

2018

## What Is Race?: The New Constitutional Politics of Affirmative Action

Mary Ziegler

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# CONNECTICUT LAW REVIEW

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VOLUME 50

MAY 2018

NUMBER 2

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## Article

### What Is Race?: The New Constitutional Politics of Affirmative Action

MARY ZIEGLER

*The Supreme Court's recent decision in Fisher v. University of Texas II defied expectations, upholding an affirmative-action program and opening the door for universities to adopt similar policies. Using original historical research, this Article contends that Fisher II matters just as much because of the new challenges it reveals for proponents of affirmative action. Read together with the Court's recent decision in Schuette v. Coalition to Defend Affirmative Action, the dissents in Fisher II lay bare profound dangers confronting proponents of affirmative action, regardless of the outcome in Fisher II. In addition to praising colorblindness, the Court has cast doubt on the very definition of race.*

*In the past, activists consistently used race to describe the color of one's skin, but before Schuette, the meaning of race itself had not played a central part in challenges to the constitutional legitimacy of affirmative action. As Schuette shows, anti-affirmative-action amici and activists have developed a new argument: a claim that if race is a social construct, race-conscious remedies are arbitrary, unfair, and likely to reinforce existing stereotypes. Shaping the Schuette majority, this argument took center stage in Justice Alito's dissenting opinion in Fisher II. Future challenges to affirmative action will center on the meaning (and incoherence) of racial categories.*

*As the new anti-affirmative-action activism makes plain, the question is how courts can address racial discrimination when racial identities themselves are fluid and complex. The Article looks to employment discrimination law—and to “regarded-as” liability—as a framework for judges seeking to address the reality of race discrimination without reifying racial categories. Under the Americans with Disabilities Act (ADA) and the Americans with Disability Act Amendments Act of 2009 (ADAAA), a worker may in certain cases seek relief when she is regarded as disabled—regardless of whether she actually belongs to a protected class. The Article argues that regarded-as reasoning has considerable potential in the context of postsecondary admissions. In complying with existing Fourteenth-Amendment jurisprudence, admissions officers already rely on proxies for applicants' race. Doing so checks self-serving behavior and better captures the fluidity of race in modern America.*

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# What Is Race?: The New Constitutional Politics of Affirmative Action

MARY ZIEGLER \*

## INTRODUCTION

The Supreme Court's recent decision in *Fisher v. University of Texas II* defied expectations, upholding an affirmative-action program and opening the door for universities to adopt similar policies.<sup>1</sup> Because of the result in *Fisher II*, commentators have mostly focused on the potential *Fisher II* holds out for universities interested in increasing racial diversity.<sup>2</sup> Using original historical research, this Article contends that *Fisher II* matters just as much because of the new challenges it reveals for proponents of affirmative action. Read together with the Court's recent decision in *Schuette v. Coalition to*

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<sup>1</sup> See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2207 (2016) (holding that the university's use of race as part of an affirmative-action admissions program did not violate the Fourteenth Amendment).

<sup>2</sup> For a sample of the response to *Fisher*, see, for example, Elise Boddie, *Symposium: The Beneficial Purposes of Race*, SCOTUSBLOG (June 24, 2016, 4:21 PM), <http://www.scotusblog.com/2016/06/symposium-the-beneficial-purposes-of-race/> [<https://perma.cc/RD6Z-P87P>] (discussing the benefits of "general race consciousness" and "intra-racial diversity"); Todd Henderson, *Symposium: What Proof Should We Demand to Justify Racist Policies?*, SCOTUSBLOG (June 24, 2016, 10:04 AM), <http://www.scotusblog.com/2016/06/symposium-what-proof-should-we-demand-to-justify-racist-policies/> [<https://perma.cc/5U25-XZMM>] ("I personally believe that racial inequality should be the most important policy issue of the day and that we should make radical changes to our education policy to give every American child a fair shot at success. But racist policies in higher education seem like an ineffective and potentially perverse mechanism to do this."); John Paul Schnapper-Casteras, *Symposium: Moving Forward from Fisher II*, SCOTUSBLOG (June 24, 2016, 5:13 PM), <http://www.scotusblog.com/2016/06/symposium-moving-forward-from-fisher-ii/> [<https://perma.cc/4G9F-CBQS>] ("The Supreme Court's decision yesterday in *Fisher v. University of Texas at Austin* marks a major victory for universities and students throughout the country, and reaffirms the commonsense proposition that diversity along various lines—including racial diversity—yields significant educational benefits on college campuses."); Elizabeth Slattery, *Symposium: A Disappointing Decision, but More Lawsuits Are on the Way*, SCOTUSBLOG (June 24, 2016, 1:13 PM), <http://www.scotusblog.com/2016/06/symposium-a-disappointing-decision-but-more-lawsuits-are-on-the-way/> [<https://perma.cc/N9RG-A4V9>] (discussing the disadvantages of the *Fisher* decision); Kimberly West-Faulcon, *Symposium: Surprisingly, Facts Rule the Day in Fisher II*, SCOTUSBLOG (June 24, 2016, 9:47 AM), <http://www.scotusblog.com/2016/06/symposium-surprisingly-facts-rule-the-day-in-fisher-ii/> [<https://perma.cc/DAQ6-T9W3>] (discussing the differences between racial affirmative action and racial discrimination).

*Defend Affirmative Action*,<sup>3</sup> the dissents in *Fisher II* lay bare profound dangers confronting proponents of affirmative action, regardless of the outcome in *Fisher II*. In addition to praising colorblindness, the Court has cast doubt on the very definition of race.

In *Schuetz*, Michigan had amended its state constitution to prevent the use of racial preferences by any university system or school district.<sup>4</sup> Rejecting a Fourteenth Amendment challenge, the Court upheld Michigan's law.<sup>5</sup> The plurality went to considerable lengths to explain that *Schuetz* in no way touched on the constitutionality or merits of race-based admissions.<sup>6</sup> However, the Court also questioned whether it was possible any longer for the racial categories used in affirmative-action programs to have any value. "[I]n a society in which [racial] lines are becoming more blurred," *Schuetz* explains, "the attempt to define race-based categories . . . raises serious questions of its own."<sup>7</sup> The dissenters in *Fisher II* spotlight this argument, insisting that racial categories are "ill suited for the more integrated country that we are rapidly becoming."<sup>8</sup>

Studying the origin of the argument at the heart of the *Fisher II* dissents, the Article explores the future of challenges to affirmative action. Historians and critical race theorists (CRTs) have long contended that race is a social construct—the product of struggles over class and political power.<sup>9</sup> For these scholars, understanding race in this way exposes the institutional racism concealed by superficially neutral laws.

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<sup>3</sup> *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623 (2014).

<sup>4</sup> MICH. COMP. LAWS ANN. § 26 (West 2006).

<sup>5</sup> *Schuetz*, 134 S. Ct. at 1636.

<sup>6</sup> *Id.* at 1630.

<sup>7</sup> *Id.* at 1634.

<sup>8</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2230 (2016).

<sup>9</sup> For a sample of historical work on the construction of race, see generally ARIELA J. GROSS, *WHAT BLOOD WON'T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008) (examining the relationship between race, personal identity, culture, and the ability to achieve citizenship); MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH* (1997) (exploring the history of relationships between white women and black men and the white South's response to these relationships prior to and following the Civil War); ELISE LEMIRE, "MISCEGENATION": MAKING RACE IN AMERICA (2002) (discussing the social construction of race as it relates to interracial relationships and white supremacy); PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA I* (2009) (discussing the "rise of a social, political, and legal system of white supremacy that reigned through the 1960s and . . . beyond"); DANIEL J. SHARFSTEIN, *THE INVISIBLE LINE: A SECRET HISTORY OF RACE IN AMERICA* (2011) (detailing the historical background around three families' stories and their experience with race). For a sample of CRT work on the construction of race, see RICHARD DELGADO & JEAN STAFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012) (discussing the earliest origins of the critical race theory movement, the present state of critical race theory, and its future); IAN HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006) (discussing the relationship between colorblindness and white supremacy). Although CRT scholars cover a range of topics, the field shares a focus on "race, racism, and power" and "questions the . . . foundations of the liberal order." DELGADO & STAFANCIC, *supra*, at 3.

For decades, opponents of affirmative action dismissed these arguments out of hand. In the past, these activists consistently used race to describe the color of one's skin, but the meaning of race itself had not played a central part in challenges to the constitutional legitimacy of affirmative action.<sup>10</sup> However, *Schuette* and *Fisher II* represent the culmination of a process of movement-counter-movement dialogue and consensus. Far from denying claims that race is a construct, opponents of affirmative action now use those claims to their advantage. For anti-affirmative-action amici and activists, the idea that race is a social construct now militates in favor of colorblindness.<sup>11</sup> Since race is a social construct, it is argued to be devoid of meaning. Any use of race, in this account, becomes an unfair and incoherent allocation of government benefits.<sup>12</sup>

Regardless of whether it has stable meaning, race shapes individual opportunities and experiences.<sup>13</sup> When voluntarily assumed, racial identities can be powerful expressions of self.<sup>14</sup> As the new anti-affirmative-action activism makes plain, the question is how courts can address racial discrimination when racial identities themselves are fluid and complex. The Article looks to employment discrimination law—and to “regarded-as” theories of liability—as a framework for judges seeking to address the reality of race discrimination without reifying racial categories.<sup>15</sup> Under the

<sup>10</sup> See, e.g., Ian F. Haney López, “A Nation of Minorities”: Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 1028–29 (2007) (discussing the use of race as skin color in colorblindness claims).

<sup>11</sup> E.g., Amicus Brief of the American Center for Law & Justice in Support of Petitioner at 3–7, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of Amici Curiae Judicial Watch, Inc. & Allied Educational Foundation in Support of Petitioner at 2–6, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

<sup>12</sup> E.g., Amicus Brief of the American Center for Law & Justice in Support of Petitioner at 5–7, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345); Brief of Amici Curiae Judicial Watch, Inc. & Allied Educational Foundation in Support of Petitioner at 3, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345).

<sup>13</sup> For a sample of the scholarship on racial identity formation, see Charmaine L. Wijeyesinghe & Bailey W. Jackson III, *Introduction*, in NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT: INTEGRATING EMERGING FRAMEWORKS 1–11 (Charmaine L. Wijeyesinghe ed., 2012); RACIAL IDENTITY THEORY: APPLICATION TO INDIVIDUAL, GROUP, AND ORGANIZATIONAL INTERVENTIONS xii–1 (Chalmer E. Thompson & Robert T. Carter eds., 2012).

<sup>14</sup> See, e.g., Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 GEO. L.J. 179, 183 (2013) (tracing the shift in modern America “to a model that places primary emphasis on ‘elective race’ or voluntary, racial self-identification decisions”); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.–C.L. L. REV. 1, 61 (1994) (“[R]ace, because it is closely tied to communities, provides an essential component of identity.”).

<sup>15</sup> See, e.g., Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded As” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1288–89 (2005) (proposing the use of regarded-as theories in the context of Title VII race discrimination); Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1136 (2004) (criticizing current Title VII doctrine for failing to recognize claims based on racial identity performance in the workplace). This Article breaks

Americans with Disabilities Act (ADA) and the Americans with Disability Act Amendments Act of 2009 (ADAAA), a worker may in certain cases seek relief when she is regarded as disabled—regardless of whether she belongs to a protected class.<sup>16</sup> Under such a “regarded-as” theory, what matters is not that an individual belongs to a particular biological or cultural category, but rather that the individual experiences the stereotypes associated with it. Regarded-as theories will allow courts to avoid placing individuals in one racial category or another. Instead, by turning to a developed body of law, courts can recognize the reality of discrimination without reinforcing the fiction of race.

The Article proceeds in four parts. Part I traces the origins of the movement-counter movement dialogue from which *Schuette* and *Fisher II* emerged. This Part lays out three influential phases in the history of opposition to affirmative action. This story begins with the fight led by Jewish organizations and unions to define legitimate affirmative action. While denouncing race-based quotas, these activists urged the government to introduce education and training programs designed to level the playing field.

In the 1970s, as Part I shows, with a revival of white ethnic identity, opposition to affirmative action took a dramatic turn. As the Supreme Court’s decision in *Regents of the University of California v. Bakke*<sup>17</sup> makes clear, opponents of affirmative action began challenging the definition of a racial majority rather than the justice of antisubordination approaches to race. Identifying themselves as victims of discrimination, a variety of white ethnics urged the Court to extend constitutional protection to them.<sup>18</sup> The colorblindness arguments now so familiar to scholars of affirmative action came to the fore when the recently mobilized New Right attacked the core premise of antisubordination reasoning.

As Part I demonstrates, the ascendancy of colorblindness rhetoric in the 1990s and 2000s concealed a more complex story about efforts to respond to the diversity rationale developed prior to, and endorsed by, the Supreme Court in *Grutter v. Bollinger*.<sup>19</sup> Some activists echoed earlier arguments about the unfairness of race-specific policies. Gradually, however,

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new ground by exploring how regarded-as theories matter in a radically different racial politics—one defined by changing arguments against affirmative action. The Article also offers the first look at how these theories should respond to powerful new arguments against an anti-subordination vision of the Constitution.

<sup>16</sup> 42 U.S.C. § 12102(3)(A) (2012); Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2062 (2013) (“The ADAAA . . . protect[s] any individual who is treated adversely because of an actual or perceived impairment without regard to the existence of any functional limitation.”).

<sup>17</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271, 319 (1978) (holding that a university admissions program that relies predominantly upon race for admissions decisions is unlawful).

<sup>18</sup> *Id.* at 277–78.

<sup>19</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that public universities may consider race as a factor in student admissions, though only temporarily).

opponents of affirmative action began presenting the very idea of diversity as incoherent. Borrowing from claims about race made by historians and CRTs, affirmative-action opponents maintained that the categories universities used to achieve diversity were arbitrary and unjust.

Drawing on this historical narrative, Part II foregrounds the new threat to affirmative-action programs articulated in *Schuette* and *Fisher II*.

The future of affirmative-action law will depend on more than the Court's understanding of how strict scrutiny operates in the context of race. The fate of affirmative action in the courts will also depend on whether progressives can reconcile support for an antisubordination vision of the Constitution with the belief that race is a social construct.

Part III develops a legal framework to address new anti-affirmative-action arguments about the social construction of race. Looking to ADA case law and Title VII individual disparate treatment cases, the Article proposes that affirmative-action law should recognize that individuals may suffer serious—and adverse—consequences when they are regarded as members of a particular race. As regarded-as reasoning shows, relevant decision makers rely not only on skin color, but also on a variety of proxies—including class, education, place of residence, dress, voice, and name—in judging an individual's racial identity.

Part III also confronts potential problems with applying regarded-as reasoning in the context of university admissions. When students categorize themselves by race, admissions officers explicitly ask about racial identity, and minority status often strengthens applicants' candidacies. An examination of the Guidance on the Voluntary Use of Race in Postsecondary Admissions issued by the Departments of Education and Justice reveals that some admissions officers likely already rely on regarded-as reasoning.<sup>20</sup> The use of proxies allows universities to comply with the Supreme Court's race-discrimination mandates while limiting self-serving behavior. At the same time, regarded-as reasoning better captures the fluidity of racial identity. The Article closes with a brief conclusion.

## I. THE HISTORY OF THE ANTI-AFFIRMATIVE-ACTION MOVEMENT, 1961 TO THE PRESENT

Opposition to affirmative action emerged almost as soon as the first race-conscious remedial programs took shape. However, the movement against affirmative action changed substantially over time. Justice Alito's invocation of a post-racial society in *Fisher II* is no accident. Instead, the argument about racial categories at work in *Fisher II* and *Schuette* arose in the aftermath of an unpredictable and decades-long struggle about the

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<sup>20</sup> U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE IN POSTSECONDARY ADMISSIONS 3, 5–6 (2011), <https://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.pdf> [https://perma.cc/A9DE-SY47].

meaning of discrimination and race. Understanding the origins of this argument makes clear the new challenges likely to face universities with affirmative-action programs.

In the mid-1960s, Jewish organizations and the labor movement mobilized to oppose what they described as race-based quotas.<sup>21</sup> Many of these advocates, however, claimed to speak for “true” affirmative action—measures to recruit, train, and fairly measure the abilities of minority candidates.<sup>22</sup> These early struggles addressed the meaning of affirmative action as much as they did the legitimacy of state-sponsored efforts to combat racial subordination. In the mid-1970s, the movement began to change, as a white ethnic revival spread across the United States.<sup>23</sup> A variety of Jews, Italian-, Greek-, and Polish-Americans defined themselves as minorities deserving of state solicitude. This new argument again assumed the legitimacy of the basic principle underlying affirmative action.

By the early 1980s, both of these factions began to lose influence, as the Democratic Party reinforced its support for affirmative action, and the Republican Party firmed up its opposition to race-conscious policies.<sup>24</sup> As the political parties realigned, conservatives came to define the anti-affirmative-action agenda, linking constitutional values of colorblindness to a faith in small government and suspicion of entitlement programs.<sup>25</sup> Together, the Reagan administration and the New Right created a new anti-affirmative-action agenda that was inextricably tied to the substantive goals of the grassroots conservative movement.<sup>26</sup>

Change defined the story of the affirmative-action movement—shifting arguments, members, and goals. When we understand the fluidity of the movement, we can see more clearly that *Schuette* and *Fisher II* represent a new chapter in the affirmative-action struggle.

### A. *The Birth of a Movement, 1961–1969*

The term “affirmative action” came into the American vocabulary in 1961, when President John F. Kennedy issued an executive order requiring

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<sup>21</sup> See ERIC J. SUNDQUIST, STRANGERS IN THE LAND: BLACKS, JEWS, POST-HOLOCAUST AMERICA 76–77 (2005) (“Many Jews, on the basis of recent experience, remembered racial quotas as a discriminatory means of denying them access to education and employment.”).

<sup>22</sup> See *id.* at 76 (explaining that Jews showed great support for the civil rights movement’s goal of achieving equal opportunity and freedom from discrimination but feared the preferential policies of affirmative action).

<sup>23</sup> See *id.* (noting that Jewish-, Italian-, Greek-, and Polish-Americans all filed amicus briefs that opposed race-based preferences in the college admission process).

<sup>24</sup> WILLIE AVON DRAKE & ROBERT D. HOLSWORTH, AFFIRMATIVE ACTION AND THE STALLED QUEST FOR BLACK PROGRESS 13, 20 (1996).

<sup>25</sup> *Id.* at 16.

<sup>26</sup> See *id.* at 20 (“In the 1980s, the major strains of the conservative attack on affirmative action were institutionalized in the Reagan administration.”).

federal employers to take “affirmative action” in combating racial discrimination.<sup>27</sup> Two years later, the executive order was extended to cover federally financed construction projects.<sup>28</sup> Kennedy himself denied that affirmative action involved or required quotas, but other influential Democrats, including the leaders of the Equal Employment Opportunity Commission (EEOC) and the United States Commission on Civil Rights, came to believe that quotas were necessary to make a dent in the legacy of slavery and Jim Crow.<sup>29</sup> By 1965, the EEOC required employers to submit forms breaking down their workforce by sex and race.<sup>30</sup> Within three years, states could receive block grants in order to identify disparate employment patterns; employers could face a variety of sanctions.<sup>31</sup> In the meantime, a debate about the importance of quotas and about the meaning of affirmative action had begun in the academy and in American politics.

The early anti-affirmative-action movement was complex and drew heavily from the ranks of the New Deal coalition and the American left. Since the mid-1960s, members of skilled trades and construction unions had tended to oppose any form of remedial program for racial minorities, worrying about the loss of control over hiring and promotion.<sup>32</sup> Industrial unions, like the AFL-CIO, favored affirmative action until such programs posed a challenge to seniority-based preferences in employment.<sup>33</sup>

Although the Jewish community would remain divided about affirmative action throughout the 1970s, organizations like the American Jewish Committee (AJC) and the American Jewish Congress (the Congress) also led the first efforts to articulate a vision of a colorblind Constitution. The AJC was formed in 1906 by Jewish community leaders concerned about pogroms in Russia.<sup>34</sup> In its early years, the AJC focused on protecting the civil liberties and religious freedoms of Jews.<sup>35</sup> By the 1950s, the AJC had expanded its mandate, arguing that all forms of discrimination based on race or ethnicity reinforced the bias experienced by Jews and other minority

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<sup>27</sup> Exec. Order No. 10925, 3 C.F.R. § 301 (Supp. 1961).

<sup>28</sup> See DENNIS DESLIPPE, *PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION* 19 (2012).

<sup>29</sup> See *id.* at 20–21.

<sup>30</sup> See *id.* at 22–23.

<sup>31</sup> See *id.* at 25–26.

<sup>32</sup> See *id.* at 27–28.

<sup>33</sup> See *id.* at 28–32.

<sup>34</sup> See, e.g., DAVID BIALE, *POWER AND POWERLESSNESS IN JEWISH HISTORY* 125 (1986) (discussing the founding of the AJC); *Jewish Committee Meets*, N.Y. TIMES, Nov. 11, 1907, at 16 (discussing the AJC’s early years).

<sup>35</sup> See, e.g., *\$1,000,000 Sought for Jews in Russia*, N.Y. TIMES, Feb. 4, 1929, at 10 (discussing the early activities of the AJC); *Jews Here Reply to Hitler’s Charge*, N.Y. TIMES, Oct. 21, 1935, at 15 (adding further insight into the AJC’s early activities).

groups.<sup>36</sup> The AJC specialized in sociological research documenting the psychological harms worked by discrimination.<sup>37</sup> Indeed, this research figured centrally in the litigation of *Brown v. Board of Education*.<sup>38</sup>

By the late 1960s, however, the AJC had come out against “quotas.” In 1969, for example, the AJC issued a statement favoring what it called “true affirmative action” while opposing quotas.<sup>39</sup> The statement explained:

[W]e cannot ignore the growing concern on the part of many Jews and members of other ethnic groups that the burden of needed social changes may especially fall on them and limit their opportunities for advancement. Care must be taken in advancing compensatory and preferential treatment for disadvantaged minorities that our sense of outrage for what they have endured does not cause us to lose sight of our sense of the needs and aspirations of other groups.<sup>40</sup>

If, as the AJC reasoned, quotas were a zero-sum game, other disadvantaged ethnic groups would necessarily pay the price for the inclusion of racial minorities.<sup>41</sup> Between 1969 and 1972, the AJC and other organizations refined their arguments. “Individual rights,” the New York Chapter of the AJC asserted in a 1971 statement on affirmative action, “which are a cornerstone of our Constitution, must be preserved and protected.”<sup>42</sup> AJC President Philip Hoffman advanced a similar view when writing to presidential candidates Richard Nixon and George McGovern.<sup>43</sup> AJC Vice President Bertram H. Gold summarized this vision, stating that “the American system, which is an open society, is based on individual

<sup>36</sup> For contemporary discussion of such initiatives, see, for example, *Two Groups Open Drive Against Bias*, N.Y. TIMES, Nov. 30, 1952, at 65 (discussing a program “‘to provide a stronger impact on the American mind concerning the evils of anti-Semitism’ and other forms of racial and religious bigotry and discrimination”); *Survey Finds U.S. Hurt By Till Case*, N.Y. TIMES, Oct. 22, 1955, at 40 (describing the committee’s report and its recommendations); *50 Years Marked by Jewish Group*, N.Y. TIMES, Apr. 7, 1957, at 120 (discussing the AJC’s history and achievements); *Civil Rights Gains of Decade Hailed*, N.Y. TIMES, Dec. 8, 1957, at 132 (discussing advancements in the civil rights movement over the prior decade).

<sup>37</sup> See, e.g., STUART SVONKIN, *JEWS AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES* 66–68 (1997).

<sup>38</sup> See *id.* at 67 (explaining the AJC’s influence on the work of Professor Kenneth Clark, whose White House Conference paper was cited by Chief Justice Earl Warren in *Brown v. Board of Education*).

<sup>39</sup> Press Release, Am. Jewish Comm., Position Statement on Compensatory & Preferential Treatment in Educ. & Emp’t 2–3 (Nov. 11, 1969) (on file with Am. Jewish Comm. Library, N.Y.C.).

<sup>40</sup> *Id.* at 2.

<sup>41</sup> See *id.* (“It is perhaps inevitable that in the short run, compensatory and preferential programs, such as those described above will result in some people being adversely affected.”).

<sup>42</sup> Press Release, Am. Jewish Comm., N.Y. Chapter Statement on Affirmative Action I (May 1, 1972) (on file with Am. Jewish Comm. Library, N.Y.C.).

<sup>43</sup> See Press Release, Am. Jewish Comm., Facts Behind the News 1–2 (Aug. 25, 1972) (on file with Am. Jewish Comm. Library, N.Y.C.) (discussing correspondence between Hoffman and both President Nixon and Sen. McGovern).

rights, not group rights. We are opposed to quotas because quotas are the negation of judging a man on his worth alone.”<sup>44</sup>

In the late 1960s and early 1970s, Jewish groups like the AJC and the Congress remained divided about what kinds of affirmative action were defensible. Founded in 1918, the Congress formed to be a democratic, representative group for Jewish leaders across the nation.<sup>45</sup> In the 1940s, the organization took a leading role in protesting Nazism in Germany, serving as a liaison between the United States Government and European Jews seeking refuge in the United States.<sup>46</sup> In the 1950s, the Congress also took part in the civil rights movement, and one of its leaders played a vital role in planning Martin Luther King’s 1963 March on Washington.<sup>47</sup>

However, like the AJC, the Congress viewed the issue of affirmative action with considerable ambivalence. For example, in May 1969, when the Congress debated the subject, members disagreed about whether “‘benign’ quotas” deserved support. One member, a professor at Rutgers, maintained that quotas were necessary to increase the access of racial minorities to quality education.<sup>48</sup> While maintaining that quotas were “deleterious to [a] democratic system,” others offered alternative methods of helping

<sup>44</sup> Press Release, Am. Jewish Comm., News From the Comm. 1 (Aug. 16, 1972) (on file with Am. Jewish Comm. Library, N.Y.C.).

<sup>45</sup> On the early years of the Congress, see, for example, *Jewish Congress to Meet*, N.Y. TIMES, Aug. 11, 1919, at 8 (discussing the reconvening of the American Jewish Congress to receive its delegates’ reports from the Paris Peace Conference); *Jews Seek Hearing at Peace Table*, N.Y. TIMES, Dec. 17, 1918, at 11 (explaining the American Jewish Congress’ plans to send a delegation of Jews to the Paris Peace Conference to lobby for full civil and political rights worldwide); *American Jewish Congress to Meet*, N.Y. TIMES, Dec. 10, 1918, at 2 (“The American Jewish Congress will convene in Philadelphia . . . to consider means of obtaining political and religious freedom for Jews throughout the world.”).

<sup>46</sup> See, e.g., *Jews Pay Tribute to Hitler Victims*, N.Y. TIMES, Aug. 30, 1943, at 6 (discussing a memorial service for Jews killed due to Hitler’s persecutions); *Wise Asks Roosevelt Aid*, N.Y. TIMES, Jul. 23, 1943, at 11 (describing the conversation between President Roosevelt and the president of the American Jewish Congress regarding Jewish casualties in Axis-controlled countries); *Embargo on Exports to Germany Urged*, N.Y. TIMES, Mar. 4, 1940, at 6 (discussing American Jewish Congress and Jewish Labor Committee pleas for a moral embargo against sending American goods to Germany); *Rescue at Once of Europe’s Jews Demanded at Conference Here*, N.Y. TIMES, Aug. 31, 1943, at 1 (discussing demands by speakers at the American Jewish Conference for immediate rescue of Jews in Nazi-controlled countries and a Jewish Commonwealth in Palestine).

<sup>47</sup> See, e.g., Irving Spiegel, *Jewish Unit To Meet on Civil Liberties*, N.Y. TIMES, May 27, 1950, at 11 (describing Jewish groups’ support of civil liberties); *Failure to Attack Bias Is Denounced*, N.Y. TIMES, May 19, 1952, at 20 (“The American Jewish Congress and the [NAACP] . . . assailed Federal, state and municipal governments for failure last year to take ‘forthright action’ to eliminate discrimination and segregation and to stop illegal attacks against minority groups.”); E.W. Kenworthy, *200,000 March for Civil Rights in Orderly Washington Rally*; *President Sees Gain for Negro*, N.Y. TIMES, Aug. 29, 1963, at 1 (discussing pleas by civil-rights leaders for laws ending racial segregation).

<sup>48</sup> Executive Committee Meeting Minutes, American Jewish Congress (May 12, 1969), in *The American Jewish Congress Papers*, Box 34, American Jewish Historical Society, New York, New York.

minorities, including “a shift to consideration of the factors of financial and economic need.”<sup>49</sup>

Later, at a 1972 meeting of its executive committee, some members of the Congress favored the use of numerical goals “during a transitional period until equality [could] be achieved.”<sup>50</sup> Other members of the Congress acknowledged that, while “[t]here [was] little argument that blacks had been discriminated against by society,” any form of special treatment for minorities would be unfair and would “severely retard, if not impede altogether, a full scale assault on the problems of all the poor and unemployed, which are the real issues and demand major attention.”<sup>51</sup> The organization could not agree even on a compromise resolution stating opposition to any government program that “require[d], permit[ted], or [made] predictable any discrimination against any ethnic, racial, or religious group or groups,” deciding to table it by a vote of 13 to 11.<sup>52</sup>

The AJC was similarly divided throughout the early 1970s. Some chapters, including the one based at its New York headquarters, seriously considered endorsing the use of goals and timetables, and even opponents of quotas worried that seemingly neutral tests used to measure individual merit unduly favored those in the white majority, constituting “a denial of the very merit principle we profess to support.”<sup>53</sup>

Generally, however, a majority in the Congress and the AJC opposed quotas while endorsing recruiting and training programs as “true” and just affirmative action. These arguments echoed the views expressed in Gunnar Myrdal’s monumental *An American Dilemma: The Negro Problem and Modern Democracy*.<sup>54</sup> Published in 1944, Myrdal’s book argued that Americans were torn between their ideals and the realities of racism, segregation, and discrimination.<sup>55</sup> Myrdal identified American commitments to democracy and egalitarianism as important weapons against Jim Crow.<sup>56</sup> He suggested that if Americans lived up to their own ideals, de jure segregation could not last long.<sup>57</sup>

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<sup>49</sup> *Id.* at 5–6.

<sup>50</sup> Executive Committee Meeting Minutes, American Jewish Congress (Mar. 16, 1972), in *The American Jewish Congress Papers*, Box 6, American Jewish Historical Society, New York, New York.

<sup>51</sup> *Id.* at 2.

<sup>52</sup> *Id.* at 14.

<sup>53</sup> DESLIPPE, *supra* note 28, at 86.

<sup>54</sup> GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

<sup>55</sup> *See id.* at 75, 1021 (explaining the flaws of using the idealistic “class struggle” doctrine to deny race problems in America, and discussing the American hypocrisy of permitting racial oppression at home while fighting for liberty abroad).

<sup>56</sup> *See id.* at 1021 (discussing America’s opportunity to amend its past racial failures).

<sup>57</sup> *See id.* (“[T]he great reason for hope is that [America] has a national experience of uniting racial and cultural diversities and a national theory, if not a consistent practice, of freedom and equality for all.”).

Myrdal's influential ideas reflected one strand of argument offered by the NAACP in *Brown*.<sup>58</sup> His arguments also helped to cement a liberal alliance committed to the achievement of civil rights reforms.<sup>59</sup> By the 1960s, however, liberal consensus about Myrdal's arguments had collapsed.<sup>60</sup> Movement activists and commentators argued that Myrdal had been naive about the pervasiveness of racism in American society.<sup>61</sup> Rather than being a matter of individual attitudes, racism shaped important institutions and laws.<sup>62</sup>

For the AJC, by contrast, prescriptions like those set forth by Myrdal still rang true. The AJC believed that neutrality was constitutionally necessary and politically possible, and the organization argued that relying on individual merit would dismantle, rather than reinforce, existing racial hierarchies.<sup>63</sup> At the same time, the organization favored some race-conscious remedial programs—if only those designed to prepare

<sup>58</sup> As Christopher Schmidt has shown, however, reasoning similar to Myrdal's was not the only kind of argument used by the NAACP in *Brown*, and the Court was not obviously deciding the case only on the basis of Myrdal-style arguments. See Christopher W. Schmidt, Essay, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 207 (2008) (distinguishing "anticlassification" arguments from "antisubordination" arguments).

<sup>59</sup> See, e.g., WALTER JACKSON, GUNNAR MYRDAL AND AMERICA'S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERATION, 1938–1987 at 261 (1994) ("*An American Dilemma* was the key book in shaping a new liberal consensus on racial issues.>").

<sup>60</sup> See, e.g., JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974 at 22 (1997) ("During the racial confrontations of the 1960s, *An American Dilemma* encountered rising criticism from activists and scholars who disputed Myrdal's optimism about white liberalism, as well as his negative statements about certain aspects of African-American culture."); DAVID CARROLL COCHRAN, THE COLOR OF FREEDOM: RACE AND CONTEMPORARY LIBERALISM 28 (1999) ("Beginning in the mid-1960s, many would denounce the book's view of black culture as a 'pathological' response to white bigotry and find its optimistic prediction of an eventual end to racial injustice naive."); CHRISTOPHER SHANNON, A WORLD MADE SAFE FOR DIFFERENCES: COLD WAR INTELLECTUALS AND THE POLITICS OF IDENTITY 48 (2001) (discussing Ralph Ellison's mid-1960s criticism of Myrdal's book).

<sup>61</sup> See, e.g., López, *supra* note 10, at 999–1000 (critiquing Myrdal's analysis for failing to emphasize inherent, structural racial subordination as the main reason for inequality).

<sup>62</sup> See, e.g., *id.* (proclaiming that racism is inherent in American society as opposed to only stemming from the views of irrational bigots). For arguments of this kind from the period, see generally ROBERT L. ALLEN, BLACK AWAKENING IN CAPITALIST AMERICA: AN ANALYTIC HISTORY 5 (1990) (agreeing with Truman Nelson's analysis: "implicit in [Nelson's analysis] are the conclusions drawn by black revolutionaries: that the American oppressive system in its totality is 'unconstitutional'; that this same system long ago decided and still maintains that oppressed blacks indeed have 'no rights which a white man is bound to respect' . . . ."); WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550–1812 (1968) (discussing the history and development of European and Anglo-American perceptions of blacks, and justifications for race-based slavery); STOKELY CARMICHAEL & CHARLES V. HAMILTON, BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA 4 (1967) ("[Institutional racism] is less overt [than individual racism], far more subtle, less identifiable in terms of *specific* individuals committing the acts. But it is no less destructive of human life. [Institutional racism] originates in the operation of established and respected forces in the society, and thus receives far less public condemnation than the first type.>").

<sup>63</sup> See Press Release, Am. Jewish Comm., Statement on Affirmative Action 1–2 (Dec. 3, 1972) (on file with Am. Jewish Comm. Library, N.Y.C.) (arguing that quotas are insufficient to solving systematic racism, and urging programs designed to help historically disadvantaged minorities).

candidates rather than those geared toward hiring or admission decisions.<sup>64</sup> The AJC also acknowledged that some tests used to measure individual merit, if not the idea of individual merit, rewarded membership in a dominant group rather than actual talent.<sup>65</sup>

These apparent contradictions made sense as part of the AJC's commitment to "true" affirmative action. The organization wanted to identify race-conscious remedial programs that would not be inconsistent with ideals of neutrality, individual merit, and equal opportunity. The quest to defend "true" affirmative action revealed the ambivalence of early affirmative-action opponents about antisubordination values or remedial programs. The movement resisted arguments that racism had infected seemingly neutral institutions and laws. In the early 1970s, however, the movement still embraced the basic idea of affirmative action as necessary and just.<sup>66</sup>

Similar arguments animated the litigation of *DeFunis v. Odegaard*, the first Supreme Court case on affirmative action in higher education.<sup>67</sup> Marco DeFunis, Jr., a Jewish man from Seattle, challenged the University of Washington Law School affirmative-action policy after being denied admission to the class of 1971.<sup>68</sup> The media portrayed the affirmative-action battle as part of the collapse of a powerful civil rights coalition, a war between blacks and Jews, between visions of the Constitution based on ending group subordination or, alternatively, on allowing individuals to prove their own merit.<sup>69</sup> For example, African-American columnist William Raspberry argued in 1972:

The fight against affirmative action programs designed to help blacks and other minorities into the American mainstream is being led by Jews. . . . And it may be that attempts at making the campuses more representative of the country are seen by Jews as attacks on their special preserve.<sup>70</sup>

The Court ultimately held that *DeFunis* was moot, since, pursuant to an order from the trial court, he had been attending the University of Washington Law School since 1971 and was soon scheduled to graduate.<sup>71</sup>

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<sup>64</sup> *Id.*

<sup>65</sup> *See id.* at 1–3 (discussing the need for truly objective tests in hiring, and acknowledging problems with allegedly objective tests in the past).

<sup>66</sup> Press Release, Am. Jewish Comm., Affirmative Action Program Statement 1 (Nov. 13, 1972) (on file with Am. Jewish Comm. Library, N.Y.C.).

<sup>67</sup> 416 U.S. 312, 312 (1974).

<sup>68</sup> *Id.*

<sup>69</sup> *See* Nina Totenberg, *Discriminating to End Discrimination*, N.Y. TIMES, Apr. 14, 1974, at 36 (“Arguments in the case are all very proper and legalistic. Yet, for whatever reason, the whole affirmative action question seems to bring out the worst in Jews and blacks, and their feelings about each other.”).

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

<sup>71</sup> *DeFunis*, 416 U.S. at 318–19.

Speaking on behalf of DeFunis's allies, the AJC maintained that affirmative action was appropriate and constitutional so long as quotas were not involved.<sup>72</sup> As Elmer Winter, the leader of the AJC, explained, "the primary goal, in our view, is the establishment of affirmative actions and processes that provide disadvantaged minorities a realistic opportunity in education and employment while avoiding the dangers of reverse discrimination."<sup>73</sup>

### B. *Bakke and the White Ethnic Revival*

Between the decisions of *DeFunis* and *Regents of the University of California v. Bakke*, the anti-affirmative-action movement changed substantially. White ethnics mobilized, contending that they suffered as serious a social disadvantage as did the people of color for whom affirmative action programs had conventionally been designed.<sup>74</sup> In major newspapers, white-male academics attacked university hiring policies that favored women and people of color.<sup>75</sup> For the first time, white males brought more than one hundred Title VII discrimination suits before the EEOC.<sup>76</sup> These activists no longer claimed to understand the true meaning of fair affirmative

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<sup>72</sup> See, e.g., Press Release, Am. Jewish Comm., News From the Comm. 1–2 (Apr. 24, 1974) (on file with Am. Jewish Comm. Library, N.Y.C.) ("The American Jewish Committee had filed [an amicus brief], charging that the University's establishment of dual standards of admission, one for whites and one for blacks, constituted a quota system and was therefore unconstitutional.").

<sup>73</sup> *Id.*

<sup>74</sup> Claims of this kind are exemplified in various articles. See, e.g., Richard Capozzola, Letter to the Editor, *Bias Against Italians*, N.Y. TIMES, Apr. 5, 1969, at 26 (expressing concerns that Italian-Americans were being overlooked for top-level appointments); Francis X. Clines, *20 Other Italian Groups Meet with State Rights Chief in Complaints of Bias*, N.Y. TIMES, June 26, 1971, at 15 (describing a meeting at which concerns regarding discrimination against Italian-Americans in promotion decisions were discussed); Michael Novak, *Black and White in Catholic Eyes*, N.Y. TIMES, Nov. 16, 1975, at 33 (exploring the tension between the black and white-ethnic Catholic populations of 1970s Boston, and commenting on how the two are more similar in terms of plight than they each recognize); Jonathan Randal, *U.S. Challenged by Polish Leader*, N.Y. TIMES, May 2, 1968, at 13 (describing how the leader of Poland's Communist party challenged the United States to prove that Polish-Americans were less discriminated against than Jews in Poland); Walter H. Waggoner, *A 'White N.A.A.C.P.' Set Up in Newark*, N.Y. TIMES, May 4, 1973, at 79 (discussing the new legal-aid service established in Newark, New Jersey for white ethnics in the area); Craig Whitney, *Italians Picket F.B.I. Office Here*, N.Y. TIMES, May 2, 1970, at 35 (explaining how the head of one of the six Mafia "families" led a picket line in front of the F.B.I. headquarters in protests of anti-Italian discrimination).

<sup>75</sup> See, e.g., Iver Peterson, *College Scored on Hiring Women*, N.Y. TIMES, Nov. 30, 1972, at 44 (describing how the efforts made to diffuse the myth that affirmative-action policies would result in reverse discrimination were failing and meeting significant resistance); Tom Wicker, *A Misplaced Anger*, N.Y. TIMES, June 30, 1974, at 19 (arguing that the anger harbored by Americans regarding implementation of affirmative-action programs is misplaced, comparing it to being angry at a "painful treatment" rather than at "the wound or illness that made it necessary"); Tom Wicker, *No Retreat Needed*, N.Y. TIMES, Jan. 14, 1975, at 33 (describing a memo written by the Office of Civil Rights of the Department of Health, Education, and Welfare that attempted to clarify the meaning of "affirmative action" requirements for schools).

<sup>76</sup> See, e.g., *U.S. to Check on Complaints of Reverse Discrimination*, N.Y. TIMES, Nov. 23, 1972, at 23 (describing how the United States had appointed an ombudsman to investigate complaints of reverse discrimination in the college acceptance process).

action. Instead, activists defined themselves—as Italians, Poles, Greeks, or Jews—as belonging to a true minority that deserved “special treatment.”<sup>77</sup>

Ian Haney López has carefully examined arguments about race as ethnicity.<sup>78</sup> He focuses on the importance of studies by sociologists Nathan Glazer and Daniel Patrick Moynihan.<sup>79</sup> Glazer and Moynihan described America not as a racially stratified society, but rather as a pluralistic place in which culturally distinct ethnic groups competed and collaborated with one another.<sup>80</sup> López is right to acknowledge the influence of this idea, and he compellingly traces its impact on later thinking about race and the Constitution.<sup>81</sup>

White ethnic identity was complex, however, and it arose because of a number of interrelated social and economic factors. What historian Matthew Frye Jacobson has called the “white ethnic revival” marked race relations in the 1960s and 1970s.<sup>82</sup> The revival manifested itself in a new national passion for genealogy and ethnic pride in art, television programming, and movies celebrating ethnic differences, in public consumption of products celebrating ethnic pride, and in a new sense of grievance among white ethnics.<sup>83</sup> Between 1967 and 1970, a variety of new ethnic organizations formed, including the American Committee for Democracy and Freedom in Greece (1967), the National Association for Irish Justice (1970), the Serbian National Committee (1968), and the Latvian Foundation (1970).<sup>84</sup> In this

<sup>77</sup> See, e.g., Capozzola, *supra* note 74, at 26 (expressing concerns about Italian-Americans being overlooked in top-level position appointments); see also Randal, *supra* note 74, at 13 (describing efforts to challenge the government to prove that Polish-Americans were less discriminated against than Polish Jews); Waggoner, *supra* note 74, at 35 (discussing the efforts to oppose discrimination against white-ethnics in the United States).

<sup>78</sup> See López, *supra* note 10, at 1006–11 (discussing the relationship between race and ethnicity and how it affects the cultural make-up of the United States).

<sup>79</sup> *Id.* at 991, 1007–10.

<sup>80</sup> *Id.* at 1008–09.

<sup>81</sup> See *id.* at 1046–51 (discussing the Supreme Court’s application of colorblind reasoning, and tracing this doctrine’s development over time).

<sup>82</sup> MATTHEW FRYE JACOBSON, *ROOTS TOO: WHITE ETHNIC REVIVAL IN POST-CIVIL RIGHTS AMERICA* 8 (2006); see also STEFANO LUCONI, *FROM PAESANI TO WHITE ETHNICS: THE ITALIAN AMERICAN EXPERIENCE IN PHILADELPHIA* 9 (2001) (describing the white ethnic movement as it pertained to Italian-Americans in the 1960s); JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* 118 (1987); JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 278 (2002) (commenting on the emergence of white-ethnic politics during the mid-to-late 1960s).

<sup>83</sup> See, e.g., JACOBSON, *supra* note 82, at 3–10 (describing a number of ways in which individuals with ethnic heritage sought to reconnect with their forgotten customs and traditions).

<sup>84</sup> See, e.g., *id.* at 28 (listing various ethnically-affiliated groups that arose during this time period). For a sample of coverage of the work done by these organizations, see *Irish Appeal Seeks Funds to Rebuild Belfast Street*, N.Y. TIMES, Jan. 26, 1970, at 20 (discussing Irish efforts to raise money to build new homes in Belfast); *Irish Group Pickets B.O.A.C.*, N.Y. TIMES, July 4, 1970, at 13 (describing the National Association for Irish Justice’s picket of a British corporation); *For Greek Democracy*, N.Y. TIMES, June 3, 1971, at 38 (describing the American Committee for Democracy and Freedom in Greece).

period, moreover, ethnic consciousness dramatically increased. For example, a study commissioned by the United States Census in the early 1970s found that a million more people identified as Polish-American than had a few years before.<sup>85</sup>

The white ethnic revival partly reflected intense nationalist sentiment provoked by Soviet intervention in Eastern and Central Europe, the “Troubles” in Ireland, and the Israeli Wars of 1967 and 1970.<sup>86</sup> The revival borrowed from the rhetoric and the symbolism of the civil-rights movement. As civil-rights activists invoked “Black pride,” white ethnics wore tam-o’-shanter hats or waved Italian or Irish flags.<sup>87</sup>

White ethnics also claimed to have been victimized by past discrimination on the part of a broader Anglo-Saxon Protestant majority. For example, the Center for Urban Ethnic Affairs, founded in New Jersey in 1978, was designed to “combat discrimination against ‘white ethnics’ at middle- and upper-management jobs.”<sup>88</sup> The organization’s director explained to the *New York Times*: “We want no slowdown in the advancement of blacks and browns, but we don’t want their advancement at the expense of white ethnics.”<sup>89</sup>

Such claims made some headway. In 1971, the Department of Health, Education, and Welfare (HEW) offered some assistance to white ethnics but stopped short of instituting the timetables or hiring goals available to people of color.<sup>90</sup> White ethnic grievance also played out in the courts. For example, Phillip DiLeo, a rejected applicant to the University of Colorado Law School, argued in court that affirmative-action programs should give equal consideration to African-American and Italian-American minority members.<sup>91</sup>

By the mid-1970s, a wide array of white ethnic organizations had come out against affirmative action. These activists demanded a new legal and social definition of a disadvantaged minority. For these activists, “minorities” included any distinct group that had experienced past discrimination and continued to suffer from its legacy. For example, in 1977, the *Jewish Advocate*, a magazine in the New England area, complained that

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<sup>85</sup> JACOBSON, *supra* note 82, at 48.

<sup>86</sup> *See id.* at 26.

<sup>87</sup> *See, e.g.,* John Kifner, *6000 in Boston Protest Bust*, N.Y. TIMES, Dec. 16, 1974, at 19. The antibusing movement at times used a kind of hybrid flag, combining the American flag with elements of the Italian and Irish flags. *See, e.g.,* John Kifner, *2 Boston Rues at Odds on Busing*, N.Y. TIMES, May 19, 1975, at 19.

<sup>88</sup> Waggoner, *supra* note 74, at 35.

<sup>89</sup> *Id.*

<sup>90</sup> *See, e.g.,* DESLIPPE, *supra* note 28, at 92.

<sup>91</sup> *See* Univ. of Colo. v. DiLeo, 540 P.2d 486, 492–93 (Colo. 1978). The DiLeo court ultimately held that the applicant lacked standing to challenge the constitutionality of the University’s affirmative-action policy, since he lacked the qualifications to have been admitted had no such program existed. *Id.* at 489–90.

existing affirmative action programs “exclude[d] the Jewish community and other white minority groups in this country.”<sup>92</sup> Other white ethnic groups and conservative activists took up similar claims. As right-wing activist Pat Buchanan argued in 1977, “the fact is that Eastern European and Mediterranean ethnic groups really aren’t much further up the executive ladder than non-whites.”<sup>93</sup>

When *Bakke* came before the Court, white ethnics in the anti-affirmative-action movement focused on similar efforts to contest the definition of minority status. *Bakke* involved a challenge to the affirmative-action program in place at the University of California-Davis Medical School.<sup>94</sup> Davis had a policy of admitting “special applicants” under provisions either for members of “minority groups” (such as African-Americans) or for those who were “economically and/or educationally disadvantaged.”<sup>95</sup> While many Caucasians had applied under this second provision, none had been successful.<sup>96</sup> The Medical School rejected the application of Alan Bakke, an American of Norwegian descent, and he sued, arguing that Davis’s affirmative-action program violated the Equal Protection Clause of the Constitution.<sup>97</sup>

Amicus briefs in *Bakke* often stressed that affirmative-action programs should protect white ethnic minorities as well as non-white ones. For example, an amicus brief submitted on behalf of the AJC and other white ethnic groups explained:

Nor can all whites by any stretch of the imagination properly be considered “advantaged.” Rarely, if ever, for instance, have whites from poverty-stricken Appalachia been singled out as a group for preferential educational treatment. Nor has favoritism been bestowed on members of other ethnic groups, which can credibly claim to have been subject to generalized societal discrimination—Italians, Poles, Greeks, Slavs—as the result of which some people bear the economic and cultural scars of prejudice.<sup>98</sup>

The Young Americans for Freedom (YAF), an anticommunist, socially conservative group, raised a similar challenge to the definition of a “minority” deserving of affirmative action under the Fourteenth

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<sup>92</sup> Patrick Buchanan, *Reverse Discrimination Advocates Must Go*, HUM. EVENTS, Nov. 15, 1975, at 9 (quoting the *Jewish Advocate*).

<sup>93</sup> *Id.*

<sup>94</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277 (1978).

<sup>95</sup> *Id.* at 274.

<sup>96</sup> *Id.* at 276.

<sup>97</sup> *Id.* at 276–78.

<sup>98</sup> Brief for the American Jewish Committee as Amici Curiae at 41–42, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811).

Amendment. “Jews, Poles, Italians, Japanese, [and] Chinese are all part of the majority now,” the YAF contended.<sup>99</sup>

These dissimilar groups have each endured past discrimination. Who but the most sheltered could avoid hearing words such as Kike, Dago, Wop, Polack, Chink, Shanty Irish, and Jap. Yet what protection or special treatment is accorded these groups who have in the past and still suffer the effects of overt discrimination?<sup>100</sup>

Anti-affirmative-action understandings of “minority” status informed the arguments about diversity and other proposed justifications for affirmative action offered in Justice Powell’s opinion in *Bakke*. The University had argued that Alan Bakke’s equal-protection argument lacked merit because whites had not suffered the history of discrimination and subordination that defined traditionally recognized minorities.<sup>101</sup> In rejecting this claim, Powell took up anti-affirmative-action claims about the difficulty of defining “minority” status.<sup>102</sup> “[T]he United States,” Powell explained, “ha[s] become a nation of minorities. Each had to struggle—and some struggle still—to overcome the prejudices not of a monolithic majority, but of a ‘majority’ composed of various minority groups . . . .”<sup>103</sup>

In Powell’s view, minority status reflected a history of past discrimination rather than a particular, entrenched, deeply rooted racial hierarchy, so white ethnics could “lay claim to a history of prior discrimination” as much as could people of color.<sup>104</sup> And if everyone who had experienced past discrimination could benefit from special preferences, “a new minority of white Anglo-Saxon Protestants” would be created and made vulnerable to discrimination.<sup>105</sup>

Courts could not competently determine which groups had suffered more prejudice, Powell asserted.<sup>106</sup> Prejudice itself would be ever-changing and that much harder to measure. “The kind of variable sociological and

<sup>99</sup> Brief for the Young Americans for Freedom et al. as Amicus Curiae at 10, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811).

<sup>100</sup> *Id.*

<sup>101</sup> See *Bakke*, 438 U.S. at 287–88 (describing the state’s argument that strict scrutiny was inappropriately applied by the lower courts in *Bakke* because such scrutiny “should be reserved for classifications that disadvantage ‘discrete and insular minorities’” (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938))).

<sup>102</sup> See *id.* at 288 (describing the respondent’s argument that the lower courts in *Bakke* correctly rejected strict scrutiny on the grounds that minority status should not be restricted to the *Carolene* “discrete and insular” standard).

<sup>103</sup> *Id.* at 292 (footnotes omitted).

<sup>104</sup> *Id.* at 295.

<sup>105</sup> *Id.* at 295–96.

<sup>106</sup> See *id.* at 296–97 (finding no feasible “principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not”).

political analysis needed to produce . . . rankings [of prejudice],” Powell concluded, “simply does not lie within the judicial competence . . . .”<sup>107</sup> *Bakke* fractured the Court. Two separate four-justice factions joined different parts of Powell’s opinion, which held that while diversity was a compelling state interest and some affirmative-action programs passed constitutional muster, the UC Davis policy went too far.<sup>108</sup>

Given the deep divide on the Court, the reach of *Bakke* remained unclear until the decision of *Grutter* decades later. Just the same, the opinion represented an important step for opponents of affirmative action. Powell’s view of Alan Bakke reflected his agreement with the definition of “minority” status proposed by anti-affirmative-action activists—Bakke bore “no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”<sup>109</sup> Indeed, Bakke himself could soon be (or already was) a member of a victimized minority.<sup>110</sup> Remedial justifications for affirmative action did not make sense when one believed that minority status was ever-changing and that people of color had no special claim to it.

### C. Reverse Discrimination: Opposition to Affirmative Action on the Right

Between 1961 and 1980, opponents of affirmative action often did not take issue with the basic premise that the State should work to address racial subordination by offering special, race-conscious assistance to the disadvantaged.<sup>111</sup> Instead, opponents of affirmative action took issue with what “true” affirmative action entailed or who belonged to “true minorities.”<sup>112</sup> By the early 1980s, however, the challenge posed by the movement against affirmative action had deepened. The anti-affirmative-action movement of the 1980s firmly established itself as part of the political

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<sup>107</sup> *Id.*

<sup>108</sup> *See id.* at 271–272 (summarizing Powell’s holding that affirmed the lower court ruling that the UC Davis policy amounted to unlawful discrimination, but reversed the lower court ruling that enjoined the University from considering race in its admissions policies). Chief Justice Burger, along with Justices Stewart, Rehnquist, and Stevens, concurred in the holding affirming the unconstitutionality of the UC Davis special admissions program. *Id.* Justices Brennan, White, Marshall, and Blackmun concurred in the holding reversing the injunction imposed by the California courts. *Id.*

<sup>109</sup> *Id.* at 310.

<sup>110</sup> *See id.* at 295–96 (stating Justice Powell’s theory that members of the white majority could soon be “a new minority” as a result of affirmative action).

<sup>111</sup> *See, e.g.*, TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 119 (2004) (explaining that the Nixon administration, while opposed to racial quotas, generally supported the goal of increasing economic opportunity for disadvantaged minorities).

<sup>112</sup> *See, e.g.*, W. AVON DRAKE & ROBERT D. HOLSWORTH, *AFFIRMATIVE ACTION AND THE STALLED QUEST FOR BLACK PROGRESS* 19 (1996) (summarizing the conservative argument that affirmative action disproportionately benefits middle class members of minority groups at the expense of the “truly disadvantaged”).

right, and different claims against affirmative action took center stage.<sup>113</sup> Instead of challenging the definition of “minority” status, opponents began stressing that affirmative action itself represented a pernicious form of “reverse discrimination” against whites.<sup>114</sup> For the first time, opponents of affirmative action denied the existence of racial subordination, and argued that racism no longer made a difference to American society.<sup>115</sup> In a post-racial society, affirmative action became both unnecessary and discriminatory.

As the YAF involvement in *Bakke* would suggest, conservatives had opposed affirmative action for the better part of a decade. Since the early 1970s, neoconservative commentators, such as Irving Kristol and Norman Podhoretz, had endorsed a vision of colorblind constitutionalism.<sup>116</sup> Perhaps the most prominent conservative spokesman for colorblindness was Thomas Sowell, an African-American economist who pioneered arguments that affirmative action actually harmed the disadvantaged minorities it was intended to aid.<sup>117</sup> Just the same, before the late 1970s, “[c]olorblind liberals were at the helm of anti-affirmative action efforts.”<sup>118</sup>

By the end of the decade, however, the involvement of the New Right in opposing affirmative action became more systematic, organized, and intense. Leaders of the New Right claimed to have risen from the ashes of the Watergate scandal and from concerns with the Nixon-Ford administration.<sup>119</sup> One of the orchestrators of this movement was Paul Weyrich, a cofounder of the Heritage Foundation, a conservative think tank,

<sup>113</sup> See *id.* at 16 (identifying conservative opposition to affirmative action as a key enabler of Republican party’s ability to increase its advantage among white voters in the 1970s and 1980s, and summarizing the primary ways in which anti-affirmative-action activists evolved their arguments during that time).

<sup>114</sup> See, e.g., ANDERSON, *supra* note 111, at 164 (reviewing the 1980 G.O.P. platform, which criticized affirmative action programs that “exclude some individuals in favor of others”). Ronald Reagan echoed this argument during his first news conference as president, in which he stated his belief that “quotas existed in the U.S. for the purpose of discrimination.” *Id.* at 165.

<sup>115</sup> See, e.g., DRAKE & HOLSWORTH, *supra* note 112, at 18 (summarizing contemporary conservative arguments that affirmative action was premised on faulty assumptions, because economic disparities were attributable to factors other than racism); ANDERSON, *supra* note 111, at 166 (identifying the beginning of the Reagan administration as the first time a presidential administration signaled a resistance to affirmative action by advancing colorblindness).

<sup>116</sup> See, e.g., DESLIPPE, *supra* note 28, at 71–72, 76–77 (identifying prominent “neoconservatives,” such as Kristol and Podhoretz, who opposed affirmative action because it threatened “colorblind notions of merit and talent”). The YAF also publicized several arguments against affirmative action in the mid-to-late 1970s. See, e.g., Walter Williams, *Racial Discrimination and the Law*, NEW GUARD, Jan. 1978, at 6–8; Clifford White, *The New Racism*, NEW GUARD, Dec. 1976, at 18–19.

<sup>117</sup> See, e.g., DESLIPPE, *supra* note 28, at 76 (describing how Sowell’s career experiences informed his opposition to affirmative action and made him a “powerful messenger for the right’s argument” on colorblindness).

<sup>118</sup> *Id.* at 77.

<sup>119</sup> Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates After Roe v. Wade, 1973–1980*, 87 CHL-KENT L. REV. 571, 588 (2012).

and the Committee for the Survival of a Free Congress (CSFC), a group dedicated to electing social conservatives to Congress.<sup>120</sup>

Weyrich saw his mission as the creation of a grassroots, politically pragmatic Right, a complement to the intellectuals who had dominated conservatism. He explained to the press in November 1977: “Conservatives have been led by an intellectual movement but not a practical movement until now . . . . We [now] talk about issues people care about, like gun control, abortion, taxes, and crime.”<sup>121</sup>

Weyrich’s organizations provided valuable training and money to fledgling New Right causes: by 1978, the CSFC and other conservative political action committees, including the National Conservative Political Action Committee (NCPAC), had raised more than \$3.5 million for conservative candidates.<sup>122</sup> While Weyrich provided political strategy for these groups, Richard Viguerie and his direct-mail organization offered lobbying and fundraising services.<sup>123</sup>

The New Right became interested in affirmative action as a “wedge” issue partly because of its connection to busing and desegregation. Following the decision of *Green v. County School Board of New Kent County*<sup>124</sup> in 1968, the Supreme Court and lower courts embraced busing as a tool used to desegregate schools.<sup>125</sup> In 1971, the Nixon administration

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<sup>120</sup> On Weyrich’s role in the Heritage Foundation and the CSFC, see GREGORY SCHNEIDER, *THE CONSERVATIVE CENTURY: FROM REACTION TO REVOLUTION* 125 (2009) (describing how Weyrich supported conservative policy).

<sup>121</sup> Richard Boerth et al., *The New Activists*, *NEWSWEEK*, Nov. 7, 1977.

<sup>122</sup> See Chip Berlet, *The New Political Right in the United States: Reaction, Rollback, and Resentment*, in *CONFRONTING THE NEW CONSERVATISM: THE RISE OF THE RIGHT IN AMERICA* 83 (Michael Thompson ed., 2007) (explaining Weyrich’s role in providing for and advocating for New Right causes); DANIEL K. WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 169 (2d ed., 2012) (stating that Weyrich significantly contributed to the campaigns of conservative candidates); ALAN CRAWFORD, *THUNDER ON THE RIGHT: THE NEW RIGHT AND THE POLITICS OF RESENTMENT* 70 (1980) (describing how Weyrich’s committee, the Survival of a Free Congress, largely funded conservative candidates).

<sup>123</sup> On Viguerie’s direct-mail services, see SARA DIAMOND, *SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT* 58 (1989) (explaining Viguerie’s new approach to lobbying through direct mail); DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THE THINK TANKS* 167 (1993) (describing Viguerie as “the most famous New Right practitioner[] of direct mail . . . rais[ing] millions of dollars for conservative[s]”).

<sup>124</sup> 391 U.S. 430, 439–40 (1968).

<sup>125</sup> On the use of busing as a remedy in desegregation cases decided between *Green* and *Milliken v. Bradley*, 418 U.S. 717 (1974), see RICHARD PRIDE & DAVID WOODWARD, *THE BURDENS OF BUSING: THE POLITICS OF DESEGREGATION IN NASHVILLE, TENNESSEE* 244 (1995) (stating courts saw busing as a useful tool to help the desegregation process); CHRISTINE ROSELL, *SCHOOL DESEGREGATION IN THE 21ST CENTURY* 45–46 (2006) (providing examples of forced busing and the Supreme Court’s approach to desegregation).

almost immediately made busing a political issue, forbidding use of federal funds for the purpose.<sup>126</sup>

By the mid-1970s, the antibusing movement had grown nationally. One related organization, the National Action Group, sponsored a constitutional amendment that would end “forced busing.”<sup>127</sup> The movement remained the most visible in Boston, where racial violence exploded in 1974.<sup>128</sup> In the next five years, busing-related fire bombings took place in East and South Boston.<sup>129</sup> During a football game, two white students shot and paralyzed a black classmate.<sup>130</sup> Major antibusing protests spread to cities like Chicago and Nashville.<sup>131</sup>

Racial prejudice certainly animated a good deal of antibusing activism. The movement’s arguments were broader, however. In Boston and Chicago, for example, protesters stressed their resentment of judicial tyranny<sup>132</sup> and of an ever larger and more interventionist federal government that used “white children . . . as pawns.”<sup>133</sup> Many members of the antibusing movement were often poor or working-class mothers who, as the *New York Times* put it in 1979, felt “that they [had] no control over their future and the future of their neighborhoods.”<sup>134</sup>

For the New Right, the connection between busing and affirmative action was obvious. Both involved the meddling of liberal bureaucrats who did not believe in the free market, who supported judicial activism, who did not respect parental rights, and who unnecessarily victimized white children.<sup>135</sup> “Conservatives cannot become the dominant political force in

<sup>126</sup> See RONALD FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S* 61–62 (1991) (illustrating that the Nixon administration played a significant role in busing).

<sup>127</sup> *Busing Protestors Reach Hills Midway on a March to Capital*, N.Y. TIMES, Apr. 2, 1972, at 23.

<sup>128</sup> See generally FORMISANO, *supra* note 126; SUSAN E. EATON, *THE OTHER BOSTON BUSING STORY: WHAT’S WON AND LOST ACROSS THE BOUNDARY LINE* (2001); STEVEN J. L. TAYLOR, *DESEGREGATION IN BOSTON AND BUFFALO: THE INFLUENCE OF LOCAL LEADERS* (1998).

<sup>129</sup> See Edward Schumacher, *School Violence in Boston Reflects Deep-Seated Racial Animosity*, N.Y. TIMES, Oct. 22, 1979, at A16 (describing how court-ordered busing led to racial tension and violence throughout the area).

<sup>130</sup> See *id.* (providing an example of racial violence during the antibusing movement).

<sup>131</sup> On protests in Chicago, see Douglas Kneeland, *Both Sides in Busing Fight Charge Chicago Mayor Lacks Leadership*, N.Y. TIMES, Sept. 19, 1977, at 16 (describing the atmosphere and racial tension in Chicago); see also PRIDE & WOODWARD, *supra* note 125 at 71 (explaining how the antibusing movement created racial tension and protests in Nashville).

<sup>132</sup> See John Kifner, *6000 in Boston Protest Busing*, N.Y. TIMES, Dec. 16, 1974, at 19 (noting that members of the Boston community saw the busing movement as an act of judicial tyranny).

<sup>133</sup> Kneeland, *supra* note 131, at 16.

<sup>134</sup> Schumacher, *supra* note 129, at A16; see also FORMISANO, *supra* note 126, at 172 (arguing that the antibusing movement “drew upon a widespread sense of injustice, unfairness, and deprivation of rights”).

<sup>135</sup> For articulations of this perspective, see, for example, FORMISANO, *supra* note 126, at 188; JEROME L. HIMMELSTEIN, *TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM* 83 (1993) (discussing the New Right’s list of issues).

America,” Viguier argued, “until we stress the issues of concern to ethnic and blue-collar Democrats, born-again Christians, and pro-life Catholics and Jews. Some of these are abortion, busing, pornography, traditional Biblical values, and quotas.”<sup>136</sup>

The New Right had political incentive to tie affirmative action to a larger conservative agenda. Significantly, in the mid-1970s, changes to party politics created a perfect opportunity for opponents of affirmative action to make their cause a core part of the New Right platform. In order to be effective, opponents of affirmative action had to work with allies in the Republican Party. At the same time, the Democratic Party firmed up its support for affirmative action, denying influence to groups such as the AJC that opposed some affirmative-action programs.

In the early 1970s, it was far from clear that the Democratic Party would take this position. In 1975, the House of Representatives voted on proposed legislation sponsored by Representatives Henry Waxman (D-CA) and James Scheuer (D-NY), stating: “No person shall, on the basis of race, color, national origin, or sex, be excluded from or admitted to participation in, . . . or be subjected to discrimination under any program.”<sup>137</sup> Between 1974 and 1980, however, the positions of the Republican and Democratic Parties diverged.

Whereas the 1980 Democratic platform asserted that “[a]n effective affirmative action program is an essential component of our commitment to expanding civil rights protections,” the Republican platform argued that “equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory.”<sup>138</sup>

By 1980, the New Right had also established a new central objection to affirmative action. Organizations like the AJC primarily contested the meaning of true affirmative action. The AJC had conceded that racial minorities deserved special assistance, nonetheless insisting that judging people exclusively by individual merit was both constitutionally necessary and effective in reducing the impact of past discrimination.<sup>139</sup> During the *Bakke* litigation, white ethnic groups primarily challenged the definition of a deserving minority.

By 1980, the New Right had rejected the need for any remedial program for any minority group. Instead, New Right activists argued that

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<sup>136</sup> HIMMELSTEIN, *supra* note 135, at 83.

<sup>137</sup> DESLIPPE, *supra* note 28, at 188.

<sup>138</sup> Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 354 (1989).

<sup>139</sup> DESLIPPE, *supra* note 28, at 130.

affirmative-action programs themselves represented racist discrimination against whites. In this account, affirmative action was no longer necessary because “discrimination [had] been effectively abolished in this country.”<sup>140</sup> At the same time, the New Right contended that the free market would address any remaining discrimination. By contrast, the wrongful “presumption” of affirmative action was “that the market will not, for the foreseeable future, operate fairly, and that racial equality requires the brokerage of progressive-minded bureaucrats.”<sup>141</sup>

If racial discrimination was no longer a major issue, remedial programs for blacks represented racial discrimination against whites. As the *National Review* argued in 1986:

Affirmative action, as it is currently being used, is quite simply wrong—wrong because it is anti-white. It seeks to wipe out the effects of past discrimination through . . . discrimination. A white male American would be justified in judging that the Supreme Court, in upholding the constitutionality of reverse discrimination, has nullified the social contract.<sup>142</sup>

Between 1980 and 1987, the New Right worked to convince the Reagan administration to oppose affirmative action. Reagan had a long track record of opposing race-conscious remedies, and after his election, Edwin Meese III, one of Reagan’s chief advisors, encountered opposition to efforts to undo federal support for affirmative action. In May 1981, for example, one of Meese’s allies complained that “careerist ideologues in the Civil Rights Division [of the Justice Department]” had endorsed busing and pushed “through decisions adverse to Reagan policies.”<sup>143</sup>

Disagreement within the administration became news when Reagan made a statement at a press conference about *United Steelworkers v. Weber*, a 1979 Title VII case in which the Supreme Court held that a white factory worker was not entitled to enroll in a training program for black workers set up under a voluntary union-management agreement.<sup>144</sup> When first asked about the case, Reagan had stated that he would approve of such programs so long as they were voluntary.<sup>145</sup> Meese and other opponents of affirmative

<sup>140</sup> George Gilder, *The Myths of Racial and Sexual Discrimination*, NAT’L REV., Nov. 14, 1980, at 1381.

<sup>141</sup> *The Real Commitment*, NAT’L REV., Nov. 27, 1981, at 1395. For an earlier version of this argument, see, for example, Walter Williams, *Racial Discrimination and the Law*, NEW GUARD, Jan. 1978.

<sup>142</sup> *Does America Hate Whites?*, NAT’L REV., Aug. 1, 1986, at 15.

<sup>143</sup> Ed Harper to Edwin Meese III and Jim Baker (May 5, 1981), in The Edwin Meese III Files, OA 9447, Ronald Reagan Presidential Library, Simi Valley, California.

<sup>144</sup> 443 U.S. 193, 197, 199, 209 (1979).

<sup>145</sup> John Herbers, *Reagan’s Changes on Rights Are Starting to Have Impact*, N.Y. TIMES, Jan. 24, 1982, at A40; Robert Pear, *President Opposes Quotas in Affirmative Action*, N.Y. TIMES, Jan. 4, 1982, at A1.

action quickly acted to correct Reagan's gaffe, and the White House issued a statement stressing Reagan's belief that the case had been "wrongly decided."<sup>146</sup>

The press conference made clear that civil-rights issues were a public relations problem for the administration. But in the short term, Meese and his allies seemed to have their way without popularizing colorblindness claims. Between 1982 and 1983, the Reagan Justice Department submitted amicus briefs arguing that affirmative-action hiring programs in Memphis and Detroit were impermissibly discriminatory, and Reagan made three new appointments to the United States Commission on Civil Rights, undercutting opposition to his policies.<sup>147</sup>

After the 1984 election, however, new internal conflict emerged. In August 1985, Meese, the new attorney general, went to work behind the scenes pushing Reagan to endorse a new executive order ending racial set-asides in hiring.<sup>148</sup> That fall, Meese called a meeting to organize support for a full-scale retreat from federal involvement in affirmative action.<sup>149</sup> During a heated exchange, Bill Brock, the secretary of labor in the Reagan administration, led a faction that favored leaving existing employment-related affirmative-action programs in place, arguing that these initiatives worked well and were necessary to demonstrate the administration's concern about civil rights.<sup>150</sup> When those at the meeting could not reach a consensus, those present produced an option paper outlining radically different strategies for dealing with affirmative action in hiring.<sup>151</sup>

In trying to popularize his positions on affirmative action, Meese took his case to the media. The claims he forged linked anxieties about reverse discrimination and antiwhite bias to constitutional arguments about the importance of original intent and anticlassification values.<sup>152</sup> He linked affirmative action to de jure segregation, suggesting that "a new version of the separate-but-equal doctrine [was] being pushed upon us."<sup>153</sup> Meese primarily stressed that the Thirteenth, Fourteenth, and Fifteenth

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<sup>146</sup> Herbers, *supra* note 145, at A1.

<sup>147</sup> See, e.g., *Just How Fair Is Affirmative Action*, N.Y. TIMES, Dec. 11, 1983, at 4 (discussing the brief for "the Detroit case" written by Assistant Attorney General William Bradford Reynolds in which he asserts that there was discrimination). For the holding in the Memphis case, see *Firefighters Local Union v. Stotts*, 467 U.S. 561, 565 (1984) (invalidating a consent decree requiring minority hiring on the part of the Memphis Police Department).

<sup>148</sup> George de Lama, *Two Key Aides Plotted to End Quotas*, CHI. TRIB., Aug. 16, 1985, at C1.

<sup>149</sup> See, e.g., Ronald J. Ostrow, *Civil Rights Leaders Accused of Advocating Discrimination*, L.A. TIMES, Nov. 1, 1985, at 14 (reporting the revision by eliminating any quota requirement).

<sup>150</sup> See *id.* (discussing the Reagan administration's attempt to repudiate enforcement policies set forth by both Democratic and Republican administrations).

<sup>151</sup> See *id.* (discussing the conflicting views on how to best achieve equality).

<sup>152</sup> Philip Shenon, *Meese Sees Racism in Hiring Goals*, N.Y. TIMES, Sept. 18, 1985, at A16.

<sup>153</sup> *Id.*

Amendments made the Constitution “officially colorblind.”<sup>154</sup> As he stated in a widely reported speech, “[t]he fact that discrimination occurred in the past provides no justification for engaging in discriminatory conduct.”<sup>155</sup> By February 1986, Reagan took a clearer position, siding with Meese and calling for a colorblind society where nothing is to be done to or for anyone because of race.<sup>156</sup>

As Reva Siegel has shown, legal scholars, sociologists, and members of the Supreme Court had spotlighted anticlassification arguments since the decision of *Brown*.<sup>157</sup> Meese and Reagan fused these arguments with popular anxieties about antiwhite “discrimination” articulated by the New Right.<sup>158</sup> The administration had developed claims against affirmative action that brought together the New Right’s arguments about reverse discrimination, judicial activism, and original intent.<sup>159</sup>

Between 1989 and 1994, Justices Antonin Scalia and Clarence Thomas (nominated by Presidents Reagan and George H. W. Bush, respectively) emerged as strong defenders of this particular vision of colorblindness.<sup>160</sup> In 1989, in *City of Richmond v. J. A. Croson Co.*,<sup>161</sup> the Court struck down the Minority Business Utilization Plan adopted by the city of Richmond. The plan required at least 30 percent of prime subcontracts to be given to minority-owned business entities.<sup>162</sup> Writing in concurrence, Scalia echoed Meese’s claims, stating that “benign racial quotas have individual victims.”<sup>163</sup> Scalia conceded that, in American society, blacks had, in the past, “suffered discrimination immeasurably greater than any . . . other racial groups.”<sup>164</sup> Nonetheless, racism and racial classifications no longer made enough of a difference to justify discrimination against whites. As Scalia explained,

Racial preferences appear to “even the score” (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* (discussing the Reagan administration’s stance against racial employment quotas).

<sup>157</sup> *See generally* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004) (examining the role of constitutional principle and constitutional politics in discussions of *Brown* today).

<sup>158</sup> Shenon, *supra* note 152, at A16.

<sup>159</sup> *Id.*

<sup>160</sup> Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 988 (2012).

<sup>161</sup> 488 U.S. 469 (1989).

<sup>162</sup> *Id.* at 511.

<sup>163</sup> *Id.* at 527 (Scalia, J., concurring) (internal quotation marks omitted).

<sup>164</sup> *Id.*

that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.<sup>165</sup>

Because racial prejudice against blacks was no longer institutionalized or widespread, Scalia suggested, colorblindness was fair to everyone, while race-conscious remedies represented discrimination against whites.<sup>166</sup>

Scalia made this point clearer in *Adarand Constructors v. Peña*, a 1995 case involving federal statutory and regulatory incentives for contractors to award subcontracts to “socially and economically disadvantaged individuals.”<sup>167</sup> Confirming that strict scrutiny applied to all racial classifications, *Adarand* held that racial preferences at issue could not stand without satisfying strict scrutiny.<sup>168</sup> Scalia’s concurring opinion again endorsed a vision of colorblindness.<sup>169</sup> In the absence of a contemporary racial hierarchy, Scalia argued, race-conscious remedies “reinforce[d] and preserve[d] for future mischief the way of thinking that produced race slavery, race privilege and race hatred.”<sup>170</sup>

Similar arguments for colorblindness dominated anti-affirmative-action activism throughout the 1990s. In this period, veterans from the Reagan and George H. W. Bush administrations formed highly organized, conservative, and professional organizations opposed to affirmative action. Organizations of this kind included the Center for Equal Opportunity (the Center), the Center for Individual Rights (CIR), and Judicial Watch, Inc. (JWI).

The Center was founded in 1995 by Linda Chavez, the former head of the United States Commission on Civil Rights.<sup>171</sup> Chavez led the Center along with Roger Clegg, a former Assistant Attorney General who served in the Reagan and George H. W. Bush administrations.<sup>172</sup> The Center set out to be a conservative think tank focused exclusively on racial issues, and its work reflected the influence of arguments against affirmative action forged

<sup>165</sup> *Id.* at 528.

<sup>166</sup> *See id.* (arguing that any race-neutral remedy program aimed at the disadvantaged would provide a disproportional benefit to blacks).

<sup>167</sup> 515 U.S. 200, 204–07 (1995).

<sup>168</sup> *Id.* at 227, 238–39.

<sup>169</sup> *Id.* at 239 (Scalia, J., concurring).

<sup>170</sup> *Id.* For discussion of Justice Thomas’s views on affirmative action, see Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 143, 144, 148 (2005).

<sup>171</sup> Susan Baer, *Confirmation Fight Looms for Conservative Chavez Civil Rights, Labor and Women’s Groups Eye Bush Nominee*, BALT. SUN, Jan. 5, 2001, at 1A; *see also* Marco della Cava, *Chavez: All Should Fit Same Standards*, U.S.A. TODAY, May 1, 1995, at 6D (presenting Chavez’s views on why affirmative action is harmful); William Goldschlag, *Affirmative Action*, N.Y. DAILY NEWS, June 18, 1995, at 20 (discussing the Center’s approach to challenging affirmative action); Elaine Woo, *Belief in Meritocracy: An Equal-Opportunity Myth*, L.A. TIMES, Apr. 30, 1995, at A1 (articulating Chavez’s belief that the constitutional prohibition on racial discrimination “includes reverse discrimination”).

<sup>172</sup> Roger Clegg, CENTER FOR EQUAL OPPORTUNITY (Dec. 21, 2011, 10:30 PM), <http://www.ceousa.org/about-ceo/staff/511-roger-clegg> [<http://www.ceousa.org/about-ceo/staff/511-roger-clegg>].

in the Reagan administration.<sup>173</sup> Chavez stressed original-intent claims, reasoning: “The Constitution forbids discrimination on the basis of race. That includes reverse discrimination.”<sup>174</sup> Clegg described himself as a victim of past reverse discrimination, and he stressed that it was “wrong to discriminate against people because of their skin color and their ancestors’ country of origin.”<sup>175</sup>

While the Center studied and criticized affirmative-action programs, the CIR was a single-issue, public-interest litigation group founded in 1989 by conservative attorneys Michael McDonald and Michael Greve.<sup>176</sup> As early as 1996, the CIR won a constitutional challenge to the affirmative-action policy used by the University of Texas, and by the late 1990s, the group led a full-scale attack on affirmative action in higher education.<sup>177</sup> McDonald particularly objected to claims that racial diversity was important to higher education.<sup>178</sup> True diversity, he argued, came from one’s beliefs and experiences. By contrast, “[m]ulticulturalism [was] just people who look different but think the same.”<sup>179</sup>

A final group, JWI, was founded in 1994 by conservative attorney Larry Klayman.<sup>180</sup> The group first attracted attention by virtue of its legal attacks on the Clinton administration in the 1990s.<sup>181</sup> By the end of the decade, conservative attorney Clint Bolick took a leading role in JWI.<sup>182</sup> Another former Reagan administration official, Bolick became a passionate opponent of affirmative action during his time interning at Senator Orrin Hatch’s (R-

<sup>173</sup> See, e.g., Woo, *supra* note 171, at A1 (articulating Chavez’s anti-affirmative-action stance).

<sup>174</sup> *Id.*

<sup>175</sup> John M. Biers, *Conservative Shock Troops Take on Racial Preferences*, CHRISTIAN SCI. MONITOR, Dec. 31, 1997, at 3; Roger Clegg, *Goodbye Quotas and Preferences*, WASH. TIMES, June 2, 1997, at A17.

<sup>176</sup> Biers, *supra* note 175, at 3; Clegg, *supra* note 175, at A17; *A Brief History of CIR*, THE CTR. FOR INDIVIDUAL RTS., <https://www.cir-usa.org/history/> [<https://perma.cc/P2SL-85DT>] (last visited Sept. 6, 2017).

<sup>177</sup> *Group Threatens Colleges Over Affirmative Action*, RICH. TIMES DISPATCH, Jan. 27, 1999, at A14; David Segal, *Putting Affirmative Action on Trial*, WASH. POST, Feb. 20, 1998, at A1.

<sup>178</sup> Biers, *supra* note 175, at 3.

<sup>179</sup> *Id.*

<sup>180</sup> Toni Locy, *Group Sues for Access to Clinton Legal Fund*, WASH. POST, Aug. 5, 1994, at A18. See Greg Pierce, *Inside Politics*, WASH. TIMES, May 15, 2003, at A5 (discussing JWI’s goals and legal strategies).

<sup>181</sup> See Toni Locy, *Conservative Group Seeks Access to White House and DNC Data*, WASH. POST, Feb. 4, 1997, at A4 (following JWI’s attempts to subpoena White House and DNC records regarding donors and trade missions); Locy, *supra* note 180, at A18 (reporting on JWI’s lawsuit against Hillary Clinton and the Clinton legal fund); *Clinton Defense Fund Hit with a Federal Suit*, CLEV. PLAIN DEALER, Aug. 5, 1994, at 6A (also summarizing JWI’s lawsuit against Hillary Clinton and “the fund designed to pay the First Family’s legal bills”).

<sup>182</sup> Biers, *supra* note 175, at 3.

UT) office.<sup>183</sup> During the litigation of *Bakke*, Bolick became convinced that Bakke was “a modern-day Rosa Parks.”<sup>184</sup>

Starting in the mid-1990s, the newly professionalized anti-affirmative-action movement made its public debut. Perhaps its best-known efforts in this period involved campaigns for anti-affirmative-action initiatives in states like California.<sup>185</sup> In 1996, Ward Connerly, an African-American member of the University of California board of regents, led the California campaign for Proposition 209, a measure prohibiting discrimination or preference on the basis of race.<sup>186</sup> Connerly worked to launch similar campaigns in Colorado, Michigan, and Washington.<sup>187</sup>

By the end of the decade, the movement turned to the courts in advancing an attack on affirmative action in higher education. The CIR held a news conference in which it questioned the constitutionality of the admissions policies in place at many universities.<sup>188</sup> The Center gathered data from schools regarding “grades and test scores as well as family income, graduation rates, and native language” and compiled state reports.<sup>189</sup> The CIR, in turn, initiated lawsuits and created a handbook for applicants interested in suing universities that had adopted affirmative-action programs.<sup>190</sup>

Between 1999 and 2003, Judicial Watch, the CIR, and the Center stressed arguments formulated by conservatives in the late 1970s and 1980s for colorblind laws and policies.<sup>191</sup> However, *Grutter v. Bollinger* marked a

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> See Jodi S. Cohen, *Ground Zero of Affirmative Action Issue: As Michigan Voters Decide Whether Gender, Race Should be Factors in Jobs And Admissions, the Outcome Could Affect the National Debate*, CHI. TRIB., Oct. 19, 2006, at C4 (discussing a white student’s lawsuit against the University of Michigan alleging discrimination in denying her admission); Dan Frosch, *Vote Results Are Mixed on a Ban on Preference*, N.Y. TIMES, Nov. 8, 2008, at A19 (describing ballot measures in Colorado and Nebraska seeking to ban affirmative action); Leslie Fulbright, *Connerly Gearing Up for Wider Crusade*, S.F. CHRON., Dec. 14, 2006, at A1 (highlighting Ward Connerly’s efforts in California and many other states to oppose affirmative action policies).

<sup>186</sup> B. Drummond Ayres, Jr., *Affirmative Action Measure Nears a High-Profile Finish*, N.Y. TIMES, Nov. 4, 1996, at B6; Frosch, *supra* note 185, at A19; see also Robert Pear, *In California, Opponents of Affirmative Action See a New Day*, N.Y. TIMES, Nov. 7, 1996, at B7 (detailing the development of Proposition 209 and its ultimate success).

<sup>187</sup> Frosch, *supra* note 185, at A19.

<sup>188</sup> *Group Threatens Colleges Over Affirmative Action*, *supra* note 177, at A14.

<sup>189</sup> *The Downgrading of Diversity*, BOS. GLOBE, Feb. 28, 1999, at C6.

<sup>190</sup> *Id.*

<sup>191</sup> *E.g.*, Shira Kantor, *Conservative Crusader Enlists in Affirmative-Action Fight*, CHI. TRIB., Jan. 19, 2003, at C8. For more examples of colorblindness claims of the kind made in this period, see Roger Clegg, *supra* note 175, at A17 (arguing that enrollment quotas for minority students is “not only impractical—the broad-brush use of preferences has been declared unconstitutional, after all—it is wrong”); Lance Gay & Bill Straub, *GOP Wants to Ban Racial Preferences*, CIN. POST, May 14, 1996, at 11A (presenting colorblindness claims from several GOP politicians); William Goldschlag, *High Court Limits Affirmative Action*, N.Y. DAILY NEWS, June 13, 1995, at 6 (reporting views that a Supreme Court

turning point for opponents of race-conscious policies. *Grutter* came at the end of earlier struggles to challenge the legitimacy of affirmative action in court. The case involved a challenge to an affirmative-action program at the University of Michigan Law School.<sup>192</sup> The law school's admissions policy required consideration of a variety of factors, including an applicant's test scores, grade point average, and "soft variables," such as the quality of an applicant's essay.<sup>193</sup> The policy further made apparent that diversity was accorded "substantial weight" in the admissions process.<sup>194</sup> While recognizing a broad range of diversity contributions, the policy reaffirmed the University's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against."<sup>195</sup>

Barbara Grutter, a white applicant, was denied admission to the law school and sued, alleging that the University had relied predominantly on race in rejecting her candidacy.<sup>196</sup> *Grutter* forced the Court to revisit the diversity rationale for affirmative action articulated by Justice Powell in *Bakke*.<sup>197</sup> Significantly, lower court opinions in the case shaped the strategies used by opponents of affirmative action. The United States Court of Appeals for the Sixth Circuit had relied heavily on *Bakke* in upholding the challenged admissions policy, concluding, among other things, that diversity was a compelling state interest.<sup>198</sup>

Opponents of affirmative action had to respond to this new focus on diversity. Already, however, affirmative-action opponents began questioning the coherence and accuracy of the State's concept of race. A brief submitted by anti-affirmative-action scholars contended that ideas of diversity were "based on racial stereotyp[es]" and made it "permissible to use race as a proxy for experiences, outlooks, or ideas."<sup>199</sup>

The CIR similarly contended that diversity reasoning assumed that members of a certain group were "particularly likely to have experiences or perspectives important to the Law School's mission merely because of their membership in a particular racial or ethnic group."<sup>200</sup> Amici suggested that

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decision limiting affirmative action programs vindicated the colorblindness argument); Ramon G. McLeod, *New Rules for Marking Racial Identity*, S.F. CHRON., Dec. 26, 1997, at A1 (describing the colorblindness position advocated by the Center).

<sup>192</sup> *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003).

<sup>193</sup> *Id.* at 315.

<sup>194</sup> *Id.* at 316.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 316–17.

<sup>197</sup> *Id.* at 322–24.

<sup>198</sup> *Grutter v. Bollinger*, 288 F.3d 732, 739, 746, 749 (6th Cir. 2002).

<sup>199</sup> Brief of Amici Curiae Law Professors Larry Alexander et al. in Support of Petitioner at \*2, 11, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 164181.

<sup>200</sup> Brief for the Petitioner at \*16, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 164185.

the diversity rationale made little sense, since racial identity did not reflect a signature experience or perspective.<sup>201</sup> An amicus brief submitted by Ward Connerly took this argument even further, explaining: “Diversity based on race is . . . meaningless given that Americans are increasingly multiracial and no one student can be fairly said to be representative of their race . . . .”<sup>202</sup>

As we have seen, previous claims about colorblindness had presented race as a matter of skin color. The *Grutter* briefs, by contrast, portrayed race as a generalization that failed to capture the beliefs of individuals belonging to the group at issue. Connerly’s brief went further, suggesting that with the increase in the number of Americans identifying as multiracial, race itself might be a myth.

*Grutter* ultimately upheld the challenged policy, reasoning that the Equal Protection Clause did not prohibit narrowly tailored admission policies designed to achieve a compelling interest in diversity.<sup>203</sup> After *Grutter* upheld Michigan’s program, the anti-affirmative-action movement continued its gradual retreat from the colorblindness arguments of the Reagan era. One new claim made in this period involved the supposed mismatch between the minority beneficiaries of affirmative-action programs and the universities to which they were admitted.<sup>204</sup> As John O’Sullivan wrote in the *National Review*, affirmative-action programs “systematically mismatch minority talent to academic opportunities, placing the top 10 percent of designated minority students into competition with the top 1 percent of white and Asian students.”<sup>205</sup> In this way, O’Sullivan contended that the beneficiaries of affirmative action were actually worse off than they would have been in programs to which they were better suited.<sup>206</sup> Similarly, in the Supreme Court, anti-affirmative-action amici less often stressed anticlassification arguments, instead emphasizing that particular

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<sup>201</sup> See, e.g., Alexander et al., *supra* note 199, at \*14 (“Michigan . . . assumes individuals generally believe that members of a ‘minority’ race all share the same viewpoint on all issues. . . . Michigan hardly needs racial preferences to teach the obvious—that not all members of any given minority think alike.”).

<sup>202</sup> Brief Amicus Curiae of Ward Connerly in Support of Petitioners at \*23, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 164184.

<sup>203</sup> *Grutter*, 539 U.S. at 343.

<sup>204</sup> See, e.g., RICHARD SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT 4 (2012) (arguing that minorities who benefit from affirmative action are ill-suited for the strenuous pace of elite universities); John O’Sullivan, *Affirmative Action Forever?*, NAT’L REV., July 28, 2003, at 15 (positing that more minority students drop out because affirmative-action policies placed them in a more rigorous program than they could manage).

<sup>205</sup> O’Sullivan, *supra* note 204, at 15.

<sup>206</sup> *Id.*

race-conscious programs were not narrowly tailored enough to satisfy strict scrutiny.<sup>207</sup>

This shift was evident in 2006, in *Parents Involved in Community Schools v. Seattle*.<sup>208</sup> The case involved voluntary integration plans adopted by school districts in Seattle and Louisville.<sup>209</sup> In the Seattle plan, race served as a tiebreaker when desirable schools were oversubscribed.<sup>210</sup> Louisville's plan also allowed students to attend a preferred school until a particular institution "reached the 'extremes of the racial guidelines,'" at which point the school district would assign students to different schools partly to achieve a more desirable racial balance.<sup>211</sup>

In a plurality opinion, the *Parents Involved* Court struck down both voluntary integration plans.<sup>212</sup> At first, the opinion seems to be a strong endorsement of the colorblind Constitution. Chief Justice Roberts provided a clear articulation of the conventional colorblind view.<sup>213</sup> As he explained, *Brown* recognized and mandated that the Court follow a colorblind approach.<sup>214</sup> "[T]he position of the plaintiffs in *Brown* . . . could not have been clearer," Roberts wrote.<sup>215</sup> "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race."<sup>216</sup> Significantly, in Roberts's view, "it was that position that prevailed in this Court."<sup>217</sup>

However, Justice Kennedy, the likely swing vote in future affirmative-action cases, distanced himself from the idea of a colorblind Constitution: "as an aspiration, [constitutional colorblindness] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle."<sup>218</sup> Kennedy laid the foundation for future

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<sup>207</sup> See, e.g., Brief of Amicus Curiae The Center For Individual Rights in Support of Petitioner at 5–6, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908) (stressing that the challenged integration plan was not narrowly tailored); Amici Curiae Brief on the Merits of Mountain States Legal Foundation in Support of Petitioner at 2, 12, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908) (contending that race-conscious programs are inherently discriminatory and unconstitutional); Brief Amicus Curiae of Pacific Legal Foundation et al. in Support of Petitioner at 4, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (No. 05-908) ("[T]he racial balancing of K-12 public schools cannot meet this Court's narrow tailoring requirements.").

<sup>208</sup> See 551 U.S. at 709–10 (discussing the use of race-based classifications in public schools).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 711–12.

<sup>211</sup> *Id.* at 716 (citation omitted).

<sup>212</sup> *Id.* at 747–48.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 747.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 788 (Kennedy, J., concurring).

opinions holding legitimate the “interest [the] government has in ensuring all people have equal opportunity regardless of their race.”<sup>219</sup>

Kennedy again zeroed in on the fit between the school districts’ ends and means. In Kennedy’s view, race-conscious remedies could “be considered legitimate only if they are a last resort to achieve a compelling interest.”<sup>220</sup>

Kennedy’s opinion laid a road map for opponents of affirmative action: activists could focus on schools’ failure to exhaust racially neutral strategies or to prove that less race-conscious methods could achieve a desired goal. In practice, this tactic could prove quite effective: schools would have to test and reject a long list of racially neutral strategies, and districts would face the difficult task of proving that a hypothetical alternative would not achieve a similar rate of integration.

Politically, however, Kennedy’s approach appears less promising for opponents of affirmative action. Narrow tailoring appears to be a technical question, whereas the idea of a colorblind Constitution is easy to convey and potentially resonant.<sup>221</sup> If Kennedy’s approach shapes the Court’s future affirmative-action opinions, opponents of race-conscious programs will have to develop a politically powerful alternative to colorblindness claims.

Two of the Court’s recent racial decisions, *Fisher II* and *Schuetz*, showcase the alternatives developed by anti-affirmative-action activists.<sup>222</sup> Rather than arguing for an abstract principle of colorblindness, these advocates question the workability of affirmative action. Borrowing from arguments made by historians and critical race theorists, opponents of affirmative action now suggest that the courts know nothing about what race means.

## II. THE ORIGINS OF THE RACIAL INCOHERENCE ARGUMENT

If read in historical context, the dissenting opinions in *Fisher II* represent a turning point in attacks on affirmative action. To be sure, *Fisher II* invokes many of the most-familiar arguments against affirmative action. Justice Alito invokes the specter of racial quotas and the value of racial

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<sup>219</sup> *Id.* at 787–88.

<sup>220</sup> *Id.* at 790.

<sup>221</sup> See, e.g., Koteles Alexander, Adarand: *Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367, 376 (1995) (“In a vacuum, a colorblind Constitution is precisely what many would want in any governing document, particularly with respect to the Equal Protection Clause.”).

<sup>222</sup> See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2211–13 (2016) (noting several arguments challenging the effectiveness of affirmative action); *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623, 1638 (2014) (holding that a voter referendum banning affirmative action could effectively supersede a prior decision that a race-based affirmative-action policy was constitutional).

colorblindness.<sup>223</sup> However, Alito also embraces a tactic deployed in Supreme Court litigation since *Fisher I*, arguing that racial categories themselves are too incoherent to serve as the basis of any admissions policy.<sup>224</sup>

This plan of attack clearly debuted in the litigation of *Fisher I*, a 2013 case involving an affirmative-action program at the University of Texas-Austin.<sup>225</sup> At that time, Texas relied on a two-tiered program of affirmative action—the product of years of litigation and experimentation.<sup>226</sup> Earlier, in 1996, in *Hopwood v. Texas*, the Fifth Circuit Court of Appeals struck down a previously applicable race-conscious admissions plan at the University of Texas School of Law.<sup>227</sup> The program divided students into three groups: presumptive admits, those in the discretionary zone, and presumptive rejects.<sup>228</sup> A special admissions subcommittee dealt with minority candidates who fell in the discretionary zone and referred promising minority candidates to the full admissions committee.<sup>229</sup> After the *Hopwood* court struck down this admissions program, the Texas Legislature passed the Top Ten Percent Law, requiring universities to admit the top ten percent of students from every high school in the state.<sup>230</sup> Given the high rate of residential segregation in Texas, the plan tended to increase the admission of Hispanic and African-American applicants.<sup>231</sup>

After the decision of *Grutter* in 2003, the University also implemented a program that allowed for consideration of race or ethnicity as a factor relevant to the admissions process.<sup>232</sup>

Following a study on the subject, the University concluded that race or ethnicity could factor into a “personal achievement score,” a measurement of whether an applicant had confronted “special circumstances” or obstacles such as growing up in poverty or a single-parent home.<sup>233</sup>

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<sup>223</sup> See *Fisher*, 136 S. Ct. at 2221, 2225 (2016) (Alito, J., dissenting) (noting the Court’s precedent favoring a colorblind Constitution and disfavoring racial balancing).

<sup>224</sup> See *id.* at 2229–2230 (opining that common racial categories, such as Asian-American and Hispanic, are too “crude” and “broad” to accurately promote a diverse student body).

<sup>225</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013).

<sup>226</sup> See *id.* at 2416–17 (describing the use of race as one of many factors to judge applicants on both their personal and academic achievements).

<sup>227</sup> *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996), *overruled by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>228</sup> *Id.* at 935.

<sup>229</sup> *Id.* at 937.

<sup>230</sup> TEX. EDUC. CODE ANN. § 51.803 (West 2012). For further discussion, see *Fisher v. Univ. of Tex. at Austin*, 631 F.3d at 213, 224 (5th Cir. 2011), *vacated*, 133 S. Ct. 2411 (2013).

<sup>231</sup> See *Fisher*, 631 F.3d at 224 (reporting that, under the plan, African-American enrollment increased from 2.7 percent to 3.0 percent and Hispanic enrollment increased from 12.6 percent to 13.2 percent).

<sup>232</sup> *Id.* at 226.

<sup>233</sup> *Id.* at 228.

In a majority opinion written by Justice Kennedy, the *Fisher* Court reversed and remanded a lower court opinion, reasoning that the Court of Appeals had not properly applied strict scrutiny in evaluating the Texas admissions policy.<sup>234</sup> *Fisher* did not transform the law of affirmative action, but the case did mark the appearance of important new arguments against race-conscious remedies. Some opponents of affirmative action made familiar claims, contending that the University's policy would fail true strict scrutiny because it failed to increase minority enrollment dramatically, because it was overinclusive, and because there was no strong basis in the evidence that the program was necessary to increase minority enrollment or access.<sup>235</sup> Two important amicus briefs, submitted by the socially conservative American Center for Law and Justice (ACLJ) and Judicial Watch, Inc. (JWI), turned to a different line of argument. One brief asserted that even if diversity counted as a compelling governmental interest, "racial categories [were] arbitrary and . . . incoherent."<sup>236</sup> Racial classifications, as amici claimed, "[were], for the most part, sociopolitical, rather than biological, in nature."<sup>237</sup>

JWI extensively quoted a statement made by the American Anthropological Association that "race evolved as a worldview, a group of prejudgments that distorts ideas about human differences and group behavior."<sup>238</sup> If racial categories had no scientific validity, and if race was a sociopolitical construct, then race-based preferences had to be inherently incoherent and wrong. As JWI contended in *Fisher I*: "Although science may have rejected race long ago, law and public policy, and in particular the University's admission policy, have yet to catch up. It is time they did so."<sup>239</sup>

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<sup>234</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2412, 2421–22 (2013) (stating that strict scrutiny was applied "in too narrow a way" by the District and Circuit Courts).

<sup>235</sup> See, e.g., Brief for Petitioner at 31–47, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345), 2012 WL 1882759 (arguing that while the strong basis in evidence standard is appropriate in educational settings for strict scrutiny, the standard cannot be met, the use of race is not narrowly tailored, it is overinclusive, and race-neutral policies would have been just as effective); Brief for the Cato Institute as Amicus Curiae in Support of the Petitioner at 3–28, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345), 2012 WL 1961247 (emphasizing the failure of the University of Texas at Austin to meet the strong basis in evidence standard, especially in light of the University's claim that the use of race was necessary); Brief of Scholars and Economists as Amici Curiae in Support of Petitioner at 7–14, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345), 2012 WL 1980050 (explaining that the University of Texas at Austin's policy fails because "racial preference policies must be effective in achieving a compelling interest to survive strict scrutiny").

<sup>236</sup> Amicus Brief of the American Center for Law & Justice in Support of Petitioner, *supra* note 11, at 3.

<sup>237</sup> *Id.* at 5.

<sup>238</sup> Brief of Amici Curiae Judicial Watch, Inc. & Allied Educational Foundation in Support of Petitioner, *supra* note 11, at 8.

<sup>239</sup> *Id.* at 9.

For *JWI*, the idea of race as a social construct first meant that racial categories are “inherently ambiguous.”<sup>240</sup> Racial definitions could be cultural, personal, or genetic, the brief argues, and individual racial groups are maddeningly hard to define.<sup>241</sup> Would an applicant from Azerbaijan be white or Asian? Who would decide the racial identity of mixed-race applicants? In asking these questions, *JWI* sought to establish that race-based preferences could not withstand strict scrutiny because race itself “cannot withstand a moment’s scrutiny.”<sup>242</sup> The *ACLJ* echoed these claims, arguing that race-conscious affirmative action is “ultimately incoherent, as racial categories are both incoherent and porous.”<sup>243</sup>

In *Schuetz*, several amicus briefs updated these arguments.<sup>244</sup> A brief by UCLA professor and noted affirmative-action critic Richard Sander spotlighted changing understandings of race in modern America. As group identities multiplied and shifted, Sander argued that “the connection between these racial categories and underlying types of ‘disadvantage’ favored, or ‘diversity’ pursued, [became] more attenuated.”<sup>245</sup> Sander focused on the impact of “a large and growing multi-racial population.”<sup>246</sup> “By what rules is racial membership assigned?” Sander argued. “How does one prevent opportunistic behavior by self-classifying applicants?”<sup>247</sup>

The new anti-affirmative-action argument questioned both the workability and fairness of racial-preference programs. If some Americans do not belong to any racial category, or fit within more than one, then someone will have to decide which individuals qualify for assistance.<sup>248</sup> If individuals can select their own racial identity, as Sander suggested, there seems to be no natural check on self-interested behavior.<sup>249</sup> If courts have to determine racial identity, the argument goes, then affirmative-action programs will enlist courts in a process that will reinforce—and rely upon—largely empty racial categories.

<sup>240</sup> *Id.* at 3.

<sup>241</sup> *Id.* at 12–13.

<sup>242</sup> *Id.* at 21.

<sup>243</sup> Amicus Brief of the American Center for Law & Justice in Support of Petitioner, *supra* note 11, at 3.

<sup>244</sup> See, e.g., Brief Amicus Curiae for Richard Sander in Support of Petitioner at 7–9, *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623 (2014) (No. 12-682), 2013 WL 3417868 (explaining that America is becoming so diverse that “racial” categories of people are becoming obsolete); Brief for Carl Cohen et al. as Amici Curiae at 37–40, *Schuetz v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623 (2014) (No. 12-682), 2013 WL 3208677 (arguing that because race is not as identifiable by appearance, race has become an identity one can put on or take off at will).

<sup>245</sup> Brief Amicus Curiae for Richard Sander in Support of Petitioner, *supra* note 244, at 7.

<sup>246</sup> *Id.* at 8.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 7–9.

<sup>249</sup> *Id.*

### A. Schuette's Definition of Race

Racial-construct arguments played an important, if subtle part, in the disposition of *Schuette*.<sup>250</sup> The case involved a challenge to Article I, Section 26 of the Michigan Constitution, which prohibited any university or school district from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.”<sup>251</sup> Joined by the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN), a group of students, faculty, and prospective applicants argued that Section 26 ran afoul of the political-process doctrine articulated by the Supreme Court in a line of cases decided in 1969 and 1982.<sup>252</sup> The first such case, *Hunter v. Erickson*, addressed a city charter amendment in Akron, Ohio.<sup>253</sup> The city had introduced a fair-housing law prohibiting racial discrimination, but voters amended the charter, requiring a referendum before a fair-housing law could be introduced.<sup>254</sup> Because the charter amendment singled out fair-housing laws, *Hunter* found that the amendment “place[d] special burdens on racial minorities in the governmental process,” thereby violating the Constitution’s protections against racial discrimination.<sup>255</sup>

In 1982, the Court elaborated on the political-process doctrine in *Washington v. Seattle School District*.<sup>256</sup> There, the Court dealt with a local school board decision to introduce busing.<sup>257</sup> Voters statewide responded with an initiative banning busing.<sup>258</sup> For the Court, the initiative raised the same constitutional concerns as the amendment addressed in *Hunter*: it “remove[d] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking [sic] body, in such a way as to burden minority interests.”<sup>259</sup>

BAMN and the Sixth Circuit read *Hunter* and *Seattle* to stand for a broader proposition: if a policy “‘inure[d] primarily to the benefit of a minority’ . . . then any state action that ‘place[s] effective decisionmaking [sic] authority over’ that policy ‘at a different level of government’” required

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<sup>250</sup> *Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623, 1634–35 (2014).

<sup>251</sup> MICH. CONST. of 1963, art. I, § 26.

<sup>252</sup> *Schuette*, 134 S. Ct. at 1629–33 (discussing *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982)).

<sup>253</sup> *Hunter v. Erickson*, 393 U.S. 385, 386 (1969).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 390–92.

<sup>256</sup> *Wash. v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982).

<sup>257</sup> *Id.* at 461.

<sup>258</sup> *Id.* at 461–62.

<sup>259</sup> *Id.* at 474.

strict scrutiny.<sup>260</sup> In a plurality opinion for the Court, Justice Kennedy concluded that this broader reading of *Hunter* and *Seattle* relied on an untenable and unfair definition of race.<sup>261</sup> Kennedy explained that to know whether a law inured primarily to the benefit of a minority, the courts would have to make sense of who was—and was not—a member of that minority.<sup>262</sup> “Were courts to embark on this venture,” Kennedy explained, “not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision[,] but also it would result in, or at least impose a high risk of, inquiries and categories dependent upon demeaning stereotypes.”<sup>263</sup>

Kennedy also echoed amici’s anxieties about the self-seeking behavior made possible by fluid racial categories. The plurality explained that adopting a broad interpretation of *Seattle/Hunter* would create “incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage.”<sup>264</sup> The plurality could imagine a kind of opportunism with few limits: groups could claim a racial disadvantage to manipulate “[t]ax policy, housing subsidies, wage regulations, and even the naming of public schools.”<sup>265</sup>

Concerns about racial construction and racial opportunism also shaped Justice Scalia’s concurrence.<sup>266</sup> While the plurality preserved a narrow reading of *Hunter* and *Seattle*, Scalia called for them to be overruled, and he did so partly by relying on the problems created by courts deciding what race means.<sup>267</sup> Scalia’s concurrence foregrounds “the dirty business of dividing the Nation into ‘racial blocs.’”<sup>268</sup>

For Scalia, racial definition presents two independent problems. First, courts would have to identify an individual’s race correctly—an exercise, Scalia writes, that is “as difficult as it is unappealing.”<sup>269</sup> Like the plurality, Scalia put mixed-race individuals center stage. “Does a half-Latino, half-American Indian,” Scalia asks, “have Latino interests, American-Indian interests, both, half of both?”<sup>270</sup> Second, racial identification would rely on disturbing—and for Scalia, unconstitutional—assumptions that race means something. To understand whether a policy advances a minority interest, a

<sup>260</sup> *Schutte v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary*, 134 S. Ct. 1623, 1634 (quoting *Seattle*, 458 U.S. at 472, 474).

<sup>261</sup> *Id.* at 1634–35.

<sup>262</sup> *Id.* at 1634.

<sup>263</sup> *Id.* at 1635.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 1643–44 (Scalia, J., concurring).

<sup>267</sup> *Id.* at 1631, 1634, 1643 (Scalia, J., concurring).

<sup>268</sup> *Id.* at 1643 (Scalia, J., concurring) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 603, 610 (1990) (O’Connor, J., dissenting)).

<sup>269</sup> *Id.* at 1643 (Scalia, J., concurring).

<sup>270</sup> *Id.*

court would have to believe that minority members, whoever they are, have something in common. For Scalia, “such ‘racial stereotyping [is] at odds with equal protection mandates.’”<sup>271</sup>

Together with Scalia’s concurrence, the *Schuetz* plurality departs from earlier attacks on affirmative action. The debate on a colorblind Constitution turns mostly on questions of principle and philosophy. Do equality mandates require formally equal—or identical—treatment? Or does equality sometimes require different treatment to address past subordination? *Schuetz* operates at a different level. *Schuetz* reasons that regardless of how one defines racial inequality, affirmative action would require the courts to label individuals by race and to know what race means.<sup>272</sup> Drawing courts into the process of racial categorization would reinforce racial categories, strengthen racial stereotyping, encourage self-seeking behavior, and offer no guarantee that affirmative action would help those actually suffering the effects of past subordination.<sup>273</sup>

## B. *The Meaning of Race in Fisher II*

The Court’s decision in *Fisher II* shows the battle lines now drawn in conflict about affirmative action. Justice Kennedy’s majority confirms the legitimacy of university policies designed to increase diversity and leaves administrators some latitude to consider race.<sup>274</sup> Justice Alito’s dissent suggests that the racial categories used to define diversity are vague, anachronistic, and hopelessly flawed.<sup>275</sup> Whether an affirmative-action policy is constitutional, it seems, will depend on the validity of racial categories.

The fault line running through *Fisher II* began to surface when the *Fisher I* Court remanded to the Fifth Circuit to consider whether the Texas policy survived strict scrutiny.<sup>276</sup> There, Fisher urged the court to strike down the policy because it had only “a de minimis effect” on diversity in the

<sup>271</sup> *Id.* at 1643–44 (Scalia, J., concurring) (quoting *Miller v. Johnson*, 515 U.S. 900, 920 (1995)).

<sup>272</sup> *See id.* at 1638 (majority opinion) (“This case is not about how the debate about racial preferences should be resolved. It is about who may resolve it.”).

<sup>273</sup> *See id.* at 1643–44 (Scalia, J., concurring) (explaining that “no good can come of such random judicial musing” in determining whether the court is dealing with a “racial issue” under the political-process doctrine).

<sup>274</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016) (explaining that “considerable deference is owed to a university” attempting to define “intangible characteristics, like student-body diversity” in its admissions, but it must be balanced “with the constitutional promise of equal treatment and dignity”).

<sup>275</sup> *See id.* at 2229–30 (Alito, J., dissenting) (explaining that UT Austin’s “crude classification system is ill suited for the more integrated country that we are rapidly becoming” because it only includes five “overly simplistic” racial categories and does not permit students to identify as more than one race).

<sup>276</sup> *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014), *aff’d*, 136 S. Ct. 2198 (2016) (“The Supreme Court vacated and remanded, holding that this Court . . . must give a more exacting scrutiny to UT Austin’s efforts to achieve diversity.”).

school.<sup>277</sup> Before UT Austin adopted a race-conscious policy, the University already had reached a rate of over 21 percent by relying on the Top Ten Percent Plan, and a race-conscious plan reportedly increased African-American enrollment by less than 1 percent.<sup>278</sup>

The majority rejected this “truncate[d]” approach to strict scrutiny.<sup>279</sup> Seizing on language from *Grutter* mandating holistic, individualized review, the court concluded that the University realistically could have concluded that a percentage-based approach alone was not enough.<sup>280</sup> Nor did the University do too little to explore race-neutral options.<sup>281</sup> The majority detailed steps taken by the University to increase diversity without explicitly considering race, including scholarship and outreach efforts.<sup>282</sup> Because African-American and Hispanic enrollment had declined notwithstanding these efforts, as the court reasoned, the University justifiably looked beyond the Top Ten Percent Plan.<sup>283</sup>

The court also highlighted supposed weaknesses of the Top Ten Percent Plan.<sup>284</sup> The scheme achieved diversity by admitting students with disproportionately low standardized test scores.<sup>285</sup> Only by adding holistic review could the University “reach a pool of minority and non-minority students with records of personal achievement.”<sup>286</sup> In this analysis, diversity included more than race.<sup>287</sup> For the majority, the University’s plan satisfied strict scrutiny.<sup>288</sup>

Writing in dissent, Judge Garza concluded that the University’s goals and strategies for achieving those ends were too vague to satisfy strict

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<sup>277</sup> *Id.* at 645.

<sup>278</sup> *Id.* at 644–45.

<sup>279</sup> *Id.* at 645.

<sup>280</sup> *See id.* at 647 (“Given the test score gaps between minority and non-minority applicants, if holistic review was not designed to evaluate each individual’s contributions to UT Austin’s diversity, including those that stem from race, holistic admissions would approach an all-white enterprise.”).

<sup>281</sup> *Id.* at 649.

<sup>282</sup> *Id.* at 647–49.

<sup>283</sup> *Id.* at 649 (explaining that in 1997, the percentage of admitted African-American students fell from 4.37 percent to 3.41 percent and the percentage of admitted Hispanic students fell from 15.37 percent to 12.95 percent).

<sup>284</sup> *See id.* at 650 (“The sad truth is that the Top Ten Percent Plan gains diversity from a fundamental weakness in the Texas secondary education system.”).

<sup>285</sup> *See id.* at 652–53 (“[L]arge numbers of students from highly segregated, underfunded, and underperforming schools . . . qualified for automatic admission to UT Austin.”). For example, in San Antonio Independent School District, a highly segregated school district, students who took the SAT averaged a score of 811 and only 28 percent of graduates were college-ready in both English and Math. In Dallas Independent School District, another highly segregated school district, the average SAT score was 856 and only 29 percent of graduates were college-ready in both English and Math. *Id.* at 652.

<sup>286</sup> *Id.* at 653.

<sup>287</sup> *Id.* at 660 (reasoning that under “the plain teachings of *Grutter* and *Bakke*,” diversity involved not only skin color but a “range of skills, experiences, and performances”).

<sup>288</sup> *See id.* (affirming summary judgment in favor of the University).

scrutiny.<sup>289</sup> Garza faulted the University for failing to define what would count as a critical mass of diverse students or to explain why race-conscious measures were needed to achieve the University's ends.<sup>290</sup>

Both the majority and dissent in *Fisher II* rely on familiar racial categories.<sup>291</sup> Some of the briefs submitted in support of Fisher's certiorari petition repeated conventional arguments about the stigmatic harms tied to race and the imprecision of the University's means and ends.<sup>292</sup> However, opponents of affirmative action treated the case as an opportunity to begin what *Schuette* started—the wholesale rejection of race as a concept. “Human race and ethnicity are ambiguous social constructs that have no validity in science,” JWI wrote in its amicus brief in *Fisher II*.<sup>293</sup> Any policy relying on “crude, inherently ambiguous, and arbitrary racial and ethnic categories . . . can never be narrowly tailored.”<sup>294</sup>

### C. *The Battle Over Racial Categories in Fisher II*

While Justice Kennedy's majority opinion in *Fisher II* did not squarely address the legitimacy of racial categories, the Court's reasoning assumes that administrators can identify students by race and under certain limited circumstances, achieve valuable classroom diversity by doing so. By contrast, in explaining why Texas's program fails strict scrutiny, the dissenting justices rejected the idea of racial categories out of hand.<sup>295</sup>

The *Fisher II* majority came closest to analyzing the value of racial categories in evaluating Abigail Fisher's arguments against the University's admission policy.<sup>296</sup> First, Fisher argued that Texas could not satisfy strict scrutiny because administrators had not defined their goal, achieving a “critical mass” of diverse students, with enough clarity.<sup>297</sup> The majority understood Fisher's argument to involve numerical clarity—that is, Texas

<sup>289</sup> *Id.* at 661–62 (Garza, J., dissenting).

<sup>290</sup> *Id.* at 667–68.

<sup>291</sup> *See id.* at 656–57, 669 (discussing the different backgrounds and stereotypes related to minority students).

<sup>292</sup> Brief for the Cato Institute as Amicus Curiae in Support of Petitioner at 5–8, *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (No. 14–981) (arguing the university pursued not diversity but racial quotas); Amicus Curiae Brief for the Center for Constitutional Jurisprudence at 2–10, *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (No. 14–981) (relying primarily on conventional colorblindness arguments in condemning the university's policy).

<sup>293</sup> Brief of Amici Curiae of Judicial Watch, Inc., & Allied Educational Foundation in Support of Petitioner at 2, *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (No. 14–981).

<sup>294</sup> *Id.* at 3.

<sup>295</sup> *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215, 2220–26 (2016) (Alito, J., dissenting) (noting that Texas's justification was too broad).

<sup>296</sup> *See id.* at 2210–13 (outlining the Petitioner's four main arguments and the Court's response to them).

<sup>297</sup> *Id.* at 2210.

had implied a numerical goal without limits.<sup>298</sup> However, Fisher's argument also implied a second form of ambiguity surrounding Texas's goal. How would the University know that individual students qualified as sufficiently diverse to create a critical mass?

In rejecting the need for any hard number defining a critical mass, *Fisher II* suggested that racial categories can have value to administrators as a means of reaping the "educational benefits that flow from student body diversity."<sup>299</sup> Describing the process by which Texas arrived at a "reasoned, principled explanation," the majority confirmed that universities could seek to "promot[e] cross-racial understanding" and prepare students for "an increasingly diverse workforce and society."<sup>300</sup>

These goals would lose value if racial categories themselves made no sense. How could a university promote understanding between students of different races if race itself was an arbitrary fiction? In that case, what kind of understanding could students gain? And if racial categories are artificial constructs, how could the university prepare students for a more diverse workforce by adopting race-conscious policies? If racial categories have less and less meaning, would a university not better prepare students for a diverse workforce by jettisoning race-conscious policies? The majority implies its answer to these questions in its analysis of Texas's goals. If cross-racial understanding and preparation for a diverse workforce are principled goals, the majority sees the possibility of racial categories having some inherent worth.<sup>301</sup>

The remainder of the majority opinion bolsters this understanding of racial categories. Fisher argued that any race-conscious policy was unnecessary because Texas had already achieved a "critical mass" through its Top Ten Percent Plan and because "race-neutral holistic review" had made only a minimal difference.<sup>302</sup> In refuting Fisher's critical-mass argument, the majority walked through empirical and anecdotal evidence documenting the experience and admission rates of "African-American," "Hispanic," and "Asian" applicants.<sup>303</sup> The validity of these categories is at the center of the Court's analysis of a critical mass.<sup>304</sup>

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 2210 (quoting *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013)).

<sup>300</sup> *Id.* at 2211.

<sup>301</sup> *See id.* at 2210–12 ("The 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 or society.'").

<sup>302</sup> *See id.* at 2211–12 (explaining that Petitioner argued that the Top Ten Percent Plan helped to achieve a critical mass).

<sup>303</sup> *See id.* at 2212 (noting that 4.1 percent of African-Americans enrolled in 2003, while percentages for Hispanic and Asian-Americans were similar).

<sup>304</sup> *See id.*

The Court relied on the same racial categories in explaining that Texas's holistic review had a "meaningful, if still limited, effect on the diversity of the University's freshman class."<sup>305</sup> Even the Court's analysis of Fisher's final suggestion—that Texas admit all diverse students through a percentage plan—assumed that race was a real, identifiable thing.<sup>306</sup> The majority rejected Fisher's proposal because it would "sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students."<sup>307</sup> The Court compared racial identities to other, unquestionably real experiences or traits. A racially diverse student could be as readily identified as a "star athlete or musician" or a "talented young biologist."<sup>308</sup>

The dissenting justices took a dramatically different position on the validity of racial categories. Justice Alito's dissent began in familiar territory, reiterating that "[d]istinctions between citizens based solely on their ancestry are by their nature odious to a free people."<sup>309</sup> Alito also accepted Fisher's argument that Texas had not defined "critical mass" clearly enough.<sup>310</sup> By accepting the Texas' "self-serving" explanation of its own goals, as Alito saw it, the majority deferred far more to administrators than strict-scrutiny review would permit.<sup>311</sup>

When explaining that Texas's admissions plan was not narrowly tailored, Alito's dissent took a new direction. The dissenting justices adopted arguments about the incoherence of racial categories championed for some time by opponents of affirmative action. Alito began by noting that Texas's policy "discriminate[d] against Asian-Americans."<sup>312</sup> Alito took Texas to task for favoring some minority groups over others, but his dissent more heavily criticized Texas's use of "crude, overly simplistic racial . . . categories."<sup>313</sup> Returning to the "Asian-American" category, Alito mocked Texas's definition of race, noting that the Asian category covered "60% of the world's population."<sup>314</sup> "It would be ludicrous," Alito wrote, "to suggest that all of these students have similar backgrounds and similar ideas and experiences to share."<sup>315</sup>

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<sup>305</sup> *Id.*

<sup>306</sup> *See id.* at 2212–13 (outlining the demographics of the UT Austin student body).

<sup>307</sup> *Id.* at 2213.

<sup>308</sup> *Id.*

<sup>309</sup> *Id.* at 2221 (Alito, J., dissenting) (citation and internal quotation marks omitted).

<sup>310</sup> *See id.* at 2222–24 (describing how UT has never clearly defined what it means by "critical mass").

<sup>311</sup> *See id.* at 2223 (noting that this Court has already faulted the Fifth Circuit for giving too much deference to a university's racial-classification policy).

<sup>312</sup> *Id.* at 2227.

<sup>313</sup> *Id.* at 2229.

<sup>314</sup> *Id.* (citation and internal quotation marks omitted).

<sup>315</sup> *Id.*

Alito then directly attacked the very idea of a racial category.<sup>316</sup> Noting that Texas had never defined who belonged in each of the five categories used in its admission policy, Alito borrowed directly from arguments made by opponents of affirmative action.<sup>317</sup> He reasoned that mixed-race students, many of whom claimed ancestry from several of the categories Texas used, would soon make any clean definition of race deeply problematic.<sup>318</sup> How, in a post-racial world, could Texas know when a student would have “a distinctive perspective or set of experiences associated with [a particular] group?”<sup>319</sup>

Alito also invoked the specter of self-serving behavior of which opponents of affirmative action had warned.<sup>320</sup> If it was no longer possible to coherently define racial categories, Texas had to rely on students to claim a racial identity for themselves.<sup>321</sup> “This,” Alito wrote, “is an invitation for applicants to game the system.”<sup>322</sup>

The Court’s opinion showcases where the war over affirmative action is headed. Proponents of affirmative action will have to respond to opposition arguments about the ambiguity and instability of race. Part III next considers one strategy for addressing this new attack on affirmative action.

### III. THE PROMISE OF “REGARDED-AS” REASONING

The problem, of course, is that racial thinking shapes individual experience and outcomes, regardless of the biological validity of racial categories. Individual background, in turn, can determine others’ perceptions of race. Using data from the National Longitudinal Survey of Youth (NLSY), a recent study conducted by Professors Aliya Saperstein and Andrew Penner found that changes in individual economic circumstances affected how interviewers defined a person’s race: interviewers more often identified a subject as a minority when she was unemployed, facing criminal charges, or otherwise struggling.<sup>323</sup> In another study, Saperstein and her colleagues explored how funeral directors categorized those who had passed

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<sup>316</sup> See *id.* at 2229–30 (discussing how the country is becoming more mixed racially, which will make classifying as one of five categories difficult).

<sup>317</sup> *Id.*

<sup>318</sup> See *id.* (discussing how many students will have parents or grandparents who fit more than one of the designated race categories).

<sup>319</sup> *Id.* at 2230.

<sup>320</sup> Brief for Petitioner at 42, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 11-345).

<sup>321</sup> *Fisher*, 136 S. Ct. at 2230 (Alito, J., dissenting).

<sup>322</sup> *Id.*

<sup>323</sup> See Andrew Penner & Aliya Saperstein, *How Social Status Shapes Race*, 105 PROCEEDINGS OF THE NAT. ACAD. OF SCI. 19628, 19628 (2008) (reporting that individuals who had been identified as white previously were less likely to be seen as white again if they were currently incarcerated, unemployed, or had household incomes below the poverty line, and individuals who had been identified as black were likely to be identified as black again if they fell into any of these categories).

away.<sup>324</sup> Again, economic and other life circumstances determined the outcome: people who had been murdered were categorized as African American, even when loved ones had identified the deceased as belonging to another race.<sup>325</sup> As these studies make apparent, economic and social stereotypes still mark our perceptions of one another. Proxies for race, including class, criminal history, and place of residence, all help to determine how an individual is categorized.

These stereotypes also make a significant difference in individuals' lives. Research by Marianne Bertrand and Sendhil Mullainathan found a 50-percent gap in callbacks for those with stereotypically "black" names on their resumes compared to those with stereotypically white names.<sup>326</sup> This effect applied regardless of the "real" race of an applicant—an individual's name brought to mind race and all it represented for many prospective employers.<sup>327</sup> Professors Douglas Massey and Garvey Lundy found a similar effect when measuring the ability of fictitious prospective tenants to get through to a rental agent.<sup>328</sup> Study subjects spoke on the phone using either White Middle Class English, Black English Vernacular, or Black Accented English.<sup>329</sup> Race, sex, and class—determined by speech alone—helped to dictate an individual's access to a landlord and to a rental unit.<sup>330</sup> For example, the study found that 87 percent of white males were able to get through to a rental agent, compared with only 63 percent of females speaking in Black English Vernacular.<sup>331</sup>

The skepticism about racial definitions expressed by *Fisher II* offers no guidance for how to deal with the difference made by perceptions of race, however inaccurate.<sup>332</sup> If racial categories are totally incoherent, and

<sup>324</sup> See Andrew Penner, Andrew Noymer & Aliya Saperstein, *Cause of Death Affects Racial Classification on Death Certificates*, 6 PLOS ONE e15812, e15812 (2011) (hypothesizing that well-known racial disparities in cause of death may lead decision makers to classify the deceased as the wrong race).

<sup>325</sup> See *id.* (finding that 1.1 percent of next of kin classify the decedent differently than was recorded in the official statistics, and that the odds of being classified as black if you were a homicide victim were higher).

<sup>326</sup> Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

<sup>327</sup> See *id.* at 991–92, 997–98 (explaining that the difference in callback rates can only be attributed to manipulation of the applicants' names).

<sup>328</sup> See Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 URB. AFF. REV. 452, 466–67 (2001) (explaining that racial discrimination occurs based solely on verbal interaction over the phone).

<sup>329</sup> *Id.* at 456.

<sup>330</sup> See *id.* at 460–61 (explaining that white males had to make fewer calls to reach a rental agent than black males, men had to make fewer calls than women, and middle-class blacks had to make fewer calls than low-class blacks).

<sup>331</sup> *Id.*

<sup>332</sup> See *supra* Part II.C.

individuals (particularly mixed-race ones) have no “real” race, then the colorblindness paradigm will need reworking. As scholars often recognize, the courts often use “color” and “race” synonymously, treating both as biological labels rather than as social constructs.<sup>333</sup> For example, under the *McDonnell Douglas* burden-shifting framework, the courts use skin color or other salient physical features as shorthand for membership in a particular group.<sup>334</sup> To know if someone has suffered racial discrimination, the final prong of *McDonnell Douglas* often requires courts to decide whether an individual was treated differently than similarly situated employees.<sup>335</sup> If that employee was replaced by someone of the same race—defined by the person’s physical traits—then discrimination becomes much harder to prove.<sup>336</sup> Even in Fourteenth Amendment cases, to make sense of the idea that someone suffered discrimination “because of race” logically requires a court to know what race that person was or was perceived to be.

How, then, should courts address the dangers of racial categorization foregrounded in *Schuetz* and *Fisher II*,<sup>337</sup> and emphasized by affirmative-action opponents, without ignoring the reality of racial stereotyping in modern America? This Article suggests that courts should look at an established body of law addressing whether a worker is “regarded as” belonging to a disfavored group. Most developed in the context of the Americans with Disabilities Act, “regarded-as” cases get at the root of the problem with racial stereotyping.<sup>338</sup> If personal circumstances determine how one’s race is defined, and if racial stereotypes can dictate certain individual outcomes, then what matters to the law of affirmative action should be how relevant decision makers perceive race to be.

Using “regarded-as” cases as a starting point also helps to address some of the problems raised by *Schuetz* and *Fisher II*. Together with a handful of cases decided under Title VII, this body of law could provide badly needed guidance for courts forced to determine whether or not an individual was

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<sup>333</sup> See, e.g., Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFR.-AM. L. & POL’Y REP. 9, 12–27 (1994) (arguing that “racial categories should be defined by the common experience of cultural subordination,” and explaining that the civil rights conception of race is too narrow because it looks separately at experiences of social groups and too broad because it ignores intra-racial distinctions); Onwuachi-Willig & Barnes, *supra* note 15, at 1293–94 (explaining that courts’ focus on “biological” race results in employers discriminating based on characteristics, such as appearance, which cannot be linked to the employee’s “visible” race); Rich, *supra* note 15, at 1140 (describing the effects of judicial treatment of race as a physical concept rather than a social construct).

<sup>334</sup> Onwuachi-Willig & Barnes, *supra* note 15, at 1293–94.

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* at 1294.

<sup>337</sup> See *supra* pp. 35–38.

<sup>338</sup> See Onwuachi-Willig & Barnes, *supra* note 15, at 1289 (arguing that courts should recognize discrimination claims based on presumptions of a certain characteristic, such as being “regarded as” black, which includes any corresponding negative stereotypes); see also Michele Goodwin, *Race as Proxy: An Introduction*, 53 DEPAUL L. REV. 931, 932 (2004) (describing the historical “collective negative imaging of blacks” as too immature and intellectually inferior to be granted fundamental rights).

judged because of race. Without adjudicating that person's identity or reaffirming racial categories, courts could return to a relatively familiar question involving how that person was perceived. As importantly, as Angela Onwuachi-Willig and Mario Barnes have argued, "regarded-as" cases recognize the harm individuals experience because of negative, and often inaccurate, stereotypes.<sup>339</sup>

But how would regarded-as reasoning apply in the dramatically different context of postsecondary admissions? Whereas race can make it harder for workers to get or keep a job, university affirmative-action programs treat race as a plus, and applicants often identify themselves, thereby increasing the chances of self-serving behavior. Moreover, the kind of evidence central to employment cases seems inapplicable in the context of admissions, where officers often rely on the content of a written application.

However, as the official guidance issued by the Departments of Education and Justice suggests, some admissions officers likely already rely on regarded-as reasoning.<sup>340</sup> Because the Court's recent affirmative-action decisions allow for race-conscious remedies only as a measure of last resort,<sup>341</sup> admissions officers seem to fall back on proxies thought to identify minorities. Regarded-as reasoning allows admissions officers to comply with the Court's mandate.

By explicitly recognizing the way in which racial identification often operates, the Court can address the problem affirmative action opponents raised in *Schuetz* and *Fisher II*. Focusing on a person's perceived race—rather than on skin color or any other pseudobiological category—would create a jurisprudence that better reflects the fluidity and context-dependence with which outsiders, and sometimes individuals themselves, perceive racial identity. Far from ignoring the dangers of racial classification, regarded-as case reasoning would take them head on.

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<sup>339</sup> See Onwuachi-Willig & Barnes, *supra* note 15, at 1289 (arguing that courts should recognize discrimination claims based on presumptions of a certain characteristic, such as being "regarded as" black, which includes any corresponding negative stereotypes); see also Goodwin, *supra* note 338, at 932 (describing the historical "collective negative imaging of blacks" as too immature and intellectually inferior to be granted fundamental rights).

<sup>340</sup> U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., *supra* note 20 at 6–7.

<sup>341</sup> See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (holding that to satisfy strict scrutiny and permit universities to use racial classifications, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity"); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2006) (Kennedy, J., concurring) ("School boards may pursue the goal of bringing together students of diverse backgrounds and races through [non-race-conscious] means . . .").

A. *The “Regarded-As” Standard under the ADA, the ADAAA, and Title VII*

In 1990, with the passage of the ADA, Congress seemed intent on including those perceived as disabled within the protections of the law.<sup>342</sup> A House Report stated:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities would be inferred and the plaintiff would qualify for coverage under the “regarded as” test.<sup>343</sup>

Following the passage of the ADA, the EEOC’s Interpretive Guidance similarly covered those regarded as disabled:

An individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under this part of the definition of disability . . . whether or not the individual’s actual physical or mental condition would be considered a disability under the first or second part of this definition.<sup>344</sup>

According to the Interpretive Guidance, an individual proceeding under this theory would have to show that an employer believed that a worker was disabled because of “myths, fears, or stereotypes.”<sup>345</sup> After the courts restricted relief for those perceived as disabled, the Americans with Disabilities Act Amendments Act (ADAAA) clarified the definition of disability.<sup>346</sup> Under the ADAAA, a person meets the regarded-as prong “if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”<sup>347</sup>

A handful of cases have developed a doctrinal framework for the ADAAA’s regarded-as prong. In *Hilton v. Wright*, a former state prisoner suffering from the Hepatitis-C Virus brought suit with several other inmates allegedly denied antiviral treatments because of past alcoholism or drug

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<sup>342</sup> Stephen F. Befort, *Let’s Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 997–998; Chai R. Feldblum, *Definition of Disability under Federal Anti-Discrimination Law: What Happened - Why - And What Can We Do about It?*, 21 BERKELEY J. EMP. & LAB L. 91, 140 (2000).

<sup>343</sup> H.R. REP. NO. 101-485, pt. 1, at 470–71 (1990).

<sup>344</sup> 29 C.F.R. app. § 1630.2(l) (1997).

<sup>345</sup> *Id.*

<sup>346</sup> See, e.g., Befort, *supra* note 342, at 1016–17 (explaining the changes Congress made to the statute to broaden the definition of disability).

<sup>347</sup> 42 U.S.C. § 12102(3)(a) (2012).

abuse.<sup>348</sup> Hilton argued that the Department of Correctional Services (DOCS) discriminated against him and others similarly situated because they were regarded as disabled.<sup>349</sup>

In addressing Hilton's claim, the Second Circuit elaborated on the standard for a regarded-as suit under the ADAAA.<sup>350</sup> At least at the summary judgment stage, Hilton would have to bring forth evidence only that DOCS regarded him as having a physical or mental impairment, regardless of how severe they believed that impairment to be.<sup>351</sup>

Several courts have also fleshed out what might count as evidence that an employer regarded an individual as disabled. In *Gil v. Vortex, L.L.C.*, the court rejected the defendant-employer's motion to dismiss the employee's disability-discrimination claim.<sup>352</sup> The court found evidence that the employer regarded the plaintiff as disabled when the employer required the plaintiff to submit additional medical documentation, expressed concern about the plaintiff's disability when talking to his daughter, and required the plaintiff to submit to tests not applicable to any other employee.<sup>353</sup> In addition to differential treatment, courts look at an employer's comments as evidence that a worker was regarded as disabled.<sup>354</sup> Consider, for example, *Darcy v. City of New York*, in which the plaintiff, a police officer, brought a disability-discrimination claim based on his superiors' belief that he was an alcoholic.<sup>355</sup> In rejecting the defendant's motion for summary judgment, the court relied on evidence that an employer had called the plaintiff an alcoholic, knew he associated with supposed alcoholics, and transferred him to a less desirable position five months later.<sup>356</sup> Consistently, when deciding cases under the ADAAA, courts have not required proof that an individual actually had an impairment. In other words, courts do not have to determine either how serious an employer believed a disability to be, or whether a worker suffered from a disability at all.

To a limited extent, the courts have imported the regarded-as standard into race-discrimination cases. The EEOC has consistently maintained that misperception should not be a defense to either race or national origin

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<sup>348</sup> 673 F.3d 120, 124 (2d Cir. 2012).

<sup>349</sup> *Id.*

<sup>350</sup> *Id.* at 128–29.

<sup>351</sup> *Id.*

<sup>352</sup> 697 F. Supp. 2d 234, 244 (D. Mass. 2010).

<sup>353</sup> *See id.* at 236, 240–241 (defendant requested an additional examination by a doctor chosen by defendant; plaintiff later alleged “disparate treatment”).

<sup>354</sup> *See, e.g., id.* at 240 (noting that the plaintiff's daughter “was told by [plaintiff's] supervisor that he had been let go because of [defendant's] fears that he would injure himself”).

<sup>355</sup> No. 06-CV-2246, 2011 WL 841375, at \*1–2 (E.D.N.Y. Mar. 8, 2011).

<sup>356</sup> *Id.* at \*1, \*5.

discrimination.<sup>357</sup> The EEOC Compliance Manual prohibits race discrimination, including

discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself. Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.<sup>358</sup>

While some federal circuit courts treat misperception as a defense,<sup>359</sup> others follow the EEOC in concluding that those regarded as minorities suffer real harm. Consider the Fifth Circuit's recent decision in *EEOC v. WC&M Enterprises*.<sup>360</sup> Mohammed Rafiq, a practicing Muslim from India, found his workplace dramatically different in the aftermath of September 11, 2001.<sup>361</sup> In addition to making comments on Rafiq's religion, his coworkers repeatedly called him "an Arab" and a "Taliban."<sup>362</sup> Rafiq suffered because coworkers regarded him as Arab, treating religion as a proxy for national origin and ethnicity.

Rafiq filed a charge of discrimination with the EEOC, which later brought a hostile work environment claim on Rafiq's behalf.<sup>363</sup> The district court had rejected Rafiq's national-origin discrimination claim, reasoning that no one had targeted Rafiq for being from India.<sup>364</sup> Relying on the EEOC's Guidance, the Fifth Circuit disagreed, suggesting that the hostility a worker faces is just as substantial in cases of misperception.<sup>365</sup> As the court explained: "[A] party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim's actual country of origin."<sup>366</sup>

<sup>357</sup> On the EEOC's position on the issue, see, for example, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.005, ENFORCEMENT GUIDANCE ON NATIONAL ORIGIN DISCRIMINATION 3–4, 7 (2016); *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, [http://www.eeoc.gov/laws/types/fs-relig\\_ethnic.cfm](http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm) [<https://perma.cc/LZW7-TZ9N>] (last visited June 27, 2014).

<sup>358</sup> U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.003, COMPLIANCE MANUAL § 15, at 15-5 (2006), <https://www.eeoc.gov/policy/docs/race-color.pdf> [<https://perma.cc/M8ZZ-DZZQ>].

<sup>359</sup> For a study of the rise and spread of the misperception defense, see, for example, D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 100–109 (2013).

<sup>360</sup> 496 F.3d 393 (5th Cir. 2007).

<sup>361</sup> *Id.* at 396.

<sup>362</sup> *Id.* at 395.

<sup>363</sup> *Id.* at 397.

<sup>364</sup> *Id.*

<sup>365</sup> See *id.* at 401 (discussing the EEOC's guidelines on discrimination and the definitions contained within).

<sup>366</sup> *Id.*

In *Jones v. UPS Ground Freight*, the Eleventh Circuit similarly recognized the harm of racial misperception.<sup>367</sup> Jones, who identified as African-American, began training for a road driver position.<sup>368</sup> Jones's race-discrimination argument relied partly on statements made by his co-worker, Kenneth Terrell, during a week-long training session.<sup>369</sup> At that time, Terrell told Jones: "I know how to train you Indians."<sup>370</sup> When Jones responded that he was not Indian, Terrell replied: "I don't care what race you are, I trained your kind before."<sup>371</sup> Terrell went on to call Jones an "Indian" several more times over the course of the conversation.<sup>372</sup>

In evaluating Jones's hostile work environment claim, the Eleventh Circuit considered how much weight to attach to Terrell's statements, particularly since he had misidentified Jones.<sup>373</sup> While recognizing that Jones was "neither Native American nor Indian," the court insisted that "a harasser's use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment."<sup>374</sup> Whatever stereotypes Terrell applied to Indians may well have affected Jones, regardless of how he categorized himself. "The fact that [a co-worker] ignorantly used the wrong derogatory ethnic remark toward the plaintiff," the court reasoned, "is inconsequential."<sup>375</sup>

The Ninth Circuit stated the rationale for rejecting a racial-misperception defense in *Amos v. City of Page Arizona*.<sup>376</sup> There, Burton Amos got in a car accident, crossing the center line and colliding with another vehicle.<sup>377</sup> Informed that Amos had exited his vehicle and likely suffered from serious injuries, the police conducted a brief search before their flashlight batteries died.<sup>378</sup> The police did not look for Amos again for more than a month.<sup>379</sup> Tourists would ultimately find Burton's remains one year later.<sup>380</sup> Representatives from Burton's estate learned that law enforcement routinely waited to conduct searches nearby, since the area

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<sup>367</sup> 683 F.3d 1283 (11th Cir. 2012).

<sup>368</sup> *Id.* at 1288.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 1299.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.* at 1300 (quoting *LaRocca v. Precision Motorcars, Inc.*, 45 F. Supp. 2d 762, 770 (D. Neb. 1999)).

<sup>376</sup> Estate of Amos *ex rel.* Amos v. City of Page, 257 F.3d 1086, 1094 (9th Cir. 2001).

<sup>377</sup> *Id.* at 1089.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 1089–90.

where Burton vanished bordered the Navajo Indian Reservation.<sup>381</sup> Burton was white, but his perceived race seems to have dictated the officers' actions.<sup>382</sup> Believing that Native Americans involved in car accidents often fled the scene, reached the reservation, and called in the next day, officers might have cut short the search for Burton based on a mistaken belief about his ethnicity.<sup>383</sup> Burton's estate filed suit under 42 U.S.C. 1983, arguing that law enforcement "violated the Equal Protection Clause by selectively withholding protective services" based on his perceived ethnicity.<sup>384</sup>

The City argued that Amos's Estate had no standing to bring a claim because Amos was white and did not belong to the class of persons that the City had stereotyped or mistreated.<sup>385</sup> The lower court had adopted this reasoning in dismissing the Estate's equal protection claim, reasoning that antidiscrimination protections help to rectify the effects of past subordination that Amos, a white man, likely never experienced.<sup>386</sup> The Ninth Circuit reversed and remanded, relying on the harms Amos suffered because of his perceived identity.<sup>387</sup> First, the court recognized that the consequences for Amos did not change because he was white, and the injury he suffered was no less real.<sup>388</sup> Stereotyping, the court recognized, was just as malevolent when an actor chose the "wrong" victim.<sup>389</sup>

Taken together, *Amos*, *Jones*, and *WC & M Enterprises* reveal that regarded-as discrimination cuts across racial lines, affecting those who identify as minorities and those who do not. These cases show how racial proxies and stereotypes influence how individuals perceive, judge, and treat one another. These cases bolster the case for separating the stereotypes associated with race from skin color. Regardless of how a person categorizes herself, the judgments and generalizations associated with perceived race can do far-reaching harm.

But how can the courts translate regarded-as reasoning in the context of postsecondary admissions? Exploring admissions officers' efforts to comply with the Supreme Court's affirmative-action jurisprudence illuminates one potentially constructive answer to this question.

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<sup>381</sup> *Id.* at 1090.

<sup>382</sup> *See id.* (stating that the Page City Attorney indicated that "it is standard practice for the police not to conduct thorough searches for runaway drivers because they suspect most are Native Americans who will call in the next day").

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at 1092–93.

<sup>385</sup> *Id.* at 1086, 1093.

<sup>386</sup> *Id.* at 1094.

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.*

## B. *Race, Regarded-As Reasoning, and Affirmative Action*

Almost inevitably, the courts will soon address the question dividing the Court in *Fisher II*: whether the race-conscious remedies discussed in *Grutter v. Bollinger* and *Parents Involved v. Seattle* can ever pass constitutional muster in a world in which racial identity is socially constructed and ever-changing. How can the courts justify any antisubordination measure designed to protect the members of a particular race when it is impossible to offer a principled definition of race itself?

Drawing on the ADAAA, courts should view affirmative action as justified and coherent when an individual is regarded as belonging to a particular race. As under the ADAAA, the question should not be whether that person actually has a particular racial background or even whether a decision maker views that racial background negatively. Instead, the analysis should turn on simple perception of race.

However, using regarded-as reasoning in the context of postsecondary admissions raises unique challenges. In the employment context, as Bertrand and Mullainathan have shown, perceived racial identity can count as a strike against a potential hire or worker.<sup>390</sup> By contrast, in postsecondary education, many admission officers view minority status favorably. In studying admissions practices at seventy-five of the nation's most competitive universities, scholar Rachel Rubin found that most admissions officers heavily weighed an applicant's "fit" with the university in question.<sup>391</sup> When asked to define fit, officers attached the most importance to an applicant's membership in an underrepresented minority.<sup>392</sup> Rubin's conclusions reinforce the findings of earlier studies, explaining that members of underrepresented minorities (along with legacy students and those with SAT scores higher than 1500) receive the greatest preference.<sup>393</sup>

Moreover, in the university setting, because applicants often identify themselves by race, the odds of opportunistic behavior are higher.<sup>394</sup> In the

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<sup>390</sup> See Bertrand & Mullainathan, *supra* note 326, at 1–3, 10 (discussing the differences in callback rates for job applicants based on their perceived race).

<sup>391</sup> See Rachel Rubin, *Who Gets in and Why? An Examination of Admissions into America's Most Selective Colleges and Universities*, 2 INT'L EDUC. RES. 1, 4, 12 (2014) (discussing the admission preferences for underrepresented minority students).

<sup>392</sup> See *id.* at 1–2, 10 (examining a study on the admissions processes of the nation's most selective colleges and universities).

<sup>393</sup> See T.J. Espenshade, C.Y. Chung & J.L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOC. SCI. Q. 1422, 1426–30 (2004) (discussing acceptance rates for underrepresented minorities with high SAT scores); see also T.J. Espenshade & C.Y. Chung, *The Opportunity Costs of Admissions Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 302 (2005) (discussing admissions preferences for legacy applicants).

<sup>394</sup> As of 2011, the Common Application used by Harvard, Yale, and over 400 other universities and colleges has asked about race as part of a section on "Demographics." Susan Saulny & Jacques Steinberg, *Mixed Race Students Wonder How Many Boxes to Check*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14students.html> [<https://perma.cc/KRN9-6JYK>]. The same

workplace, employers cannot select workers by race or even ask about the identity of a potential hire.<sup>395</sup> Because students have more control over the process of racial categorization, the risk of self-serving behavior is naturally higher.

Finally, the evidentiary strategies used in ADAAA and race discrimination cases seem to be a poor fit in the context of university admissions. In employment cases, courts rely on off-color comments, adverse employment actions, and comparator evidence to smoke out regarded-as discrimination.<sup>396</sup> Given the confidentiality surrounding university admissions and the different ways in which applicants categorize themselves by race, this kind of evidence seems unlikely to surface.

However, the United States Departments of Education and Justice's Guidance on the Voluntary Use of Race in Postsecondary Admissions (the Guidance) suggests that some universities have already adopted regarded-as reasoning.<sup>397</sup> Under *Grutter*, *Parents Involved*, and their progeny, as the Guidance asserts, universities must first justify why diversity counts as a compelling state interest.<sup>398</sup>

Centrally, however, the Guidance addresses how to create a diverse student body without recourse to racial categorization. The Guidance encourages admissions officers to turn first to race-neutral alternatives to achieve obviously race-conscious outcomes. "In selecting among race-neutral approaches," the Guidance explains, "you may take into account the racial impact of various choices."<sup>399</sup> The Guidance next explores

year, the number of racial categories available to select increased dramatically, as the Department of Education ordered universities to comply with a federal edict to collect more information on race and ethnicity. *See, e.g.,* Susan Saulny & Jacques Steinberg, *On College Forms, a Question of Race, or Races, Can Perplex*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14admissions.html?pagewanted=all> [<https://perma.cc/9ZVK-7K29>] ("[S]tudents can now choose from a menu of new boxes of racial and ethnic categories . . . . The change has made it easier for students to claim a multiracial identity—highlighting those parts of their backgrounds they might want to bring to the fore and disregarding others . . . .").

<sup>395</sup> *See, e.g.,* *Questions and Answers about Race and Color Discrimination in Employment*, U.S. EQUAL EMP'T. OPPORTUNITY COMM'N, [http://www.eeoc.gov/policy/docs/qanda\\_race\\_color.html](http://www.eeoc.gov/policy/docs/qanda_race_color.html) [<https://perma.cc/AA3J-4HC3>] (last modified May 16, 2016) (discussing race in relation to recruitment and hiring practices).

<sup>396</sup> *See* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, *supra* note 20 (discussing illegal racial discrimination practices). Following the decision of *Fisher I*, the Departments of Education and Justice issued a letter concluding that the 2011 Guidance would remain in effect. *See, e.g.,* U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, QUESTIONS AND ANSWERS (2013), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-qa-201309.pdf> [<https://perma.cc/5KJZ-UA7Q>] (discussing how higher education institutions, school districts, and K-12 schools can achieve a diverse student body); U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE, JOINT "DEAR COLLEAGUE" LETTER, (Sept. 27, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309> [<https://perma.cc/WHR5-Y27Z>] (explaining the steps the U.S. Department of Education and the U.S. Department of Justice are taking to assist schools in avoiding racial discrimination).

<sup>397</sup> *See supra* note 396.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

how admissions officers might identify minority applicants without turning to racial categories. Rather than explicitly asking about race, as the Guidance states, universities may rely on proxies, including “socioeconomic status,” “the educational level attained by parents,” “first-generation college status,” “marked residential instability,” or “enrollment in a low-performing school or district.”<sup>400</sup> While officially race-neutral, these criteria allow officers to identify applicants they regard as minorities. The Guidance treats these proxies as strategies that “would assist in drawing students from different racial backgrounds to the institution.”<sup>401</sup>

Most obviously, regarded-as reasoning allows universities invested in racial diversity to proceed in spite of the Court’s decisions in *Grutter*, *Parents Involved*, and *Fisher I* and *II*. In *Fisher I*, Justice Kennedy’s majority opinion reminded universities that to satisfy strict scrutiny, “[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>402</sup> Using race-neutral proxies appears to allow admissions officers to achieve a desired result without resorting to racial categorization.

In defining race, the courts should look to how admissions officers identify students. By acknowledging and analyzing the way in which admissions officers deal with students’ race, the Court can better capture the reality of racial identity, both as college applicants experience it and admissions officers perceive it. As Saperstein and Penner have shown, outsiders’ perception of another’s racial identity—and even an individual’s understanding of herself—varies depending on the surrounding circumstances.<sup>403</sup> And as Bertrand and Mullainathan indicate, the stereotypes and judgments surrounding race do damage regardless of a person’s “true” identity.<sup>404</sup>

Furthermore, if the Court relies on evidence of a person’s perceived race, the risk of opportunism might decrease, since there is anecdotal evidence that admissions officers sometimes already use regarded-as reasoning to detect and resist self-serving behavior. Rather than taking an applicant’s self-categorization at face value, admissions officers at Rice University “try to reconcile whatever boxes an applicant may have checked with the rest of the application.”<sup>405</sup> Some admissions officers at Rice used a

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<sup>400</sup> *Id.*

<sup>401</sup> *Id.*

<sup>402</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013).

<sup>403</sup> *See, e.g.*, Penner & Saperstein, *supra* note 323, at 19628–30 (discussing research on how human beings perceive race); Penner, Noymmer & Saperstein, *supra* note 324, at e15812 (exploring whether nonracial characteristics affect how individuals are perceived by others).

<sup>404</sup> *See, e.g.*, Bertrand & Mullainathan, *supra* note 326, at 1–3, 10 (discussing an experiment in which resumes submitted with African-American names received far fewer callbacks than those submitted with white names).

<sup>405</sup> Saulny & Steinberg, *supra* note 394.

specific essay question about “unique life experiences and cultural traditions” to filter out applicants who were insincere about a particular racial identity.<sup>406</sup> Another former admissions officer interviewed by the *Huffington Post* explained that her colleagues had used proxies when students refused to answer questions about race, believing that officers discriminated against Asian or Caucasian applicants.<sup>407</sup> In particular, she described how officers used a student’s name, parents’ name, or school of origin to determine racial identity.<sup>408</sup> As this anecdotal evidence suggests, courts focusing on an individual’s perceived identity might more effectively check the kind of self-serving behavior that *Schuetz* and the *Fisher II* dissenters foreground.

Nonetheless, in the university setting, regarded-as reasoning represents a far from perfect solution. Critics of *Grutter* and its progeny have long insisted that the Court’s approach to diversity encourages universities to conceal their true objectives.<sup>409</sup> First, diversity jurisprudence encourages decision-makers to play down the remedial interest in addressing the effects of past race discrimination that likely motivates many admissions officers.<sup>410</sup> By prohibiting quotas and other quantitative approaches to affirmative action, the Court encourages officers to obscure how much race matters to admissions decisions.<sup>411</sup> By focusing on how admissions officers evaluate students’ racial identity, the Court can acknowledge the social construction of race while recognizing the ways in which perceived race impacts individual outcomes. However, at least in the affirmative-action context, regarded-as approaches to race seem to ratify admissions officers’ efforts to achieve a race-specific outcome without admitting their true intentions. To the extent that a regarded-as approach represents an effort to comply with

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<sup>406</sup> *Id.*

<sup>407</sup> See Steffie Drucker & Josh Kalamotousakis, *College Applications Can Be Complicated for Mixed-Race Teens*, HUFFINGTON POST (Dec. 1, 2012, 1:31 PM), [http://www.huffingtonpost.com/2012/12/01/mixed-race-teens-and-coll\\_n\\_2224256.html](http://www.huffingtonpost.com/2012/12/01/mixed-race-teens-and-coll_n_2224256.html) [<https://perma.cc/TQ23-JZTZ>] (“Admissions folks can usually sniff out who (is Asian) based on their name, their parents’ names or where their parents went to school.” (quoting the admissions officer)).

<sup>408</sup> *Id.*

<sup>409</sup> See, e.g., Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?* *Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 VAND. L. REV. EN BANC 77, 91 (2012) (“The troubling lack of intellectual forthrightness in the Court’s opinions . . . in some ways mirrors the ways ‘plus plans’ and percentage schemes lack the candor of old-fashioned set-asides.”); Colin S. Diver, *From Equality to Diversity: The Detour from Brown to Grutter*, 2004 U. ILL. L. REV. 691, 718 (“[T]he Court in *Grutter* and *Gratz* has adopted a rule that penalizes candor.”).

<sup>410</sup> See, e.g., Amar, *supra* note 409, at 93 (“[T]he goal of remedying past discrimination has largely been abandoned as a legal justification for affirmative action programs.”); Diver, *supra* note 409, at 718 (arguing that “the rush to embrace the diversity rationale” has obfuscated affirmative action’s remedial purposes).

<sup>411</sup> See, e.g., Diver, *supra* note 409, at 718 (stating that the Court in *Gratz* stuck down a points-based admissions approach that made “clear the extent to which the University was favoring race”).

*Grutter* and its progeny, it may once again allow officers and courts to deny the extent to which racial categorization still drives admissions decisions.

Regarded-as approaches may also be over- or underinclusive, given a university's genuine interest in diversity. First, by focusing on variables like socioeconomic class, such an approach may fail to capture the disadvantaged minority students that affirmative-action programs would ideally assist.<sup>412</sup> As importantly, by failing to address all self-serving behavior, regarded-as approaches may give an unfair advantage to students more successfully able to simulate a favored racial identity. From the standpoint of individual students, regarded-as approaches ignore the importance of a student's sense of identity. Regardless of whether or not it is constructed, racial identity can play a crucial role in how an individual sees herself and her place in the community.<sup>413</sup> By relying so heavily on what outsiders think, regarded-as approaches do not do justice to students' understandings of themselves.

Just the same, regarded-as reasoning provides the best path for courts faced with a Hobson's choice: categorizing individuals by race or rejecting all antistatutory remedies that touch on racial differences. Recognizing the impact of perceived racial differences allows courts to rationalize affirmative action policies without assuming the validity of racial categories. Should courts ever have to adjudicate race, in the context of affirmative action or otherwise, an existing (albeit developing) legal framework exists to provide guidance.

Regarded-as reasoning may also work effectively to allow universities to address past subordination without running up against constitutional prohibitions on racial classifications. Recent work published by the *Harvard Journal of Law and Policy* studied the impact of a proxy program developed at the University of Colorado Boulder.<sup>414</sup> Prior to 2009, the University used socioeconomic class instead of race in admissions decisions.<sup>415</sup> By 2010, the University had turned to a race-plus-class model.<sup>416</sup> A 2009 study found that officers admitted 9 percent more underrepresented minorities under the race-

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<sup>412</sup> For example, critics of the Texas Top Ten Percent Law addressed in *Fisher*—one type of proxy program—point out that it is less effective than traditional affirmative action and may in fact increase admissions of Caucasian students. See, e.g., Marta Tienda et al., *Affirmative Action and the Texas Top 10% Admission Law: Balancing Equity and Access to Higher Education*, at 10 (2008), [http://theop.princeton.edu/reports/wp/AffirmativeAction\\_TopTen.pdf](http://theop.princeton.edu/reports/wp/AffirmativeAction_TopTen.pdf) [<https://perma.cc/SKJ8-ZNUR>] (“Most evaluations of the top 10% law conclude that [it] is less efficient than affirmative action in achieving diversity of enrolled students . . .”).

<sup>413</sup> “If race is closely linked to communities, and communities are similarly tied to identities, then race and identity are themselves connected,” writes Ian F. Haney López. López, *supra* note 14, at 57. “Race matters because community ties link our faces to our souls.” *Id.*

<sup>414</sup> See Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, 7 HARV. L. & POL'Y REV. 367, 387–90 (2013) (describing the study's “Disadvantage Index”).

<sup>415</sup> *Id.* at 390.

<sup>416</sup> *Id.* at 396.

blind policy.<sup>417</sup> In evaluating the race-plus-class approach, a 2010 study concluded that it had resulted in a 13-percent increase in acceptance rates for the poorest students, a 17-percent increase for underrepresented minority students, and a 32 percent-increase in the lowest-income, minority students.<sup>418</sup> At least some well-tailored proxy programs may make a significant difference to minority enrollment.

In spite of its drawbacks, regarded-as reasoning offers a promising solution for the dilemma outlined by affirmative-action opponents in *Fisher II*. By defining racial identity according to others' perception, regarded-as reasoning reduces the threat of opportunism or self-serving behavior. It captures the fact that racial proxies and all the stereotypes they represent matter more than color or biological race. In this way, the challenge raised by anti-affirmative-action advocates may create an unexpected new opportunity. From equal protection to Title VII jurisprudence, commentators have long faulted the courts for adopting a biological understanding of race that is inaccurate and misleading. Forcing cause lawyers and the courts to say what race means might finally provide a way forward.

#### CONCLUSION

It is tempting to view colorblind constitutionalism through the lens of contemporary politics. Opposition to affirmative action has become a signature position of the political Right, synonymous with faith in the free market, emphasis on the harms created by racial classifications, and concern about discrimination against whites. The history of opposition to affirmative action shows, however, that the politics of colorblindness have been contested and complex. The players and terms of the anti-affirmative-action debate have changed considerably over time, and the form of "reactionary" colorblindness familiar to us from the dissents of Justices Thomas and Scalia developed only recently.

Viewed in historical context, the stakes of *Fisher II* become clearer. More than ever before, the Supreme Court has come to grapple with what race means. However, the Court's growing awareness of the social construction of race has created new challenges for supporters of an antistatist vision of the Constitution. Opponents of affirmative action have marshalled new arguments, borrowing from the claims long advanced by historians and CRT theorists. These activists argue that if race is artificial, race-conscious admissions programs are unfair, arbitrary, and easy to manipulate.

Nevertheless, future battles over affirmative action may open up an unexpected opportunity. Those on opposing sides of the affirmative-action issue have come to an uneasy consensus that racial identities are fluid,

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<sup>417</sup> *Id.* at 372.

<sup>418</sup> *Id.* at 397–98.

contested, and socially determined. Perhaps for the first time, in using regarded-as reasoning, discrimination jurisprudence will come to grips with what race means in modern America.