of granular, plan-specific objections institutions with race-conscious admissions programs may see in future challenges to their plans' continuing validity.

### III. Conclusion

The *Fisher* results reaffirmed important points from prior cases about the constitutionality of race-conscious admissions plans. As was held in *Bakke* and *Grutter*, the Court ruled that the Equal Protection Clause does not categorically bar the use of racial criteria for remedial or other benign purposes. It reaffirmed strict scrutiny as the standard of judicial review that should be applied to all such programs and, in the case of institutions of higher education, that the goal of creating and maintaining a diverse student body qualifies as the kind of "compelling" interest capable of surviving strict scrutiny. Thus, if the *Fisher* result holds, a rough consensus on the basic framework for reviewing these cases may finally have been reached.

Disagreements among the Justices clearly remain, however, about how courts should apply the strict scrutiny standard in a given case. It is this disagreement (coupled with the fact that *Fisher II* was decided by only seven members of the Court, a single vote separating its four-person majority from the three dissenting Justices) that pulls a degree of uncertainty back into the Court's application of its precedents in cases involving race-conscious admissions or, indeed, any kind of racially-conscious government program. In the view of *Fisher II*'s dissenters, the majority adopted a plan that allowed UT to adopt a racially discriminatory admissions process, "simply by asserting that such discrimination is necessary to achieve 'the educational benefits of diversity,' without explaining—much less proving—why the discrimination is needed or how the discriminatory plan is well crafted to serve its objectives."<sup>140</sup> They seek a standard that would in essence authorize, and encourage, challenges to what they would view as constitutionally deficient plans today and not at some future date. Moreover, their standard would

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138 *Id.*

139 *See id.* 2210 (reminding University of review requirement and warning that "[t]he type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come").

140 *Id.* at 2242 (Alito, J., dissenting).

require highly specific proof about the data available to a college at the time it adopted its race-conscious program, and evidence developed contemporaneously by the educational institution that justified its decision. A standard of review that would require a high (and perhaps insurmountable) level of judicial skepticism about the value of race-conscious admissions plans and their operation would appear to be the mechanism these Justices would employ to prevent racial preferences from becoming ingrained in state educational systems, and society in general.

For its part, the majority in *Fisher II* appears to have intended to lay a legal foundation for allowing colleges and universities to continue to utilize race-conscious strategies for as long as they remain necessary, but *only* for as long as they are needed. Their answer to concerns about affirmative action becoming an entitlement is to emphasize the need for institutional self-policing that can keep legitimate affirmative action plans from degenerating into unconstitutional “race-balancing,” and to suggest that plans not subject to rigorous internal reviews could be vulnerable to judicial revocation in the future. The standard of judicial review they would employ in these kinds of cases would be stringent, but more pragmatic than the approach favored by the dissenting Justices in assessing whether colleges and universities have met their Fourteenth Amendment obligations.

That these disagreements are likely to continue should come as no surprise. Given where we are as a nation, some degree of tension in the adjudication of cases involving race-conscious measures is inevitable. As has always been the case with debates over government uses of affirmative action, disputes among American citizens over the constitutionality of race-conscious actions by government are based on deeply-held beliefs about fairness that are not likely to resolve themselves anytime soon. The federal courts’ divisions on these issues have to some extent mirrored society’s differences, and the Supreme Court itself has not been immune to them. The application of strict scrutiny to these kinds of governmental actions heightens the level of uncertainty, as skepticism about the wisdom of any race-conscious measure is built into the standard of review.<sup>141</sup> Thus, absent some major change in either the Court’s composition or the doctrine to be applied in these cases, an undercurrent of disagreement is bound to persist.

Given the result in *Fisher*, it will be the lower courts’ task, at least initially, to figure out how to walk the line between applying a standard of review that would be “fatal in fact” in nearly all cases (which is, from a fair reading of Justice Alito’s dissent, what the dissenting Justices in *Fisher II* seem to want), and the application of strict scrutiny adopted by the majority in *Fisher II*. The majority’s standard is meant to be stringent, but also discerning enough to distinguish between plans that serve legitimate state purposes and other uses of racial criteria that governments may label “benign” but that are in the view of the courts invidious or overreaching. In all probability, the debate among the Justices in *Fisher II* will be reflected in these lower court decisions.

Care should be exercised in attempting to apply reasoning from the *Fisher* case to contexts other than college and university admissions. One of the analytical

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141 See *Adarand Constructors*, 515 U.S. at 223-24.

cornerstones of Justice Powell's analysis in *Bakke* was his conclusion that maintaining a diverse student body was the kind of "compelling" government interest capable of surviving strict scrutiny. As Justice Powell noted, that particular interest is rooted in the First Amendment's protection of academic freedom, which the Court had recognized as a substantial interest in its own right.<sup>142</sup> How the *Bakke/Grutter/Fisher* approach to strict scrutiny might be applied to other uses of affirmative action in future cases remains to be seen. Indeed, other decisions by the Court have suggested that the "diversity" rationale held to justify race-conscious measures in *Bakke* might not necessarily be accepted as a sufficiently compelling justification for the use of race-conscious government action in other contexts.<sup>143</sup>

Moreover, even in the specific context of college admissions, the direction the Court has taken in the *Fisher* cases should not be taken as an excuse for complacency in the use of race-conscious measures. Considering these cases as a whole, it is fair to conclude that the Court has determined three things: *first*, that while thoughtfully planned and sensitively administered race-conscious admissions policies may be legal today, if and when demographic or other relevant circumstances change, these same plans may not necessarily be viewed as constitutional at some undetermined point in the future; *second*, that educational institutions must shoulder the burden of proving when and if challenged, that such measures are still required; and, *third*, that one of the ways educational institutions should be preparing to meet this burden is by being able to demonstrate that they have conducted the kind of oversight necessary to ensure that whatever race-conscious measures they employ have remained necessary and are sufficiently narrowly tailored in light of current circumstances.

Through its discussion of the evidence offered by UT to justify its admissions plan, the *Fisher II* Court provided guidance about how colleges and universities might provide the kind of proof necessary to survive strict scrutiny, but only in a general sense. Its warning that "more" in the way of supporting evidence of the need for race-conscious measures than UT offered in *Fisher* may be required in future cases adds an additional complication that also must be addressed. The Court appears to be leaving the development of review strategies, at least initially, to colleges and universities in their role as "laboratories" for change. Higher education cannot afford to ignore *Fisher's* challenge, as the Court has been clear about the "constant deliberation and continued reflection" it expects educational institutions to be giving these issues. The Court's opinion put the University of Texas on notice that its favorable decision in *Fisher II* did not necessarily mean that the University could rely indefinitely on the same policy "without refinement" in the event of future challenges. This admonition is meant to influence the admissions practices of other public colleges and universities as well.<sup>144</sup>

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142 See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 311-314 (1978).

143 See, e.g., *Parents Involved*, 551 U.S. 701, 722-25 (2007) (holding that *Grutter's* diversity rationale did not apply to public school policies that took racial factors into consideration when ranking students for assignment to high schools, noting that the Court's decision in *Grutter* "relied upon considerations unique to institutions of higher education").

144 See *Fisher II*, 136 S. Ct. at 2215.

This warning is, perhaps, the most important message from the *Fisher* case: a reminder that, in the view of the Court, if state-run colleges and universities are feeling unsettled about how long they may continue to use race-conscious measures to maintain diverse learning environments, it is because the utilization of race-conscious measures, even for constitutionally acceptable reasons, is *supposed* to make them uncomfortable. The results in *Fisher* all but instruct institutions of higher education now utilizing race-conscious strategies to monitor their programs, and to experiment with race-neutral strategies in an effort to replace, at an appropriate point in time, the programs they are using today. This will be a challenge. The Court is imposing this requirement at a time when many of the same inequities in educational opportunities that gave rise to race-conscious strategies in the first place continue to plague the nation's public school systems. In the end, although the Court may have given higher education a "win" today in *Fisher*, it also has given them a whole new set of challenges to consider and address in the future.

# 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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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.

# THE U.S. SUPREME COURT'S USE OF NON-LEGAL SOURCES AND *AMICUS CURIAE* BRIEFS IN *FISHER v. UNIVERSITY OF TEXAS*

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## I. Introduction

In February 2012, the U.S. Supreme Court agreed to hear a case that challenged the constitutionality of a race-conscious admissions policy at the University of Texas at Austin (“the university”). In addition to the evidence put forward by the parties, a broad constituency of individuals and organizations on both sides of the debate mobilized to inform the Court of the arguments under consideration. For example, *amici curiae* in support of the university presented research to impress upon the Court the need for postsecondary institutions to be permitted to consider race as one among myriad factors in admissions to fulfill their educational missions. *Amici* in support of *Fisher* also submitted a wide range of sources to support arguments that the university’s race-conscious policy did not meet the requirements of the Equal Protection Clause. Four years later in 2016, the Court ultimately upheld the constitutionality of the policy in a 4-3 decision.<sup>1</sup> Applying the standard of strict scrutiny, the Court’s decision re-affirmed decades of precedent establishing that postsecondary institutions had a compelling interest in furthering a diverse student body and held that, as implemented by the university, the use of race was narrowly tailored to this goal. Justice Kennedy, who for the first time found a race-conscious policy in education to be narrowly tailored, authored the majority opinion in the case.<sup>2</sup>

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1 Justice Kagan recused herself in light of her past involvement in the case endorsing the university’s race-conscious admissions policy, and Justice Scalia had passed away, so only seven Justices voted in the case. Overall, the Court issued two separate opinions in the case. The 2016 decision followed a 2013 ruling remanding the case to the lower court, (*Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) [hereinafter *Fisher I*]), a second ruling from the lower court upholding (yet again) the constitutionality of the policy (*Fisher v. University of Tex. at Austin*, 758 F.3d 633 (5<sup>th</sup> Cir. 2014)) and an extremely rare decision by the Court to agree to hear the case for a second time (*Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) [hereinafter *Fisher II*]).

2 In two past cases, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), and *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 706 (2007), Justice Kennedy found the consideration of race in a postsecondary admissions policy, and a voluntary student assignment desegregation policy, respectively, not to be narrowly tailored.

Across various concurring and dissenting opinions, it was apparent that the Justices viewed and treated in conflicting ways the non-legal sources<sup>3</sup> submitted to inform their ruling in the case. To help inform future research and litigation efforts, this Article explores how the Justices used<sup>4</sup> such non-legal sources and *amicus curiae* briefs in their opinions in *Fisher I* and *Fisher II* and the implications for colleges and universities broadly, the social science research community specifically, and *amici*, going forward. This examination is important because the Court's decisions provide the contours around which colleges and universities must operate. Understanding how non-legal sources and *amicus curiae* briefs were cited and interpreted within this framework will illuminate the ways in which these sources can be relevant for educational policies and practices and continuing legal developments.<sup>5</sup>

In Part II, to set the context for this Article and situate the analysis within existing scholarship, we summarize research on the Court's use of social science evidence as well as the Court's use of *amicus* briefs. In Part III, to provide background for the cases on which we focus, we briefly summarize *Fisher I* and *Fisher II*. In Part IV, we examine how the Justices used non-legal sources and *amicus* briefs in their opinions to address the constitutional question in the case. Overall, the Justices cited a range of non-legal sources and *amicus* briefs to support various factual, legal, or contextual determinations in their opinions. The non-legal sources included items such as news articles (media), journal articles in the areas of education and law, and books. Our analysis reveals that across the various opinions, the ways the Justices conceptualized (1) the manifestation of race (*i.e.*, as skin color alone or as socially constructed in a number of ways) and (2) classifications on the basis of race (*i.e.*, as whether the classification itself involves racial discrimination or not) informed their use of non-legal sources and *amicus* briefs and the extent to which they were relevant to the Justices' various factual, legal, or contextual determinations. In Part V, we discuss the implications for colleges and universities of the Court's use of non-legal sources, including social science evidence, and *amicus* briefs in their ruling. We present the lines of research that may be important for scholars to pursue as judges and colleges and universities continue to debate the role race should play in postsecondary policies and practices.

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3 We employ the term non-legal sources to include the range of sources that the Justices cited in their opinions and that fall outside the traditional "legal" sources such as legal cases, statutes, or regulations. These sources, which include, in part, demographic data, news sources, books, law journal articles, and education articles, may have come to the attention of the Justices via the parties, *amicus* briefs, or their own searches. For a complete list of categories of non-legal sources cited in *Fisher I* and *Fisher II*, see Patricia Marin, Catherine L. Horn, Karen Miksch, Liliana M. Garces & John T. Yun, *Use of Extra-Legal Sources in Amicus Curiae Briefs Submitted in Fisher v. University of Texas at Austin*, 24 Educ. Pol'y Analysis Archives (forthcoming 2018) (setting forth 20 types of non-legal sources cited in all *amicus* briefs filed in *Fisher I* and *II* and analyzing relative use of each type of source by supporting party and category of *amici*).

4 We define "use" as both explicit citations to such sources as well as instances in which the Justices' conclusions reflect the conclusions or findings of social science research.

5 Two new challenges to the constitutionality of race-conscious policies at Harvard University and UNC-Chapel Hill, for example, are making their way through the lower courts and may ultimately reach the Supreme Court. See Brittany N. Ellis, *The Harvard Admissions Lawsuit Explained*, The Harvard Crimson, Nov. 7, 2016, <http://www.thecrimson.com/article/2016/11/7/harvard-admissions-lawsuit-explainer/>; *UNC's affirmative action lawsuit moves forward with Supreme Court ruling*, The Daily Tarheel, Nov. 20, 2016, <http://www.dailytarheel.com/article/2016/11/uncs-affirmative-action-lawsuit-moves-forward-with-supreme-court-ruling>.

## II. The U.S. Supreme Court's Use of Non-Legal Sources and Amicus Curiae Briefs

Research has examined the Justices' use of social science, *amicus curiae* briefs,<sup>6</sup> and other non-legal sources that have been presented to the Court in support of one side or the other of a case.<sup>7</sup> To be sure, the extent to which non-legal sources such as social science research *should* inform judicial decision making on questions of constitutional significance remains a disputed normative question.<sup>8</sup> After all, social science research is not free of subjectivity and can call into question prior accepted findings depending on the advancement of research methods. Indeed, some conflicting findings reflect the normal development of science, which depends on the accumulation of knowledge gathered over time, and across multiple contexts, by many different scholars. For these reasons, while social science research has informed constitutional questions,<sup>9</sup> disputes often arise over whether such evidence is consistent enough to be a reliable basis for legal action. For the purposes of this Article, what is most compelling is that non-legal sources and *amicus* briefs continue to be submitted to the Court and the Court continues to incorporate some of these sources into their opinions, thereby motivating our analysis.

Social science research has played an increasing role in the legal advocacy before the U.S. Supreme Court as well as in its judicial opinions most notably since the 1954 *Brown v. Board of Education* decision.<sup>10</sup> Although not the first use of modern social science, *Brown's* footnote 11 citing seven psychological and sociological studies is considered a turning point for the Court's consideration, and inclusion of, empirical evidence in its opinions.<sup>11</sup> That increased use of social science by legal advocates and the Supreme Court has generated a body of research examining these phenomena. For example, historical studies have analyzed the evolution of the incorporation of more social science into the Court's thinking and opinions.<sup>12</sup> Empirical analyses have investigated the frequency of social science citations by

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6 For this Article, we treat *amicus* briefs as a source of evidence that can be cited by the Court. In other work (see Marin et al., *supra* note 3) we further disentangle all the sources that can be cited within *amicus* briefs themselves.

7 As it is beyond the scope of the Article to discuss this entire body of scholarship, we focus on examples that are most relevant to this Article.

8 See Erica Frankenberg & Liliana M. Garces, *The Use of Social Science in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. Louisville L. Rev. 703, 706 (2007); Liliana M. Garces, *Social Science Research and the Courts: Informing Post-Grutter v. Bollinger Developments in Higher Education Cases*, 27 Educ. Pol'y 591, 593 (2013).

9 See, e.g., Angelo N. Ancheta, *Scientific Evidence and Equal Protection of the Law* (2006) (discussing line of constitutional cases in which social science evidence has been deemed relevant).

10 See Catherine L. Horn & Patricia Marin, *Higher education and affirmative action: Understanding and enhancing the use of policy research in informing decision-making* (Nov. 2012); Garces, 2013, *supra* note 8 at 592; Ancheta, 2006, *supra* note 9; Rosemary J. Erickson & Rita J. Simon, *The Use of Social Science Data in Supreme Court Decisions* (1998).

11 See Ancheta, 2006, *supra* note 9; Erickson & Simon, *supra* note 10.

12 See, e.g., Thomas G. Hansford & Kristen Johnson, *The Supply of Amicus Curiae Briefs in the Market for Information at the U. S. Supreme Court*, 35 Just. Sys. J. 362 (2014).

the Court,<sup>13</sup> as well as differing citation patterns among the Justices and between majority and dissenting opinions.<sup>14</sup> A related body of scholarly work characterizes the Justices' use of social science as unpredictable. For example, some have focused on the instances in which the Court has ignored social science,<sup>15</sup> others have described the misinterpretation of research by the Court,<sup>16</sup> and yet others have discussed the misuse of social science by the Court.<sup>17</sup> Overall, a review of existing scholarship reveals that such evidence has been presented to the courts and cited in decisions, ultimately informing the jurisprudence in various cases.<sup>18</sup>

Most recently in the context of postsecondary education in *Grutter v. Bollinger*<sup>19</sup> and *Gratz v. Bollinger*,<sup>20</sup> the Court again demonstrated that scientific evidence and expert testimony can play important roles in constitutional analysis. Justice O'Connor's majority opinion in *Grutter* cited multiple research studies that addressed the educational benefits of racial and ethnic diversity to support the Court's conclusion that institutions of higher education have a compelling interest in the educational benefits of a diverse student body.<sup>21</sup> Various research studies were also relevant to the Court's narrow tailoring analysis.<sup>22</sup> By referencing such studies, the Court acknowledged that legal determinations can be supported by non-legal sources that speak to the relationship between fact and law.

In addition, much of the social science (and other non-legal sources) put before the Court is done so via *amicus curiae* briefs, the submission of which has increased markedly over time.<sup>23</sup> Work seeking to understand the impact of these briefs, however, has shown mixed results.<sup>24</sup> Similarly, studies have varied in their

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13 See, e.g., James R. Acker, *Thirty Years of Social Science in Supreme Court Criminal Cases*, 12 Law & Pol'y 1 (1990).

14 See James R. Acker, *Research on the Death Penalty. A Different Agenda: The Supreme Court, Empirical Research Evidence, and Capital Punishment Decisions, 1986-1989*, 27 Law & Soc'y Rev. 65 (1993).

15 See, e.g., Craig Haney & Deana Dorman Logan, *Broken Promise: The Supreme Court's Response to Social Science Research on Capital Punishment*, 50 J. Soc. Issues 75 (1994).

16 See, e.g., Paul S. Appelbaum, *The Empirical Jurisprudence of the United States Supreme Court*, 13 Am. J. L. & Med. 335 (1987).

17 Donald Bersoff & David Glass, *The Not-So Weisman: The Supreme Court's Continuing Misuse of Social Science Research*, 2 U. Chi. L. Sch. Roundtable 279 (1995).

18 See, e.g., Frankenberg & Garces, *supra* note 8.

19 *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

20 *Gratz v. Bollinger*, 539 U.S. 244, 269 (2003).

21 *Grutter*, 539 U.S. at 330 (citing relevant studies).

22 See, e.g., Catherine L. Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences*, The Civil Rights Project (2003), available at <http://www.civilrightsproject.ucla.edu/research/affirmativeaction/tristate.pdf>; Patricia Marin & Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida*, The Civil Rights Project (2003), available at <http://www.civilrightsproject.ucla.edu/research/affirmativeaction/florida.pdf>.

23 See Reagan W. Simpson & Mary R. Vasaly, *The Amicus Brief: Answering the Ten Most Important Questions About Amicus Practice* (4th ed. 2015).

24 See, e.g., Gregory A. Caldeira & John R. Wright, *Amici Curiae Before the Supreme Court: Who*

findings with respect to the conditions that produce strategically useful products.<sup>25</sup> Regardless of the impact or of the “doubts about the utility of conducting research to influence the judicial policy-making process”,<sup>26</sup> the increased use of *amicus* briefs suggests that *amici* are convinced of their value<sup>27</sup> due to “their perceived impact on the Court’s decisions.”<sup>28</sup>

### III. The U.S. Supreme Court’s Decisions in *Fisher v. University of Texas at Austin*

#### A. *Fisher I*

When the Supreme Court heard *Fisher* in 2012, many in the higher education community were concerned that the Court would reverse, or severely limit, prior rulings upholding the constitutionality of race-conscious practices in postsecondary admissions.<sup>29</sup> Given the composition in the Court, few observers expected the 7-1 opinion in 2013 that sent the case back to the Fifth Circuit for further review, leaving in place the core principles that allowed for race-conscious policies.<sup>30</sup> In its ruling, the Court clarified that the lower court had to conduct its independent determination of whether the race-conscious policy is necessary (*i.e.*, narrowly tailored) for the university to obtain the educational benefits of a diverse student

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*Participates, When, and How Much?*, 52 J. Pol. 782 (1990); Paul M. Collins, Jr., *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (2008); Paul M. Collins, Pamela C. Corley & Jesse Hamner, *The Influence of Amicus Curiae Briefs on U. S. Supreme Court Opinion Content*, 49 Law & Soc’y Rev. 917 (2015); Allison O. Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014); Claire B. Wofford, *Assessing the Anecdotes: Amici Curiae, Legal Rules, and the U.S. Supreme Court*, 36 Just. Sys. J. 274 (2015).

25 See Julie Margetta Morgan & Diana Pullin, *Challenges and Strategies for Bridging Gaps Between Law and Research*, 39 Educ. Researcher 515 (2010); Katie Zuber, Udi Sommer & Jonathon Parent, *Setting the Agenda of the United States Supreme Court? Organized Interests and the Decision to File an Amicus Curiae Brief at Cert*, 36 Just. Sys. J. 119 (2015).

26 See Charles Robert Tremper, *Sanguinity and Disillusionment Where Law Meets Social Science*, 11 Law & Hum. Behav. 267, 270 (1987).

27 See Jonathon Alger & Marvin Krislov, *You’ve Got to Have Friends: Lessons Learned From the University of Michigan Cases*, 30 J.C. & U.L. 503 (2004); Caldeira & Wright, 1990, *supra* note 24.

28 Simpson & Vasaly, *supra* note 23, at 11.

29 Concern over the future permissibility of race-conscious practices was warranted, due to the composition of the Court. Four Justices—Chief Justice Roberts and Justices Alito, Thomas, and Scalia—had voted to strike down the use of race in admissions policies under any circumstances, and Justice Kennedy had dissented in *Grutter*, which upheld the constitutionality of race-conscious policies in postsecondary admissions on the grounds that the University of Michigan Law School’s policy was a disguised quota. Only three other current Justices—Sotomayor, Breyer, and Ginsburg—have supported race-conscious policies in education. Justice Kagan, who might have sided with the latter group, recused herself in light of her involvement in the case in the early stages of litigation. Thus, with Justice Kennedy as the swing vote, UT Austin’s policy could have been struck down as unconstitutional in a 5-3 vote or, with a 4-4 tie, left in place based on the lower court’s ruling that the policy is constitutional.

30 Other analyses have described the Court’s 2013 decision to remand the case to the lower court—rather than to overrule the lower court’s decision 5-3 or let it stand with a tie vote, as the composition of the Court suggested—as a compromise. See Mark Walsh, *Fiery Draft Dissent by Sotomayor Influenced Race Case*, New Book Says, Education Week, Oct. 10, 2014, [http://blogs.edweek.org/edweek/school\\_law/2014/10/fiery\\_draft\\_dissent\\_by\\_sotomay.html](http://blogs.edweek.org/edweek/school_law/2014/10/fiery_draft_dissent_by_sotomay.html).

body. The Court’s decision also clarified the importance of considering workable “race-neutral”<sup>31</sup> alternatives, stating that if a non-racial approach could promote diversity “about as well and at tolerable administrative expense,”<sup>32</sup> then the university could not consider race directly.<sup>33</sup>

## ***B. Fisher II***

Following remand, and after reconsidering the case, the Fifth Circuit concluded that UT Austin’s admissions policy met the Court’s requirements, as clarified in its 2013 opinion. Fisher then appealed, arguing that the Fifth Circuit still had not applied the Court’s requirements in past cases correctly, and the Court, in a rare move, agreed to hear the case again. The constitutional question the Court addressed in *Fisher II* was: whether UT Austin’s race-conscious admissions policy met strict scrutiny requirements as interpreted in prior cases, including the 2013 *Fisher* decision. Part of the determination concerned whether the university would be allowed to complement the percent plan with a race-conscious holistic review (an affirmation of the Fifth Circuit’s ruling) or whether the percent plan was deemed sufficient (disagreeing with the lower court).<sup>34</sup>

## **IV. The Justices’ Use of Non-Legal Sources and *Amicus curiae* Briefs**

In this Part, we examine the Justices’ use of non-legal sources and *amicus curiae* briefs in their various opinions. For our analysis, we define “use” as both explicit citation as well as instances in which the Justices’ conclusions reflected the conclusions or findings of a non-legal source.<sup>35</sup> In some instances, we highlight areas where the conclusions in the cited non-legal sources were refuted by other sources, primarily social science research. To be sure, even when the opinions do

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31 There is substantial debate as to whether policies can be deemed “race-neutral,” particularly when they have racial consequences or are based on racial considerations (*see, e.g.*, Eduardo Bonilla-Silva, *Racism Without Racists: Color-Blind Racism and the Persistence of Racial Inequality in America* (4<sup>th</sup> ed. 2014)). In the legal context, however, a policy is deemed “race-neutral” when it does not explicitly reference race, even if it indirectly considers race. This artificial legal definition led Justice Ginsburg to state in her dissent in *Fisher I*, “I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives [*i.e.*, the Top Ten Percent Plan] as race unconscious” (at 2433).

32 *Fisher I*, at 2420.

33 Justice Thomas filed a concurring opinion in which he agreed with the determination that the lower court did not apply strict scrutiny, but disagreed with the need to send it back to the lower court. Rather than remanding the case to the lower court, he would categorically prohibit the consideration of race under the Equal Protection Clause. Only Justice Ginsburg dissented, on the grounds that the facts were sufficient to find the university’s use of race constitutional without a remand.

34 See Liliana M. Garces, *Balancing Liberty and Equality: Justice Kennedy’s Decisive Vote in Fisher v. University of Texas*, Part II, 44 *Educ. Researcher* 442, 443–44 (2015) for a longer explanation of the legal issues in the case.

35 It is important to note that the latter is not based on a systematic, exhaustive analysis of the opinions and is intended simply to be illustrative of alignment between conclusions in a Justice’s opinion and findings from non-legal sources, particularly social science research. While we highlight most of the instances where the Justices cite non-legal sources, in some instances we limit our discussion to some examples that illustrate the major take-away.

not explicitly reference a non-legal source or an *amicus* brief, it is possible that, at some point in time, the Justice used or was informed by such a source or brief in his or her deliberation. It is also possible that a non-legal source or *amicus* brief that includes information similar to those already cited would not be cited to avoid duplication. Thus, the fact that a non-legal source is not explicitly cited does not mean that it was not used; there are many other types of influence that our analysis cannot capture. Accordingly, the following question guided our main analysis: If a Justice cited / used non-legal sources or an *amicus* brief in his or her opinion, what factual, legal, or contextual determination did it support?

Overall, the Justices cited a range of non-legal sources and *amicus* briefs to support various factual, legal, or contextual determinations in their opinions. Our analysis reveals that across the various opinions, the way the Justices conceptualized (1) the manifestation of race (*i.e.*, as skin color alone or as socially constructed in a number of ways) and (2) classifications on the basis of race (*i.e.*, as whether the classification itself involves racial discrimination or not) informed their use of non-legal sources and *amicus* briefs and the extent to which they were relevant to the Justices' various factual, legal, or contextual determinations. On the first point, Justice Kennedy's opinion, for example, illustrates an understanding of race that is contextual—that is, one that can operate alongside other factors and that can be relevant to the experiences of all students. Justice Alito's opinion, on the other hand, reflects a definition of race that appears to be limited to skin color. With this lens, he cites to the same non-legal sources from the factual record that Kennedy relies on, but to reach the opposite conclusion that race is “omnipresen[t]” in the university's admissions policy. These conflicting definitions of the ways race manifests informed their use of non-legal sources and *amicus* briefs.

On the second factor underlying the Justice's different uses of non-legal sources—whether the racial classification itself involves racial discrimination—Justice Kennedy's and Justice Ginsburg's opinion reflect an understanding of the Equal Protection Clause that allows for the consideration of race to address the ongoing significance of race and racial inequities. Under this reading, non-legal sources submitted in the factual record were sufficient to meet the various elements of narrow tailoring, and for Ginsburg in particular, to satisfy constitutional requirements even before the Court remanded the case to the Fifth Circuit. By contrast, Justice Thomas' and Justice Alito's opinions reflect an “anti classification” reading of the Equal Protection Clause; that is, one that equates racial classifications with racial discrimination. From this perspective, any non-legal sources that relate to the educational benefits of diversity are irrelevant. Because the classification itself is harmful, it cannot be tolerated under the principle of Equal Protection much less constitute a compelling interest. Under this view, instead, the non-legal sources that are relevant instead are those that, like for Thomas, demonstrate the harms to student of color, such as those that are alleged under a mismatch theory, or like for Alito, non-legal sources that support arguments for why the university's goals are a “pretext” for racial discrimination. These different understandings of the Equal Protection Clause by various Justices thus informed the ways they cited non-legal sources as well as *amicus* briefs.

Below, we start with Kennedy's majority opinions in *Fisher I* and *Fisher II* and then we discuss other Justices' opinions in the order in which they appear in each

case. Proceeding in this way allows us to highlight the connection between each of the Justice’s conceptualization of race and racial classifications and his, or her, use of non-legal sources in the respective opinion.

### ***A. Justice Kennedy’s Majority Opinion in Fisher I<sup>36</sup> and Fisher II<sup>37</sup>***

An important feature of Justice Kennedy’s majority opinions in both *Fisher I* and *Fisher II* are his references to evidence from the record—the 2004 Proposal, findings from the university’s survey of students, affidavits, and depositions—and an *amicus* brief to support factual conclusions and legal determinations in the case. Throughout both opinions, Kennedy takes evidence from the record at face value; that is, he finds it sufficient to establish factual conclusions and to meet the elements of narrow tailoring in the case. As we discuss in a section below, this is an approach that is in stark contrast to how Justice Thomas in *Fisher I* and Justice Alito in *Fisher II* consider these same sources.

#### *1. Factual Conclusions*

In setting forth the factual conclusions in *Fisher I* and *Fisher II*, Kennedy cites to demographic data and other non-legal sources submitted in the record to conclude that the University’s race-conscious admission, combined with the Top Ten Percent Plan (TTP), resulted in a student body that was more racially diverse than the student body that was admitted under other admissions regimes (pre-*Hopwood* and pre-TTP, as well as post-*Hopwood*, pre-race-conscious policy). Kennedy also cites to the factual record to outline the steps that the University took before implementing its race-conscious policy. He cites to the University’s Proposal in 2014, which relied on findings from several sources, including a study that showed that few undergraduate classes containing between 5 and 24 students “had significant enrollment by members of racial minorities” and “reports from students regarding their ‘interaction in the classroom.’”<sup>38</sup> Kennedy also cites to the record to summarize the various factors that go into a determination of admission, including essays and other factors that contribute to an applicant’s scores. Based on these factors, he concludes that race is ultimately considered in an “indirect” fashion; that is, it is “contextual”<sup>39</sup> and does not operate as a “mechanical factor.”<sup>40</sup> He also notes that the consideration of race can be relevant for individuals from any racial group, including Whites and Asian Americans. In making this point, he cites to the *Amicus Curiae* Brief for Asian American Legal Defense and Education Fund et al. for the proposition that “the contention that the University discriminates against Asian-Americans is ‘entirely unsupported by evidence in the record or empirical data.’”<sup>41</sup> This is an important reference that stands in stark contrast to the conclusions Thomas and Alito make in their respective opinions.

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36      Joined by Chief Justice Roberts, Justices Scalia, Thomas, Breyer, Alito, and Sotomayor.

37      Joined by Justices Breyer, Sotomayor, and Ginsburg.

38      *Fisher I*, at 2416; *Fisher II*, passim.

39      *Fisher II*, at 2207.

40      *Id.*

41      *Id.*

## 2. Legal Determinations on Narrow Tailoring

In addition to establishing the factual conclusions, Kennedy cites to the non-legal sources from the record to support various legal determinations related to the narrow tailoring elements in the case. These legal determinations include: (a) whether the university's interests are concrete and precise; (b) whether the university offered a reasoned and principled explanation for its race-conscious policy; and (c) whether the consideration of race was necessary given the sufficiency of other race-neutral efforts or the impact of race-conscious admissions on the diversity of the student body. In addressing each of these points, Kennedy cites to the non-legal sources in the record to conclude that the university's policy meets each of these requirements.

On the first element, he states: "The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals."<sup>42</sup> Specifically, he states: "On the first page of its 2004 'Proposal to Consider Race and Ethnicity in Admissions,' the University identifies the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the promot[ion of] cross-racial understanding, the preparation of a student body for an increasingly diverse workforce and society, and the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry" [citing the supplemental appendix, depositions, and affidavits] [internal quotes omitted].<sup>43</sup> To conclude that the university has offered a "'reasoned, principled explanation' for its decision to pursue these goals," Kennedy references "The University's 39-page proposal" that "was written following a year-long study, which concluded that '[t]he use of race-neutral policies and programs ha[d] not been successful' in 'provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society'" [citing the supplemental appendix and affidavits].<sup>44</sup>

Finally, in concluding that the consideration of race was necessary, Kennedy cites to non-legal sources in the record that supported the university's position. He states, the "University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," App. 446a, and concludes that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University, Supp. App. 25a".<sup>45</sup> He notes, "The record itself contains significant evidence, both statistical and anecdotal, in support of the

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42 *Id.* at 2211.

43 *Id.*

44 *Id.* As we note below, Justice Alito dismisses the relevance of this evidence on the grounds that it is "self-serving" (*Fisher II*, at 2223).

45 *Fisher II*, at 2211. In considering the empirical evidence, Kennedy limits the bounds of the evidence to that which was available to UT at the time of Ms. Fisher's application to UT. In doing so, he dismisses "extra-record" evidence Justice Alito relies on in his dissent, while bringing attention to the importance of ongoing studies that the University needs to undertake to defend its race-conscious policy from legal threat in the future (a point we address in more detail below).

University's position."<sup>46</sup> The anecdotal evidence he refers to includes "evidence that minority students admitted under the *Hopwood* regime experienced feelings of loneliness and isolation. See, e.g., App. 317a–318a."<sup>47</sup> He states, "This anecdotal evidence is, in turn, bolstered by further, more nuanced quantitative data,"<sup>48</sup> which includes findings from the university's report regarding the number of African American or Latino students in small undergraduate classes. Finally, Kennedy cites to evidence related to "the many ways in which [the University] already had intensified its outreach efforts to those students," including the fact that the university "created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events. Supp. App. 29a–32a; App. 450a–452a (citing affidavit of Michael Orr ¶¶ 4–20)."<sup>49</sup>

### 3. Legal Determinations on Narrow Tailoring Reflecting Findings of Social Science Research

Notably, the conclusions Kennedy draws about each of the elements of the narrow tailoring analysis often reflects the findings from social science research even though he does not always cite to specific sources. For example, in addressing petitioner's argument that the university lacked a defined goal by not specifying a level of minority enrollment that would constitute a "critical mass," Kennedy states: "Increasing minority enrollment may be instrumental to [the] educational benefits [of diversity], but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers."<sup>50</sup> Instead, Kennedy draws attention to the importance of "provid[ing] an educational setting that fosters cross-racial understanding ... [and] enlightened discussion and learning."<sup>51</sup> Both of these conclusions draw attention to the experiences of students, not only their numbers on colleges campuses, as an important component for attaining the educational benefits of diversity. This important connection reflects findings of research that was submitted to inform the Court's deliberation in the case in a number of *amicus* briefs in support of the university.<sup>52</sup>

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46 *Id.* at 2212.

47 *Id.*

48 *Id.*

49 *Id.* at 2213.

50 *Id.* at 2210.

51 *Id.* at 2211.

52 See, e.g., *Amicus Curiae* Brief of the American Educational Research Association et al., *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*5 in support of Petitioner (citing to multiple studies finding that more numbers of students of color, coupled with institutional support and strategies for meaningful intergroup interaction, is effective in decreasing prejudice by encouraging both formal and informal intergroup contact and friendships, as well as increasing students' cognitive abilities, critical thinking skills, and civic engagement); Brief of 823 Social Scientists as *Amici Curiae* in Support of Respondent, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*18 (citing to analyses of decades of research on diversity finding that numbers alone do not generate educational benefits; rather, the interactions that take place among students, the particular contexts of these interactions, and the conditions that help facilitate productive interactions generate the exchange of ideas that are necessary for realizing the educational benefits of diversity).

## ***B. Justice Thomas's Concurring Opinion in Fisher I (joined by Justice Scalia)***

In his concurring opinion in *Fisher I*, Justice Thomas, joined by Justice Scalia, cites a broad range of non-legal sources—books, law journal articles,<sup>53</sup> education journal articles,<sup>54</sup> policy reports,<sup>55</sup> and news media<sup>56</sup>—to support the overall argument that the educational benefits that flow from diversity do not constitute a compelling interest. His use of non-legal sources throughout the opinion mostly provides contextual support for these legal determinations, all of which reflect a fundamental disagreement with Kennedy on whether racial classifications are the equivalent of racial discrimination.<sup>57</sup> Reflecting an anti-classification understanding of the Equal Protection Clause, Thomas considers racial classifications to be the same as racial discrimination. From this perspective, the “alleged educational benefits of diversity cannot justify racial discrimination today.”<sup>58</sup> By equating racial classifications with racial discrimination, he renders any research related to the educational benefits of diversity as irrelevant to the legal determinations in the case. As he states, “just as the alleged educational benefits of segregation were insufficient to justify racial discrimination then [citing *Brown*], the alleged educational benefits of diversity cannot justify racial discrimination today.”<sup>59</sup>

### *1. Contextual Support for Anti-Classification Understanding of the Equal Protection Clause*

Throughout the opinion, Thomas advances several conclusions about the university's policy that render it unconstitutional under his reading of the Equal Protection Clause as prohibiting all types of racial classifications. A substantial part of his opinion, for instance, cites text presented in legal briefs submitted by the main parties in the cases that accompanied the *Brown* case. He cites the text of these briefs to equate the rationale for race-conscious policies in *Fisher* to those that were advanced in support of segregated schools during the litigation in *Brown*. In making these arguments, he uses non-legal sources as contextual support for his argument. In addressing one of the arguments made against the desegregation of schools (*i.e.*, that public schools would decline in quality or cease to exist altogether), he cites to a book that documented such consequences: “[a]fter being ordered to desegregate, Prince Edward County closed its public schools from the summer of 1959 until the fall of 1964.”<sup>60</sup>

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53 Including an article published in the University California Law Review (*see infra* for text accompanying note 69).

54 These include articles published in the Journal of Negro Education and Research in Higher Education (*see infra* notes 64, 75).

55 Including reports published by the National Science Foundation and American Association of Medical Colleges (*see infra* note 76).

56 Such as a CNN report (Monika Plocienniczak, *Pennsylvania School Experiments with 'Segregation,'* CNN (Jan. 27, 2011) <http://www.cnn.com/2011/US/01/27/pennsylvania.segregation/index.html>).

57 This disagreement is based on an understanding of the Equal Protection Clause from an anti-classification versus anti-subordination perspective. *See, e.g.*, John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 Fordham L. Rev. 423, 436–38 (2002).

58 *Fisher I*, at 2424–25.

59 *Id.*

60 *Id.* at 2426 (citing R. Sarratt, *The Ordeal of Desegregation* 237 (1966)).

Thomas also uses non-legal sources to demonstrate that the university's policy is a "pretext" for discrimination—discrimination that even if presented as "benign" is nevertheless racial discrimination. In a lengthy paragraph, for example, Thomas cites various books that quoted speeches of slaveholders who "argued that slavery was a 'positive good' that civilized blacks and elevated them in every dimension of life."<sup>61</sup> In one of the citations to a legal brief in *Briggs*,<sup>62</sup> which argued that "separate schools protected black children racist white students and teachers,"<sup>63</sup> he explicitly includes a parenthetical to note that the brief was quoting an article by DuBois.<sup>64</sup> Because both involve racial discrimination, Thomas argues that there is no principled distinction between the University's assertion that diversity yields educational benefits and the segregationists' arguments that segregation also yielded those same benefits.<sup>65</sup>

## 2. Legal Determinations on Harms to Students

In addition, Thomas argues that the university's race-conscious policy has insidious consequences for those who are admitted under the policy. In advancing this line of argument, he ignores the relevance of research on the benefits of diversity, while simultaneously relying on non-legal sources that argue the opposite, including those in support of the "mismatch" theory.<sup>66</sup> On this point, he cites to several sources, including the *Amicus Curiae* Brief for Richard Sander et al.<sup>67</sup> and a book by Thomas Sowell that advances the mismatch theory.<sup>68</sup> In a statement that

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61 *Id.*, at 2429 (citing text from various books).

62 34 U.S. 350 (1952).

63 *Fisher I*, at 2430.

64 W.E.B DuBois, *Does the Negro Need Separate Schools?*, 4 J. Negro Educ. 328, 330-31 (1935).

65 In a footnote, Thomas acknowledges the difference that "the segregationists argued that it was *segregation* that was necessary to obtain the alleged benefits, whereas the University argues that *diversity* is the key" (*Fisher I*, at 2428, n.3). He also notes that "Today, the segregationists' arguments would never be given serious consideration," while citing to a news media report by CNN (*supra* note 56) as a "*but see*," to illustrate that similar efforts are taking place today.

66 Conceptually, mismatch suggests that admitted students with test scores below those of their peers at an institution do not perform as well and would therefore be better served by attending institutions where the average standardized test scores are similar to their own.

67 Specifically, Thomas states that "Blacks and Hispanics admitted to the University as a result of racial discrimination are, on average, far less prepared than their white and Asian classmates. In the University's entering class of 2009, for example, among the students admitted outside the Top Ten Percent plan, blacks scored at the 52d percentile of 2009 SAT takers nationwide, while Asians scored at the 93d percentile [citing brief for Richard Sander et al. as *amici curiae*]" (*Fisher I*, at 2431).

68 Thomas cites Thomas Sowell, *Affirmative Action Around the World*, 145-46 (2004) in support of the argument that "the University's discrimination has a pervasive shifting effect" of admitting "minorities who otherwise would have attended less selective colleges where they would have been more evenly matched" (*Fisher I*, at 2431). A number of *amicus* briefs filed in support of the university challenged the theory of mismatch as well as the findings from work that claims to support it. *See., e.g.*, Brief of Empirical Scholars as *Amicus Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), *passim* (citing multiple studies and articles rebutting methodology and research design of Sander and Taylor's studies, including statistical errors and regression analysis that could not produce credible estimates of causation, as well as rebutting claims that their work is unchallenged and presenting findings directly contradictory to theirs in terms of educational outcomes for minority students); Brief of *Amicus Curiae* the American Psychological

appears to dismiss the large body of research disputing the mismatch argument and findings, he notes:

Tellingly, neither the University nor any of the 73 *amici* briefs in support of racial discrimination has presented a shred of evidence that black and Hispanic students are able to close this substantial gap during their time at the University. Cf. Thernstrom & Thernstrom, *Reflections on the Shape of the River*, 46 UCLA L. Rev. 1583, 1605–1608 (1999) (discussing the failure of defenders of racial discrimination in admissions to consider the fact that its “beneficiaries” are underperforming in the classroom).<sup>69</sup>

Thomas goes on to directly quote from a book: “It is a fact that in virtually all selective schools ... where racial preferences in admission is practiced, the majority of [black] students end up in the lower quarter of their class.”<sup>70</sup> He speculates that “[t]here is no reason to believe this is not the case at the University”<sup>71</sup> and accuses “The University and its dozens of *amici*” as being “deafeningly silent on this point”<sup>72</sup> Emphasizing the harms for students admitted under race-conscious policies, he states: “Setting aside the damage wreaked upon the self-confidence of these overmatched students, there is no evidence that they learn more at the University than they would have learned at other schools for which they were better prepared. Indeed, they may learn less.”<sup>73</sup> With these statements, he categorically dismisses the large body of work demonstrating contrary findings.<sup>74</sup>

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Association in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*29–31 (citing research purporting mismatch hypothesis is empirically flawed and ignores other influences on student performance and persistence); Brief *Amicus Curiae* of the National Education Association, et al., in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*32–34 (citing criticisms of Sander’s flawed methodology and inability of studies using the same data and other analytical approaches to replicate Sander’s findings); Brief of the American Educational Research Association et al. as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*26–31 (citing to multiple analyses questioning empirical foundations and methodological soundness of studies purporting mismatch). See also Brief *Amicus Curiae* for Richard Lempert in Support of Respondents, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), *passim* (citing to multiple analyses that criticize methods employed by Sander and that question results of his findings, their replicability, and problematic assumptions regarding ordering of tiers of schools, and utilizing quantity of studies at odds with Sander’s work to show how Sander has attempted to create false consensus around mismatch theory by ignoring critics and contradictory findings). Thomas, however, dismisses the relevance of the social science studies cited in these briefs, which dispute in great detail the methodology and interpretation of the findings of the sources he cites.

69 *Fisher I*, at 2431.

70 *Id.* (citing “S. Cole & E. Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 124 (2003)”).

71 *Id.*

72 *Id.*

73 *Id.*

74 See, e.g., Brief *Amicus Curiae* Kimberley West-Faulcon in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*19–23 (citing to multiple studies showing higher graduation rates among minority students attending elite institutions where their admissions scores are below those of institution’s White average and lack of strong (or any) predictability of scores such as LSAT or SAT for academic performance of minority students);

Thomas cites non-legal sources to support additional arguments related to the harms of the university's policy, including "some evidence that students admitted as a result of racial discrimination are more likely to abandon their initial aspirations to become scientists and engineers than are students with similar qualifications who attend less selective schools."<sup>75</sup> He provides contextual support for his argument by citing reports by the National Science Foundation and the American Association of Medical Colleges that illustrate: "The success of historically black colleges at producing graduates who go on to earn graduate degrees in science and engineering."<sup>76</sup>

### C. Justice Ginsburg's Dissenting Opinion in Fisher I

Similar to Justice Thomas, Justice Ginsburg cites *amicus* briefs and non-legal sources as contextual support for her legal determinations and underlying understanding of what is permitted by the Equal Protection Clause.

#### 1. Contextual Support for Legal Determinations

Ginsburg cites *amicus* briefs to support the statement that the university's race-conscious policy is "like so many educational institutions across the nation."<sup>77</sup>

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Brief of *Amicus Curiae* the American Psychological Association in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*29–31 (citing multiple studies finding that graduation rates for minority students increase with selectivity of institution); Brief *Amici Curiae* of 28 Undergraduate and Graduate Student Organizations Within the University of California in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*25–26 (citing multiple studies documenting that graduation rates increase for under-represented minorities with selectivity of institution, including studies that selectivity increase benefited African American students more than White students and that selectivity was only statistically significant factor affecting African American graduation rates); Brief for the National Black Law Students Association as *Amicus Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*13–15, 24 (citing to multiple studies finding that Black students are more likely to graduate from selective institutions than less-selective institutions and that Black students in lowest category of SAT scores graduated at progressively higher levels as institutional selectivity increased); Brief of the American Educational Research Association et al. as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*24–32 (citing to multiple studies finding that internal stigma among minority undergraduate students was significantly lower in minority students at schools with race-conscious admissions than at schools that bar race-conscious admissions and that minority students nationwide and at public Texas institutions had higher graduation rates at more selective institutions than at those less-selective institutions where their admissions credentials would have made them a better "match").

75 *Fisher I*, at 2431–32 (citing "Elliott, Strenta, Adair, Matier, & Scott, The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions, 37 Research in Higher Educ. 681, 699–701 (1996)").

76 *Id.* at 2432, n.5 (citing "National Science Foundation, J. Burrelli & A. Rapoport, InfoBrief, Role of HBCUs as Baccalaureate–Origin Institutions of Black S & E Doctorate Recipients 6 (2008) (Table 2)" and "American Association of Medical Colleges, Diversity in Medical Education: Facts & Figures 86 (2012) (Table 19)").

77 Specifically, she references "Brief for Amherst College et al. as *Amici Curiae* 33–35; Brief for Association of American Law Schools as *Amicus Curiae* 6; Brief for Association of American Medical Colleges et al. as *Amici Curiae* 30–32; Brief for Brown University et al. as *Amici Curiae* 2–3, 13; Brief for Robert Post et al. as *Amici Curiae* 24–27; Brief for Fordham University et al. as *Amici Curiae* 5–6; Brief for University of Delaware et al. as *Amici Curiae* 16–21" (*Fisher I*, at 2433, n.5).

In demonstrating that other institutions follow the university's approach, she suggests that any ruling by the Court that changes prior case law would affect many other institutions, a concern that Justice Breyer shared during the oral argument in *Fisher I*.<sup>78</sup> In addition to providing this broader context for the impact of the Court's ruling, Ginsburg cites to non-legal sources as contextual support for the determination that the Top Ten Percent Plan is not race-neutral, but race-conscious. In a memorable quote, she stated: "Only an ostrich could regard the supposedly neutral alternative as race unconscious."<sup>79</sup> She writes: "It is race consciousness, not blindness to race, that drives such plans," and in an accompanying footnote cites to a book that included a law professor's famous statement: "'If you think that you can think about a thing inextricably attached to something else without thinking of the thing which it is attached to, then you have a legal mind.'"<sup>80</sup>

## 2. Understanding of Ongoing Significance of Race Reflecting Findings of Social Science Research

Importantly, in her opinion, Ginsburg references her understanding of the ongoing significance of race, an understanding that reflects findings of research studies cited in *amicus* briefs submitted in support of the university. Quoting her dissent in *Gratz*, in *Fisher I* she states: "I have several times explained why government actors, including state universities, need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality.'"<sup>81</sup> Numerous *amicus* briefs submitted in support of the university summarized research findings documenting the lingering effects of government-sanctioned racial segregation and other ways in which race continues to influence educational outcomes and opportunity.<sup>82</sup> For these reasons, Ginsburg "remain[s]

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78 In addressing the lawyer for Abigail Fisher, Justice Breyer asks, "Why overrule a case into which so much thought and effort went and so many people across the country have depended on" (Transcript of Oral Argument at \*8, lines 12-14, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345)).

79 *Fisher I*, at 2433.

80 *Id.* (citing "T. Arnold, *The Symbols of Government* 101 (1935)").

81 *Id.* at 2433. See also *Gratz*, 539 U.S. at 300–01 (noting that "[b]ias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country's law and practice").

82 See, e.g., *Amicus Brief of the Lawyer's Committee for Civil Rights Under Law in Support of Respondent, Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*6–11 (summarizing research findings demonstrating ongoing racial disparities in education, employment, criminal justice, healthcare, and other sectors in society); Brief of Social and Organizational Psychologists as *Amici Curiae* in Support of Respondent, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*27–29 (citing to studies finding continued negative impact of economic segregation on educational opportunities and outcomes of minority students); Brief of *Amici Curiae* Coalition of Bar Associations of Color in Support of Respondent, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*16–20 (citing research documenting history of exclusion and segregation and its connection to present day racial inequities in education); Brief of National Latino Organizations as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), at \*31–34 (citing research demonstrating connection between former de jure and present de facto school racial segregation); Brief of *Amicus Curiae* the American Psychological Association in Support of Respondents, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*10–18 (citing numerous research findings documenting detrimental effects of sub-conscious racial bias on educational outcomes by race).

convinced [that policies] that candidly disclose their consideration of race [are] preferable to those that conceal it.”<sup>83</sup> As she stated in *Gratz*, the recognition of race in policies is important because it can help counter the negative effects of subconscious racialized judgments.<sup>84</sup> Ginsburg’s view reflects a reading of the Equal Protection Clause that allows for state actors to address the continuing importance of race. As she states: “the Constitution, properly interpreted, permits government officials to respond openly to the continuing importance of race.”<sup>85</sup>

#### ***D. Justice Alito’s Dissenting Opinion in Fisher II***<sup>86</sup>

Like Justice Thomas’s dissent, Justice Alito’s dissent in *Fisher II* cites to a range of non-legal sources and *amicus curiae* briefs<sup>87</sup> that include: evidence from the record, demographics statistics,<sup>88</sup> education journals,<sup>89</sup> books,<sup>90</sup> policy reports,<sup>91</sup> news sources,<sup>92</sup> and college reports/admissions standards/guidelines. Like Kennedy, Alito cites evidence from the record, and from non-legal sources, to support factual and legal conclusions as well as contextual support for critique of the university’s goals. Unlike Kennedy, he finds the factual record insufficient to meet the elements of narrow tailoring. Specifically, his arguments negate the relevance of the evidence in the record by outlining parameters of evidence that are missing. At the same time, he relies on findings from non-legal sources, including research, that support his criticism of the university’s race-conscious policy. His criticism is based on a fundamental understanding of the Equal Protection Clause as one that calls for “race-neutrality,” reflecting an anti-classification reading of the Equal Protection Clause, and a definition of race that is limited to skin color.

##### *1. Factual Conclusions*

In Part I of the opinion, Alito cites to non-legal sources to support a number of factual conclusions. For example, he cites to evidence in the factual record to support his conclusion that UT had achieved a high (and presumably sufficient)

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83 *Fisher I*, 133 S. Ct. at 2433–34 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 305 n.11 (2003)).

84 *Gratz v. Bollinger*, 539 U.S. 244, 299–301, 304–05 (2003) (Ginsburg, J., dissenting).

85 *Id.* at 305 n.11.

86 Joined by Chief Justice Roberts and Justice Thomas.

87 These include *amicus curiae* briefs submitted by the following organizations and/or individuals: the Cato Institute, Judicial Education Project, California Institute of Technology, Amherst, Experimental Psychologists, Asian American Legal Foundation et al., Judicial Watch, and Six Educational Nonprofit Orgs.

88 Including demographic data from the U.S. Census Bureau, the Department of Education, and UT’s office of admissions (*see infra* notes 108, 118, 124, and 126).

89 Such as articles published in the Journal of Blacks in Higher Education and Harvard Educational Review (*see infra* notes 127 and 128).

90 Including SAT Wars by Soares (*see infra* note 128).

91 Those published by the Pew Research Center and the University of Texas system (otherwise referred to as the “Kroll Report”) (*see infra* notes 110 and 119).

92 These include articles published in the Dallas Morning News, Wall Street Journal, Washington Post, and National Law Journal (*see infra* notes 95, 111, 126, 127).

level of racial diversity under the TTP. He states: “By 2004—the last year under the holistic, race-neutral AI/PAI system—UT’s entering class was 4.5% African-American, 17.9% Asian-American, and 16.9% Hispanic. Supp. App. 156a. The 2004 entering class thus had a higher percentage of African-Americans, Asian-Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences.”<sup>93</sup> Next, Alito cites to the record to support factual conclusions related to the steps UT undertook before introducing the consideration of race after *Grutter* implicitly overruled *Hopwood*. Alito cites to a string of news media reports, for example, to support the conclusion that for the university, the “reintroduction of race into the admissions process was anything other than a foregone conclusion” the very day *Grutter* was handed down. Based on these news media accounts, Alito dismisses the Proposal and the accompanying studies that the university undertook the year after *Grutter*, going as far as saying “there is no evidence”<sup>94</sup> to support the contention that the university engaged in such deliberations.

In addition, Alito cites to the record to support the view that race is an “omnipresent” factor in the university’s policies, and in doing so relies on the same evidence Kennedy relied on, but to reach the opposite conclusion. Alito states:

Because an applicant’s race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation.” 645 F.Supp.2d, at 597; see also *id.*, at 598 (“[A] candidate’s race is known throughout the application process”). Consideration of race therefore pervades every aspect of UT’s admissions process. See App. 219a (“We are certainly aware of the applicant’s race. It’s on the front page of the application that’s being read [and] is used in context with everything else that’s part of the applicant’s file”).<sup>95</sup>

For these reasons, he rejects the university’s argument that “race is a factor of a factor” or a “contextual” determination.

While relying on evidence from the record to support a conclusion about “the omnipresence of racial classifications”<sup>96</sup> in the university’s policy, Alito also faults it for failing to “keep any statistics on how many students are affected by the consideration of race in admissions decisions [or] “how many minority students are affected in a positive manner by the consideration of race.”<sup>97</sup> He concludes that “UT thus makes no effort to assess how the individual characteristics of students admitted as the result of racial preferences differ (or do not differ) from those of students who would have been admitted without them.”<sup>98</sup> Because

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93 *Fisher II*, at 2218.

94 *Id.* at 2219.

95 *Id.* at 2220 (further citing to an editorial by former UT President Bill Powers published in the National Law Journal, “Powers, Why Schools Still Need Affirmative Action, National L. J., Aug. 4, 2014, p. 22”, for the proposition that “UT considers its use of racial classifications to be a benign form of ‘social engineering’”).

96 *Id.*

97 *Id.*

98 *Id.*

Alito’s argument relies primarily on “racial classifications” that are devoid of other contextual factors, in his mind, the consideration of race can be isolated for having determined a student’s “odds of admission.”<sup>99</sup> And because race is a factor that can be isolated, Alito faults the university for not presenting evidence that demonstrates its consideration for “each” applicant—evidence that he would also find relevant for the elements of narrow tailoring.<sup>100</sup> In this way, Alito’s use of non-legal sources reflects a fundamental disagreement with Kennedy’s majority opinion about the definition (or manifestations) of race and the role it plays in the university’s determinations.

## 2. Legal Determinations

### 1. Necessity of Race-Conscious Means

Overall, Alito dismisses the relevance of the non-legal sources Kennedy cites to support legal determinations in the case. He dismisses it on the grounds that it fails to demonstrate what is needed to show that race is necessary to further the university’s compelling interest. In reference to the survey study of students’ experiences, Alito faults the university for failing to demonstrate that “its race-conscious plan actually ameliorates this situation.”<sup>101</sup> He faults the university for presenting “no evidence that its admissions officers, in administering the ‘holistic’ component of its plan, make any effort to determine whether an African-American, Hispanic, or Asian-American student is likely to enroll in classes in which minority students are underrepresented”<sup>102</sup> He notes:

although UT’s records should permit it to determine without much difficulty whether holistic admittees are any more likely than students admitted through the Top Ten Percent Law [citation omitted] to enroll in the classes lacking racial or ethnic diversity, UT either has not crunched those numbers or has not revealed what they show.<sup>103</sup>

Alito also finds evidence from the Proposal insufficient: “The Proposal did not analyze the backgrounds, life experiences, leadership qualities, awards, extracurricular activities, community service, personal attributes, or other characteristics of the minority students who were already being admitted to UT under the holistic, race-neutral process.”<sup>104</sup> Alito thus focuses on data that is missing in a manner that ultimately dismisses the data that was sufficient for Kennedy’s factual and legal conclusions.

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99 *Id.*

100 It is worth noting that this approach presents a catch-22 for the university. If the university could provide such evidence, then it would open itself to legal vulnerability for a process that makes race a determinative factor and not holistic. Yet, by not being able to provide the evidence, they fail to satisfy the standard Alito requires for strict scrutiny.

101 *Id.* at 2216.

102 *Id.*

103 *Id.*

104 *Id.* at 2219.

Alito also faults the university for failing to demonstrate that its race-conscious admissions helped address the concern over the number of students of color in smaller undergraduate classes. He states:

As far as the record shows, UT failed to even scratch the surface of the available data before reflexively resorting to racial preferences. For instance, because UT knows which students were admitted through the Top Ten Percent Plan and which were not, as well as which students enrolled in which classes, it would seem relatively easy to determine whether Top Ten Percent students were more or less likely than holistic admittees to enroll in the types of classes where diversity was lacking. But UT never bothered to figure this out. See *ante*, at 2209 (acknowledging that UT submitted no evidence regarding “how students admitted solely based on their class rank differ in their contribution to diversity from students admitted through holistic review”). Nor is there any indication that UT instructed admissions officers to search for African-American and Hispanic applicants who would fill particular gaps at the classroom level.<sup>105</sup>

Without this evidence, according to Alito, the university cannot demonstrate that the consideration of race is needed.

## 2. *Precision of the University’s Goal and Critical Mass*

Alito cites non-legal sources to support the conclusion that university’s interests are not “concrete or precise.”<sup>106</sup> In response to Kennedy’s references to the university’s Proposal as evidence of the specified goals the university sought to meet, Alito dismisses the relevance of such evidence on the grounds that: “If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, see *ante*, at 2210–2211 (citing *only* self-serving statements from UT officials), then the narrow tailoring inquiry is meaningless.”<sup>107</sup> By referring to the statements as “self-serving,” Alito questions the reliability of such sources. The extent to which the evidence from the factual record was relevant for informing a legal determination, therefore, seemed to depend on whether it supports the university’s case (in which case it is suspect and not relevant), or whether it refutes it (in which case it is not suspect, but relevant). This ideological position as a metric for considering the relevance of research is also one that Justice Thomas appears to adopt, a metric that does not bode well for researchers or colleges and universities that seek to use research to inform their deliberations.

In addition to whether the evidence can be considered “self-serving” or not, Alito would require the university to present evidence that supports the necessity of a race-conscious policy before the policy is put into place. The evidence the university considered, before reintroducing race into its policy, however, was not sufficient for Alito. Instead, what Alito requires, in part, are statistics about how many students are affected by the consideration of race and which students are

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105 *Id.* at 2226–27.

106 *Id.* at 2223.

107 *Id.*

admitted as a result of a race-conscious system or under a race-neutral process. His rationale also appears to require evidence that demonstrates the *lack of educational benefits* of diversity when race-conscious policies are not in place (that is, under a race-neutral process), a standard that would position many diversity-related studies, which focus on capturing the educational outcomes from diverse peers and environments, incomplete in their findings and potentially irrelevant.

Alito also cites non-legal sources, particularly demographic characteristics, to support the argument that the university's goals, including obtaining a critical mass, are akin to racial balancing. Citing facts published by the U.S. Census, Alito asks:

Does critical mass depend on the relative size of a particular group in the population of a State? For example, is the critical mass of African-Americans and Hispanics in Texas, where African-Americans are about 11.8% of the population and Hispanics are about 37.6%, different from the critical mass in neighboring New Mexico, where the African-American population is much smaller (about 2.1%) and the Hispanic population constitutes a higher percentage of the State's total (about 46.3%)?<sup>108</sup>

Referencing the Proposal's "numerical assessments of the racial makeup of the student body," Alito faults the university for "resort[ing] to a simple racial census," "instead of focusing on the benefits of diversity."<sup>109</sup> In doing so, Alito dismisses the relevance of the findings from the students' survey and their educational experiences.

### 3. *Good Faith Determination of Race-Neutral Alternatives*

Expanding on a point raised in Part I of his opinion, Alito draws from what Kennedy refers to as "extra record" evidence to question the university's motives in its admissions policies and its "good faith" determination of alternatives to race-conscious admissions. Alito cites a report published by the UT system that conducted an investigation of the university's policies to support the conclusion that "UT maintained a clandestine admissions system that evaded public scrutiny until a former admissions officer blew the whistle in 2014."<sup>110</sup> In addition, he cites the report and a news article to support the conclusion that:

Under this longstanding, secret process, university officials regularly overrode normal holistic review to allow politically connected individuals—such as donors, alumni, legislators, members of the Board of Regents, and UT officials and faculty—to get family members and other friends admitted to UT, despite having grades and standardized test scores substantially below the median for admitted students.<sup>111</sup>

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108 *Id.* at 2224 (citing "United States Census Bureau, QuickFacts, online at <https://www.census.gov/quickfacts/table/PST045215/35,48> (all Internet materials as last visited June 21, 2016)").

109 *Id.* at 2225.

110 *Id.* at 2240 (citing "Kroll, Inc., University of Texas at Austin—Investigation of Admissions Practices and Allegations of Undue Influence 4 (Feb. 6, 2015) (Kroll Report)").

111 *Id.* Citing pp. 12–14 of the Kroll Report and "Blanchard & Hoppe, Influential Texans Helped

In his majority opinion, Kennedy explicitly rejects the relevance of the report and the news media accounts on the grounds that they are “extra record” materials (*i.e.*, not submitted during the time of the litigation in the lower courts), tangential to the case, and because the university did not have “a full opportunity to respond” to them.<sup>112</sup> In a lengthy footnote citing to the brief for the respondent and several *amicus* briefs, Alito disputes all of these points, highlighting the instances in which the university responded to the allegations in the report, the relevance of the findings to a “good faith” determination, and its “hollow” concern about considering “extra record” materials when it, too, affirmed the Fifth Circuit’s opinion, which according to Alito, “relied heavily” on its “own extrarecord internet research.”<sup>113</sup>

#### 4. *Discrimination Against Asian Americans*

Alito dedicates a substantial part of his opinion to addressing the role Asian American students play in the university’s admissions policy. Specifically, Alito finds the university’s policy to “discriminate against Asian-American students”<sup>114</sup> and cites to text from an *amicus* brief filed in support of the Petitioner to note that: “In UT’s view, apparently, ‘Asian Americans are not worth as much as Hispanics in promoting “cross-racial understanding,” breaking down “racial stereotypes,” and enabling students to ‘better understand persons of different races.’”<sup>115</sup> To bolster this point and demonstrate that the university’s policy discriminates against Asian Americans, Alito cites to various *amicus* briefs to provide a historical context of discrimination against Asian Americans. He states: “the Court’s willingness to allow this ‘discrimination against individuals of Asian descent in UT admissions is particularly troubling, in light of the long history of discrimination against Asian Americans, especially in education.’”<sup>116</sup> Kennedy’s and Alito’s citation to the *amicus* briefs that support their respective conclusions illustrates the role these briefs can play in providing contextual or rhetorical support for the legal determinations in the case, a focus that has implications for future cases.

#### 5. *Definition of Racial Categories and Race*

Alito also cites to *amicus* briefs and non-legal sources to criticize the university’s “crude” racial categories and the definition (or lack thereof) of various racial and

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Underqualified Students Get Into UT, Dallas Morning News, July 20, 2015, online at <http://www.dallasnews.com/news/education/headlines/20150720-influential-texans-helped-underqualified-students-get-into-ut.ece> (“Dozens of highly influential Texans—including lawmakers, millionaire donors and university regents—helped underqualified students get into the University of Texas, often by writing to UT officials, records show”).

112 *Id.* at 2211–12.

113 *Id.* at 2240, n.18.

114 *Id.* at 2227.

115 *Id.* (citing “Brief for Asian American Legal Foundation et al. as *Amici Curiae* 11 (representing 117 Asian-American organizations”).

116 *Id.* at 2228 (citing Brief for Asian American Legal Foundation et al. as *Amici Curiae*).

ethnic groups.<sup>117</sup> Using the example of Asian Americans, he cites two different *amicus* briefs submitted in support of the petitioner to demonstrate the varied backgrounds that are captured by such a broad category, including “individuals of Chinese, Japanese, Korean, Vietnamese, Cambodian, Hmong, Indian and other backgrounds comprising roughly 60% of the world’s population.”<sup>118</sup> He also cites to demographic data published by the U.S. Census Bureau and a report by the Pew Research Center to support the statement that an increasing number of individuals describe “themselves as multiple races” and “marry a spouse of a different race or ethnicity.”<sup>119</sup> Based on these sources, Alito concludes that the U.S. is “rapidly becoming” a “more integrated country.”<sup>120</sup> He seems to define “integration” based on the percentage of individuals who report interracial marriage, a conception of race that is based on biology and/or color of one’s skin.

Alito also questions whether a student’s race is connected to a varied perspective in the classroom, a view that categorically dismisses findings from social science research demonstrating the connection in light of the history of the U.S. For instance, he asks: “If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student’s classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? UT does not say.”<sup>121</sup> In doing so, Alito not only disagrees with precedent in *Grutter* (where the majority opinion authored by Justice O’Connor acknowledged the connection between race and experiences that contribute a different perspective), but ignores findings from a large body of research studies demonstrating the relationship between race and backgrounds and experiences. *Amicus* briefs submitted in support of the university summarized the research that supported these arguments.<sup>122</sup> It is

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117 This question of racial categories was one that a four-Justice block, including Alito, in a concurring opinion in *Parents Involved* rendered the school districts’ voluntary race-conscious student assignment policies unconstitutional (551 U.S. at 2743–44. Kennedy, J. joined with respect to Parts I, II, III & III.C) (noting that the district’s plan was too “broad,” and “imprecise” in utilizing categories of only “white” and “non-white,” and did not state a clear necessity for use of racial classifications).

118 *Id.* at 2229 & n.6 (citing Brief for Asian American Legal Foundation et al. as *Amici Curiae* in *Fisher I* and Brief for Judicial Watch in *Fisher II*).

119 *Id.* at 2230, n.7 (citing “United States Census Bureau, 2010 Census Shows Multiple-Race Population Grew Faster Than Single-Race Population (Sept. 27, 2012), online at <https://www.census.gov/newsroom/releases/archives/race/cb12-182.html>”) and n.8 (citing “W. Wang, Pew Research Center, Interracial Marriage: Who Is ‘Marrying Out’? (June 12, 2015), online at <http://www.pewresearch.org/fact-tank/2015/06/12/interracial-marriage-who-is-marrying-out/>; W. Wang, Pew Research Center, The Rise of Intermarriage (Feb. 16, 2012), online at <http://www.pewsocialtrends.org/2012/02/16/the-rise-of-intermarriage/>”).

120 *Id.* at 2230.

121 *Id.*

122 See, e.g., Brief of *Amici Curiae* the Leadership Conference on Civil and Human Rights and the Southern Poverty Law Center, et al., in Support of Respondents in, *Fisher v. University of Tex.* at Austin, 136 S. Ct. 2198 (2016) (No. 14-981), at \*21 (citing numerous studies finding that students’ race and/or ethnicity plays a role in shaping their perspectives and worldviews); Brief of Teach for America et al. as *Amici Curiae* in Support of Respondents, *Fisher v. University of Tex.* at Austin, 136 S. Ct. 2198 (2016) (No. 14-981), at \*19 (citing multiple studies supporting conclusion that schools should include information about applicants’ racial and ethnic identities in addition to socioeconomic status to truly capture existing viewpoints and experiences); Brief of *Amici Curiae* for the American Jewish

not surprising that Alito ignores the relevance of this research, as his rationale illustrates a definition of race that is a-contextual and a-historical.

### 3. Contextual Support to Question the Candid Nature of the University's Interest

Alito relies on research findings to support the argument that the university's race-conscious policy is based on "unsupported assumptions" about African-American and Hispanic students admitted through the Top Ten Percent Plan. He cites to non-legal sources to support the argument that the university's interest in "diversity within diversity" reflects an interest in seeking the "right type" of student, that is, one that is wealthy or has high standardized test scores. Across a long section of his opinion, for example, Alito cites statistics from the Department of Education, the U.S. Census Bureau, the university's office of admission, and the record, to support the conclusions that African-American and Hispanic students admitted through the Top Ten Percent Plan: (a) have the education levels that far exceed the norm in Texas,<sup>123</sup> (b) have income levels that exceed the Texas median,<sup>124</sup> and (c) earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law.<sup>125</sup>

On this last point, Alito cites to a news media article from the Washington Post documenting findings from "nationwide studies" "showing that high school

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Committee, Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism in Support of Respondents, *Fisher v. University of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), at \*16 (citing various studies finding experience of racial discrimination, race consciousness, and different "culturally related experiences" of members of different racial and ethnic groups will directly impact perspectives).

123 For example, on pages 2232–33, Alito writes: "In 2008, when petitioner applied to UT, approximately 79% of Texans aged 25 years or older had a high school diploma, 17% had a bachelor's degree, and 8% had a graduate or professional degree. Dept. of Educ., Nat. Center for Educ. Statistics, T. Snyder & S. Dillow, *Digest of Education Statistics 2010*, p. 29 (2011). In contrast, 96% of African-Americans admitted through the Top Ten Percent Plan had a parent with a high school diploma, 59% had a parent with a bachelor's degree, and 26% had a parent with a graduate or professional degree. See UT, Office of Admissions, *Student Profile, Admitted Freshman Class of 2008*, p. 8 (rev. Aug. 1, 2012) [citation omitted]. Similarly, 83% of Hispanics admitted through the Top Ten Percent Plan had a parent with a high school diploma, 42% had a parent with a bachelor's degree, and 21% had a parent with a graduate or professional degree. *Ibid.* As these statistics make plain, the minorities that UT characterizes as "coming from depressed socioeconomic backgrounds," Tr. of Oral Arg. 53 (Dec. 9, 2015), generally come from households with education levels exceeding the norm in Texas."

124 Specifically, on page 2233, Alito notes: "In 2008, the median annual household income in Texas was \$49,453. United States Census Bureau, A. Noss, *Household Income for States: 2008 and 2009*, p. 4 (2010), online at <https://www.census.gov/prod/2010pubs/acsbr09-2.pdf>. The household income levels for Top Ten Percent African-American and Hispanic admittees were on par: Roughly half of such admittees came from households below the Texas median, and half came from households above the median. See 2008 Student Profile 6. And a large portion of these admittees are from households with income levels far exceeding the Texas median. Specifically, 25% of African-Americans and 27% of Hispanics admitted through the Top Ten Percent Plan in 2008 were raised in households with incomes exceeding \$80,000. *Ibid.*"

125 Citing the record, Alito states on p. 2234: "Indeed, the statistics in the record reveal that, for each year between 2003 and 2007, African-American in-state freshmen who were admitted under the Top Ten Percent Law earned a higher mean grade point average than those admitted outside of the Top Ten Percent Law. Supp. App. 164a. The same is true for Hispanic students. *Id.*, at 165a."

grades are a better predictor of success in college than SAT scores.”<sup>126</sup> and to two education journal articles (both published in the *Harvard Educational Review*), three separate *amicus* briefs filed in support of the respondent, and another media report, for the proposition that the SAT “has often been accused of reflecting racial and cultural bias” and “clearly correlate[s] with wealth.”<sup>127</sup> As further contextual support for this argument, Alito cites to an education journal article, a book, and numerous examples of institutions that do not require the SAT or ACT.<sup>128</sup>

On a separate point, Alito cites to figures from the U.S. Census bureau to question the logic of the university’s interest in seeking demographic parity to avoid isolation. He states: “linking racial loneliness and isolation to state demographics is illogical. Imagine, for example, that an African-American student attends a university that is 20% African-American. If racial isolation depends on a comparison to state demographics, then that student is more likely to feel isolated if the school is located in Mississippi (which is 37.0% African-American) than if it is located in Montana (which is 0.4% African-American) [citing U.S. Census Bureau]. In reality, however, the student may feel—if anything—*less* isolated in Mississippi, where African-Americans are more prevalent in the population at large.”<sup>129</sup>

## V. Implications for Postsecondary Institutions, Researchers, and *Amici*

Our analysis indicates that the Justices utilized non-legal sources and *amicus* briefs in a variety of ways and toward vastly different ends in their opinions. One important overarching consideration is that the ideological differences of the Justices are part and parcel of the review of the constitutional questions involved in the affirmative action debate. As we noted, our analysis reveals that across the various opinions, the way the Justices conceptualized: (1) the manifestation of race (*i.e.*, as skin color alone or as socially constructed in a number of ways) and (2) classifications on the basis of race (*i.e.*, as whether the classification itself involves racial discrimination or not) informed their use of non-legal sources and *amicus* briefs and the extent to which they were relevant to the various factual, legal, or contextual determinations. In this Part, we first consider the broad lessons of our analysis for colleges and universities that employ race-conscious admissions, including lessons for general counsels and administrators. Next, we discuss the implications for researchers who seek to contribute to the legal debate as well as

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126 *Fisher II*, at 2234, n.10 (citing “Strauss, Study: High School Grades Best Predictor of College Success—Not SAT/ACT Scores, *Washington Post*, Feb. 21, 2014, online at <https://www.washingtonpost.com/news/answer-sheet/wp/2014/02/21/a-telling-study-about-act-sat-scores/>”).

127 *Id.* at n.11 (citing “Freedle, Correcting the SAT’s Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores, 73 *Harv. Ed. Rev.* 1 (2003)”, “Santelices & Wilson, Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning, 80 *Harv. Ed. Rev.* 106, 127 (2010)”) and n.12 (citing “Zumbrun, SAT Scores and Income Inequality: How Wealthier Kids Rank Higher, *Wall Street Journal*, Oct. 7, 2014, online at <http://blogs.wsj.com/economics/2014/10/07/sat-scores-and-income-inequality-how-wealthier-kids-rank-higher/>”).

128 *Id.* at n.13 (citing “Wake Forest Presents the Most Serious Threat So Far to the Future of the SAT, *The Journal of Blacks in Higher Education*, No. 60 (Summer 2008), p. 9” and “J. Soares, SAT Wars: The Case for Test-Optional College Admissions 3 (2012)”).

129 *Id.* at 2236.

to inform policy as postsecondary institutions comply with the Court's decision. Finally, we conclude with thoughts for individuals and organizations considering the submission of *amicus* briefs in future Supreme Court cases.

### *A. Implications for Colleges and Universities*

Our analysis reinforces the legal boundaries and needed documentation, as well as collaborations with researchers, that exist for colleges and universities as they consider how to enact admissions procedures and, potentially, defend them in court. The university, for example, was challenged to consider the question of how much "diversity" was developed through the Top Ten Percent Plan versus holistic admissions, reminding universities of the need to explore and document the outcomes associated with "race-neutral" alternatives aimed at obtaining racial and ethnic diversity. The Justices' citation to the factual record and the non-legal sources that were submitted as part of that record further demonstrates the need for colleges and universities to continue to document and gather evidence of the benefits of diversity, and to do so by engaging in important collaborations with researchers, within or outside the university. Specifically, via the sources they cited, the Justices in *Fisher* reinforced what was outlined in *Grutter*: that there is a need for institutions to carefully document the educational benefits of diversity derived from implemented admissions processes. The findings of this study further suggest the importance of introducing such evidence early in the litigation process.

Related, universities need to clearly document the steps they undertake to realize the benefits of diversity *after* admissions. As Justice Kennedy wrote in the majority opinion—"Increasing minority enrollment may be instrumental to [the] educational benefits [of diversity]," but so is "provid[ing] an educational setting that fosters cross-racial understanding...[and] enlightened discussion and learning."<sup>130</sup> In this way, the Court emphasized an "educational setting" that allows for the educational benefits of diversity to occur. Kennedy's use of the factual record, particularly the student survey, in his decision, also pointed to the importance of considering student experience when justifying race-conscious admissions policies. In so doing, the Court's decision (and cited non-legal sources from the factual record) focused on the experiences of students in a way that prior decisions on affirmative action had not—shifting from a numbers-focused diversity approach to one that also considers efforts to realize the educational benefits of diversity. This shift requires that institutions not only attain numerical representation of students of color, but that they more fully document whether they are *obtaining* the educational benefits of diversity with policies and practices that promote the type of racial climate and environment that facilitates such benefits.<sup>131</sup>

Finally, the Justices' statements on the Top Ten Percent Plan and how the plan might be characterized (race-neutral or race-conscious), have implications for colleges

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130 *Id.* at 2211.

131 See, e.g., Garces, *supra* note 34; Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 *Educ. Researcher* 115 (2014).

and universities that may implement similar policies in the future.<sup>132</sup> Justice Ginsburg cites to a non-legal source as a rhetorical tool to emphasize the mental gymnastics that are needed to term the Top Ten Percent Plan “race-neutral.” The constitutionality of the Top Ten Percent Plan and whether it can be considered “race-neutral,” of course, was not a legal issue before the Court, yet, Ginsburg’s characterization of the plan may help bolster challenges to such plans on the grounds that they are “race-conscious.”<sup>133</sup> Subsequently, general counsels and administrators will need to consider the framing of alternatives they may employ.

### ***B. Implications for Researchers***

Moving forward, it will be important for researchers to work with their own universities to help in rigorous documentation of admissions procedures and outcomes, as well as race-neutral alternatives. In relying on the evidence from the record and finding it sufficient to meet the elements of narrow tailoring, for example, Justice Kennedy’s rationale draws attention to the importance of this evidence for justifying the university’s race-conscious policy in the future. Throughout the opinion in *Fisher II*, Kennedy references the importance of “regular evaluation of data and consideration of student experience” to ensure “that race plays no greater role than is necessary to meet [the university’s] compelling interest.”<sup>134</sup> He calls attention to: “[t]he type of data collected, and the manner in which it is considered,” as having “significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.”<sup>135</sup> At the end of the opinion, Kennedy states: “The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.”<sup>136</sup> This clear reference to non-legal sources, and the need for additional evidence, provides many opportunities for researchers to engage by conducting studies to further inform the debate.

One important consideration for researchers will be communicating findings to broad audiences via various mediums. Social science will likely continue playing an illuminating role in critical matters to education, particularly as colleges and universities and advocates strive to ensure equality and opportunity for all students. Toward this end, the communication of findings of work to broad audiences, including the media, is critical. As our analysis revealed, Justices cited media reports that discussed the findings of a study instead of the study itself. Justice Alito, for example, cited to the Washington Post, which summarized findings from research studies on the SAT. This indicates that media sources may be serving as “proxies” for studies. This use heightens the importance of media sources for more effective communication of research to legal audiences.

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132     *See infra* Part IV.

133     *See infra* Part IV.

134     *Fisher II*, at 2210.

135     *Id.*

136     *Id.*, at 2214–15.

As researchers continue to conduct studies that may inform the Court's deliberations on these constitutional questions, it is also important to understand, as our analysis revealed, that the Justice's ideological positions may ultimately shape whether such research is deemed relevant or if it is cited in their opinions. As we noted, a number of *amicus* briefs in support of the university included findings from numerous studies that challenged the theory of mismatch as well as the findings from work that claims to support it. Justice Thomas, however, ignored the studies cited in these briefs, which dispute in great detail the methodology and interpretation of the findings of the sources he cites. As we demonstrate in our analysis, Thomas' (and Alito's) "anti-classification" reading of the Equal Protection Clause, which equates racial classifications with racial discrimination, shaped the consideration of the research and other non-legal sources. In contrast, Kennedy's and Justice Ginsburg's opinions reflect an understanding of the Equal Protection Clause that allows for the consideration of race to address the ongoing significance of race and racial inequities. Kennedy's majority opinion, moreover, reflects an understanding of race that is "contextual," an understanding of race that is also supported by research findings. These perspectives underscore the importance of research that documents the myriad ways in which race continues to manifest in U.S. society and to shape students' educational opportunities and life outcomes.

### *C. Implications for Future Amici*

While the utility of *amicus* briefs continues to be debated, it is clear in this case that the Justices do reference them in their opinions. In particular, Justice Kennedy's, Justice Ginsburg's, and Justice Alito's citation to the *amicus* briefs that support their respective conclusions illustrates the role these briefs can play in providing contextual or rhetorical support for the legal determinations in the case. Through the explicit references to *amicus* briefs filed on either side of the case, Kennedy and Alito shared their perspectives on the relevance of research for addressing the argument that race-conscious policies discriminate against Asian Americans. This exchange has particular implications for future cases, including current lawsuits against the University of North Carolina Chapel Hill and Harvard University that are making their way through the courts and may ultimately reach the Supreme Court. With the case against Harvard involving an Asian American plaintiff, the exchange provides insight into how the various Justices viewed the relevance of *amicus* briefs that addressed this issue.

Considering the findings from our analysis, individuals and organizations who believe they have a stake in the outcome of a case, or unique knowledge to contribute, might be encouraged to file briefs in future cases. Of course, not all briefs are cited; however, we note that some briefs, while not directly cited, are having an influence because their conclusions are reflected in the opinions of Justices. In sum, challenges to positions on either side of the issue allow *amici* to seek additional non-legal sources that might strengthen their arguments, as well as partner with researchers who may be able to assist in filling gaps in evidence.

## V. Conclusion

Ultimately, the Court in *Fisher II* upheld the constitutionality of race-conscious admissions. Throughout their opinions, the Justices cited non-legal sources and *amicus* briefs in conflicting ways, as informed by their respective positions on the interpretation of the Equal Protection Clause and their definitions of race. Understanding the Justice's use (or questioning) of non-legal sources is critical for those interested in presenting this type of evidence to the Court. As challenges to affirmative action continue, the Justices' use of non-legal sources and *amicus* briefs in *Fisher* suggests it is essential for colleges and universities to continue to document the need for their admissions policies, for researchers to communicate findings about this contentious issue to broad audiences via targeted mediums (particularly media sources) and for *amici* to continue to support their positions with various non-legal sources. Collaborations among institutions, researchers, and authors of *amicus* briefs may be specifically beneficial to derive and help translate the findings from research to legal audiences. These efforts will be important as social science continues to play an illuminating role in the decisions of the Supreme Court and, consequently, on educational policy.

# TO THE RICH GO THE SPOILS: MERIT, MONEY, AND ACCESS TO HIGHER EDUCATION

JONATHAN D. GLATER\*

## **Abstract**

*Although student aid from the federal government has provided grants and loans allowing more students to pursue higher education, meaningful access remains elusive for those of lesser means. Students who belong to historically excluded groups lag in rates of matriculation and graduation. Too often they take on debt burdens that hurt their educational experience and constrain their subsequent careers, while aid allocated on the basis of academic achievement too often is regressive in effect. This Article analyzes the impact of different, and at times conflicting, models guiding federal aid policy. The Article advocates re-establishment of access as the paramount goal, a move that would restore coherence to the student aid regime and enhance college accessibility.*

## **I. Introduction**

Financial aid from the federal government helps put higher education within reach of aspiring college students and plays a critical role in determining who has meaningful access to opportunity in the United States. Increasingly, this system works to undermine the success of poorer students and, disproportionately, African American and Latino students<sup>1</sup> who need and receive financial aid. This outcome has occurred not because federal aid policy has failed but because of how it has succeeded: Government-provided credit enables students to finance college. The rising cost of college<sup>2</sup> has led more students to borrow larger amounts

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\*Professor of Law, University of California, Irvine, School of Law. This article benefitted from suggestions and criticism from Mitchell Crusto, Areto Imoukhuede, David Troutt, and Del Wright Jr., as well as participants in faculty workshops at Boston College Law School and Stanford Law School, and comments from participants in the Duke Law School Conference on The Present and Future of Civil Rights Movements in November 2015, the ClassCrits VIII annual conference in October 2015, the John Mercer Langston Writing Workshop in July 2015, and the panel on *The Hollowing of Hopes: When Access Is Granted but Opportunity Proves Elusive* at the annual meeting of the Law & Society Association in May 2015.

1 More than 50 percent of African American undergraduate students use federal student loans to help pay for higher education while overall, about 40 percent of undergraduate students do. Education Department, Digest of Education Statistics 2014 (“Digest”), Table 331.10 (“Percentage of undergraduates receiving financial aid, by type and source of aid and selected student characteristics: 2011-12”), available at [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_331.10.asp](http://nces.ed.gov/programs/digest/d14/tables/dt14_331.10.asp). About 40 percent of white students take out federal loans, 34 percent of Latino students, and 27 percent of Asian students. Id.

2 Growth in tuition and fees (and tuition, fees, room and board) at both public and private, four-year colleges has exceeded the rate of growth in consumer prices for decades, although it has been declining in recent years. College Board, Trends in College Pricing 2014 16 (Fig. 5: “Average Annual Percentage Increase in Inflation-Adjusted Published Prices by Decade, 1984-85 to 2014-15”). Between the 1984-85 and 2014-15 academic years, the average published tuition and fees at private four-year institutions rose by 146%, from \$12,716 (in 2014 dollars) to \$31,231. The average published price for in-state students at public four-year institutions increased by 225%, from \$2,810 to \$9,139. Id.

and that debt can undermine academic success<sup>3</sup>, career choice<sup>4</sup>, and socioeconomic mobility<sup>5</sup> – the very goals lawmakers sought to promote. Access is less meaningful to the extent that those who use federal aid are constrained to a greater degree than those students who do not. Meaningful access, enabling students to pursue careers regardless of how they finance higher education, is undermined by debt. Growing indebtedness is the product of conflicting legislative efforts,<sup>6</sup> declining direct financial support of public colleges and universities,<sup>7</sup> and corresponding growth in tuition that has exceeded growth in household incomes.<sup>8</sup> This Article identifies distinct models that have guided policy interventions affecting the accessibility of higher education in the United States and develops a critique of their effects.

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3 Nearly one-third of students who started college in the 2003-04 academic year and who subsequently dropped out reported that they did so for financial reasons. Terris Ross, Grace Kena, Amy Rathbun, Angelina KewalRamani, Jijun Zhang, Paul Kristapovich, Eileen Manning, Higher Education: Gaps in Access and Persistence Study 190 (2012) (Table 38-1: “Percentage of 2003-04 beginning postsecondary students who left school by 2004 without completing a program and the reported reasons for leaving, by sex and race/ethnicity: 2004”).

4 Jesse Rothstein and Cecilia Elena Rouse, *Constrained after College: Student Loans and Early Career Occupational Choices*, National Bureau of Economic Research Working Paper 13117 (2007), at 26, available at <http://www.nber.org/papers/w13117.pdf> (finding that when a highly selective college eliminated loans from financial aid awards, students made different career choices: “[S]tudents with more debt are less likely to accept jobs in low-paying industries and accept higher paying jobs more generally”).

5 For example, there is some evidence that indebted college graduates have less opportunity to start their lives and careers: they may postpone buying a house. Wenli Li, *The Economics of Student Loan Borrowing and Repayment*, Federal Reserve Bank of Philadelphia Business Review at 9(2013); see also Andrew Martin and Andrew Lehren, *A Generation Hobbled by the Soaring Cost of College*, N.Y. Times, May 13, 2012 at A1 (reporting that student debt led borrowers to put off major purchases, in some cases to move in with relatives and even to cease to continue pursuit of education).

6 See *infra* Part III.

7 The amount of money that states have provided to public colleges and universities per student enrolled has declined for years. College Board, Trends in College Pricing 2014 27 (Fig. 16B: “Total and Per-Student State Funding for Higher Education in 2013 Dollars, and Public FTE Enrollment, 1983-84 to 2013-14”); see also Wenli Li, *The Economics of Student Loan Borrowing and Repayment*, Federal Reserve Bank of Philadelphia Business Review at 4 (2013) (reporting that “state appropriations for colleges and students sank by 7.6 percent in 2011-12, the largest such decline in at least half a century”).

8 According to the Federal Reserve Bank of San Francisco, average household income in 2012 reached \$71,274 and the median household earned \$51,017. Federal Reserve Bank of San Francisco, *U.S. Household Incomes: A Snapshot*, available at <http://www.slideshare.net/fullscreen/FRBSFWeb/income-snapshot-final20140204/2>. Ten years earlier, the median family earned more: \$54,127. Federal Reserve Bank of San Francisco, *Median Household Income: Life in the Middle*, available at [http://www.frbsf.org/education/files/MedianIncome\\_Final\\_2014-02-04.pdf](http://www.frbsf.org/education/files/MedianIncome_Final_2014-02-04.pdf). These figures take into account inflation. *Id.* The current median household income figure is nearly identical to that earned in the mid- to late 1980s, although incomes did rise through the 1990s before falling. *Id.* “A household includes the related family members and all the unrelated people, if any, such as lodgers, foster children, wards, or employees who share the housing unit.” Census Bureau, *Current Population Survey – Definitions*, available at <https://www.census.gov/cps/about/cpsdef.html>, last visited August 29, 2014. The financial crisis of 2008, not surprisingly, had an adverse effect on household incomes; one study found that real median household income fell by 11 percent between 2007 and 2010. Wenli Li, *The Economics of Student Loan Borrowing and Repayment*, Federal Reserve Bank of Philadelphia Business Review at 4-5 (2013).

The regime that enables access to higher education is a regulatory system. This characterization may run counter to popular perceptions of what matters in achieving college access and success. Merit is supposed to determine these outcomes,<sup>9</sup> perhaps with federal aid playing a supporting but subordinate role by reducing or eliminating financial obstacles. No central authority dictates who attends a particular college or university, let alone what happens to a student afterward. Rather, a web of institutions and practices in concert—and sometimes in conflict—functions as regulator. The evolution of federal programs illustrates that regulatory systems may come into being in the absence of a formal agency and indeed in the absence of planning. In the mid-1960s, when federal lawmakers established the early version of the aid regime that students rely on to this day, they saw what they did as intervening in a market to promote access;<sup>10</sup> they corrected an imperfection.<sup>11</sup>

Processes including the provision and setting of terms of education loans, the award of need-based and non-need-based grant aid, and the application of a conservative and simplistic definition of merit all determine higher education opportunity.<sup>12</sup> The system directly implicates questions of law, because Congress created aid programs,<sup>13</sup> federal legislation sets the terms of federal loans and grants,<sup>14</sup> and federal courts have repeatedly addressed the question of what criteria selective institutions may consider when deciding whom to admit.<sup>15</sup> The education of the citizenry has for centuries been a concern of law as well as politics and civil rights battles over access to classrooms have raged in courts, state legislatures and the Capitol. Consequently, policies and practices that restrict access to higher education are proper subjects of legal, scholarly analysis, which may advance and enhance potential proposals for reform.

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9 Tk Kett, tk page.

10 111 Cong. Rec. – Senate 22,692 (Sept. 2, 1965) (statement of Sen. Yarborough) (“[S]ince commercial credit is frequently available only at high interest rates and must be repaid in the same year in which it is borrowed, it seems advisable to have a program in which loans can be secured at a reasonable rate of interest and be paid back over a longer period of time”).

11 Milton Friedman, typically an advocate of markets unfettered, noted the possibility of this particular imperfection in *Capitalism & Freedom*, more than 50 years ago: in the absence of government action, there could be underinvestment in human capital, perhaps because “market investment in human beings cannot be financed on the same terms or with the same ease as investment in physical capital.” Milton Friedman, *Capitalism & Freedom* 88 [tk confirm cite] (2002). However, higher education need not be perceived as a commodity sold by colleges and universities in order to accept the argument of this Article. This commodification of education has been lamented by many within the academy. See, e.g., Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* 6 (2004) (warning of the danger of commercialization to the traditional mission of the university).

12 This Article, however, will focus on federal student aid. Others have addressed the consequences of traditional measures of merit; see, e.g., Lani Guinier, *The Tyranny of the Meritocracy: Democratizing Higher Education in America* 13 (2015).

13 National Defense Education Act of 1958 (“NDEA”), Pub. L. 85-864, §201 et seq. (“to stimulate and assist in the establishment at institutions of higher education of funds for the making of low-interest loans to students in need thereof to pursue their courses of study in such institutions”).

14 20 U.S.C. §1091.

15 The federal Supreme Court has addressed the consideration of race in the admissions processes of selective institutions of higher education more than once, most recently permitting the practice under limited circumstances in *Fisher v. Texas*. *Fisher v. Texas*, No. 14-981 (slip op.). It is likely that the Court will take up the question again.

This Article is motivated by concern over—and seeks to address—persistent gaps in enrollment in and graduation from degree-granting institutions by students who are members of groups historically excluded from higher education opportunity in the United States, especially African American students, Latino students, and poorer students.<sup>16</sup> The proposals contemplated below also respond to the uneven distribution of debt affecting those who do pursue higher education: It is poorer students who need to borrow.<sup>17</sup> The increasing use of aid not awarded on the basis of financial need exacerbates the problem, as described further below.<sup>18</sup>

The analysis in this Article builds and expands upon prior work that recognized the effect of rising college costs and growing student indebtedness to be redistribution of risk onto students and families, who bear a larger share of the cost of higher education now than in past years and who must borrow to manage it.<sup>19</sup> As that essay noted, the allocation of risk is a tool to influence behavior in pursuit of policy goals; the riskier the conduct, the less attractive it is and, presumably, the fewer people engage in it.<sup>20</sup> Risk is only one of the regulatory mechanisms at work in the context of higher education and this Article encompasses others. In doing so, the Article identifies different models federal higher education policy has adopted and the ways in which they are in tension; this contribution to the conversation over access ties more abstract critiques of education's role in perpetuating inequality<sup>21</sup> to concrete legislative acts.

The discussion that follows has four parts. Part II analyzes federal student aid and explains how it both (a) constrains meaningful access to higher education for aspiring students of lesser means and for students who belong to groups historically excluded from college and (b) facilitates access for others who enjoy more privileged backgrounds. One driver of this trend and a particular target of the critique developed in this Article is increased use of financial aid awarded to students not

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16 See, e.g., Jeremy Ashkenas, Haeyoun Park, and Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. Times, Aug. 24, 2017, available at <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html> (reporting on widening gaps in enrollment by black and Hispanic students at various selective, four-year colleges and universities); Education Department, *Higher Education: Gaps in Access and Persistence* xii (Fig. 6) (Aug. 2012), available at <http://nces.ed.gov/pubs2012/2012046.pdf> (showing gaps in college attendance among students of different racial/ethnic backgrounds, with fewer black and Latino students enrolled); see also Education Department, *Digest of Education Statistics* Table 302.30 (Percentage of recent high school completers enrolled in 2-year and 4-year colleges, by income level: 1975 through 2013), available at [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_302.30.asp?current=yes](http://nces.ed.gov/programs/digest/d14/tables/dt14_302.30.asp?current=yes) (showing that a greater share— about 64 percent of students from high-income families enrolled in college, while about half of students from low-income families did).

17 Among students who borrow, debt burdens are also uneven across students of different racial and ethnic backgrounds. African Americans are more likely to need to borrow to pay for college, for example. Abby Atkinson, *Race, Educational Loans & Bankruptcy*, 16 Mich. J. Race & L. 1, note 99 and accompanying text (2010).

18 See *infra* Part II.C.

19 Jonathan D. Glater, *Student Debt and Higher Education Risk*, forthcoming 103 Cal. L. Rev. 1561 (2015).

20 See, e.g., Tom Baker, *Health Insurance, Risk, and Responsibility after the Patient Protection and Affordable Care Act*, 159 U. Pa. L. Rev. 1577, 1621 (2011) (noting that adjusting cost of care to the patient through insurance policy terms may change behavior).

21 See *infra* note 23.

on the basis of need but on the basis of test scores and/or grades. The critique in Part II concludes that the system regulating access increasingly favors those who have greater privilege and so is regressive; it reinforces preexisting inequality.<sup>22</sup>

Part III steps back to provide a brief history of the evolution of federal policies that have enabled students and families to pay for college. These interventions have grown increasingly conflicted, pursuing multiple goals that may be in tension and serving those who face the highest barriers to college less effectively. This Part identifies models of access that guided major post-World War II federal legislation intended to promote access to higher education, beginning with the Servicemen's Readjustment Act of 1944 ("GI Bill")<sup>23</sup> and the National Defense Education Act of 1958 ("NDEA").<sup>24</sup> These two landmark laws set the stage for but differ from the Higher Education Act of 1965 ("HEA"),<sup>25</sup> which dramatically expanded preexisting student aid programs and made grants and loans more widely available. This Part then analyzes the evolution of the HEA, identifying critical modifications that in combination have come to undermine the goals of the law, and makes the case that restoring access as the primary objective that federal policy should pursue would restore coherence to aid policy.

To develop proposals to increase accessibility, Part IV applies lessons from analyses of more formal and explicit regulatory regimes and identifies reforms with potentially broad and expansive impact. Although viewing access to higher education as governed by a regulatory system is helpful by redirecting attention to basic principles—the evaluation of a system turns on a normative assessment of the outcomes it produces—it is not necessary to agree with that characterization to appreciate the reforms the Article recommends. This Article aspires above all else to stimulate a more precise and informed debate on the question of how best to promote access.

Part V offers a brief conclusion.

## II. Inequality in Access

Would-be college students must clear a variety of hurdles in order to matriculate. They must have access to information about college in order to begin the process of applying; they usually must satisfy entry requirements by showing completion of high school or its equivalent; they must complete application and financial aid forms disclosing details of their lives; and they must amass the financial resources to pay whatever their chosen higher education provider will charge them. These requirements limit and thereby regulate access, making it more difficult for

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22 This critique is advanced by sociologists who have studied the institution of higher education. See, e.g., Rajani Naidoo, *Fields and institutional strategy: Bourdieu on the relationship between higher education, inequality and society*, 25 *British J. of Soc. of Educ.* 457, 460 (2004) (describing the argument that higher education "acts as a 'relay' in that it reproduces the principles of social class and other forms of domination under the cloak of academic neutrality").

23 Pub. L. 78-346 (1944).

24 Pub. L. 85-864 (1958).

25 Pub. L. 89-329 (1965).

those who are less well-informed, less successful in their high school years, less comfortable with paperwork, and less well-off to complete the process. Some of these difficulties arise because students do not receive sufficient support while enrolled, too; while the focus of this Article is the regulation of access defined as gaining admission, this is not to suggest that attention need not be paid to retention efforts for those who do matriculate. The existence and quality of policies and practices that can improve rates of retention and, ultimately, graduation, also regulate who successfully completes a course of study.

Intangible obstacles loom. Uninformed perceptions may affect students' interest in, or willingness to, pursue higher education. The more expensive and difficult the process of gaining access looks, the less likely some students are to expend the effort. The riskier the decision to invest in higher education appears, the more likely some will be deterred. The allocation of risk deters some from college entirely and burdens others who use loans, thereby increasing the penalty of a lower-than-expected post-graduate income and reducing the financial benefit<sup>26</sup> of the investment in higher education.

Hurdles to access are erected by institutional actors empowered by the structure of higher education in the United States. Colleges and universities may disseminate information about admissions widely or narrowly, they may set standards for admission that are difficult or easy for different kinds of students to meet, they set the price to be charged, and they may pick both criteria for and size of discounts provided to particular, desirable candidates in the form of financial aid. Lawmakers, through decisions about how much to fund public institutions and through legislation that governs state and federal aid programs, may make it more or less costly for students to attend college.

If lawmakers' goal is greater equity in access to college, then the results produced by the complex system they created should cause concern. Although decades of policy interventions have put higher education within reach of a greater number of students of more varied backgrounds, the access granted is less meaningful, the greater the debt burden carried by students; meaningful access would ensure that students of lesser means enjoy opportunity to reap the benefits of higher education on par with that enjoyed by students with greater resources. And gaps persist. The paragraphs that follow analyze two dimensions of inequality, along lines of class and along lines of race, and then tie these gaps to the trend toward offering financial aid on the basis of past academic performance, to highlight the broader implications of these disparities.

#### *A. Class and access*

Socioeconomic status is a powerful predictor of enrollment in an institution of higher education. Students who are wealthy or whose parents earn high incomes

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26 There are many reasons to pursue a college degree, beyond the income effects related to it. In this Article by no means do I mean to endorse a purely mercenary motive. However, a growing share of college students believes that the chief virtue of a college degree is financial. Kevin Eagan, Ellen Bara Stolzenberg, Joseph J. Ramirez, Melissa C. Aragon, Maria Ramirez Suchard and Sylvia Hurtado, *The American Freshman: National Norms Fall 2014* 37, available at <http://heri.ucla.edu/monographs/TheAmericanFreshman2014.pdf>.

overwhelmingly populate college campuses. According to the federal Education Department, nearly 79 percent of students from high-income families enrolled in 2013 in two- or four-year college, while less than half of students from low-income families did.<sup>27</sup> A study by *The New York Times* found that at the nation's elite institutions, the share of lower-income first-year students<sup>28</sup> does not exceed 25 percent.<sup>29</sup> If the process that puts these students at these institutions truly rewards ability rather than money, then low numbers of poorer students are justifiable if ability tracks wealth and income<sup>30</sup>—a proposition that has dubious normative validity and that is undermined by the development recently of solid evidence to the contrary.<sup>31</sup>

Lower-income students disproportionately enroll in institutions, especially for-profit institutions, that report higher dropout rates, higher debt burdens and higher student loan default rates.<sup>32</sup> One review of federal data on student matriculation found that 19 percent of poor students enroll at for-profit institutions, while just 5 percent of higher income students do.<sup>33</sup> Choice of institution matters greatly for poorer students, who are more likely to complete a course of study the more selective the institution attended.<sup>34</sup> Some research has found that poorer students who do graduate from college earn lower incomes than their higher-income classmates,<sup>35</sup> and poorer students are less likely to pursue graduate or professional school after

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27 National Center for Education Statistics, Education Department, *Digest of Education Statistics* Table 302.30, available at [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_302.30.asp?current=yes](http://nces.ed.gov/programs/digest/d14/tables/dt14_302.30.asp?current=yes). For purposes of understanding these figures, “low income” refers to families in the bottom 20 percent of all family incomes and “high income” refers to families in the top 20 percent of all family incomes. *Id.* About 64 percent of students from families in the middle 60 percent of all family incomes enrolled.

28 The *Times* used the share of students eligible for federal Pell Grants, scholarship aid awarded to the neediest students, to determine the number of low-income students. The study also only evaluated colleges with a four-year graduation rate of at least 75 percent. *The Most Economically Diverse Top Colleges*, N.Y. Times, Sept. 8, 2014, available at [http://www.nytimes.com/interactive/2014/09/09/upshot/09up-college-access-index.html?\\_r=0&abt=0002&abg=1](http://www.nytimes.com/interactive/2014/09/09/upshot/09up-college-access-index.html?_r=0&abt=0002&abg=1).

29 *Id.*; see also David Leonhardt, *Measuring Colleges' Success in Enrolling the Less Affluent*, N.Y. Times, Sept. 9, 2014, at A3 (article accompanying graphic cited *supra* note Error! Bookmark not defined.), available at <http://www.nytimes.com/2014/09/09/upshot/top-colleges-that-enroll-rich-middle-class-and-poor.html?abt=0002&abg=1>.

30 SAT scores certainly are consistent with this hypothesis; scores rise with family income. College Board, Total Group Profile Report: 2016 College-Bound Seniors 4 (tbl. 10) (showing average SAT scores by income quintile of test-takers' family). But this may be cause to question what the SAT measures and its normative relevance.

31 Caroline Hoxby & Christopher Avery, *The Missing “One-Offs”: The Hidden Supply of High-Achieving, Low-Income Students*, Brookings Papers on Economic Activity (Spring 2013), available at [http://www.brookings.edu/~media/projects/bpea/spring%202013/2013a\\_hoxby.pdf](http://www.brookings.edu/~media/projects/bpea/spring%202013/2013a_hoxby.pdf).

32 See *infra* notes 100-102.

33 Institute for Higher Education Policy, Initial College Attendance of Low-Income Adults 3 (Fig. 1) (June 2011), available at <http://www.ihep.org/research/publications/portraits-initial-college-attendance-low-income-young-adults?id=145>.

34 *Id.* at 1.

35 MaryBeth Walpole, Socioeconomic Status and College: How SES Affects College Experiences and Outcomes, 27 Rev. Higher Educ. 45, 56 (2003).

college.<sup>36</sup> These findings suggest that access alone is not necessarily enough<sup>37</sup> to ensure equality of opportunity. What colleges do after admitting students matters greatly<sup>38</sup>: Students who are relatively more disadvantaged, perhaps by poverty or by lack of information about what success in college requires, benefit from a variety of resources, including academic advising and more general counseling. Increasing graduation rates from such students requires greater attention to these forms of support.

Poorer students who must borrow to pay the cost of college suffer potentially devastating consequences if they drop out, but even for those who graduate, student loans constitute a heavy burden. For those fortunate enough to have career options, the obligation to repay may constrain career choice<sup>39</sup> and may reduce the financial benefits of employment by continuing to siphon off income. The effects of prior inequality thus persist through college even for those who complete a course of study. One study found evidence that indebted students make career choices to maximize starting income and that those who did so subsequently enjoyed smaller raises over time.<sup>40</sup> Higher debt burdens also are correlated with a lower likelihood of applying to and pursuing graduate or professional study, meaning that debt undermines efforts to put poorer students on the path to careers that require postgraduate training, such as law, medicine, or research in science, technology, engineering, and mathematics.<sup>41</sup> Thus student loans, while enabling access, can also circumscribe the realm of possibility for students who benefit from that access.

## ***B. Race and access***

Disparities in higher education access also exist along lines of race: in 2013, while nearly 69 percent of white high school graduates continued to enroll in either two-

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36 Id.

37 The findings of studies of education outcomes are invariably unsatisfying. Some students facing tremendous handicaps as a result of prior education experiences, financial burdens, family crises or health issues, manage to excel, while others with every benefit may struggle and fail. Education is a complicated experience and outcomes cannot be attributed simply to student characteristics as observed *ex ante* nor to institutional procedures and policies, but must instead be recognized as the produce of the interplay of background and experience and, relatedly, effort.

38 See, e.g., John Bound, Michael Lovenheim, and Sarah Turner, *Why Have College Completion Rates Declined? An Analysis of Changing Student Preparation and Collegiate Resources* 5, National Bureau of Economic Research Working Paper 15566 (Dec. 2009) (finding that college student preparation only partially explains different outcomes).

39 See, e.g., Jesse Rothstein and Cecilia Elena Rouse, *Constrained After College: Student Loans and Early Career Occupational Choices*, National Bureau of Economic Research Working Paper No. 13117 (May 2007) (finding that elimination of loans from student financial aid packages affected students' career choices, making them more likely to pursue public interest careers that earned relatively lower salaries).

40 Alexandra Minicozzi, *The Short-term Effect of Educational Debt on Job Decisions*, 24 *Econ. of Educ. Rev.* 417, 425 (2004). The study included only men, however, and that conceivably could have affected the findings.

41 Catherine M. Millett, *How Undergraduate Loan Debt Affects Application and Enrollment in Graduate or First Professional School*, 74 *J. Higher Educ.* 386, 406 (2003). These are the so-called STEM fields.

or four-year colleges, about 57 percent of African American students and about 60 percent of Latino students did.<sup>42</sup> The share of students from these groups at the most selective colleges and universities is also small, research has found: at the 468 most selective colleges in the United States, white students accounted for 75 percent of the student body, Asian Americans for 10 percent, African American students for 7 percent and Latino students for 8 percent.<sup>43</sup> African American and Latino students are also less likely to complete a course of study. About half of black students and slightly more than half of Latino students who started at a four-year college in 2003-04 obtained a bachelor's degree by 2009, compared to more than 70 percent of white students and Asian students.<sup>44</sup> Black and Latino students disproportionately enroll at for-profit institutions, which have lower rates of completion,<sup>45</sup> higher levels of undergraduate student indebtedness<sup>46</sup> and higher rates of student loan default.<sup>47</sup> Of approximately 1.4 million undergraduate students who enrolled at for-profit institutions in 2013, about 28 percent were black and 16 percent were Latino, while at public institutions, blacks accounted for 13.2 percent of enrolled students and Latinos, 17.8 percent.<sup>48</sup>

### *C. Merit aid and its regressive effect on access.*

Access to college for an ever-greater number of students depends on financial

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42 National Center for Education Statistics, Education Department, *Digest of Education Statistics* Table 302.20, available at [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_302.20.asp?current=yes](http://nces.ed.gov/programs/digest/d14/tables/dt14_302.20.asp?current=yes). In contrast, more than 80 percent of Asian students enrolled in college.

43 Anthony P. Carnevale and Jeff Strohl, *Separate & Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 19 and Tbl. 5, Appendix B, available at [https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR\\_.pdf](https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf). The report also found that white students formed a smaller share of the population at open-access colleges and universities, falling by 12 percentage points between 1995 and 2009. Id. at 17-18.

44 Terris Ross, Grace Kena, Amy Rathbun, Angelina KewalRamani, Paul Kristapovich, Eileen Manning, Higher Education: Gaps in Access and Persistence Study 184 (Fig. 37-1) (Aug. 2012) (“Gaps”).

45 At four-year, private, nonprofit institutions, 63.1 percent of students who started in 2007 finished within five years; at public institutions, 52.3 percent, and at for-profit institutions, 27.8 percent. Education Department, *Digest of Education Statistics*, Table 326.10 (Graduation rate from first institution attended for first-time, full-time bachelor's degree-seeking students at 4-year postsecondary institutions, by race/ethnicity, time to completion, sex, control of institution, and acceptance rate: Selected cohort entry years, 1996 through 2007), available at [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_326.10.asp](http://nces.ed.gov/programs/digest/d14/tables/dt14_326.10.asp). The outcomes at two-year programs are better for for-profits. Id. at Table 326.20.

46 College Board, Trends in Student Aid 2014 22.

47 The default rate at for-profit, or proprietary, institutions exceeded 19 percent, while at private nonprofit institutions it was 7.2 percent and at public institutions, 12.9 percent. Education Department, *Comparison of FY 2011 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates* (July 2014), available at <http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf>. According to the College Board, for-profit institutions accounted for 44 percent of students who entered repayment in 2010-11 and defaulted by the end of September 2013. College Board, Trends in Student Aid 2014 4.

48 Education Department, *Digest of Education Statistics*, Table 306.5 (Total fall enrollment in degree-granting postsecondary institutions, by control and level of institution, level of enrollment, and race/ethnicity of student: 2013), available at [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_306.50.asp?current=yes](http://nces.ed.gov/programs/digest/d14/tables/dt14_306.50.asp?current=yes). These figures include undergraduates at all types of public institutions—two-year and four-year, for example.

aid. Institutions' prices, their allocations of financial aid, and the transparency of admission and aid decisions shape the college population. Student loans and potential borrower attitudes toward debt help determine who attends college. Grant aid, which does not need to be repaid, matters greatly for poorer students.

Federal student loans, created by Congress decades ago,<sup>49</sup> account for slightly more than one-third of all undergraduate aid; federal, need-based grants for 18 percent; and institutional grants for 21 percent.<sup>50</sup> Aid may be offered to address demonstrated financial need or to recognize prior academic achievement. Non-need-based aid, or "merit aid," awarded to students who have earned higher grades in high school and/or achieved high scores on standardized tests,<sup>51</sup> has formed an increasing share of grant aid in recent decades.<sup>52</sup> Many colleges and universities blend the two types of aid, making it more difficult to determine how often factors other than financial need play a role in the decision to discount price.<sup>53</sup>

Grant aid reduces the impact of cost on a student, reducing the height of that barrier to access. Because grant aid reduces the amount that a student may need to borrow, it also reduces the riskiness of the investment in higher education. Thus, the allocation of grant aid directly promotes access, and studies suggest that grant aid significantly affects students' decisions about college.<sup>54</sup> If provision of financial

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49 Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More through Federal Aid Programs*, 14 N.Y.U. J. Legis. & Pub. Pol'y 11, 37 (2011) ("The guaranteed student loan program took as its model preexisting state programs and loans offered under the National Defense Education Act... passed in 1958 in reaction to the launch of the Sputnik satellite by the Soviet Union").

50 The College Board, *Trends in Student Aid 2014* 12 (Fig. 2A), available at <http://trends.collegeboard.org/sites/default/files/2014-trends-student-aid-final-web.pdf>. The balance of aid came in the form of federal education tax credits and deductions, grants (other than the Pell grant), private and employer grants, state grants, and federal work-study. *Id.*

51 *See, e.g.*, the terms of the Georgia HOPE Scholarship, which awards money to students to attend college or university in the state and requires that high school students to have maintained a 3.0 grade point average. Georgia's Hope Scholarship Program Overview, available at [https://secure.gacollege411.org/Financial\\_Aid\\_Planning/HOPE\\_Program/Georgia\\_s\\_HOPE\\_Scholarship\\_Program\\_Overview.aspx](https://secure.gacollege411.org/Financial_Aid_Planning/HOPE_Program/Georgia_s_HOPE_Scholarship_Program_Overview.aspx).

52 The College Board, *Trends in Student Aid 2014* at 34 (Fig. 26A). The data reflected here may understate the frequency of use of non-need-based aid, because The College Board treated as need-based all aid that took into account a student's financial circumstances, and colleges and universities will package need-based and non-need-based aid into a single financial aid award.

53 Ronald G. Ehrenberg and Daniel R. Sherman, *Optimal Financial Aid Policies for a Selective University*, 19 J. Hum. Resources 202, \_\_ (1984); *see also* College Board, *Trends in Student Aid 2016* 29 (Fig. 21A and fig. 21B), available at [https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid\\_0.pdf](https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid_0.pdf) (showing share of student aid awarded on basis of factors other than need; note that the data here most likely understate the share of non-need-based aid because the College Board treats as need-based an aid award any fraction of which is based on need).

54 *See, e.g.*, Christopher Avery and Caroline Minter Hoxby, *Do and Should Financial Aid Packages Affect Students' College Choices?*, in Caroline Minter Hoxby, ed., *College Choices: The Economics of Where to Go, When to Go, and How to Pay for It* 262 (2004), available at <http://www.nber.org/books/hoxb04-1> (describing empirical study that found that additional grant aid correlated with a greater likelihood of matriculation at the college providing the grant aid than did provision of loans). Grant aid also may lead students to pursue different career choices by freeing them from concern over finding jobs paying high enough incomes to cover debt obligations. Glater, *supra* note 49 at 61.

aid seeks to encourage and enable poorer students to pursue careers requiring higher education that would otherwise be out of reach, then loans undermine that goal; debt scares away potential students.

The form of aid and the amount of aid provided encourages or discourages enrollment at particular colleges and universities. Students rationally respond to grant aid and are more likely to matriculate, the more such aid they receive.<sup>55</sup> Students' willingness to borrow may vary unevenly across the applicant population, with greater resistance among students whose families earn low incomes, who attend college part-time, and who attend public institutions.<sup>56</sup> Black students appear less averse to student debt than white students, and Asian and Hispanic students appear more averse to debt than white students.<sup>57</sup> So while it may be true that the more an institution requires a prospective student to borrow, the less likely that student is to enroll, the probabilities vary with student characteristics.<sup>58</sup> Black students may be more likely to enroll despite the incurrence of a larger debt, for example. In this way decisions about grants and loans help determine who attends particular colleges.<sup>59</sup>

The more grant aid a particular institution chooses to give a particular student, the more likely that student is, all else equal, to matriculate. So colleges may pursue those admitted applicants they deem most valuable, such as students whose academic profile in the form of test scores may bolster institutional ranking in important publications like *U.S. News & World Report*. The media organizations that produce rankings function as an indirect or ancillary regulator of opportunity because rankings reward particular statistics. Colleges also allocate grant aid to students who bring other, intangible benefits to the institution, such as athletic prowess, artistic talent, or parental political and cultural capital.<sup>60</sup> In an effort to preserve institutional culture, some colleges and universities also reward alumni by

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55 Christopher Avery and Caroline M. Hoxby, *Do and Should Financial Aid Packages Affect Students' College Choices?*, NBER Working Paper No. 9482 (2003), at 19. Professor Avery and Professor Hoxby also find that additional spending by colleges on "student-related activities" like instruction and student services also makes matriculation more likely, giving wealthier institutions an automatic advantage in recruiting applicants.

56 One study defined "significant unmet need" at \$2,000. Sara Goldrick-Rab and Robert Kelchen, *Making Sense of Loan Aversion: Evidence from Wisconsin*, Univ. of Michigan Conference on Student Loans, at 9 (2013).

57 Id.

58 This can explain two trends that otherwise appear paradoxical: a rising premium to college graduates and college participation rates that have increased by just a few percentage points. Kartik Athreya and Janice Eberly, *The College Premium, College Noncompletion, and Human Capital Investment*, Federal Reserve Bank of Richmond Working Paper No. 13-02R, at 3. The more a student must borrow and the less certain a sufficiently high postgraduate income seems, the riskier—and less likely—the decision to enroll. Id. at 18.

59 There are consequences for the student, of course. The more indebted the student is, the more the student will be constrained after graduation or after dropping out. Thus, debt may put college within reach, but access is less meaningful—less empowering and less rewarding—the greater the debt burden is.

60 See generally Daniel Golden, *The Price of Admission* (describing instances of college admissions of students from wealthy, politically connected, or otherwise highly privileged families).

disproportionately accepting their children. Such decisions valorize certain student characteristics, reward members of certain groups, and shape the populations on college campuses—disproportionately those who were already privileged.<sup>61</sup>

Increasingly, academic performance, measured by high school grades and scores on standardized tests, is the basis of grant aid instead of or in addition to financial need.<sup>62</sup> Colleges and universities, as well as some states, offer this non-need-based aid.<sup>63</sup> Such aid is consistent in spirit with one goal of student aid: rewarding stars.<sup>64</sup> However, because students from higher-income families disproportionately earn higher grades and perform better on standardized tests,<sup>65</sup> using such measures of academic performance almost certainly diverts aid dollars from students with financial need and/or students who have historically been underrepresented or excluded outright from colleges and universities.<sup>66</sup> Though the close relationship between test performance and socioeconomic status has been evident for considerable time, the efforts of scholars to promote alternative definitions of merit or alternative tests to measure it have not succeeded. Still, admissions officers at selective institutions already take into account evidence that students have overcome obstacles, for example, or otherwise have shown that

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61 See *supra* Part II.B. (describing who advances in the regulatory system).

62 In 2011-2012, according to the College Board, 26 percent of grants were distributed by states without regard to financial need. College Board, *Trends in Student Aid 2013* 28, fig. 17B. This figure understates the total amount of non-need-based aid because the College Board classified financial aid as “need-based” if any portion is allocated on the basis of need. According to a more recent report by the College Board, 9 percent of full-time students at public, four-year institutions and 12 percent at private, nonprofit, four-year institutions received grant aid in excess of need. College Board, *Trends in Student Aid 2015* 29, Fig. 20. At public institutions, nearly one-third of the full-time students whose parents reported the highest incomes received grant aid in excess of need and at private, nonprofit institutions, so did nearly half of the students whose parents were in that income bracket. *Id.* (This appears to be the most recent data available from the College Board.)

63 Using the term “merit aid” when discussing scholarship money allocated on the basis of high school grades and standardized test scores begs a conversation about what constitutes merit. Such measures of past performance may or may not reveal a student’s intrinsic aptitudes or capabilities. Further, use of the term “merit” suggests that somehow a student with good grades and high scores deserves the scholarship money provided, a potentially pernicious attitude given that some evidence suggests that those who feel merit has entitled them to aid rather than indebted to its provider may be less likely to engage in public service or other forms of civic participation. Lani Guinier, *Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 *Harv. L. Rev.* 113, 149 (2003).

64 See *infra* Part III.B. Some lawmakers at the time of adoption of the HEA opposed provision of federal aid dollars on the basis of academic performance entirely, describing as unfair a situation in which two students of comparable financial need might nevertheless receive different amounts of aid based on their high school grades. This statement shows the sharply contrasting views of the purpose of federal financial aid to students—and it is difficult to imagine a similar statement being made in Congress fifty years later.

65 College Board, *2015 College-Bound Seniors Total Group Profile Report* 4, Table 10: Student Background and Characteristics (2015), available at <https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2015.pdf>.

66 Susan Sturm and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 *Cal. L. Rev.* 953, notes 8-10 and accompanying text (1996). High-achieving students who also demonstrate financial need may benefit from merit-based aid, but such students presumably would have received financial assistance even if they lacked coveted scores.

they have desirable attributes. To take into account more qualitative indicators of a broader, more sophisticated idea of merit presents logistical but not conceptual difficulty. Similarly, design of a test that does not reproduce preexisting inequality is a practical but not a theoretical challenge.<sup>67</sup> And at least one institution has experimented with assessments that are contextual, assessing student applicants' performance in light of the schools they attend rather than in absolute terms.<sup>68</sup>

It is likely that money allocated to non-need-based aid would go to poorer students, were financial need the sole criterion or if merit were differently conceived.<sup>69</sup> To the extent that aid is intended to promote college attendance by students who, in the absence of government or institutional action, would not seek higher education, non-need-based aid is money wasted when paid to higher income students who would have matriculated regardless.<sup>70</sup>

Inequity in the distribution of college access has wider, societal implications. The population of college graduates increasingly and disproportionately enjoys both tangible and intangible benefits of opportunity. While causation is difficult to establish, studies show that college graduates earn higher incomes,<sup>71</sup> live longer and healthier lives,<sup>72</sup> participate more extensively in politics,<sup>73</sup> and are more content with their lives<sup>74</sup> than their high school classmates who do not graduate from college. People in positions of power in politics, business and the arts have benefitted from undergraduate and, often, graduate educational experiences. While a few individuals are exceptional and achieve success, even fame and fortune, without higher education, statistics collected by the government and analyzed by researchers are unequivocal: college matters. It follows that for most students, access to higher education constitutes access to opportunity. For poorer students in particular, to the extent that class mobility exists in the United States—and the phenomenon is less prevalent than many believe<sup>75</sup>—education is a significant driver.

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67 For example, scholars at the University of California, Berkeley, developed a test to take the place of the LSAT for would-be lawyers. Jonathan D. Glater, *Study Offers New Test of Potential Lawyers*, N.Y. Times, Mar. 10, at A22. Unlike the LSAT, the new test, which was informed by extensive interviews of lawyers about the qualities that a good lawyer should have, “did not produce a gap in scores among different racial or ethnic groups.” *Id.*

68 See Matthew N. Gaertner and Melissa Hart, *Considering Class: College Access and Diversity*, 7 Harv. L. & Pol’y R. 367 (2013) (describing an effort to design alternative applicant assessment methods at the University of Colorado).

69 As various scholars have proposed. See, e.g., Lani Guinier, Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 Harv. L. Rev. 113, 149 (2003).

70 Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in Donald E. Heller, ed., *Condition of Access* 51 (2002). See also note 92 and accompanying text.

71 David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. Times, May 27, 2014, at A3.

72 Walter W. McMahon, Higher Learning, Greater Good 119 (2009).

73 McMahon, *supra* note 114, at 206.

74 McMahon, *supra* note 114, at 146 (describing evidence for both indirect effects, given the correlation between education and higher income, and direct effects).

75 Raj Chetty, Nathaniel Hendren, Patrick Kline, Emmanuel Saez and Nicholas Turner, *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104(5) American Economic Review Papers and Proceedings 141, (2014), available at <http://www.equality-of-opportunity.org/>

Gaps in access that have persisted despite the expansion of federal interventions in higher education finance are the result of a conundrum: Even though resources exist to put college within reach of more students, potential college students face a daunting array of costs that complicate completion and may deter them entirely, and poorer students who complete a course of study carry a burden that constrains their future options. Policies adopted to achieve multiple goals, from supporting stars to enabling anyone to matriculate to helping upper-middle-class students spread the cost of tuition over time, have come into tension with each other. Aid policy has grown more incoherent as a result of these tensions, which would matter less had the cost of college not risen as high as it has and had a greater share of those costs not been passed on to students. The next Part traces the development of this policy confusion over time.

### III. The Corrosion of Good Intentions

For at least 150 years, the United States has experienced nothing close to a pure market for college education. Federal and state governments have long intervened. A complex set of interacting institutions and rules works to allocate higher education opportunities, and a prerequisite to development of a normative argument for reform of this system is an understanding of how it arose.

A complete history could begin at the time of the founding. George Washington proposed the creation of a national university, an idea not adopted by Congress.<sup>76</sup> Yet higher education has not been provided solely or even primarily by private, profit-seeking actors; far from it. In 1862, Congress passed the Morrill Act,<sup>77</sup> which provided land for the first public universities, the “land grant” institutions.<sup>78</sup> But for the purposes of this Article, four major phases of federal involvement in higher education finance matter: the period immediately after World War II, the Cold War years from the 1950s to the early 1960s, the civil rights era from the 1960s into the 1970s, and the “Reagan revolution” that followed and continues to shape federal policy today. In each of these phases, Congress has pursued a different goal and cited a different rationale to justify its approach.

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images/mobility\_trends.pdf (reporting that the chances of upward socioeconomic mobility for poorer children have remained stable for decades but noting that because income inequality has increased, the consequences of the socioeconomic status of a child’s parents’ are greater).

76 Martin Paul Claussen Jr., *The Fate of Washington’s Bequest to a National University*, George Washington University, available at [http://encyclopedia.gwu.edu/index.php?title=The\\_Fate\\_of\\_Washington%E2%80%99s\\_Bequest\\_to\\_a\\_National\\_University](http://encyclopedia.gwu.edu/index.php?title=The_Fate_of_Washington%E2%80%99s_Bequest_to_a_National_University).

77 37 Cong. Ch. 130, 12 Stat. 503 (1861).

78 An overview of the involvement of the federal government in financing higher education prior to the enactment of the Servicemen’s Readjustment Act, Pub. L. 78-346, can be found in Christopher P. Loss’s BETWEEN CITIZENS AND THE STATE: THE POLITICS OF AMERICAN HIGHER EDUCATION IN THE 20<sup>TH</sup> CENTURY. Christopher P. Loss, BETWEEN CITIZENS AND THE STATE: THE POLITICS OF AMERICAN HIGHER EDUCATION IN THE 20<sup>TH</sup> CENTURY 91-120. Professor Loss provides both a nuanced description of the development of government policy and a theory explaining the goals of the government. [PLEASE NOTE: several footnotes in this Article refer to “locations” within Kindle editions of books cited. These are in the process of being updated to refer to the published, hard copy editions.]

The discussion that follows analyzes changing priorities driving federal intervention in higher education finance. Overall, the focus of policy has shifted from providing aid to students who otherwise would not enroll to providing a financing tool to students likely to enroll no matter the aid provided. This shift has occurred as legislators have grown more concerned about helping the middle class pay for college and as college has come to be viewed as a private good primarily or solely conferring an economic benefit upon individual students.<sup>79</sup> As a result, while aid programs still enable access to college for poorer students, the debt these students incur undermines the goals that aid sought to achieve.<sup>80</sup>

### *A. Rewarding and Reabsorbing Veterans: The GI Bill*

The federal aid regime has its roots in the GI Bill. With this legislation, the federal government for the first time attempted to enable access to college for millions of people by providing them, rather than the public institutions they attended, with money to pay for their education. Ultimately more than 8 million veterans took advantage of benefits provided by the GI Bill.<sup>81</sup> These benefits were not evenly distributed: the beneficiaries were overwhelmingly white men,<sup>82</sup> even though veterans who were not white were eligible to participate.

Title II of the GI Bill contains the provisions relevant for this discussion. Here, lawmakers provided education benefits including support to cover the cost of education or training, including costs of library or other fees, for at least one year at any of a wide variety of primary, secondary and postsecondary institutions, as well as a “subsistence allowance” to help cover the cost of living.<sup>83</sup>

Notable from the perspective of the present day is the absence in the GI Bill of a significant student lending program.<sup>84</sup> Lawmakers could have created such a program and did create one to help veterans finance the purchase of homes.<sup>85</sup> Perhaps because the legislation had its roots in gratitude and a determination to help returning warriors make a successful transition to a domestic, peacetime existence, lawmakers did not go this route in the context of education. Not for nothing was this legislation dubbed the “Readjustment Act.” Debt was integral to the program, but it was not a debt owed by students to a beneficent government; it was the obligation of a grateful nation to its returning soldiers, many of whom

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79 David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AM. EDUC. RES. J. 39, 73 (1997) (lamenting the “increasing hegemony of the [socioeconomic] mobility goal and its narrow consumer-based approach to education [that] have led to the reconceptualization of education as a purely private good”).

80 See *supra* note 40. and accompanying text.

81 Department of Education, *The Federal Role in Education: Overview*, available at <http://www2.ed.gov/about/overview/fed/role.html> (last visited April 15, 2013).

82 Loss, *supra* note 26, at 116.

83 GI Bill at §400(b).

84 The home loan program does show that lawmakers knew of the possibility of subsidizing credit and could have chosen to use that policy tool instead of providing federal funding of education directly.

85 Id. at §500 *et seq.*

had given up years of their lives and suffered hardships of combat.<sup>86</sup> The federal intervention to put college within reach of millions who otherwise might not have pursued higher education was not about achieving a vision of the ideal democracy—although helping soldiers return to civilian life certainly was preferable to the alternative. Nor was the GI Bill about promoting socioeconomic mobility or national competitiveness. The modern federal student aid regime began with the idea of a debt owed by the state to particular people and not the other way around.

### ***B. Chasing Sputnik: The National Defense Education Act***

Student debt took root in the National Defense Education Act (the “NDEA”), the next major piece of legislation that involved the federal government in higher education finance. The NDEA was adopted by Congress largely as a response to the launch of the Sputnik satellite by the Soviet Union.<sup>87</sup> Certain students could borrow money from the government; this was the modest start of a reallocation of cost and, consequently, the risk of higher education onto students and families. The NDEA provided funds to states for acquisition of equipment and facilities for teaching of science, mathematics and foreign languages<sup>88</sup>; funding of fellowships for graduate students, provided that students’ course of study had as its objective the production of university-level teachers<sup>89</sup>; grants to states to pay for counseling of students and for testing to identify students with intellectual promise<sup>90</sup>; and, most importantly for present purposes, an early version of the loan program with which millions of college students today are familiar.<sup>91</sup>

The decision to use debt is significant. Debt is a complex instrument that implicates deeply conflicting views.<sup>92</sup> Payment of one’s debts is a moral imperative and failure to repay can draw harsh criticism; one reason that some lawmakers approved of providing credit, rather than grant aid, to students was a desire to teach borrowers the meaning of fiscal responsibility.<sup>93</sup> Decades after the GI Bill, lawmakers worried that students were irresponsible borrowers and imposed tough restrictions on discharge of loans in bankruptcy.<sup>94</sup>

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86 Loss, *supra* note 26, at 112.

87 Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 11, 37 (2011).

88 Pub. L. 85-864, §301 *et seq.*

89 *Id.* at §403(a).

90 *Id.* at §501 *et seq.*

91 The loan program is described in Title II of the NDEA and, importantly, provided that education loans be made “without security.” Pub. L. 85-864, §205(b)(5). The guaranteed student loan program in the NDEA was modeled on the housing loans provided to veterans under the GI Bill. 1958 Cong. Rec.—House 16,712, Aug. 8, 1958, statement of Rep. Ayres.

92 David Graeber, *DEBT: THE FIRST 5,000 YEARS* 9 (2011). Professor Graeber wrote that debt causes “profound moral confusion” because of the contradictory attitudes we hold toward it. *Id.*

93 1965 Cong. Rec.—H 21,932, Aug. 26, 1965 (statement of Rep. Jones).

94 Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783 (2004) (“There was a perception in Congress that an unacceptable number of student debtors were filing for bankruptcy after graduation (and on the eve of lucrative careers) seeking to discharge their federal loans”).

Arguably, student borrowers have two obligations: the financial debt to the government or the financial institution extending credit,<sup>95</sup> and the intangible, moral debt to the government for its role in making credit more affordable to the student. The former obligation may be satisfied by earning enough money to pay off the loan, while the latter may be satisfied by spending some time in public service, perhaps, or otherwise fulfilling a national need. In the minds of students, though, the moral obligation and any accompanying sense of gratitude may be swamped by the financial one.<sup>96</sup> The presence of a lender, whether a for-profit entity like a bank or the federal government itself,<sup>97</sup> obscures the fact that the availability of credit on favorable terms at all is the result of government action. Indeed, the expansion of federal debt forgiveness programs to encourage borrowers is a direct effort to counter the pressure to make life choices based on the financial debt. Loan forgiveness seeks to leverage financial debt to encourage public service.

Borrowing puts within reach investments that otherwise would be unattainable, thereby increasing potential earnings. When things go well, borrowing results in profit to the borrower and to the lender. But debt amplifies risk: If an investment loses money, then the debtor still faces an obligation to repay. Thus, to pay for higher education with debt is to engage in a leveraged transaction and for students without financial resources of their own, it can be a highly leveraged transaction. Education is an unusual investment, though, in that the potential upside is the same no matter how much a student borrows. Only the potential downside worsens.

The NDEA enabled access to college for students who would have been unable to attend, but universal access was not the primary goal. Rather, lawmakers emphasized the importance of identifying talented young people—stars—and ensuring that they received the education necessary to permit them to contribute to the security of the nation. Lawmakers feared that hidden within the population of high school students lay diamonds in the rough, young women and men whose potential to enhance the public good was hindered by financial need. The nation could not afford to squander such human resources, even if the difficulty of identification of these diamonds meant that taxpayers would bear the cost of educating students who might promise less. In remarks typical of those made by supporters of the legislation, one congressman stated:

The legislation before us, although providing for large numbers of grants, does not have its most important value in the number of Americans who will be the recipients of the scholarships, but rather in the hope that out of this number will develop the one or more great minds which will provide us with the genius brainpower that we need.<sup>98</sup>

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95 Until 2010, commercial lenders could make federal student loans that were guaranteed by the federal government. Glater, *supra* note 32, at 14.

96 A sense of moral obligation to help the community may be further undermined if students believe they deserve their success, suggests Professor Lani Guinier. Lani Guinier, *Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 149 (2003).

97 Prior to 2010, commercial lenders made federally guaranteed loans through the Family Federal Education Loan Program, while now only the federal government itself makes federal student loans. *See infra* note 43. (the elimination of federally guaranteed loans made by commercial lenders).

98 1958 Cong. Rec.—House 16,685, Aug. 8, 1958, statement of Rep. Zelenko. Others expressed similar views:

While the GI Bill, driven by a sense of obligation to potential students, sought to enable returning soldiers to adjust to and succeed in private life, the NDEA sought to find and put to use the brightest young people in service to the nation.<sup>99</sup>

Lawmakers did not discuss the debt that borrowers would owe to the government, which in retrospect is striking because both loans and grants had as a goal the development of particular skills viewed as necessary to national defense: science, mathematics, technology and foreign languages.<sup>100</sup> If students studied those subjects but then did not offer them in service to the government after graduating, lawmakers could conclude that the students did not perform their side of the bargain. Yet, the concern did not surface that student aid might, from the aid provider's perspective, be a poor investment: that fear is of more recent vintage. Rather, during debate over the NDEA several lawmakers argued that federal aid should not be limited to funding students studying fields directly and clearly related to national defense, that the government should not discriminate at all on the basis of students' choice of major, for example.<sup>101</sup> They contended that study of science, technology, engineering and mathematics, today referred to as the STEM fields, was not all that beneficiaries of aid should pursue nor all that the nation would need.<sup>102</sup>

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In this great, rich country, there must be an opportunity for every capable, worthy boy or girl to secure higher education. This has special significance in the case of exceptionally talented students, and it is imperative that Congress and the States move as rapidly as possible to eliminate actual and potential waste of the intellectual resources and abilities of our young people and insure for them proper educational training.

1958 Cong. Rec. – House 16,684 (Aug. 8, 1958), statement of Rep. Philbin.

99 In the opening moments of debate of the NDEA, for example, Rep. Edmondson called the legislation “one of the most far-sighted pieces of legislation we have had the opportunity to consider this session.” 1958 Cong. Rec. – House 16,683 (Aug. 8, 1958), statement of Rep. Edmondson.

100 1958 Cong. Rec. – House 16,686 (Aug. 8, 1958), statement of Rep. Elliott; *see also* 1958 Cong. Rec. – Senate 17,246 (Aug. 13, 1958), statement of Sen. Allott (also emphasizing the importance of the sciences, mathematics and foreign languages to national defense and prosperity and warning that shortages of graduates in these fields would be “dangerous to the national welfare itself”).

101 Even some of the law's critics endorsed this view. Rep. Keating, who thought the dollar amounts to be provided in loan and scholarship programs were too great and expressed other misgivings about the NDEA, still argued that “[i]t will indeed be money well spent if we can establish a nationwide program to give full rein to the potential leaders of tomorrow in their necessary training, not just in the scientific fields, but in all areas of endeavor where their desire and capacities lead them.” 1958 Cong. Rec.–House 16,721, Aug. 8, 1958, statement of Rep. Keating. In debate in the Senate, similar views were expressed. *See, e.g.*, 1958 Cong. Rec.–Senate 17247, Aug. 13, 1958, statement of Sen. Allott (“the American citizen is neither as well-educated as we like to think he is, nor as well informed as he should be. The problem certainly goes beyond science, mathematics, and foreign languages”). Others, in particular those concerned about federal overreaching, seized on the flexibility afforded to students by the law to argue that the act did not ensure that beneficiaries of loan and grant programs actually pursued careers in the national interest. *See, e.g.*, 1958 Cong. Rep.–House 16735, Aug. 8, 1958, statement of Rep. Saylor (“instead of requiring a student to study a subject which might assist in the development of missiles, the harnessing of atomic energy, or the conquering of outer space, one might receive a [student] loan and become an accredited fly-fisherman which I assure you will add nothing to the national defense of this country”); 1958 Cong. Rec.–Senate 17271, Aug. 13, 1958, statement of Sen. Thurmond (challenging a supporter of the NDEA by asking whether “under the pending bill, [is] ... the student loan program ... limited in any way to persons undertaking a course of study considered to be critical to our national defense?”).

102 The sentiments of Rep. Porter are representative: “Certainly we need outstanding students

The idea that government should facilitate access to higher education for those students who stand to provide the most benefit to the public persists to this day, alongside and at times in tension with other rationales. The transaction between student and the state is *quid pro quo* in nature: the state invests in providing the student with education because the state has concluded that this particular student possesses attributes valuable to the nation. In this model, students lacking such promise, on the other hand, merit no such investment; they benefit only because of the lack of an effective screening mechanism.

### *C. Civil rights and access for all: The Higher Education Act*

A radically broad view of national need provided the foundation for the next major step in the development of federal aid policy, the HEA.<sup>103</sup> Lawmakers emphasized that access to higher education was not just an instrument to bolster national defense or economic competitiveness or another geopolitical goal: “[T] here is increasingly an element of national policy that this Congress is trying to state – that any qualified American should not be denied the opportunity for a college education by reason of lack of financial means.”<sup>104</sup> This and other statements<sup>105</sup> by lawmakers show a new focus on fairness, an adoption of the view that the nation should ensure that income and wealth do not limit opportunity because leveling the playing field was a worthy end in itself.<sup>106</sup> This perspective reflected events of the years between the NDEA and HEA. The struggle to advance civil rights on behalf of African Americans, women and members of other minority groups had put equity at the center of the debate over the proper role of the federal government in higher education finance.<sup>107</sup>

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in the field of humanities as well as in the physical science area.” 1958 Cong. Rec.–House 16,742, Aug. 8, 1958, statement of Rep. Porter.

103 Pub. L. 89-329 §101 (1965) (stating that the purpose of the legislation was to “assist[] the people of the United States in the solution of community problems such as housing, poverty, government, recreation, employment, youth opportunities, transportation, health and land use”).

104 1965 Cong. Rec.–House 21,892, Aug. 26, 1965, statement of Rep. Reid.

105 See, e.g., 1965 Cong. Rec.–House 21898, Aug. 26, 1965, statement of Rep. Mink (“There must be no question that any youngster, regardless of his family circumstance has the right to fullest opportunity to develop his intellect for the good of both himself and the Nation”); 1965 Cong. Rec.–House 21,901, Aug. 26, 1965 (statement of Rep. Fogarty) (“It is time to implement... [a] century-old commitment with further measures to assure that every qualified high school graduate may attend and graduate from college”).

106 Representative Brademas, speaking in favor of the bill, presented a chart showing that among high-achieving students, nearly 20 percent from low-income families did not attend college, while for higher income families, the comparable figure was 6 percent. 1965 Cong. Rec.–House 21,887, Aug. 26, 1965, statement of Rep. Brademas. The congressman described “almost a straight-line correlation between your family income in this country and your prospects for getting into college.” Id.

107 Brian K. Fitzgerald and Jennifer A. Delaney, *Educational Opportunity in America*, in Donald E. Heller, ed., *Condition of Access: Higher Education for Lower Income Students* 5 (2002). This is not to say that lawmakers analyzed fairness in a vacuum; since the end of World War II, policymakers knew that domestic segregation and continuing discrimination undermined the United States government’s advocacy of democracy and human rights. Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 60 (2005) (“the continuation of segregation posed a contradiction for the self-proclaimed exemplar of freedom and democracy”). National security and equity were thus linked.

The HEA provided funds directly to states to support public colleges' and universities' community service programs, defined as university extensions or research intended to solve a community problem<sup>108</sup>; grants to colleges and universities to support acquisitions of books, periodicals and other materials for their libraries<sup>109</sup>; funds for "developing institutions," defined as institutions that faced financial difficulty and were "isolated from the main currents of academic life"<sup>110</sup>; scholarship aid to needy students<sup>111</sup>; education loan insurance to encourage lending to students<sup>112</sup>; grants to support campus work-study programs<sup>113</sup>; funding of a national Teacher Corps program to direct experienced teachers and recent college graduates pursuing careers in teaching to work in underserved communities<sup>114</sup>; funds to the states to purchase equipment for use on campus<sup>115</sup>; and grants to institutions for construction of academic facilities.<sup>116</sup> The legislation may properly be characterized as sweeping.

As part of the effort to widen the distribution of educational opportunity to historically underrepresented and/or excluded students, the scholarship program, called the Basic Educational Opportunity Grant in the original authorizing legislation, was the dominant intervention. The scale and scope of the program grew when the HEA was reauthorized and amended in 1972.<sup>117</sup> Between 1965 and 1976 the maximum amount of a grant grew in size to cover more than three-quarters of the cost of attending a public, four-year institution.<sup>118</sup> The loan program authorized by the HEA, on the other hand, simply was not essential to promoting access for poorer students, and wealthier students were not eligible to use it.

#### *D. Corrosion: The decline of grants and rise of loans*

In the decades after the enactment of the HEA, popular and legislative attention shifted increasingly from the goal of promoting higher education access to all to the goal of keeping college affordable for the middle class. This meant making student

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108 HEA §102.

109 *Id.* at §201.

110 *Id.* at §301 *et seq.* This language reflects concern for higher education providers in geographically isolated areas, for example, as well as for those serving students who belong to historically excluded groups, especially black students. Advisory Council on Developing Institutions, STRENGTHENING DEVELOPING INSTITUTIONS: TITLE III OF THE HIGHER EDUCATION ACT OF 1965 ANNUAL REPORT 12-13 (1978).

111 HEA § 401 *et seq.*

112 *Id.* at §421 *et seq.*

113 *Id.* at §441 *et seq.*

114 *Id.* at §501 *et seq.*

115 *Id.* at §601 *et seq.*

116 *Id.* at §701 *et seq.*

117 Suzanne Mettler, *Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream* 61-2 (2014).

118 Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in Donald E. Heller, ed., *CONDITION OF ACCESS: HIGHER EDUCATION FOR LOWER INCOME STUDENTS* 51 and fig. 3.4 (2002).

loans available to middle-income families, as well as providing loans and grants to poorer students.<sup>119</sup> Funding of Pell grants, as the Basic Educational Opportunity Grant was renamed, did not keep pace with tuition increases.<sup>120</sup> Amendments to the HEA and other legislative action, such as creating tax-favored investment vehicles to encourage the accumulation of savings for college,<sup>121</sup> reflected this change in emphasis, making more federal resources available to students regardless of family income.<sup>122</sup> Lawmakers focused less on enabling students to attend college who would not have done so in the absence of federal intervention.<sup>123</sup>

For example, in 1978 Congress passed the Middle Income Student Assistance Act,<sup>124</sup> which amended the HEA to eliminate a provision that had restricted how much the family of a student borrower could earn and still be eligible.<sup>125</sup> This move made federal student loans available to students whose families earned higher incomes. In a sense, the tide rose and lifted all boats, but people in bigger, faster boats retained their advantages. This change was consistent with a view of higher education as an individual, private investment rather than a shared, community one.<sup>126</sup>

Amendments to the HEA in 1992, while generally clarifying existing law, included another change that in retrospect proved significant: they changed how the wealth of a student's family was calculated, excluding the value of equity in a home.<sup>127</sup> For students whose families rent their homes or whose families' homes are not a significant source of wealth, the exclusion of home equity from aid calculations matters little. This modification is evidence of the legislative shift in priorities from promoting access to attempting to help mitigate, or at least manage, the rising cost of college for students who would likely have matriculated no matter what. The move made more students from higher income families eligible to use federal loans. In the years following implementation of this change, use

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119 Growing numbers of students enrolling in college also meant that institutions received federal support, for example under Title III and Title VI of the HEA, an important component of the legislation that has received less attention than have aid programs providing funds directly to students under Title IV.

120 Gladieux, *supra* note 118, at 51.

121 Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 32 *J. L. & Educ.* 475, 477 (2003).

122 See *infra* note 67 and accompanying text.

123 Suzanne Mettler, *Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream* 61-2 (2014).

124 Pub. L. 95-566 (1978).

125 Congressional Research Service, *Summary for the Middle Income Student Assistance Act*, available at <https://www.govtrack.us/congress/bills/95/s2539/summary>. [tk full cite]

126 Suzanne Mettler, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM* 64-5 (2014) (describing policy "drift" that allowed funding levels for grant aid to languish while tuition costs rose and blaming political polarization).

127 Report 102-630 of the House of Representatives, *Higher Education Amendments of 1992*, Conference Report (June 29, 1992) at 490.

of federal loans increased dramatically, with total amounts borrowed rising from \$20.7 billion to \$49.1 billion<sup>128</sup> in ten years<sup>129</sup> and to \$101.5 billion<sup>130</sup> in 2012.<sup>131</sup>

Congress effected another significant change in the legislative treatment of student loans through the Bankruptcy Code. Lawmakers did not define the standard that borrowers had to meet if they sought to discharge their loans in bankruptcy proceedings.<sup>132</sup> For present purposes, the special treatment of student loans in bankruptcy is less important than the reasons underlying lawmakers' action. Members of Congress feared that students might exploit federal aid programs, obtaining an education without paying for it and reaping economic benefits in the form of employment opportunities to which they were not morally entitled.<sup>133</sup>

Two other trends in higher education finance undermine efforts to promote access for students of more modest means. First, more scholarship funds are now awarded on the basis of criteria other than financial need, as discussed above.<sup>134</sup> Second, lawmakers acted to help middle-class families manage the rising cost of higher education through the tax code by providing favored status to college savings plans and allowing deduction of some college expenses.<sup>135</sup> The law allowed families to deduct education expenses of up to \$1,500 from their taxes, and the amount was increased in later years.<sup>136</sup> These benefits were costly, accounting for \$5.4 trillion in lost federal revenue by 2000, according to Suzanne Mettler. That is nearly three-fourths of federal spending on Pell grants, she notes,<sup>137</sup> yet these tax benefits are less effective at enabling poorer students to attend college. Providing

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128 In constant 2002 dollars.

129 That is, between 1992-93 academic year and the 2002-2003 academic year.

130 This figure is in 2012 dollars.

131 College Board, *Trends in Student Aid 2013* at 10 and College Board, *Trends in Student Aid 2003*, available at [http://trends.collegeboard.org/sites/default/files/SA\\_2003.pdf](http://trends.collegeboard.org/sites/default/files/SA_2003.pdf), at 7.

132 11 U.S.C. §523(a)(8). Lawmakers accorded special bankruptcy treatment to federal student loans with the Education Amendments Act of 1976, and have toughened the Code's provisions on education debt for years since. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 Santa Clara L. Rev. 329, 363-364 (2013).

133 Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 Santa Clara L. Rev. 329, note 258 and accompanying text (2013).

134 See supra Part II.C.

135 The Taxpayer Relief Act of 1997, Pub. L. 105-34. A discussion of the appeal of these programs is beyond the scope of this Article, but Professor Gladieux notes that subsidizing higher education through the tax code requires no annual reauthorization, consequently functions as an entitlement and is unlikely to be reduced or repealed. Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in Donald E. Heller, ed., *CONDITION OF ACCESS* 54 (2002). Pell grants, in contrast, require financing from year to year. *Id.* See also Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 32 J.L. Educ. 475, 501 (2003) (discussing the equity implications of adopting tax-favored college savings plans).

136 Suzanne Mettler, *Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream* 80 (2014).

137 *Id.* [Mettler at 80]

higher education subsidies as the tax code currently does<sup>138</sup> is inherently regressive and for that reason encountered strong opposition when proposed prior to the 1990s.<sup>139</sup> Only families with higher incomes or greater wealth can afford to set aside funds in a tax-favored college savings plan.<sup>140</sup> Because the tax incentive affects students whose families earn relatively high incomes and who consequently would likely have obtained higher education regardless of government subsidies,<sup>141</sup> the incentives once again do little to encourage or enable access.

Why, recognizing the drawbacks of debt as a means of enabling greater access to higher education, have lawmakers increasingly emphasized such a double-edged tool? Some lawmakers have praised the disciplining effects of debt, which they suggest forces students to take their education more seriously.<sup>142</sup> There are student loan borrower bogeymen who lurk around the edges of congressional debate over federal education loans: students who fraudulently seek to avoid their debts, for example, or who perhaps benefit from grant aid, do very well for themselves and could easily satisfy student debts. Lawmakers' fear rests on the conception of college as a private good, the benefits of which accrue to the student. If this is how society views education, the rationale for any federal role in financing higher education is vulnerable.

Lawmakers took steps toward restoring access in the Higher Education Opportunity Act of 2008, which reauthorized and amended the HEA. The law provided matching funds to states to provide grants to low-income students on the basis of need, for example.<sup>143</sup> The law also added to the list of careers entitling indebted graduates to loan repayment assistance.<sup>144</sup> And the law added disclosure requirements for loan terms, intended to improve potential borrowers' ability to engage in comparison-shopping. With the exception of raising Pell grant amounts, most of these changes did not aim directly to promote greater access for poorer students.<sup>145</sup>

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138 If the subsidy extended to include a credit to the student and/or family paying for college, like the Earned Income Tax Credit, then the regressivity problem could be cured. Michael S. McPherson and Morton Owen Schapiro, *Opportunity in American Higher Education*, in Advisory Committee on Student Financial Assistance, *Reflections on College Access and Persistence* (2006) at 25. As is, however, the tax deduction is of little use to a low-income student and/or family that pays little or nothing in taxes. Id.

139 Suzanne Mettler, *Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream* 79 (2014).

140 Michael S. McPherson and Morton Owen Schapiro, *Opportunity in American Higher Education*, in Advisory Committee on Student Financial Assistance, *Reflections on College Access and Persistence* (2006) at 25.

141 Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 32 J.L. EDUC. 475, 501 (2003).

142 1965 Cong. Rec.—House 21,932, Aug. 26, 1965 (statement of Rep. Jones of Missouri).

143 Pub. L. 110-315, §415E(a)(2), amending 20 U.S.C. §1070c-3a.

144 Pub. L. 110-315, §428K(b), amending 20 U.S.C. §1078-11.

145 Julie Margetta Morgan, *Consumer-Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education Act*, 17 J.L. & POL'Y 531, 533 (2009).

#### IV. Restoring Access

Across the legislative interventions shaping federal student aid, access has been the unifying theme. Even if the immediate motivation of lawmakers in enacting the GI Bill and the NDEA—and even reauthorizations of the HEA in the 1980s and more recently—was to put higher education to use in service of other national ends, the consistent and related intent was to ensure that students who might otherwise not have enrolled in college, could do so. Concern about rising tuition and rising indebtedness should not obscure the fundamental objective of aid. Yet, the preceding discussion illustrated how the evolution of federal policy has undermined the efficacy of mechanisms that put college within reach of poorer students. The goal of promoting access has come into tension with the achievement of other ends; re-emphasizing access is essential to making federal policy in this area both more coherent and effective. This Part develops a framework for reform aimed at putting access first.

Thinking of higher education access as subject to—and a subject of—regulation forces reflection upon the goal that such regulation seeks. Merely aiding students to finance the acquisition of a credential that may confer a higher lifetime income may not justify a national policy intervention, while enabling the public to benefit from such an investment certainly should. And there is good evidence that higher education indeed confers benefits beyond the student who receives it, in the form of better health, lower crime, longer life, and even greater happiness.<sup>146</sup> Some states, like New York<sup>147</sup> and Tennessee<sup>148</sup>, are already acting in a manner consistent with this insight, reducing or eliminating the cost of college at public institutions, for example, to make it easier for students to attend. The stated ambition is to keep graduates, and all the good things they do and bring, in the state.<sup>149</sup>

Recognition that access to higher education and corresponding personal, financial, social and political empowerment is governed by a regulatory system also offers two critical advantages to the analyst. First, it offers a way to understand both the causes of counterproductive effects of policies pursued and the persistence of those effects. Second, it enables the reformer to develop policy proposals informed by an awareness of how each intervention may impact other aspects of the system and result in unexpected consequences. The discussion that follows analyzes federal student aid as such a regulatory system and so draws on insights of the scholarly literature on regulatory design to develop proposals aimed at enhancing higher education access. The first section below analyzes the impact of aid decisions, the second offers a framework for developing reform proposals, and the third uses that framework develop modest modifications that could have broad effects.

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146 Jonathan D. Glater, *Law and the Conundrum of Higher Education Quality*, forthcoming, tk UNIV. OF CALIF., DAVIS L. REV. \_\_ at note 142 and accompanying text (2018)

147 Jesse McKinley, Cuomo Proposes Free Tuition at New York State Colleges for Eligible Students, N.Y. TIMES, Jan. 4, 2017 at A1.

148 David W. Chen, *Free Tuition? Tennessee Could Tutor New York*, N.Y. TIMES, May 15, 2017, at A1.

149 *Id.* Under the New York plan, students who benefit must remain in-state after they complete their course of study.

For years, scholars evaluating regulatory systems have focused on particular regulatory failures. Some criticize the costs created by regulations and, more importantly, question whether the benefits obtained are worth the price.<sup>150</sup> Regulatory procedures may be unfair or arbitrary<sup>151</sup> and unpredictable in their effects.<sup>152</sup> Some critics complain that the processes creating regulations are “fundamentally undemocratic and lacking legitimacy.”<sup>153</sup> Regulatory processes may be “captured” by interested parties seeking to use the regulatory apparatus to advance their own ends.<sup>154</sup> Capture, when used by legal scholars in the context of regulatory design, is the “result or process by which regulation (in law or application) is, at least partially by intent and action of the industry regulated, consistently or repeatedly directed away from a defeasible model of the public interest and toward the interests of the regulated industry.”<sup>155</sup> It is this last critique, invoking a more general theory of how regulations are produced, that is helpful in developing possible reforms in the context of higher education. The regulated industry is not exactly the college, but the analogy is useful as a justification for taking a closer look at reforms considered by scholars in other contexts. Scholars who have studied regulatory design suggest two general tactics for resisting or undermining capture: Empowering an actor motivated by a different set of interests or removing the ability of a regulator to provide whatever the regulated parties want. Scholars have developed other critiques and reform proposals, but they are less relevant to higher education.<sup>156</sup>

Capture theory is controversial, and with reason. If regulatory agents are subject to capture, why then are rules hostile to the interests of the powerful ever adopted?<sup>157</sup> And might not regulatory systems evolve over time, regardless of and at times in spite of the efforts of parties subject to its authority?<sup>158</sup> Fortunately, this section need not assess the validity of a theory of regulatory capture. The interest this Article takes in scholarship on regulatory design is pragmatic: Prescriptions for

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150 Stephen Breyer, *REGULATION AND ITS REFORM 2* (“Second, and more important, critics charge that too little is obtained...”) (1982).

151 *Id.*

152 *Id.* at 3.

153 *Id.*

154 *Id.* at 10.

155 Daniel Carpenter, *Detecting and Measuring Capture*, in Daniel Carpenter and David A. Moss, eds., *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 60-61.

156 For example, Professor Rachel Barkow has pointed out the significance of agency officers’ qualifications, relationships among agencies, and restrictions on their jobs after leaving the agency in insulating a formally constituted regulatory agency. Rachel Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 *TEX. L. REV.* 15, 42 (2010). Setting agency A against agency B to counter the possibility of A’s capture has a certain appeal, but again, there is no higher education regulator to be reined in. *Id.* at 23.

157 Breyer, *Regulation and Its Reform* at 10.

158 Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, in Daniel Carpenter and David A. Moss, eds., *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 49 (2014). I am paraphrasing the idea expressed by Judge Posner here, because his discussion is directed to formal regulatory agencies rather than the more elaborate web of institutions that determines access to higher education.

policies that could help to ensure that regulatory systems do what they are supposed to do, are what matter. Scholars have identified a few, generally applicable steps to improve a regulatory system.

### A. Follow, and intercept, the money

Agencies funded by the industries they regulate are, not surprisingly, subject to capture because agency funds constitute a potential hostage, especially if the industries can choose among a set of regulators competing for business.<sup>159</sup> Although in the higher education context there is not a single regulator depending on fees or assessments paid by colleges and universities, this is an intriguing insight to ponder. While the wealthiest institutions supplement tuition revenue with income generated by an endowment, most colleges depend on students who pay to keep themselves operating and so must appeal to those who can afford to do so.<sup>160</sup>

Selective colleges with resources offer discounts both to poorer students and to students who can afford to pay the full, stated or “sticker” price. A student from a wealthy or high-income family might receive a non-need-based scholarship intended to entice that student into enrolling and paying almost full-freight in cash. Non-need-based aid, which conservatively defined<sup>161</sup>—accounts for about one-quarter of grant aid provided to students,<sup>162</sup> is an institutional practice that rewards the privileged. About one-third of grant aid provided by private, nonprofit, four-year institutions is not need-based,<sup>163</sup> and more than half of grant aid provided to dependent students by public, four-year institutions is not need-based.<sup>164</sup> This aid is not characterized as buying revenue but as rewarding merit: The recipients of these scholarships may have the ability to pay but they have desirable indicia of success.<sup>165</sup> So-called merit aid discounts tuition for wealthier and/or higher-income families in order to assure a stream of revenue.<sup>166</sup>

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159 Rachel Barkow, *Explaining and Curbing Capture*, 18 N.C. BANKING INSTIT. 17, 22 (2013) (describing the competition among banking regulators and concluding that “I could not have devised a more ill-considered scheme if you had asked me to think about it and try”).

160 At even the most elite universities, whose endowments are measured in the tens of billions of dollars (for example, Harvard University’s endowment is valued at more than \$35 billion; that of Stanford University, more than \$21 billion. Boston College, *Top 50 Endowments*, available at <http://www.bc.edu/offices/endowment/top50endowments.html> (last visited Aug. 1, 2015)), tuition matters. Harvard does not compete on price against rivals and does not charge less than other institutions operating without the benefit of an enormous endowment, although it could.

161 See *supra* note 51.

162 See *supra* note \_\_ [College Board, *Trends in Student Aid 2015* 29, Fig. 20].

163 College Board, *Trends in Student Aid 2015*, Institutional Grant Aid by Tuition Level and Family Income at Private Nonprofit Four-Year Institutions, 2011-12, online at <http://trends.collegeboard.org/student-aid/figures-tables/institutional-grant-aid-tuition-level-family-income-private-nonprofit-four-year-2011-12>.

164 College Board, *Trends in Student Aid 2015*, Institutional Grant Aid by Dependency Status and Family Income at Public Four-Year Institutions, 2011-12, online at <http://trends.collegeboard.org/student-aid/figures-tables/institutional-grant-aid-dependency-status-family-income-four-year-2011-12>.

165 Ronald G. Ehrenberg and Daniel R. Sherman, *Optimal Financial Aid Policies for a Selective University*, 19 J. OF HUM. RESOURCES 202, 223 (1984).

166 Note that this practice creates an incentive to raise the publicly stated tuition by a larger

The move away from need-based aid is analogous to regulatory action favoring particular industry groups. One simple, if controversial, solution is to eliminate the power to reward the students who do not need the aid. Participation by colleges and universities in federal aid programs administered under Title IV of the HEA could be limited to those that pledge to provide only need-based aid. The Education Department has the authority to set terms colleges and universities must meet in order to participate in the Direct Loan Program,<sup>167</sup> which provides the most popular federal student loans. A ban on non-need-based aid would mean that students attending a college or university that offered such aid would not have access to federal loan or grant programs at all. This would raise the cost of using so-called merit aid far too high; it is unlikely that any institution would want to risk shutting its students out of federal aid programs.

An effective prohibition on non-need-based aid would limit at least one aspect of the costly arms race among colleges competing for prominent placement in rankings like that produced by *U.S. News & World Report*. Currently, so-called merit aid offers a way to improve an institution's statistical profile: a college can offer scholarship aid to high-scoring students whose matriculation in turn makes the institution more impressive when evaluated. To the extent that college officials resent this kind of gamesmanship, as many claim to, the elimination of non-need-based aid would come as a welcome relief.<sup>168</sup> Of course, to institutions that may lack the appeal of the most elite universities and depend on merit-based scholarships to attract high-achieving students, a ban on merit aid could hurt placement in the rankings. Colleges might have to find other ways to compete—perhaps by demonstrating the quality of the education provided, rather than relying on that of the students admitted.

## ***B. Student empowerment***

In a setting in which a regulated industry may attempt to dictate the behavior of a regulator, empowering the customers of that industry to resist its efforts can

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amount than an institution otherwise might, to reduce the impact of the discount.

167 20 U.S.C. §§1082, 1087a, and 1087c. Only a few cases have involved challenges to the authority of the Secretary of Education to regulate under Title IV of the HEA. *See, e.g., Windsor University v. Secretary of Health, Ed. and Welfare*, 550 F.2d 1203 (9<sup>th</sup> Cir. 1977) (upholding the secretary's authority to regulate to protect the financial integrity of the student loan program); *Association of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427 (2012) (upholding certain regulations promulgated by the Department but finding others beyond the scope of the language of the HEA); *Association of Proprietary Colleges v. Duncan*, 107 F.Supp.3d 332 (2015) (upholding federal Education Department regulations that may exclude from federal programs those institutions whose students do not achieve "gainful employment").

168 There is a huge obstacle to this reform: college athletics. Massive alumni resistance to abolition of scholarship aid to student athletes attending highly competitive universities would be very difficult to overcome. While popular support of access should overcome the desire to field a competitive team, as a matter of practical politics a carve-out of athletic scholarships may be inevitable. And, indeed, some amount of athletic scholarship funds certainly enable students of lesser means to enroll—not all athletes hail from wealthy families. Nevertheless, restricting athletic scholarship aid to needy students would likely result in a less regressive distribution of financial aid. Perhaps a compromise could be reached, preserving scholarships for athletes in specific sports—but this is beyond the scope of the discussion here.

be effective. For example, a government agency could be tasked with advocacy on behalf of students, who are the consumers in this paradigm.<sup>169</sup> Consumer groups could be invited to participate in regulatory hearings, offering testimony and evidence of the effects of rule changes sought (or opposed) by the regulated industry. This is a form of “new governance” giving consumers a direct role in regulatory decision-making.<sup>170</sup> These mechanisms are, of course, still subject to capture themselves, in that interested stakeholders other than members of the regulated industry may manipulate a formal advocate or gain access to the most powerful roles in regulatory proceedings.<sup>171</sup>

For student borrowers and their families, empowerment could be enabled through expansion of the powers of the federal Education Department.<sup>172</sup> Currently the Department’s student loan ombudsman, in the Office of Federal Student Aid, mediates disputes between borrowers and lenders, but the role could be considerably broader. Perhaps the Department could undertake an education effort aimed at enabling students to navigate more effectively the financial aid process and assess aid packages they receive, for example. Students and families could, for example, take concerns over colleges’ financial aid packages to an aid review officer, who could review the grant and loan components to assure affordability and fairness.<sup>173</sup> This officer would have the advantage of knowledge of the composition of aid packages—the amount that is need-based and the amount that is not—that are awarded to other students, the kind of information rarely, if ever, available to students.

Such an outside review regime, which would entail abandonment of the ombudsman model in favor of a more aggressive role, would face at least two serious hurdles. First, given the scale of student borrowing—the millions of students taking advantage of aid programs every year—reviewing college aid decisions would be logistically demanding. Second, given colleges’ and universities’ prized autonomy, any governmental authority to demand changes to institutional decisions would create ongoing and serious tension. Could an official of the Education Department effectively veto the decisions of a college about aid? Historically, courts have been most reluctant to step into such a role and there is every reason to think that an

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169 Daniel Schwarcz, *Preventing Capture through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, in Daniel Carpenter and David A. Moss, eds., *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 368 (in the insurance rate-setting context, “[p]roxy advocates wield their influence primarily by providing information and a consumer perspective to an Administrative Law Judge... in technical rate-setting hearings, or negotiating settlements in connection with those hearings”).

170 *Id.* at 368.

171 *Id.* at 369.

172 Currently, the role of the ombudsman at the Education Department is not as broad as it might be; the ombudsman response to resolving disputes over loans, rather than institutional decisions over aid. Education Department, *Getting Prepared before Seeking Help*, available at <https://studentaid.ed.gov/sa/repay-loans/disputes/prepare> (last visited August 2, 2015).

173 Colleges and universities used to share information on financial aid packages but ran afoul of federal antitrust enforcement. Anthony DePalma, *Ivy Universities Deny Price-Fixing But Agree to Avoid It in the Future*, N.Y. TIMES, May 23, 1991, at <http://www.nytimes.com/1991/05/23/us/ivy-universities-deny-price-fixing-but-agree-to-avoid-it-in-the-future.html>.

executive effort in this direction would encounter fierce resistance. Litigation would almost certainly raise challenges arguing that the federal government lacks the authority to intervene in the affairs of education institutions within a state.

### C. External review

The formal actions of administrative agencies may be subject to review by courts or an executive,<sup>174</sup> which could curb potential capture. Members of regulated industries can and do mount challenges to rules proposed and enforced by their regulators.<sup>175</sup> Yet this check on agency authority<sup>176</sup> does not obviously lend itself to policing a system characterized by the operation of a diffuse set of actors, including colleges and universities, students, lenders and the government—which is at once both a lender and a regulator. Even if courts could review decisions dispositive of college accessibility, they might choose not to. Courts generally are reluctant to second-guess in this area, as they are reluctant to review decisions about grades.

More radically, current student borrowers or alumni who borrowed could be given a role in reviewing financial aid decisions at their (or other) institutions, much as current students have a role in admissions processes at some colleges and universities.<sup>177</sup> This would sidestep the challenges created by federal government oversight, but it would represent a shift in how colleges and universities currently relate to students and alumni. As colleges have come increasingly to be viewed as purveyors of a service and students as their customers,<sup>178</sup> envisioning a role for students in critical management decisions is quite difficult. But the roles of students and—perhaps more importantly—the roles of alumni could change, if the education enterprise were conceived differently. Not only would this provide a check on college decisions, it might also bolster a bulwark against the further commercialization of higher education by ensuring that values prized by students and alumni had formal advocates with a place in the institutional structure. Naturally, such a check would not be welcomed by the previously unchecked party; this, too, is consistent with the insights of scholarship on regulatory design.

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174 The Office of Information and Regulatory Affairs (“OIRA”), housed within the Executive Office of the President, reviews regulatory agency decisions, for example. Michael A. Livermore and Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, in Daniel Carpenter and David A. Moss, eds., *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 429.

175 To take one relatively recent example, in *Business Roundtable v. Securities and Exchange Commission*, 647 F.3d 1144 (2011), an industry group successfully challenged a rule adopted by the Securities and Exchange Commission.

176 The ability of courts to rein in capture is not automatic even when a formal regulatory agency is available as a defendant. M. Elizabeth Magill, *Courts and Regulatory Capture*, in Daniel Carpenter and David A. Moss, eds., *PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT* 398 (“As a result of [their] formal authority, courts *might* be in a position to police regulatory capture” (emphasis in original)).

177 At the University of California, Irvine School of Law, where I have on a few occasions served on the Admissions Committee, the student member of the group has often provided invaluable advice and perspective. The student is far closer to the education experience from the user’s end than the faculty or professional admissions officers, after all.

178 See Labaree, *supra* note 79.

#### *D. The shortcomings of prior reform efforts*

The reforms proposed above go beyond past efforts to reduce the adverse effects of indebtedness on students, such as those implemented by the Obama Administration and proposed by the Trump Administration<sup>179</sup> to promote college access by gradually expanding federal repayment assistance programs.<sup>180</sup> These efforts seek to counter some of the ways that aid can favor students who are more privileged and undermine those who are less so. However, plans that limit students' monthly repayment obligations to a fraction of their income operate after students are already enrolled and indebted, and so may be less effective at overcoming some of the obstacles confronting poorer students prior to matriculation.

The narrative of the striving, indebted student has no doubt fueled support for expansion of loan forgiveness programs. But these programs also sidestep a difficult legislative debate over the proper role of the federal government in facilitating access to higher education. Because loan forgiveness under new programs, which tie monthly payment obligations to students' income, may occur twenty-five years into the future, their cost is uncertain. Critics warn that as more students take advantage of the flexible repayment options, the cost could balloon and contribute to federal indebtedness.<sup>181</sup>

How much the government should spend to support college access is a normative question that is beyond the scope of this Article; but the question of the proper form support should take is quite relevant. Loan forgiveness counters the burden imposed on students by debt, which they incur because their financial resources and financial aid in the form of grants fail to match the cost of attending college. Yet institutions that can promote wider higher education access may respond to income-based repayment in ways not necessarily evident ahead of time. While wider exploitation of federal programs could increase government costs, more disturbing is the possibility that other components of the system may adjust their conduct, too.

Consider: The existence of forgiveness reduces the incentive for institutions to provide grant aid to students or to attempt to control costs. Colleges may shift resources away from grant aid, aware that the government will help borrowers manage their debt burdens. In the absence of limits on non-need-based aid, status-seeking, selective institutions will redirect need-based aid to applicants with higher grades

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179 For a discussion of the Trump Administration's proposed reforms, see Jonathan D. Glater, *Public Service Loan Forgiveness in the Administration's Crosshairs*, EDUCATION LAW PROF BLOG, May 24, 2017, available at [http://lawprofessors.typepad.com/education\\_law/2017/05/public-service-loan-forgiveness-in-the-administrations-crosshairs-by-jonathan-d-glater.html](http://lawprofessors.typepad.com/education_law/2017/05/public-service-loan-forgiveness-in-the-administrations-crosshairs-by-jonathan-d-glater.html).

180 For example, the federal Education Department recently expanded access to repayment programs for indebted students, making more borrowers eligible for eventual forgiveness of their loans. Michael Stratford, *Income-Based Repayment Expansion Advances*, CHRON. OF HIGHER EDUC., May 1, 2015, available at <https://www.insidehighered.com/news/2015/05/01/federal-rule-making-panel-oks-plan-expand-income-based-repayment-program>.

181 See, e.g., Kevin Carey, *Flip Side of Reducing Student Debt Is Increasing the Federal Deficit*, N.Y. TIMES, Feb. 11, 2015, at <http://www.nytimes.com/2015/02/11/upshot/calculating-the-price-to-taxpayers-of-easing-the-student-debt-burden.html?abt=0002&abg=0>.

and test scores, bolstering that recruitment tactic. Colleges could also raise tuition more sharply than they otherwise would.<sup>182</sup> Such potentially undesirable responses to policy innovation could reduce the efficacy of both aid and raise the cost of forgiveness. Thus, recognition of the ways in which components of the higher education regulatory system interact is critical to ensuring success. Policy interventions should be designed to create positive rather than negative incentives.<sup>183</sup>

Both Democratic presidential candidates in the 2016 campaign proposed providing funds directly to states that reduce or eliminate tuition for college students.<sup>184</sup> These plans would certainly have enhanced access and would represent a historic shift away from the high-price, high-aid model that many colleges have adopted. These plans would also have marked a shift away from equal treatment of higher education providers that are public and private, nonprofit or for-profit,<sup>185</sup> and away from provision of federal student aid to students rather than institutions. The Trump Administration has not endorsed such a shift, but has proposed expanding general loan forgiveness after 15 years of repayments.<sup>186</sup> The new administration has also signaled a different attitude toward for-profit higher education providers, attempting to slow or freeze implementation of regulations aimed at making such institutions accountable for poor student outcomes.<sup>187</sup> Reforms like those described here appear unlikely as a matter of federal policy or legislative action, as of this writing, though institutions could take steps independently to promote greater equity in access.

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182 Whether college and university administrators do in fact raise tuition in response to more generous federal aid programs, consistent with fear expressed in the “Bennett hypothesis” outlined by William J. Bennett, the former secretary of education, is unclear; this article takes no position that question. William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES, Feb. 18, 1987, available at <http://www.nytimes.com/1987/02/18/opinion/our-greedy-colleges.html>; but see Ronald G. Ehrenberg, TUITION RISING: WHY COLLEGE COSTS SO MUCH 265 (2002) (finding that colleges and universities raise prices for reasons unrelated to the availability of aid).

183 Forgiveness could be made contingent on some aspect of institutional conduct, such as the pace, of tuition increases, so that institutions would face pressure from students and alumni to keep costs low. Critics of higher education pricing have noted the consistency with which tuition has grown more quickly than inflation, so the rate of inflation could be the benchmark for such a limitation. See College Board, TRENDS IN COLLEGE PRICING 2014 16 (Fig. 5), available at <http://trends.collegeboard.org/sites/default/files/2014-trends-college-pricing-final-web.pdf> (illustrating pace of tuition increases in inflation-adjusted dollars over ten-year periods beginning in 1984).

184 Senator Sanders’ proposal is described in S. 1373 (2015), the “College for All Act,” introduced in 2015. S. 1373, available at <https://www.congress.gov/114/bills/s1373/BILLS-114s1373is.pdf>. Hillary Clinton’s proposal is summarized in a briefing document, Hillary Clinton, *New College Compact* (2015), available at <https://www.hillaryclinton.com/briefing/factsheets/2015/08/10/college-compact-costs/> and on file with author.

185 Although Hillary Clinton’s plan would address the provision of federal support to nonprofit institutions. See Hillary Clinton, *supra* note 187.

186 See *supra* note 173.

187 Stacy Cowley and Patricia Cohen, *U.S. Halts New Rules Aimed at Abuses by For-Profit Colleges*, N.Y. TIMES, June 15, 2017, at B8.

#### IV. Conclusion

Access to higher education is governed by a complex, dynamic and interacting set of institutions, policies and practices. Sociologists studying college access have recognized this. This Article has developed this insight in the context of legal scholarship, illustrating the complexity of the regime and the resulting difficulty of predicting the effects that any modifications might have. The goal of the Article has in a sense been modest: To inform debates over potential reforms by drawing attention to the effect they may have on the accessibility of higher education and on life opportunity. In offering proposals to broaden access, the Article has applied insights of scholars who have studied the effects of particular regulatory designs. Thus the Article has used a critical perspective on higher education to develop pragmatic, legal recommendations.

Animating this Article's analysis of federal policy in higher education is a profound concern that meaningful access to educational opportunity has become more and more restricted. This is so even though the system created to enable students to matriculate regardless of wealth persists largely in the same form that it has had for five decades.<sup>188</sup> This Article thus belongs to a larger critique of dynamic societal structures and processes that advantage people who already enjoy benefits in the form of wealth, education, social or other forms of capital, and that disadvantage those lacking such assets. This is not a new story; critical scholars have noted other ways that legal doctrines and regulatory regimes have resisted policies promoting greater equity with "retrenchment" rather than acceptance.<sup>189</sup> Higher education is not a purely private good and discussions of how to allocate it should not be shaped by the assumption that it is. Fulfilling the ideals that led to adoption of legislation that sought to put college within reach of all requires reconsideration of the financial aid and admissions system students and colleges rely on, as both the political and the economic contexts change.

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188 The current structure of federal aid in the United States was established in the Higher Education Act of 1965, which was signed into law by President Lyndon Baines Johnson on Nov. 8, 2015. Pub. L. 89-329 (1965).

189 Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 WIS. L. REV. 579, 580 (1989); see also Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373-374 (1992) ("Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance"); Richard Delgado and Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547, 551 (1995) ("For social reform to happen, 'everything must change at once,' but in the law, doctrines such as stare decisis, standing, mootness, ripeness, and political question mean that the law cannot change everything at once"); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STANFORD L. REV. 1111, 1142 (1997) ("status-enforcing state action is mutable in form, evolving in rule structure and justificatory rhetoric as it is contested"). Many more articles could be included in this list.

REVIEW OF GENNA RAE MCNEIL'S  
GROUNDWORK,  
CHARLES HAMILTON HOUSTON  
AND THE STRUGGLE FOR CIVIL RIGHTS

BY LAVERNE LEWIS GASKINS\*

The introduction in *Groundwork* appropriately begins with a quote from Charles Hamilton Houston's most famous student, the late United States Supreme Court Justice Thurgood Marshall. "We wouldn't have any place if Charlie hadn't laid the groundwork for it." Without question, even a casual examination of the life and work of Charles Hamilton Houston welcomes the conclusion that the title of this extensive biography is fitting. The book not only surveys Houston's most noted legal victories and accomplishments in higher education, it moves beyond the veneer. The reader is afforded a perspective into childhood and early adult experiences that undoubtedly shaped Houston's philosophy about American society and in particular, its judicial system.

In gifted detail, the book suggests that Houston inherited a family legacy of social defiance and a tenacity to dream beyond the dictates of his immediate circumstances. Houston's grandfather, Thomas Jefferson Hunn or "T.J." as he was called by his family and friends, escaped a cruel, violent master and changed his surname to Houston to avoid capture. T. J. Houston later became a 'conductor on the underground railroad between Missouri and Illinois, repeatedly crossing the Mississippi River to bring slaves into free territory.' Eventually T.J. met and married Katherine Theresa Kirkpatrick—a slave who fled the constant abuse of her owner. After the end of the Civil War the two escaped slaves began their lives together as "free" people. William Houston, Charles' father, was the oldest son of the five surviving children of T.J. and Katherine. Eventually, William Houston migrated to Washington D.C. where he worked as a clerk in the federal government and studied law at night at Howard University. William married Mary Hamilton in 1891, was admitted to the D.C. bar, and established a law practice in 1892.

In 1895, Charles Hamilton Houston was born, cloaked with a family legacy of upward social mobility and within an era marked by "... peonage, occupational ceilings for the race and unemployment." An accomplished student, Houston was accepted into Amherst College(?) where he was elected Phi Beta Kappa, and selected as one of the commencement speakers. The author of *Groundwork* exercised care not to convey an unblemished account of Houston's academic experiences. As the only black student at Amherst in the class of 1915, Houston had to navigate isolation and social codes that precluded meaningful interactions with other students. He had 'very few friends in town and rarely paid a social

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visit.' Houston, sensitive of the impact race had on all aspects American society, chose to highlight Paul Laurence Dunbar, noted African American poet, as the subject of his commencement speech.

Following his graduation from Amherst, Houston, reluctant to enter the legal profession, joined the military. One of the many experiences profoundly effecting Houston's decision to become a lawyer, was his tenure with the Army during World War I. Determined to avoid the traditional path for blacks of being drafted to labor details, front-line duty, or other menial assignments, Houston, along with others advocated for a "Colored Officers Training Camp." He met this opposition with fierce determination to serve the country as an officer, and, eventually, the War Department acquiesced. Houston was assigned, with others, as an infantry officer, and segregated from white officers of the regiment. He was later reassigned to serve as a judge-advocate in two cases involving black soldiers charged with disorderly conduct. It was during this time that Houston learned of the disparity in prosecution and sentencing of soldiers along racial lines. Houston's experiences altered the trajectory of the American judicial system. He recalled, 'I made up my mind that I would never get caught again without knowing something about my rights; that if luck was with me, and I get through this war, I would study law and use my time fighting for me who could not strike back.'

Upon his discharge from the military, Charles was greeted by a nation that was a racial battleground with a "Red Summer" of approximately twenty-five race riots. In 1919, he began his first year at Harvard Law School. Later he was elected to the editorial board of *Harvard Law Review*, graduated with an LL.B. in the top 5 percent of his class, and later earned a Doctor of Judicial Science. Armed with the necessary tools to fight discrimination, Houston ~~was~~ became instrumental in cultivating black lawyers to join the cause beginning with his efforts in transforming Howard University's Law School, where he served as Dean in 1924. The title *Groundwork* is indeed appropriate when one reads about the tremendous, time, effort and devotion Houston expended toward Howard's Law School. In 1931, under Houston's leadership, the university's law school program had the distinction of being approved by the American Bar Association and accredited by the Association of American Law Schools.

Eventually, Houston left his position at Howard to focus his immediate attention on cases impacting race relations in America. The book chronicles, through a series of events of cases, Houston's transformation of the legal landscape for the benefit of socioeconomic conditions of blacks and American society overall. Houston served as chief counsel on matters of concern to the NAACP, including the case involving the "Scottsboro Boys." He was strategic in his attack on discrimination. Houston sought not simply isolated struggles, but rather a system-wide approach. He recognized that: "In the United states the Negro is economically exploited, politically ignored and socially ostracized. Further, "[h]is education reflects his condition; discriminations against him are no accident." Yet, he realized that in order to dismantle a system so entrenched in society as to be perceived as normal and acceptable, success could only be achieve by incorporating slow building of legal precedents to support equality.

Houston achieved major United States Supreme Court victories<sup>191</sup> in his fights for employment rights and against unfair labor practices affecting black workers, as well as housing. Expectedly, his victories met with some political opposition that sought to slow progress. In 1944, President Harry Truman appointed Houston to serve as a member of the Fair Employment Practices Committee. As a result of the committee's work, Houston revealed discriminatory practices against blacks in a transportation company. When the federal government took control of the company after employees called a strike rather than modify their practices, the committee voted to issue a directive demanding the elimination of discriminatory treatment. President Truman wrote a letter to Houston explaining that when the company was seized by the federal government the conditions and practices that existed within company were to remain in effect. Houston resigned from the committee.

Houston made a mark in dismantling discrimination in higher education as well. In 1935, the NAACP, with Houston serving as chief legal strategist, launched a legal campaign against segregation in professional and graduate training. His efforts resulted in the desegregation of the University of Maryland's<sup>2</sup> law school—a decision that served as a foundation for other cases leading to the integration of various state universities across the country.

The author reminds us that while Houston enjoyed legal victories and acclaim, he was not immune from the indignities that the culture of his time inflicted on some of its citizens on a recurrent basis. To prevent the reader from being seduced into thinking that Houston's professional social status allowed him to be emotionally detached from the overall goal of advancing civil rights, the author relays a private observation. While practicing in D.C., when the court was in recess, it was the law and custom that white judges, law students, and clerks could eat where they pleased. However, Houston and his black lawyer associates had to either stand for carryout at a restaurant or go back to their offices. On one particular day, when Houston returned to his office for lunch, he said he couldn't stand it and 'he threw the stuff on the floor... burst into tears and said, one day, we'll see these streets open and Negro[es] can ... go anywhere and eat.'

Although in later years Houston's health constrained his work schedule, he remained involved in a number of cases that paved the way for dismantling *de jure* and *de facto* discrimination in voting rights, public transportation, and education. Houston was a strategist. When his protégée, Thurgood Marshall, worked on NAACP cases, and developed cases and tactics, Houston regularly met with Marshall, and "Thurgood ...didn't make any moves without ...Houston."

Charles Hamilton Houston died on April 22,1950, and the impact of his groundwork on civil rights is undeniable. He understood the Constitution of the United States, and altered the trajectory of the judicial system. He understood the power of education. The 1954 victory of *Brown v. Board of Education*<sup>3</sup> was "the

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2        *Steele v. Louisville and Nashville et al* and *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 305 U.S. 337 (1938), *Tunstall v. Brotherhood of Locomotive Fireman and Enginemen*, 323 U.S. 192 (1944), *Hurd v. Hodge*, 323 U.S. 210 (1944).

3        347 U.S. 483 (1954)

simultaneous culmination of the legal campaign based on Charles Houston's strategy carried forward by the NAACP's a cadre of lawyers and a watershed decision in constitutional law with respect to equal protection of the laws."

Houston had faith in the legal process and used it to effectuate positive change. His legacy lives on not only at Howard University, but in his students, their students, and the countless individuals who now live in a better society. This well researched book on a man who's life's work was groundbreaking is, at the very least, a must read for anyone with even the slightest interest in history. For attorneys who have lost sight of purpose, perhaps Charles Hamilton Houston's famous quote may serve as inspiration:

"A lawyer's either a social engineer or he's a parasite on society."

REVIEW OF JACOB H. ROOKSBY'S:  
THE BRANDING OF THE AMERICAN MIND:  
HOW UNIVERSITIES CAPTURE, MANAGE,  
AND MONETIZE INTELLECTUAL PROPERTY  
AND WHY IT MATTERS

BY C. J. RYAN

Jacob Rooksby's task in *The Branding of the American Mind: How Universities Capture, Manage, and Monetize Intellectual Property and Why it Matters* is an ambitious one. At the outset, Rooksby makes clear that his book seeks not only to introduce the reader to intellectual property law—specifically how universities engage with intellectual property law—but also to do so in a way that is accessible to a non-legal audience. Rooksby succeeds at this endeavor in spite of the complexities of intellectual property law and modern universities.

Throughout the book, and especially within the book's second chapter, Rooksby treats the reader to a thorough and comprehensible summary of intellectual property law—trademark, patent, and copyright—and its close kin—trade secrets, internet domains, and rights of publicity. The legal-trained reader will find this book neatly provides a focused review of intellectual property principles. While the non-legal audience will appreciate that the work is not as jargon-laden as most intellectual property scholarship. Notwithstanding some of the commentary on patents, which retains a shade of legalese density, Rooksby's digest of the law is remarkably accessible to any reader.

*The Branding of the American Mind* is comprehensive in both its erudite analysis of the way universities interact with the contemporary intellectual property complex, often for private gain, as well as its explanation of the same for lay and legal audiences. However, the book is most successful in developing a robust discussion of the emerging existential conflict in higher education: universities that engage in activities to produce purely private gain while seeking to fulfill their public-good missions. The first chapter introduces the reader to this central conflict at the beginning of the modern era in which universities ventured boldly into the world of monetizing their intellectual property. Starting with the passage of the Bayh-Dole Act in 1980, which allowed universities to take patent ownership of inventions produced with federally-funded research, Rooksby recounts dozens of examples of the delicate balance universities walk between pursuing public good and private benefit. One example is the OncoMouse, Harvard's genetically-modified cancer research rodent, the development of which was partially funded by the National Institutes for Health, and for which Harvard received a watershed patent on a living organism. Through this example, Rooksby poses a critical question that lies at the heart of the first chapter and motivates the entire book: should a university, which to Rooksby is a "public-sector entity," receive a private benefit, such as an intellectual property right, from an invention developed with

public funds?

On this point, Rooksby's view is unambiguous: "[t]he accumulation, use, and enforcement of intellectual property by colleges and universities reflects choices to engage in a system that ... takes knowledge and information that is otherwise subject to ... public use and restricts it, by attaching private claims to it." However, Rooksby does not nakedly assert this bold claim; rather, he positions this argument as an offshoot of the "two-good framework"—that the activities of a university serve either its public-service mission or its concern for revenue generation. Rooksby's reasoning also runs parallel to critiques of "academic capitalism" and how universities exploit their relationships with industry for private reward. As such, Rooksby outlines a strong argument for how a university's relentless pursuit of monetizing its intellectual property closely resembles revenue generation rather than serving a university's public function.

An additional strength of the book is its intuitive organization, given its examination of intellectual property law's component parts. The third chapter is the book's most substantive and successful, investigating the way that universities engage in trademark rights accretion, protection, and enforcement. By summarizing illustrative cases and presenting compelling statistical trends, Rooksby reveals the rapidly increasing, sometimes frivolous, and often absurd rate and ferocity with which universities pursue protection and enforcement of their brand—all for almost entirely private gain.

In a memorable illustration of this trend, the University of Alabama and its trademark-holding company sued to enforce the university's trademark against a small-town bakery that deigned to ornament cupcakes with the infamous, stylized, crimson "A"—proving once again that the Tide roll over their opponents on and off the gridiron. Though the parties settled and the bakery agreed to pay a licensing fee, the legal fees alone associated with this dubious trademark enforcement cost the university over \$1.5 million. Thus, as universities continue the relentless pursuit of their brand, ostensibly at any cost, questioning how universities can serve the public good and curry public favor while suing any possible infringer of their brand, no matter how remote the infringement or how economically unsound the enforcement, is more timely than ever.

Following the discussion of trademark, in the fourth chapter, Rooksby delves into the world of patent law. Universities have long engaged in this sector of intellectual property but have only recently had an incentive to engage more vigorously, as changes to patent policy have afforded them greater protections—as well as opportunities to extract revenue from infringement lawsuits. Rooksby underscores an important asymmetry when enumerating many examples of how, for university research resulting in a patented invention, the benefits of patent protection almost always accrue to the university and seldom accrue in any significant sense to the researchers themselves. That said, Rooksby treads lightly on the fact that university research, generated by faculty and research staff, rarely results in profitable patented inventions, a fact that would bolster his argument against universities' blind pursuit of intellectual property portfolio growth. Yet, universities continue to seek patents, transfer them to the technology transfer offices, and enforce them at an alarming rate. Rooksby's argument that the focus of

the university should be innovation, not litigation, dovetails with his discussion in the fifth chapter as the book turns its attention to copyright law and the university. Here, Rooksby champions policies that promote open-access and creativity for faculty and students—not the transparent snatching up of rights by the university. Innovation within the scientific disciplines is impeded by both patent infringement litigation and when universities or their publishers restrict or embargo innovative research—Rooksby rightly scrutinizes such practices.

Finally, the book closes with a consideration of elements of a university's brand portfolio—such as protecting domain names, images, and secrets, as well as trademarking slogans—as a means of illustrating the apparent dangers of the often typhlotic pursuit of “brand.” Rooksby's recommendations in the final chapter conclude the book's thoughtful discussion of the pitfalls of this pursuit and attempt to equilibrate an untenably imbalanced environment in higher education.

Drawing on his experience as an intellectual property attorney and legal academic, Rooksby's first book-length effort is as broad as it is deep. The result is a definitive discussion of the 21<sup>st</sup> Century university and its employment of intellectual property law both as a shield and sword. In fact, readers will remember this book for its important discussion of the underlying question: what should the role of higher education be in relation to the public good and increasing private rights? On consideration of this question, Rooksby's book is in a class of its own, posing and answering a question that all future research for which the university serves as the primary unit of analysis must reckon.

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