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## Not White Enough, Not Black Enough: Reimagining Affirmative Action Jurisprudence in Law School Admissions Through a Filipino-American Paradigm

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# **Not White Enough, Not Black Enough: Reimagining Affirmative Action Jurisprudence in Law School Admissions Through a Filipino-American Paradigm**

## *Abstract*

*Writing the majority opinion upholding the use of racial preferences in law school admissions in 2003, Justice Sandra Day O'Connor anticipated that racial preferences would no longer be necessary in twenty-five years. On the contrary, 2021 has seen the astronomic rise of critical race theory, the popularity of race-driven "diversity" initiatives in higher education, and the continued surge of identity politics in the mainstream. So much has been written on affirmative action—what else could this Comment add to the conversation?*

*Analyzing the Court's application of strict scrutiny through a Filipino-American paradigm, this Comment ultimately concludes that affirmative action in law school admissions is unconstitutional under the Fourteenth Amendment's Equal Protection Clause. However, this Comment also concludes that affirmative action is not only necessary to but also consistent with the repeatedly upheld anti-subordination aspect and redistributive rubric of the Reconstruction Amendments.*

*Navigating the tension between these two tenets, this Comment cautiously proposes a race-neutral alternative to current affirmative action policy toward building a more perfect union.*

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“[E]l genio no tiene patria, el genio brota en todas partes, el genio es como la luz, el aire, patrimonio de todos: cosmopolita como el espacio, como la vida y como Dios . . . .”

-Dr. José Protasio Rizal Mercado y Alonso Realonda<sup>1</sup>

## I. INTRODUCTION: THE FIRST FILIPINO

On Ferdinand Magellan’s 1520 expedition sailing from Spain on a westward route to the Americas, Magellan chanced upon an archipelago that would later be claimed for King Phillip II of Spain.<sup>2</sup> The Spanish would proceed to colonize these islands and coalesce the native tribes into a country we now know as the Republic of the Philippines.<sup>3</sup> “Filipino” was an identification reserved for men of Spanish descent born in the colonies<sup>4</sup> The natives were called “*Indios*,” inferior brown people of limited intelligence compared to their white European overlords, not unlike the other “*Indios*” half a world away in the Americas.<sup>5</sup>

Toward the end of the 19th century, a group of men who called themselves “*Ilustrados*” ignited the Philippine Revolution.<sup>6</sup> These men were nothing more than *Indios* who, having had the chance to study in Europe, realized that the color of their skin did not make them inferior to their colonial

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1. *Jose Rizal’s Homage to Luna and Hidalgo*, MALACAÑAN PALACE: PRESIDENTIAL MUSEUM & LIBR., <http://malacanang.gov.ph/4071-jose-rizals-homage-to-luna-and-hidalgo/> (last visited Sept. 7, 2021). In English, the quote translates to, “Genius does not manifest itself solely within the borders of a specific country: it sprouts everywhere; it is like light and air; it belongs to everyone: it is cosmopolitan like space, life, and God.” *Id.*

2. See PATRICIO N. ABINALES & DONNA J. AMOROSO, *STATE AND SOCIETY IN THE PHILIPPINES* 47 (2005). This expedition later gained notoriety as the first known circumnavigation of the Earth. *See id.* at 49.

3. *Id.* The Philippines—or more accurately, the initial set of islands claimed by the Spanish conquistadores—was named after King Philip II. *Id.*

4. See LÉON MARÍA GUERRERO, *THE FIRST FILIPINO* 81 (1981). The de facto caste system—arguably still prevalent in Philippine society—had the Spanish born and blooded *Peninsulares* on top and the native born “Malayan” blooded *Indios* toward the bottom. *See* Elfren S. Cruz, *From Indio to Filipino*, PHIL. STAR (July 29, 2018, 12:00 AM), <https://www.philstar.com/opinion/2018/07/29/1837622/indio-filipino>. Between them are the multiracial *Mestizo* classes, which include local inhabitants of Chinese descent known as *Chinos*. *Id.*

5. See ABINALES & AMOROSO, *supra* note 2, at 103. For an insightful analog of the legal relationship between *Indios* and European settlers in the Americas, see JUSTICE IN A NEW WORLD: NEGOTIATING LEGAL INTELLIGIBILITY IN BRITISH, IBERIAN, AND INDIGENOUS AMERICA (Brian P. Owensby & Richard J. Ross eds., 2020).

6. See ABINALES & AMOROSO, *supra* note 2, at 104–05. While several women figured prominently in the Philippine revolution, only men attended universities in 19th century Philippines—much less overseas—so membership in the *Ilustrados* was limited to men. *See id.* at 107.

masters.<sup>7</sup> The *Ilustrados* would take action to educate fellow *Indios* and fight for independence from the Spanish.<sup>8</sup> Thus, the first *Filipinos* were reborn—natives who would no longer accept subjugation in their own land.<sup>9</sup> One of the *Ilustrados*' central figures, José Rizal, inspired a Philippine revolution against Spain and was shot by Spanish colonists for treason.<sup>10</sup> But Rizal's legacy of fighting for equality between the conqueror and the conquered would live on.<sup>11</sup>

This Comment participates in the fight for racial equality in a new context—affirmative action in law school admissions for United States citizens of all races.<sup>12</sup> It does so in three ways: First, by using the Filipino-American experience, this Comment exposes concealed challenges in current affirmative action jurisprudence by adding sophistication to discussions surrounding race.<sup>13</sup> Second, this Comment argues that the Supreme Court's application of faux strict scrutiny is inherently flawed because of the Court's refusal to challenge the universities' use of broad racial categorizations.<sup>14</sup> Finally, this Comment proposes an alternative to current affirmative action policy that skirts strict scrutiny, attempts to remedy discrimination, and invites individual agency from all Americans.<sup>15</sup>

Part II provides context by discussing the history of affirmative action rooted in the Fourteenth Amendment of the United States Constitution.<sup>16</sup> Section III.A traces the evolution of affirmative action jurisprudence in the higher education context,<sup>17</sup> while Section III.B uses the Filipino-American experience to highlight pervasive practical problems in current affirmative action policy in higher education.<sup>18</sup> Section IV.A argues that the Court's

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7. See ABINALES & AMOROSO, *supra* note 2, at 105.

8. *Id.*

9. See *id.* at 106 (outlining the *Ilustrados*' proposal for comprehensive reform in the Philippines, including "recognition of Filipino rights," "extension of Spanish laws to the Philippines," and "assertion of the dignity of the Filipino").

10. See *id.* at 107, 110–11; see also José Rizal, LIBR. CONG., <https://www.loc.gov/tr/hispanic/1898/rizal.html> (last visited Sept. 24, 2021) (stating José Rizal was executed by firing squad). León María Guerrero's book entitled *The First Filipino*, is a biography on José Rizal. GUERRERO, *supra* note 4.

11. ABINALES & AMOROSO, *supra* note 2, at 107, 110–11.

12. See *infra* Parts III–VI.

13. See *infra* Parts III–VI.

14. See *infra* Part IV.

15. See *infra* Part V.

16. See *infra* Part II.

17. See *infra* Section III.A.

18. See *infra* Section III.B.

abandonment of strict scrutiny effectively permitted universities to prevaricate in practice, insulating them from any meaningful scrutiny,<sup>19</sup> and Section IV.B asserts that the lack of a limiting principle equates to an unconstitutional grant of complete deference to the universities.<sup>20</sup> Part V proposes an affirmative action policy that eschews the unsolvable challenges of identity embedded in racial preferences and addresses the reality of past and present discrimination.<sup>21</sup> Finally, Part VI summarizes and concludes.<sup>22</sup>

## II. BACKGROUND: A PROMISE UNFULFILLED

Despite the founding generation's high ideals of equality among men, the United States Constitution did not contemplate racial equality.<sup>23</sup> After a bloody civil war, a constitutional revolution brought about the Reconstruction Amendments, which abolished slavery's legal structure and—at least on paper—made every person born or naturalized in the United States an equal citizen by securing a battery of civil rights.<sup>24</sup> The Fourteenth Amendment's Equal Protection Clause has since been at the center of a national debate on the meaning of equality as it relates to race.<sup>25</sup> Twenty-eight years after its

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19. See *infra* Section IV.A.

20. See *infra* Section IV.B.

21. See *infra* Part V.

22. See *infra* Part VI.

23. See MICHAEL STOKES PAULSEN & LUKE PAULSEN, *THE CONSTITUTION: AN INTRODUCTION* 73–89 (2015) (asserting that the Constitution, as originally proposed and adopted, is unequivocally proslavery).

24. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 351 (2005) (stressing the monumental importance of the Fourteenth Amendment in shaping the country after the Civil War). For a more focused discussion on the history and significance of the Reconstruction Amendments, see ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* (2019).

25. See FONER, *supra* note 24, at 55, 66 (comparing the differing, if not opposing, notions of “equality” between the Democrats and the Republicans of the 39th Congress in the Fourteenth Amendment's ratification process). Overriding President Andrew Johnson's veto, the 39th Congress also passed the Civil Rights Act of 1866, which mandated “all persons within the jurisdiction of the United States shall have the same rights in every State . . . [as are] enjoyed by white citizens.” MELVIN I. UROFSKY, *THE AFFIRMATIVE ACTION PUZZLE: A LIVING HISTORY FROM RECONSTRUCTION TO TODAY* 3 (2020). President Andrew Johnson vetoed the bill because it contained a distinction of preferential treatment among citizens based on race. *Id.* at 3–4. He particularly rejected the citizenship provision because it immediately granted citizenship to former slaves, while European immigrants had to wait several years through the naturalization process. *Id.* at 4. President Johnson's attack on the bill as a measure of race legislation “made to operate in favor of the colored and against the white race,” is an early manifestation of what we now describe as “reverse discrimination.” President Andrew Johnson, Address to the Senate of the United States Vetoing the Civil Rights Bill (Mar. 27,

ratification, the Supreme Court ruled in *Plessy v. Ferguson* that state racial segregation laws in railway carriages did not violate the Fourteenth Amendment's guarantee of equal protection of the laws.<sup>26</sup> Sixty years later in 1954, the Court in *Brown v. Board of Education* effectively overturned this "separate but equal doctrine" in the name of equal protection to attempt to desegregate public schools in America.<sup>27</sup>

The Court's application of the Fourteenth Amendment through the years mirrors the complicated nature of race relations in the United States.<sup>28</sup> It is against this backdrop that affirmative action emerged.<sup>29</sup> One of the most prevalent rationales for affirmative action, remedying past discrimination, was underscored in President Lyndon B. Johnson's famed 1965 commencement address at Howard University:

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "[Y]ou are free to compete with all the others," and still justly believe that you have been completely fair. Thus, it is not enough just to open the gates of opportunity. . . . We seek . . . not just equality as a right . . . but equality as a fact and equality as a result.<sup>30</sup>

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1866), [https://www.digitalhistory.uh.edu/exhibits/reconstruction/section4/section4\\_10veto2.html](https://www.digitalhistory.uh.edu/exhibits/reconstruction/section4/section4_10veto2.html); see also Stephanie Duncan-Peters, *How Far Can Affirmative Action Go Before It Becomes Reverse Discrimination?*, 26 CATH. U. L. REV. 513, 513 (1977) (exploring the contours of affirmative action as positive public policy).

26. 163 U.S. 537, 548–49 (1896) (holding the racial segregation laws for public facilities did not violate the Fourteenth Amendment's Equal Protection Clause as long as said facilities were equal in quality).

27. 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

28. See FONER, *supra* note 24, at 127 (recounting the "battle" over the Fourteenth Amendment's meaning along racial lines shortly after its ratification); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 989–97 (1979) (discussing Supreme Court cases in the 20th century that interpreted the Fourteenth Amendment's tension between liberty and equality). For a thorough discussion on the Fourteenth Amendment's original meaning from its 1866 inception to its 1964 application in the context of racial segregation, see Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

29. See UROFSKY, *supra* note 25, at 34. One of the first instances of affirmative action in the modern era was the Kennedy Administration's creation of the Committee on Equal Employment Opportunity to take an active role in ensuring equal opportunity by taking "affirmative action to ensure . . . [fair employee treatment] without regard to their race, color, creed, or national origin." *Id.* at 35–36.

30. Lyndon B. Johnson, President of the United States, Commencement Address at Howard University, 1965, <https://www.lbjlib.org/wh/wh/wh.cfm?x=1&y=1>.

Affirmative action programs in the 1960s manifested in several forms across employment, government contracting, and education.<sup>31</sup> As state actors and private enterprises tried to implement affirmative action, resistance to affirmative action grew.<sup>32</sup> In the field of higher education, the Supreme Court wrestled with affirmative action for the first time in *Regents of University of California v. Bakke*.<sup>33</sup> Allan Bakke, a “white male” Marine Corps Vietnam War Veteran and National Merit Scholar, was twice denied admission to the University of California Davis Medical School.<sup>34</sup> Bakke filed suit claiming that the university, through its admissions policy, had discriminated against him because of his race in violation of the Fourteenth Amendment’s Equal Protection Clause.<sup>35</sup>

When a discriminatory law is challenged on equal protection grounds, the Court uses strict scrutiny to “‘smoke out’ illegitimate uses of race by assuring

University: “To Fulfill These Rights,” (Jun. 4, 1965), in AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights>.

Throughout the years, the rationale for affirmative action—particularly in higher education—has morphed from this remedy for past discrimination into a “diversity” interest. See *infra* note 75.

31. See UROFSKY, *supra* note 25, at 34–36. This Comment’s focus is on affirmative action in law school admissions. See *infra* Part V. Arguably, affirmative action manifested in voting as well with the Voting Rights Act. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 299 (2000) (“[T]he [Voting Rights Act], particularly as amended and as interpreted by the Warren Court, constituted an affirmative action program in the arena of electoral participation.”).

32. See Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 275 & n.6 (2015) (enumerating studies that evaluate the fairness of racial affirmative action programs along with contradictory citizen attitudes about affirmative action); Duncan-Peters, *supra* note 25, at 546 (conceding that equitable remedies to correct past discrimination may be laudable but can unduly infringe other citizens’ rights as a form of “reverse discrimination”).

33. 438 U.S. 265, 302–03 (1978). *DeFunis v. Odegaard*, which involved an Equal Protection challenge to the University of Washington School of Law’s admissions policy, was argued before the Supreme Court three years earlier but was not decided on its merits. 416 U.S. 312, 314–16 (1974).

34. *Bakke*, 438 U.S. at 276; see *Allan Bakke: The Applicant and Plaintiff*, CIVIL RIGHTS MOVEMENT (Feb. 18, 2015), <https://civilrightsmovement.blogs.wm.edu/2015/02/18/allan-bakke-the-applicant/>. Since the early days of the republic, attempts to neatly categorize race by colors such as “white,” “black,” or “colored” have elicited wide disagreement. See, e.g., KEYSSAR, *supra* note 31, at 58–59 (footnote omitted) (“Attorney Charles Chauncy maintained in Pennsylvania in 1838 that it was ‘our duty to do everything that lies in our power[] to elevate and to improve the condition of the colored race . . . instead of cutting them off.’ Other advocates pointed out that the very term *white* was ambiguous in its meaning: ‘Does it mean only Anglo-Saxons?’ queried an Ohio delegate. ‘Does it embrace all Caucasians? This interpretation would include many who are darker than some it would exclude.’ Still others played the military card, quoting General Andrew Jackson’s praise of black soldiers who took up arms during the War of 1812[] and insisting that those who fought for their country, and might fight again, should not be denied the [voting] franchise.”).

35. *Bakke*, 438 U.S. at 277–78.



that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.<sup>36</sup> Because the University of California Davis Medical School's admissions program involved the use of race, the Court had to apply strict scrutiny.<sup>37</sup> A plurality of the Court, led by Justice Powell, invalidated the admissions scheme that reserved 16 of 100 slots for minorities.<sup>38</sup> Justice Powell reasoned the quota system disregarded individual rights protected by the Fourteenth Amendment's Equal Protection Clause.<sup>39</sup> It is crucial to note that Justice Powell's opinion identified the "attainment of a diverse student body" as a "constitutionally permissible goal for an institution of higher education."<sup>40</sup> While the University of California Davis Medical School's policy passed the first prong of strict scrutiny analysis, the Court ruled that the school's pursuit of that goal through a quota system was not sufficiently narrowly tailored.<sup>41</sup> The plurality opinion also pointed to other

36. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989). Strict scrutiny, the highest standard of judicial review, invalidates a challenged law unless it passes a two-prong test: (1) the law must be justified by a compelling government interest, and (2) the means must be sufficiently narrowly tailored to achieve the law's purpose. *See infra* notes 46–47 and accompanying text.

37. *Bakke*, 438 U.S. at 279.

38. *Id.* at 278–79 (“The trial court found that the special program operated as a racial quota, because minority applicants . . . were rated only against one another. . . . [A]nd 16 places in the class of 100 were reserved for them.”).

39. *Id.* at 319–20 (“It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.”). There is a textualist argument that Title VI of the Civil Rights Act of 1964—incorrectly construed by *Bakke*—totally precludes any racially discriminatory practice. *See* Jonathan F. Mitchell, *Textualism and the Fourteenth Amendment*, 69 STAN. L. REV. 1237, 1309 (2017) (“A text-centered resolution to the affirmative action controversy would be simple: allow the practice under the Equal Protection Clause, while forbidding it under Title VI. That would permit Congress to decide whether to amend Title VI to permit race-conscious admissions policies or other types of preferences for underrepresented minorities. And it would have the added benefit of giving the final word to the national political branches—which are better suited than the judiciary to resolve the disputed empirical questions and value judgments that go into deciding whether a controversial practice such as affirmative action should continue.”).

40. *Bakke*, 438 U.S. at 311–12. The Court highlighted that academic freedom, while not explicitly stated as a constitutional right, is a “special concern of the First Amendment,” thereby leaving a university free to make its own judgments as to the selection of its student body. *Id.* at 312. This holding is groundbreaking in strict scrutiny analysis because prior to *Bakke*, the only interest that the Court found to be substantial enough to justify racial classifications centered on emergency wartime measures. *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214, 223 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Hirabayashi v. United States*, 320 U.S. 81 (1943).

41. *Bakke*, 438 U.S. at 320. (“[W]hen a [s]tate’s distribution of benefits or imposition of burdens hinges on ancestry or the color of a person’s skin, that individual is entitled to a demonstration that

race-conscious methods that would allow the university to pursue the substantial state interest of diversity without using a quota system.<sup>42</sup>

### III. CURRENT STATE OF THE LAW: LAW SCHOOL ADMISSIONS AND FILIPINO-AMERICANS

The Supreme Court's 2003 decisions in *Gratz v. Bollinger*<sup>43</sup> and *Grutter v. Bollinger*<sup>44</sup> draw from *Bakke* and shape the current state of law school admissions in the United States.<sup>45</sup> As both decisions turn on the use of racial classifications in government programs, the Court once again applied strict scrutiny, the most stringent standard of judicial review.<sup>46</sup> Strict scrutiny commands that a law must be struck down unless the government can show that it is necessary to achieve a compelling government interest and is narrowly tailored to this purpose.<sup>47</sup>

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the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden.”).

42. *Id.* at 321. The plurality points to the “Harvard Plan” as an illuminating example of a university admissions program that uses race or ethnic background as a “plus” factor without the use of a hard quota. *Id.* at 317, 321. *But see* Note, *The Harvard Plan That Failed Asian Americans*, 131 HARV. L. REV. 604, 605 (2017) (arguing the diversity rationale Justice Powell endorsed in the “Harvard Plan” functionally discriminated against Asian-Americans).

43. 539 U.S. 244 (2003).

44. 539 U.S. 306 (2003).

45. *See* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV., 517, 519–21 (2007) (describing the deficiencies of the *Grutter* and *Gratz* Court's application of strict scrutiny and how these failures have shaped current affirmative action jurisprudence's disingenuous posture).

46. *Id.* The *Bakke* Court, citing *Korematsu v. United States* and *Hirabayashi v. United States*, stressed that strict scrutiny is the correct standard for analyzing an admissions policy that involved racial and ethnic classifications because such distinctions are inherently suspect. *Bakke*, 438 U.S. at 290–91 (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

47. *See* Ayres & Foster, *supra* note 45, at 521. Justice O'Connor, who wrote the majority opinion in *Grutter*, also wrote for the majority in *Adarand Constructors, Inc. v. Peña*, which held that all laws using racial categorizations—by both state and federal actors—must pass strict scrutiny analysis. 515 U.S. 200, 236 (1995) (“[R]acial characteristics so seldom provide a relevant basis for disparate treatment, and . . . classifications based on race are potentially so harmful to the entire body politic’ . . . . We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means.” (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 533–34 (1980))).

*A. Race to the Bottom*

In *Gratz*, plaintiffs Jennifer Gratz and another Caucasian applicant to the University of Michigan sued the university after being denied admission to the College of Literature, Science, and the Arts.<sup>48</sup> The university utilized a points system in its admissions process and automatically assigned twenty points—which was 20% of the points needed to guarantee admission—to underrepresented minority applicants.<sup>49</sup> The plaintiffs argued that the admissions process’s consideration of race violated the Fourteenth Amendment’s Equal Protection Clause.<sup>50</sup> While recognizing the substantial state interest in having a racially and ethnically diverse student body, the Supreme Court struck down the University of Michigan’s use of predetermined point allocations assigned to underrepresented minority applicants in the undergraduate admissions process.<sup>51</sup> The Court held that automatically awarding points solely on the basis of race is not narrowly tailored enough to achieve the otherwise valid interest in educational diversity.<sup>52</sup>

In the same term, the Supreme Court in *Grutter v. Bollinger* upheld the University of Michigan Law School’s “race-conscious” admissions process.<sup>53</sup> Justice O’Connor, writing for the 5–4 majority, stressed that a policy that uses racial preferences to admit a “critical mass” of underrepresented minority students is a permissible “narrowly tailored use of race” because it used race merely as one factor in assembling a diverse student body.<sup>54</sup> She distinguished the admissions process in *Grutter*, which only utilized race as a factor in a “highly individualized” review of each applicant, from *Gratz*, where the use of automatic points precluded an “individualized assessment[]” of racial preferences.<sup>55</sup> Justice O’Connor stressed that race is not to be used in a

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48. 539 U.S. at 251–52.

49. *Id.* at 255. Applicants could also receive points for socioeconomic disadvantage, attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the course of study. *Id.* at 255.

50. *Id.* at 252. The Caucasian plaintiffs’ challenge to the university’s admissions policy centered on less favorable treatment “on the basis of race in considering [plaintiffs’] application for admission.” *Id.* at 253 (citation omitted).

51. *Id.* at 275.

52. *Id.*

53. 539 U.S. 306, 343 (2003) (citations omitted) (“We take the [l]aw [s]chool at its word that it would ‘like nothing better than to find a race-neutral admissions formula’ and will terminate its race-conscious admissions program as soon as practicable.”).

54. *Id.* at 341, 343.

55. *Id.* at 337–41. Justice Ginsburg, who sided with the majority in *Grutter* and dissented in *Gratz*, thought that both schemes were functionally equivalent. *See Gratz*, 539 U.S. at 293 (Souter, J.,

mechanical way while also deferring to the university's judgment in deeming diversity as essential to its educational mission.<sup>56</sup> However, she also qualified the decision with a sunset provision, anticipating that racial preferences would no longer be necessary in the next twenty-five years.<sup>57</sup>

After *Grutter*, schools around the country were validated in continuing their own affirmative action policies.<sup>58</sup> Among them was the University of Texas (UT), which employed a two-tier admissions system to its highly coveted flagship Austin campus.<sup>59</sup> The first tier was a race-blind scheme that automatically offered admission to students who graduated in the top 10% of Texas high schools.<sup>60</sup> In the second tier, the university incorporated the use of race as a meaningful factor for underrepresented minorities—albeit without an articulable mathematical boost—in its holistic-review admissions policy to fill up the rest of the class.<sup>61</sup> Abigail Fisher, a Caucasian applicant to UT who did not gain admission through the “Top Ten Percent Plan,” was forced to compete for a slot in the second tier.<sup>62</sup> Fisher also did not gain admission

dissenting) (demonstrating Justice Ginsburg joined Justice Souter in Part II of his dissent). Justice Ginsburg candidly observed that, “If honesty is the best policy, surely Michigan’s . . . affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.” *Id.* at 305 (Ginsburg, J., dissenting).

56. *Grutter*, 539 U.S. at 328. (“The [l]aw [s]chool’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

57. *Id.* at 343 (“We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”). Justice Ginsburg and Justice Breyer disagreed with the majority’s sunset provision, stressing “one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.” *Id.* at 346 (Ginsburg, J., concurring).

58. See UROFSKY, *supra* note 25, at 367–68. Universities around the country tailored their admissions policies to the University of Michigan Law School’s lead as upheld by the Supreme Court. *Id.* This further highlights the importance of a clear, constitutional ruling from the Court—one that is rigorous enough to advance the substantial state interest while sufficiently equipped to capture the nuances of racial and ethnic classifications. See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 858 (1995) (affirming the benefits of racial and ethnic diversity while warning that a poorly tailored admissions policy could “stigmatize and foster antagonism” towards beneficiary groups).

59. See UROFSKY, *supra* note 25, at 430.

60. See TEX. EDUC. CODE ANN. § 51.803 (West 2009). The Texas Legislature enacted the “Top Ten Percent Law” partly in response to a Fifth Circuit decision in *Hopwood v. Texas*, which held the University of Texas School of Law’s race-conscious admissions program unconstitutional under the Fourteenth Amendment’s Equal Protection Clause. See *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 304–05 (2013) (citing *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996)).

61. See *Fisher I*, 570 U.S. at 306 (“Race is not assigned an explicit numerical value, but it is undisputed that race is a meaningful factor.”). To this end, the university asks applicants to classify themselves from among five preset racial categories. *Id.*

62. *Id.* at 301.

through the second tier, and she sued UT under a Fourteenth Amendment Equal Protection challenge to UT's race-conscious admissions process.<sup>63</sup> Her case reached the United States Supreme Court in *Fisher v. University of Texas (Fisher I)*.<sup>64</sup>

A 7–1 majority remanded the case to the Fifth Circuit with clearer guidance on analyzing the constitutional question of affirmative action.<sup>65</sup> The Court stressed that racial classifications must be subjected to the most rigid scrutiny but also echoed *Grutter* in deferring to UT's educational judgment in finding that diversity was “essential to its educational mission.”<sup>66</sup> Further, the Court stressed deference to a university's identification of diversity as a substantial state interest as long as there is a “principled explanation for the academic decision.”<sup>67</sup> However, courts should grant “no deference” in assessing

63. *Id.* at 302. UT offered Fisher a standard scheme where she could have transferred to the Austin campus on her second year if she maintained a 3.2 GPA at a different UT campus. See UROFSKY, *supra* note 25, at 430. Fisher's grades were neither exceptionally good nor bad—there were admitted minority students who had lower numbers than her in the same way that there were admitted “Anglo” students who had lower grades than her as well. *Id.*

64. 570 U.S. at 303. A disturbing story behind the scenes of *Fisher I* surfaced when Joan Biskupic, a journalist covering the Supreme Court, reported that the Court initially ruled for Fisher in striking down UT's admissions policy. See UROFSKY, *supra* note 25, at 430–31. However, Justice Sotomayor wrote a dissent in defense of affirmative action that would have placed a negative spotlight on the majority, insinuating racism from the Justices. *Id.* at 431. Justice Sotomayor apparently “shelved” her dissent after striking a compromise that remanded the case back to the Fifth Circuit for further consideration. *Id.*; see also JOAN BISKUPIC, BREAKING IN: THE RISE OF SONIA SOTOMAYOR AND THE POLITICS OF JUSTICE 200–11 (2014) (reporting the compromise among the Justices behind *Fisher I* in fuller detail).

65. *Fisher I*, 570 U.S. at 314–15 (citations omitted) (“The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University's good faith in its use of racial classifications . . . . [F]or judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this Court has approved in this context . . . .”). Justice Kagan recused herself from the proceedings in *Fisher I* because she worked on the case in her former function as United States Solicitor General. *Id.* at 315; Jill Anderson, *HGSE Reacts to Supreme Court's “Fisher” Ruling*, HARV. ED. MAG. (Fall 2013), <https://www.gse.harvard.edu/news/ed/13/06/hgse-reacts-supreme-courts-fisher-ruling>.

66. *Fisher I*, 570 U.S. at 310 (citing *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)).

67. *Id.* Here, the Court reaffirmed a groundbreaking rationale that Justice Powell first articulated in *Bakke*—that diversity is a compelling government interest that would justify the use of racial classifications. See *supra* note 40. Compare *Korematsu v. United States*, 323 U.S. 214, 217–19 (1944) (upholding the internment of Japanese-Americans as a compelling government interest, a response to the attack on Pearl Harbor), with *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., concurring in part and dissenting in part) (“[T]here is no pressing public necessity in maintaining a public law school at all . . . certainly not an elite law school.”). But see *Parents Involved Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 725 (2007) (plurality opinion) (declining to extend diversity as a compelling government interest in a context outside of higher education). While the issue of whether “diversity,” however it may be defined, should be a compelling government interest that would justify

whether the means are narrowly tailored.<sup>68</sup> On this issue, the Court put forth a high standard: a university must demonstrate that no “workable race-neutral alternatives would produce the educational benefits of diversity.”<sup>69</sup>

After the Fifth Circuit upheld the University of Texas’s scheme on remand, the Court granted certiorari yet again in *Fisher v. University of Texas (Fisher II)* and ultimately held UT’s race-conscious admissions policy constitutional in a 4–3 decision.<sup>70</sup> Justice Kennedy, who dissented in *Grutter*, provided the “swing vote” and wrote for the majority in holding that UT’s admissions policy survived strict scrutiny in pursuing diversity because UT used race as a “factor of a factor of a factor” in its holistic review calculus.<sup>71</sup> Ultimately, the Court stressed that “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity,” but the university must also balance this interest with the “constitutional promise of equal treatment and dignity.”<sup>72</sup> Furthermore, the Court recognized the shifting nature of affirmative action as an application of the Fourteenth Amendment’s Equal Protection Clause by hedging its decision through delineating the university’s “ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.”<sup>73</sup>

The Court’s rulings from *Bakke* to *Fisher I* and *Fisher II*, at least at first glance, make clear that diversity is a constitutionally permissible government interest, and substantial deference must be given to the universities in that regard.<sup>74</sup> But this raises a complicated question that the Court either purposely

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the use of racial classifications is intriguing, it is beyond the scope of this Comment. See *infra* Part IV.

68. *Fisher I*, 570 U.S. at 298 (“[O]nce the University has established that its goal of diversity is consistent with strict scrutiny, the University must prove that the means it chose to attain that diversity are narrowly tailored to its goal. On this point, the University receives no deference.”).

69. *Id.* at 312.

70. 136 S. Ct. 2198, 2207 (2016). Only seven justices reviewed the case with Justice Kagan’s recusal and Justice Scalia’s death in February 2016. Lauren Camera, *Supreme Court Rules 4–3 for Affirmative Action*, U.S. NEWS (Jun. 23, 2016), <https://www.usnews.com/news/articles/2016-06-23/supreme-court-rules-4-3-for-affirmative-action>; see *Fisher II*, 136 S. Ct. at 2198.

71. *Fisher II*, 136 S. Ct. at 2207 (quoting *Fisher v. Univ. of Tex.*, 645 F. Supp 2d. 587, 608 (2009), *vacated*, 570 U.S. 297 (2013)). Much has been made of the changed composition of the Court with Justice Alito, deemed to be more conservative, replacing Justice O’Connor, and Justice Kagan’s recusal from the case. See *id.* Justice Kennedy’s vote came as a surprise, as Justice Kennedy never before voted to affirm race-conscious affirmative action programs. See Yuvraj Joshi, *Bakke to the Future: Affirmative Action After Fisher*, 69 STAN. L.R. ONLINE 17, 17–18 (2016) (elaborating Justice Kennedy’s unanticipated switch to defend affirmative action as rooted from *Bakke*).

72. *Fisher II*, 136 S. Ct. at 2214.

73. *Id.* at 2215.

74. See *supra* note 67.

sidestepped or naively overlooked: what is diversity?<sup>75</sup> Perhaps an even more focused inquiry is asking what exactly is an underrepresented minority?<sup>76</sup>

### *B. The White Man's Burden: Problematic Categorization of Filipino-Americans*

After winning the Spanish–American war, the United States “purchased” the former Spanish colony in the West—the Philippines—as their own.<sup>77</sup> Collaborating with natives who desired independence from Spain, the United States double-crossed their Filipino allies and effectively supplanted the Spaniards as the new colonial overlords.<sup>78</sup> The Philippines served as the United States’ gateway to the Pacific and a prime forward military base.<sup>79</sup> In fact, the Japanese bombed Manila the day after bombing Pearl Harbor to hamstringing the sizeable American forces based in the Philippines.<sup>80</sup>

75. See *infra* Section III.A; Victor C. Romero, *Are Filipina/os Asians or Latina/os? Reclaiming the Anti-Subordination Objective of Equal Protection After Grutter and Gratz*, 7 U. PA. J. CONST. L. 765, 773 (2005) (footnote omitted) (“If the true goal of affirmative action programs is to level the playing field, then schools should recapture this anti-subordination principle rather than use diversity ‘aesthetics’ as its chosen means.”).

76. See *supra* note 75.

77. See ABINALES & AMOROSO, *supra* note 2, at 113. This Section’s title alludes to the British poet Rudyard Kipling’s 1899 poem, “The White Man’s Burden,” which was written in response to the American occupation of the Philippines. *Modern History Sourcebook: Rudyard Kipling, The White Man’s Burden, 1899*, FORDHAM UNIV., <https://sourcebooks.fordham.edu/mod/kipling.asp> (last visited Sept. 19, 2021).

Take up the White Man’s burden—  
Send forth the best ye breed—  
Go bind your sons to exile  
To serve your captives’ need;  
To wait in heavy harness,  
On fluttered folk and wild—  
Your new-caught, sullen peoples,  
Half-devil and half-child.

*Id.*

78. See ABINALES & AMOROSO, *supra* note 2, at 126. For an insightful racial analysis of the Philippine–American War, see Mark D. Van Ells, *Assuming the White Man’s Burden: The Seizure of the Philippines, 1898-1902*, 43 PHIL. STUD. 607 (1994). One of the first shots that started the Philippine–American War was fired by U.S. Army Private William Grayson, who boasted of shooting his “first n\*\*\*\*\*.” *Id.* at 616; see also Juan Torruela, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT’L L. 283 (2007) (discussing the attitudes and legal implications surrounding the acquisition of American colonies, to include the Philippines).

79. See ABINALES & AMOROSO, *supra* note 2, at 159.

80. *Id.*; see also DAVID JOEL STEINBERG, *PHILIPPINE COLLABORATION IN WORLD WAR II* 113–14 (1967) (describing the destruction of Manila after the Second World War, making it the second most damaged city only after Warsaw).

Filipino migration to the United States grew as the need for cheap labor increased on the fecund farms of Hawaii and California.<sup>81</sup> Filipino immigration was particularly convenient as English was taught in the American-founded Philippine public school system.<sup>82</sup> Moreover, the shared history of war between the Philippines and the United States made the former colony a potent pool for poaching manpower as the United States military expanded beyond a pace its native population could sustain.<sup>83</sup>

Filipino-Americans offer a difficult but enlightening study of racial categorizations.<sup>84</sup> On the one hand, Americans—to include many of Filipino descent—consider Filipino-Americans as Asians, mostly due to the geographical accident of the Philippines being in Asia.<sup>85</sup> On the other hand, the Philippines shares a strikingly similar heritage with the former Spanish colonies in the Americas.<sup>86</sup> Of course, there is also the most obvious classification: considering the approximately four million Filipino-Americans as their own race, with their own unique challenges and peculiarities.<sup>87</sup> However, this level of sophistication might be too nuanced for an American society that treads lightly on the brink of balkanization and can only handle shades of black and

81. See H. Brett Melendy, *Filipinos in the United States*, 43 PAC. HIST. REV. 520 (1974) (surveying immigration “waves” of Filipinos to the United States in the 20th century).

82. See ABINALES & AMOROSO, *supra* note 2, at 122.

83. See Luisito G. Maligat, Study of the U.S. Navy’s Philippine Enlistment Program, 1981–1991 (Jun. 2020) (M.S. Thesis, Naval Postgraduate School) (2000), [https://calhoun.nps.edu/bitstream/handle/10945/9294/00Jun\\_Maligat.pdf?sequence=1&isAllowed=y](https://calhoun.nps.edu/bitstream/handle/10945/9294/00Jun_Maligat.pdf?sequence=1&isAllowed=y) (studying a unique recruitment and retention program of Filipinos serving in the United States Navy); see also Antonio Raimundo, *The Filipino Veterans Equity Movement: A Case Study in Reparations Theory*, 98 CALIF. L. REV. 575, 575–77, 590–92 (2010) (discussing the disparate treatment received by Filipino World War II veterans despite their loyal service to the now defunct United States Armed Forces of the Far East).

84. See *infra* Part IV.

85. See ABINALES & AMOROSO, *supra* note 2, at 11 (pointing out that the Philippines has a much closer relationship with the United States than its traditional rival neighbors in Southeast Asia). For a legal history of the development of *Asian-Americans* as a subcategory of the United States’ racial topography, see Robert S. Chang, *The Invention of Asian Americans*, 3 U.C. IRVINE L. REV. 947, 952–59 (2013).

86. See generally ANTHONY CHRISTIAN OCAMPO, *THE LATINOS OF ASIA: HOW FILIPINO AMERICANS BREAK THE RULES OF RACE* (2016) (analyzing the intersection of heritage and race in Filipino-American identity from a sociologist’s standpoint).

87. See ABINALES & AMOROSO, *supra* note 2, at 11; Abby Budiman, *Filipinos in the U.S. Fact Sheet*, PEW RSCH. CTR. (Apr. 29, 2021), <https://www.pewresearch.org/social-trends/fact-sheet/asian-americans-filipinos-in-the-u-s/> (demonstrating that in 2019, there were about 4.2 million Filipino-Americans). The Philippines, a country of 110 million people, resists crude simplification in its own category with its seventy-eight languages and approximately 500 identified dialects. See ABINALES & AMOROSO, *supra* note 2, at 11; *Philippines Population 2021 (Live)*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/philippines-population> (last visited Sept. 20, 2021).



white.<sup>88</sup>

In the United States, Filipino-Americans are the second largest “Asian-American” group behind Chinese-Americans.<sup>89</sup> While the Filipino-American community has largely embraced this status quo designation as Asians, the classification is ostensibly ironic given the Philippines’ limited cultural affinity with its Asian neighbors,<sup>90</sup> including a bloody world war fought against Japan<sup>91</sup> and a particularly unsavory history with China.<sup>92</sup> Filipino-Americans have always had peculiar interests separate from other Asian groups.<sup>93</sup> Aside from a strong tradition of military service (mostly in less prestigious enlisted positions), Filipino-Americans are heavily involved in the healthcare industry, primarily as nurses and other forms of auxiliary staff.<sup>94</sup> Filipino immigrants

88. See Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1301 (2010) (“Proponents of antibalkanization are concerned that the pursuit of racial justice itself poses threats to community and are prepared to subordinate the pursuit of racial justice to the preservation of social cohesion.”).

89. See *Asian Alone by Selected Groups*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=Asian&tid=ACSDT1Y2019.B02015&hidePreview=false> (last visited Sept. 19, 2021). Legally documented Filipino-Americans, composing about three million of the U.S. population, are either the second or third largest “Asian” demographic depending on whether “Indian Asians” are included in the “Asian” census data. *Id.*

90. See OCAMPO, *supra* note 86, at 10–12. Filipinos, who eat with a spoon and fork instead of chopsticks, practice mostly Christianity rather than Buddhism, and write with the Latin alphabet instead of Kanji, are cultural outliers in Asia. *See id.*

91. See ABINALES & AMOROSO, *supra* note 2, at 159–63.

92. *See id.* at 253–54 (recounting the collusion between the Philippines’ strongman Ferdinand Marcos and Chinese-Filipino businessmen who continue to maintain a grip on the country’s largest industries); AMY CHUA, *WORLD ON FIRE: HOW EXPORTING DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* 36 (2004) (“The Chinese in the Philippines share their economic dominance with a powerful and glamorous ‘Spanish-blooded’ gentry class. . . . Filipino[-]Chinese, just [one] to [two] percent of the population, control all of the Philippines’ largest and most lucrative department store chains, major supermarkets, and fast-food restaurants . . .”). The racial component of the traditional social hierarchy is still prevalent in Philippine culture as interracial marriages between Filipino and Filipino-Chinese remain taboo. *See, e.g.*, Cheekie Albay, *How 4 Filipino-Chinese Couples Made Their Relationship Work*, COSMOPOLITAN (Feb. 5, 2019), <https://www.cosmo.ph/relationships/filipino-chinese-couples-stories-a93-20190205-lfrm> (enumerating examples of couples who “beat the odds” in making an interracial Filipino-Chinese marriage work).

93. See YEN LE ESPIRITU, *ASIAN AMERICAN PANETHNICITY: BRIDGING INSTITUTIONS AND IDENTITIES* 107 (1992).

94. See Anne Brice, *Why Are There So Many Filipino Nurses in the U.S.?*, BERKELEY NEWS (May 28, 2019), <https://news.berkeley.edu/2019/05/28/filipino-nurses-in-the-us-podcast/>. For an extensive study of Filipino-Americans in the nursing profession, see CATHERINE CENIZA CHOY, *EMPIRE OF CARE: NURSING AND MIGRATION IN FILIPINO AMERICAN HISTORY* (Gilbert M. Joseph & Emily S. Rosenberg eds., 2003). *See also* Tiffany Wong, *Little Noticed, Filipino Americans Are Dying of COVID-19 at an Alarming Rate*, L.A. TIMES (July 21, 2020, 12:14 PM), <https://www.latimes.com/california/story/2020-07-21/filipino-americans-dying-covid> (reporting that Filipino-Americans have a

have also filled positions in less-than-prime elementary and secondary teaching assignments in the United States.<sup>95</sup>

Studies among Filipino-Americans in the legal profession are hard to come by since this data is conflated with other Asian-American groups.<sup>96</sup> The same is true in higher education, where Filipino-Americans lag behind their Asian-American peers.<sup>97</sup> While Asian-American groups are well represented in Ivy League institutions, Filipino-Americans have largely remained in less prestigious schools.<sup>98</sup> In California, Filipino-Americans are overrepresented when conflated with Asian-Americans in the University of California System, yet Filipino-Americans are underrepresented on the prestigious campuses of UC Berkeley and UCLA.<sup>99</sup>

much higher mortality rate than the national average, partly because of their increased risk as overrepresented “frontliners” in the healthcare industry).

95. See Terry Greene Sterling & Jude Joffe-Block, *The Job Americans Won't Take: Arizona Looks to Philippines To Fill Teacher Shortage*, GUARDIAN (Sept. 5, 2018, 2:00 AM), <https://www.theguardian.com/us-news/2018/sep/05/arizona-teachers-filipino-schools-low-pay> (“Some American public schools are turning to foreign teachers because Americans with college educations are increasingly uninterested in low-paid, demanding teaching jobs. . . . [The need for . . .] teachers is especially dire in poor and rural schools throughout the country.”).

96. See *Section of Legal Education – ABA Required Disclosures*, ABA., <http://www.abarequired-disclosures.org/Disclosure509.aspx> (last visited Sept. 19, 2021) (displaying student demographic data for every accredited law school, Filipinos are presumably categorized under the “Asian” category). Yale Law School and the National Asian Pacific American Bar Association published a study that is a “systematic understanding of how Asian-Americans are situated in the legal profession,” proclaiming that Asian-Americans are disproportionately enrolled in higher ranked law schools. See ERIC CHUNG, SAMUEL DONG, XIANONAN APRIL HU, CHRISTINE KWON & GOODWIN LIU, YALE L. SCH. & NAT. ASIAN PAC. AM. BAR ASS'N, *A PORTRAIT OF ASIAN AMERICANS IN THE LAW 4–5* (2017), [https://static1.squarespace.com/static/59556778e58c62c7db3f8e84/t/596cf0638419c2e5a0dc5766/1500311662008/170716\\_PortraitProject\\_SinglePages.pdf](https://static1.squarespace.com/static/59556778e58c62c7db3f8e84/t/596cf0638419c2e5a0dc5766/1500311662008/170716_PortraitProject_SinglePages.pdf). This survey of Asian-Americans only had a participation rate of 11% from Filipino-Americans. *Id.* at 7. Chinese-Americans figured at 35%, Korean-Americans at 22%, and Taiwanese-Americans—who have a population size fifteen times smaller than Filipino-Americans—at 10%. *Id.*

97. See Romero, *supra* note 75, at 774 (footnotes omitted) (“Relatedly, Filipinas enrolled at higher rates than other Asians at the less prestigious community college and California State University systems. . . . [Filipino-Americans] were less likely to attend private universities than their Chinese, Japanese, and Korean counterparts.”).

98. See *supra* notes 96–97; see also *Disaggregated Data*, U. CAL., <https://www.universityofcalifornia.edu/infocenter/disaggregated-data> (last visited Sept. 19, 2021) (showing Filipino-American enrollment in the University of California placed as a far third despite Filipino-Americans being the state’s largest “Asian” population).

99. See *supra* notes 94–96; see also Jenn Fang, *Filipinos Are Underrepresented at Most Selective of UC Campuses*, REAPPROPRIATE (Dec. 8, 2014), <http://reappropriate.co/2014/12/filipinos-are-underrepresented-at-most-competitive-of-uc-campuses-blockblum-iamnotyourwedge> (parsing a study on Asian-Americans in the University of California system and concluding that Filipino-Americans are underrepresented—relative to statewide demographics—at the prestigious University of California campuses at Berkeley and Los Angeles). While the California Constitution precludes race-based

Filipino-Americans present an interesting challenge to UT's conception of critical mass.<sup>100</sup> *Filipino* is not a choice among UT's predefined racial category options,<sup>101</sup> which prompts the question: are Filipinos considered Hispanic or Asian under UT's racial categorizations?<sup>102</sup> Setting aside issues of the morality of choice and the irreducible nature of identity, the challenge of categorizing Filipino-Americans is indicative of the problem of an unexamined "critical mass" concept.<sup>103</sup> Whether intentionally overlooked by the courts as a discussion that is so granular as to encumber constitutional analysis or naively conceded due to political pressure, the concept of what constitutes an underrepresented minority presents largely unresolved issues in affirmative action jurisprudence.<sup>104</sup> Analyzing the Supreme Court's decision in *Fisher II* from this lens sheds new light on the Fourteenth Amendment's Equal Protection Clause, revealing new ideas towards advancing racial equality across the states.<sup>105</sup>

#### IV. CURRENT AFFIRMATIVE ACTION POLICY IN LAW SCHOOL ADMISSIONS: UNWORKABLE, UNINHIBITED, UNCONSTITUTIONAL

##### *A. The University's Use of Racial Categorizations in Its Pursuit of Diversity Is Largely Unexamined and Not Sufficiently Clear To Be Constitutionally Permissible*

Current affirmative action jurisprudence fails under an Equal Protection challenge because of the Court's disingenuous application of strict scrutiny.<sup>106</sup> There is no question that strict scrutiny is the standard that applies to race-

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affirmative action, the University of California system is publicly and unapologetically pursuing an elastically self-defined goal of "diversity." See *infra* Part IV; Teresa Watanabe, *How UCLA Is Boosting Campus Diversity, Despite the Ban on Affirmative Action*, L.A. TIMES (June 23, 2016), <https://www.latimes.com/local/california/la-me-ucla-diversity-20160620-snap-story.html>.

100. See *infra* Part IV.

101. See *Fisher v. Univ. of Tex. (Fisher II)*, 136 S. Ct. 2198, 2219 (2016) (Alito, J., dissenting) ("The University asks students to classify themselves from among five predefined racial categories on the application." . . . UT decided to use racial preferences to benefit African-American and Hispanic students because it considers those groups "underrepresented minorities." (first quoting *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297, 306 (2013); and then citation omitted)).

102. See *supra* notes 84–88 and accompanying text.

103. See *infra* Part IV.

104. See *infra* Part V.

105. See *infra* Part V.

106. See *supra* Part III.

based affirmative action in law school admissions.<sup>107</sup> In this context, the *Fisher II* Court provided the most recent and clearest standard in stressing that race may not be considered “unless the admissions process can withstand strict scrutiny.”<sup>108</sup> Thus, a university must clearly demonstrate that its “purpose or interest is both constitutionally permissible and substantial[] and that its use of the classification is necessary . . . to the accomplishment of its purpose.”<sup>109</sup>

### 1. Not Strict Enough

With the growing social acceptance surrounding the talismanic idea of “diversity,” it has become increasingly difficult to argue against diversity as a compelling government interest that survives strict scrutiny—especially in a multiethnic country with a dark history of racial conflict like the United States.<sup>110</sup> Moreover, the Court has upheld this interest in stronger degrees from *Bakke* to *Fisher I & II*.<sup>111</sup> However, understanding affirmative action jurisprudence requires an analysis of how states, through their universities, define diversity.<sup>112</sup>

In *Bakke*, the University of California Davis Medical School viewed “‘Blacks,’ ‘Chicanos,’ ‘Asians,’ and ‘American Indians,’” as part of a minority group.<sup>113</sup> The Court acceded to this categorization without any further meaningful scrutiny as to how or why the university chose to protect these

107. *See supra* notes 45–46. The Court clarified in *Adarand Constructors, Inc. v. Peña* that any laws that use racial classifications must pass strict scrutiny analysis. 515 U.S. 200, 227 (1995). Justice O’Connor further endorsed this standard in the context of law school admissions in *Grutter v. Bollinger* by stressing that strict scrutiny applies to all racial classifications to “smoke out” illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.” 539 U.S. 306, 326 (2003) (quoting *Richard v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)). *But see* Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. PA. J. CONST. L. 729, 730 (2015) (arguing the Court’s framework for strict scrutiny in race-based affirmative action is “wildly, almost absurdly, wrong”).

108. *Fisher II*, 136 S. Ct. 2198, 2208 (2016) (quoting *Fisher I*, 570 U.S. 297, 309 (2013)).

109. *Id.* (quoting *Fisher I*, 570 U.S. at 309).

110. *See* RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION AND THE LAW 22 (2013) (“Every major step toward undoing racial oppression in America has been met with the charge that it constitutes reverse discrimination against whites and unfair preference for people of color.”).

111. *See supra* Section III.A.

112. *See infra* Part V.

113. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 274 (1978) (citing *Bakke v. Regents of Univ. of Cal.*, 553 P.2d 1152, 1173–74 (1976) (Tobriner, J., dissenting)).

groups at the inevitable expense of others.<sup>114</sup> Because the plurality ultimately ruled that the use of racial quotas is unconstitutional, one could forgive the *Bakke* Court for not thoroughly analyzing the overly broad use of racial categories.<sup>115</sup>

That same leniency cannot be granted towards the *Grutter* Court, which not only upheld the diversity interest but also approved of the University of Michigan Law School's admissions policy as sufficiently tailored to pass strict scrutiny.<sup>116</sup> Despite the sharp language of precedent on strict scrutiny as applied to racial preferences, the Court somehow managed to recognize diversity as a compelling government interest without scrutinizing how the university defined "diversity."<sup>117</sup> It is one thing to defer to the university in acceding that diversity is a compelling government interest, but the Court missed an opportunity to inquire as to what exactly the university meant by

114. *Id.* An obvious case could be made for "Blacks" and "American Indians" given even a cursory knowledge of American history. See ILAN WURMAN, *THE SECOND FOUNDING: AN INTRODUCTION TO THE FOURTEENTH AMENDMENT* 93 (2020) (noting the 39th Congress intended for the Fourteenth Amendment to provide a constitutional basis to give freed Blacks the same privileges and immunities as white citizens in various states). But what is the rationale behind naming "Chicanos" as a minority group and not Filipinos, for example? See *id.* The Court relied on conclusory categorizations of race without parsing the principles of this categorization. Cf. *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting) (discussing the University of Washington Law School's admissions policy that had a separate track for applicants who were "[B]lack, Chicano, American Indian, or Filipino").

115. 438 U.S. at 320. Justice Powell did address the complexity of race-based affirmative action and the inescapable complexity of racial categorizations, which perhaps led to the plurality decision. *Id.* at 297 (footnote omitted) ("The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable."). The plurality opinion actually discussed groups like Filipino-Americans and the folly of race-based considerations in law school admissions—notwithstanding the noble purpose that animate these programs. *Id.* at 296–97 ("Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. . . . As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary.").

116. *Grutter v. Bollinger*, 539 U.S. 306, 338–40 (2003).

117. See *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."); *Korematsu v. United States*, 323 U.S. 214, 216 (1944), *abrogated by Trump v. Hawaii*, 138 S. Ct. 2392 (2018) ("[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny."); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.").

“diversity.”<sup>118</sup> A university that touts its race-conscious, individualized review should at the very least be asked how it managed to grasp the intermingling diasporas all across the United States and distill an underrepresented minority block comprising three groups.<sup>119</sup>

This is particularly important in *Grutter* because the majority points to the unique nature of a law degree.<sup>120</sup> Since law schools “represent the training ground for a large number of our Nation’s leaders,” the prestige accompanying law schools renders the limited class seats coveted and the admissions policies controversial.<sup>121</sup> Elite law schools, in particular, open doors to positions that wield great influence and power in society.<sup>122</sup> If law school admissions policies use race as a factor in the name of diversity, strict scrutiny commands clarity on what constitutes diversity to provide a fair framework for constructing the most narrowly tailored means to achieve it.<sup>123</sup> Without further judicial scrutiny, flawed racial categorizations, deficiencies in data, or simple racial politics could result in a use of “diversity” that is counter to the ideals it purports to serve.<sup>124</sup>

118. See Romero, *supra* note 75, at 767 (contending the elimination of subordination, not diversity, should be the core of modern equal protection jurisprudence); see also Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) (arguing diversity is an indefensibly broad rationale for affirmative action as diversity of backgrounds and perspectives is clearly not being pursued).

119. See *Grutter*, 539 U.S. at 316 (identifying African-Americans, Hispanics, and Native Americans). While the University of Michigan Law School did not limit the consideration of underrepresented minority within these three groups, naming these three in particular signals the contours of the university’s “critical mass” concept. See *infra* note 137; see also Brest & Oshige, *supra* note 58, at 877–97 (comparing and contrasting the intricacies of affirmative action issues in law school admissions among different racial categories).

120. See 539 U.S. at 332.

121. *Id.* (“Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives.”).

122. *Id.* (“The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.”).

123. See *supra* note 46. For a candid discussion of “diversity” and its increasing impact in mainstream American culture, see PETER WOOD, *DIVERSITY: THE INVENTION OF A CONCEPT* (2003).

124. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 892–95 (Vicki Been et al. eds., 9th ed. 2014) (arguing that the Constitution can be wielded by groups sufficiently powerful to obtain constitutional protection for their interests). What about the interests of groups like Filipino-Americans, who are not even counted separately by the American Bar Association yet have interests that are different from “Asian-Americans”? See *Section of Legal Education, supra* note 96 (displaying student demographic data for every accredited law school); see also Brest & Oshige, *supra* note 58, at 895–96 (observing Filipinos are “averse to pan-Asian organizations” out of fear that Filipino interests will be subordinated to the Asian hegemony). Generalization to permit expedient data analysis is acceptable, if not pragmatic, but the issue of devising policy using such broad categorizations demands strict

The *Grutter* Court's acquiescence to the university's conclusory racial categorizations contradicts the lip service the Court gives to strict scrutiny.<sup>125</sup> For instance, the majority was willing to accept the university's testimony that certain "groups, such as Asians and Jews," had previously suffered discrimination yet were not included in the policy's system of classification, despite the university's alleged "commitment to racial and ethnic diversity . . . [for] groups which have been historically discriminated against."<sup>126</sup> The majority did not probe the university further as to what metrics or criteria—if any—the university used in determining why groups such as Jews and Asians were no longer seen favorably in the name of diversity.<sup>127</sup> The Court's failure to demand clarity needs to be made explicit in light of Justice Ginsburg's concurrence, where she highlighted the need for race-based affirmative action for Hispanic and African-American children.<sup>128</sup>

This lack of clarity raises three general concerns: First, in their failure to address why Jews and Asians were no longer beneficiaries of the university's diversity-driven admissions policy, the majority missed an opportunity to identify—with any scintilla of clarity—the amount of "critical mass" sufficient to produce the university's desired diversity level to justify its admissions policy.<sup>129</sup> Second, the majority completely abandoned strict scrutiny by submitting to the university's broad racial categorizations without demanding any meaningful inquiry.<sup>130</sup> The majority did not challenge the university's neat categorizations of the multiple levels of diasporas, immigration waves, and interracial marriages from the multiple ethnicities that form the country.<sup>131</sup>

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scrutiny from the courts in light of the Fourteenth Amendment's Equal Protection Clause. *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) ("[T]he Fourteenth Amendment 'protect[s] persons, not groups . . .'" (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995))).

125. *See supra* note 117.

126. *See Grutter*, 539 U.S. at 319 (quotations omitted).

127. *See generally* AMY CHUA & JED RUBENFELD, *THE TRIPLE PACKAGE: HOW THREE UNLIKELY TRAITS EXPLAIN THE RISE AND FALL OF CULTURAL GROUPS IN AMERICA* (2014) (explaining the traditional success of certain racial or ethnic groups—among them Jewish and Asian-American groups—despite their history of facing discrimination in America as well).

128. *See Grutter*, 539 U.S. at 345–46 (Ginsburg, J., concurring).

129. *Id.* The dissent picked up on the nebulous concept of critical mass and its problematic nature. *See id.* at 379 (Rehnquist, C.J., dissenting) ("Stripped of its 'critical mass' veil, the [l]aw [s]chool's program is revealed as a naked effort to achieve racial balancing."). *But see* Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 *CARDOZO L. REV.* 97 (2007) (setting forth arguments for the viability and importance of "[c]ritical [m]ass in [l]egal [d]iscourse").

130. *See supra* note 65.

131. *See Grutter*, 539 U.S. at 380–81 (Rehnquist, C.J., dissenting) (citations omitted) ("Respondents explain that the [l]aw [s]chool seeks to accumulate a 'critical mass' of *each* underrepresented minority group. . . . But the record demonstrates that the [l]aw [s]chool's admissions practices with

By punting on this problematic, but critical, question of race, the majority effectively allowed the university to employ a race-based admissions policy that could not sensibly be the least restrictive means possible as required by strict scrutiny.<sup>132</sup> Whatever the merits of the program, the Court’s anemic analysis passed on an opportunity to provide more guidance in interpreting the Fourteenth Amendment through the prism of “the most exacting judicial examination.”<sup>133</sup>

Finally, in allowing these broad categorizations without further scrutiny, the majority “intentionally short change[s]” groups that straddle the broad racial lines.<sup>134</sup> What of a Filipino-American applicant, who could arguably fall between a Hispanic group that is preferred or an Asian group that is no longer preferred?<sup>135</sup> Does the university expect such an applicant to side with a larger

respect to these groups differ dramatically and cannot be defended under any consistent use of the term ‘critical mass.’”). An interesting consequence of these broad racial categories, whether intentional or not, is the remarkably strong performance of “[B]lack” African immigrants in higher education. See CHUA & RUBENFELD, *supra* note 127, at 41–45. Nigerian-Americans are a curiously prominent example, making up 0.7% of the Black American population, yet composing 20–25% of the Harvard Business School class of 2010. *Id.* at 42; see also Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, but Which Ones?*, N.Y. TIMES (June 24, 2004), <https://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html> (discussing the skewed distribution of affirmative action’s benefits in higher education among African-Americans).

132. *Contra* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1252–60 (2002) (arguing affirmative action is constitutionally permissible under strict scrutiny as a remedy for private-sector discrimination on policy grounds). To reiterate, this Comment is not arguing the merits of affirmative action on public policy grounds, but rather questioning the scope of the Court-approved premise of diversity—with the goal of crafting a more sensible policy.

133. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978); see *supra* note 67.

134. See *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part) (“[L]itigation can be expected on behalf of minority groups intentionally short changed . . . . The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”).

135. See Romero, *supra* note 75, at 771 (pondering on what strategy Filipinas should embrace in race-conscious college admissions). The obvious reply here is that racial identification in these affirmative action programs uniformly rely on self-identification. See KENNEDY, *supra* note 110, at 135. Harvard Law Professor Randall Kennedy argues that such instances of fraud are marginal and incur a sufficiently low cost in exchange for the massive benefits of affirmative action. *See id.* at 140. This statement, while probably true in a larger societal cost-benefit analysis, is easier to digest if all minorities shared the same interests, but if the purpose of diversity is to “promote[] cross-racial understanding,” the lack of sophistication in demarcating conclusory racial categorizations minimizes, if not eradicates, the voices of some minority groups that affirmative action purports to raise. *Grutter*, 539 U.S. at 319–20, 330 (2003) (citation omitted) (“[W]hen a critical mass of underrepresented minority students is present, racial stereotypes lose their force because nonminority students learn there is no ‘minority viewpoint’ but rather a variety of viewpoints among minority students.”). If there is no single minority viewpoint, liberating viewpoints from the constraints of arbitrary racial categories might make more sense. *See id.* at 319–20.



hegemony that wields more political power rather than their own heritage or, for those not born on American soil, to cultivate the cultural identity of the country of their birth?<sup>136</sup> Perhaps even more importantly, if Justice Ginsburg's concurrence was predicated on the fact that African-American and Hispanic children attend largely minority schools and are therefore disadvantaged, this affirmative action policy does not help (and ultimately harms) non-Hispanic or African-American children who attend those very same schools.<sup>137</sup>

One could make a strong argument that notwithstanding these concerns, the balance still strikes in favor of the majority's holding.<sup>138</sup> The majority's failure is not in the prudence of policy, but rather in the dereliction of duty—a lackluster use of strict scrutiny that leaves critical questions unasked for groups that are silently vulnerable to current affirmative action jurisprudence: those who are neither white enough to be part of the majority nor black (or apparently Hispanic) enough to be part of a powerful political group.<sup>139</sup> In the Constitution's promise of equal protection of the laws, the Court could have found the best position to protect these individuals, or in the alternative, to lay out a clearer Fourteenth Amendment explanation in defense (and perhaps

136. See generally ROBERT L. FLEEGLER, *ELLIS ISLAND NATION: IMMIGRATION POLICY AND AMERICAN IDENTITY IN THE TWENTIETH CENTURY* (2013) (providing historical context to a discussion on immigration and multiculturalism in a multiethnic republic like the United States).

137. See *Grutter*, 539 U.S. at 345 (Ginsburg, J., concurring). But maybe that is the point—advancing an (ironically named) equal protection jurisprudence that would sacrifice the interests of some races for the greater good of advancing the interests of preferred races. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1195 (2008) (criticizing color-blindness because of its effect of favoring the majority). The trouble with this approach is that a lack of sophistication in ascribing minority status shortchanges groups like Filipino-Americans, but in their quest for racial justice, proponents of affirmative action in its current form may simply see these groups as collateral damage in advancing their own interests. See KENNEDY, *supra* note 110, at 244 (“That is not to say that affirmative action is without risk and expense . . . . [A]ffirmative action does generate toxic side effects—like many useful medicines. If the side effects outpace the therapeutic benefit, the medicine should be discontinued . . . .”). Judge Richard Posner explains that the use of race in advancing diversity is a way to economize search costs. See also RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 366–68 (1981) (discussing race as a proxy for desirable underlying characteristics such as an adverse background, ability to relate to marginal causes, motivation to promote a suppressed viewpoint, etc.). With the universities highlighting the individualized nature of their admissions review process, this Comment argues it is time to clarify the interest of diversity and tailor a more targeted, sensible solution that would pass constitutional muster. See *infra* Part V.

138. See *infra* Part V.

139. See *Grutter*, 539 U.S. 306. The language set forth in *Grutter* is clear: racial classifications must be “narrowly tailored to further compelling governmental interests.” *Id.* at 326. If the racial classifications purporting to animate a compelling government interest are not clear enough, meaningful equal protection cannot be achieved as the Equal Protection Clause requires equal protection of the laws for all citizens. See U.S. CONST. amend. XIV, § 1 (“[N]or deny to any person within its jurisdiction the equal protection of the laws.”).

even endorsement) of affirmative action.<sup>140</sup>

Justice Kennedy correctly criticized the majority in his dissent by stressing that not only did the majority fail to apply strict scrutiny, but by “trying to say otherwise, it undermine[d] both the test and its own controlling precedents.”<sup>141</sup> In describing the majority’s review as “nothing short of perfunctory,” Justice Kennedy highlighted the folly of the university’s concept of admitting a “critical mass” of minorities as automatically using race “to achieve numerical goals indistinguishable from quotas.”<sup>142</sup> However, he only briefly touched on the problem of giving expansive deference to the university’s racial categorizations.<sup>143</sup> This line of questioning would have been emblematic of the type of exacting scrutiny that could have led to a more sensible

140. See Rubenfeld, *supra* note 118 (“[I]nstitutions with affirmative action plans should be open about them or scrap them. If the burdens that an honest affirmative action program imposes on its beneficiaries are too great to bear, the correct response is not to prevaricate, but to try something new.”); see also Kingsley R. Brown, *Affirmative Action: Policy-Making by Deception*, 22 OHIO N.U. L. REV. 1291, 1296 (arguing affirmative action programs setting numerical targets for African-Americans and Mexican-Americans in Texas has little to do with diversity but more so with the very same racial politics prohibited by the Constitution). Perhaps just as important, the Court’s treatment of this case erodes the supposedly most exacting constitutional analysis of strict scrutiny. See *supra* note 67.

141. See *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

142. See *id.* at 388–89. Professor Randall Kennedy, who champions “sensible affirmative action programs,” provides an insightfully candid response to Justice Kennedy’s position in *Grutter*. See KENNEDY, *supra* note 110, at 146 (“[A]ffirmative action, with all of its deficiencies, is available. I will take what I can get for the purposes of making amends for past injustice, tapping into ‘diversity,’ countering ongoing prejudice, and accessing the benefits of integration.”).

143. See *Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting) (“The Court’s refusal to apply meaningful strict scrutiny will lead to serious consequences. By deferring to the law schools’ choice of minority admissions programs, the courts will lose the talents and resources of the faculties and administrators in devising new and fairer ways to ensure individual consideration. Constant and rigorous judicial review forces the law school faculties to undertake their responsibilities as state employees in this most sensitive of areas with utmost fidelity to the mandate of the Constitution.”). Justice Kennedy also pointed out a disturbing glimpse into the policymakers who construct these arbitrary racial categorizations. *Id.* (“An example [the former director of law school admissions] offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans. Many academics at other law schools who are ‘affirmative action’s more forthright defenders readily concede that diversity is merely the current rationale of convenience for a policy that they prefer to justify on other grounds.”) (quoting Peter H. Shuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 34 (2002))). It is impossible to ignore the political overtones of this report; this Comment challenges the prudence of good faith deference to the universities given the political climate in academia. See James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL’Y 89, 139 (2016) (citing a study where 81% of law professors contributed predominantly to Democratic candidates while only 15% contributed to Republicans); Michael Conkling, *Political Ideology and Law School Rankings: Measuring the Conservative Penalty and Liberal Bonus*, 2020 U. ILL. L. REV. ONLINE 178, 186 (2020) (concluding that the current system of ranking law schools penalizes those with conservative leanings in favor of liberal ones).

affirmative action jurisprudence.<sup>144</sup> Justice Kennedy’s insight is especially valuable because he recognized that, generally, the use of race in law school admissions is a compelling government interest but disagreed with the university’s policy as it stood.<sup>145</sup>

## 2. A Fishy Standard

However, Justice Kennedy undermined both strict scrutiny and its precedents in *Fisher II*.<sup>146</sup> At the heart of the dispute between the majority and the dissent was UT’s definition of a “critical mass” of enrollment from underrepresented minorities.<sup>147</sup> Responding to a challenge by the petitioner that the university must set forth a precise level of minority enrollment to achieve “critical mass,” Justice Kennedy highlighted the university’s interest in attaining the educational benefits from a diverse student body.<sup>148</sup> He reconciled two contrasting ideas in pursuing this goal: while boosting enrollment numbers from underrepresented minorities was critical to achieving diversity, the university was constitutionally precluded from operating a quota—hence, the goal cannot and should not be reduced to pure numbers.<sup>149</sup> By framing the

144. *See Grutter*, 539 U.S. at 393 (Kennedy, J., dissenting).

145. *Id.* at 395 (“It is regrettable the Court’s important holding allowing racial minorities to have their special circumstances considered in order to improve their educational opportunities is accompanied by a suspension of the strict scrutiny . . . . [T]hough I reiterate my approval of giving appropriate consideration to race in this one context, I must dissent in the present case.”).

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

147. *See id.* at 2216–17 (Alito, J., dissenting).

148. *Id.* at 2211. “Critical mass” has been a pressure point for the universities since *Grutter*: during oral arguments for *Fisher I*, Justice Scalia quipped on the concept. *See* Transcript of Oral Argument at 71–72, *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013) (No. 11-345) (“We should probably stop calling it critical mass then, because mass, you know, assumes numbers, either in size or a certain weight. . . . Call it a cloud or something like that.”). Even though Justice Scalia likely said this in jest, it is noteworthy how the Court’s “most exacting judicial [scrutiny]” can be bypassed by mere semantics. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978); *see also* Transcript of Oral Argument, *supra*.

149. *Fisher II*, 136 S. Ct. at 2210 (“Increasing minority enrollment may be instrumental to these educational benefits, but it is not, as petitioner seems to suggest, a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.”); *see also* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., concurring in the judgment) (citation omitted) (“[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race

key issue as whether the university had a “reasoned, principled explanation” for pursuing diversity without first scrutinizing what diversity actually is, the majority sidestepped a critical piece in answering the ultimate issue of whether the university’s use of race violated the Fourteenth Amendment’s Equal Protection Clause.<sup>150</sup> Justice Kennedy distinguished *Grutter*, where “[t]he consultation of daily reports during the last stages in the admissions process suggest[ed] there was no further attempt at individual review save for race itself,” from *Fisher II*, where “[t]he admissions officers who [made] . . . the final decision as to whether a particular applicant [would] . . . be admitted [made] . . . that decision without knowing the applicant’s race.”<sup>151</sup> However, this distinction is pointless if diversity is itself not scrutinized.<sup>152</sup> The Court’s analysis skipped the first part of strict scrutiny in identifying a clear, substantial state interest and dove straight to evaluating the narrowness of the means.<sup>153</sup> Race may indeed have been only used as a “factor of a factor of a factor” in UT’s admissions policy.<sup>154</sup> However, by not scrutinizing the concept of broad racial categorizations as it related to diversity, the analysis

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irrelevant.”)

150. *Fisher II*, 136 S. Ct. at 2208 (quoting *Fisher I*, 570 U.S. at 310). At this point, several opinions have touched on the importance of diversity and its validity as a compelling government interest. *See supra* notes 65–68 and accompanying text. However, it is worth pointing out that this “reasoned, principled explanation” that passed the Court’s most stringent scrutiny is nothing more than a thirty-nine-page document of the university’s own making. *See Fisher II*, 136 S. Ct. at 2210–11 (quoting *Fisher I*, 570 U.S. at 310).

151. *See Joshi, supra* note 71, at 21–23 (arguing that Justice Kennedy built on Justice Powell’s endorsement of the “Harvard Plan” in *Bakke* in using race as an important, but not the sole, factor in a holistic review). Justice Alito expressed skepticism of UT’s underplaying the importance of race as he pointed out that race is the only “holistic factor” that is in the cover of every of applicant file. *See Fisher II*, 136 S. Ct. at 2220 (Alito, J., dissenting) (citations omitted) (“Because an applicant’s race is identified at the front of the admissions file, reviewers are aware of it throughout the evaluation. Consideration of race therefore pervades every aspect of UT’s admissions process.”).

152. *See Fisher II*, 136 S. Ct. at 2210–11. Justice Kennedy himself made clear that a university’s goals “cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adapted to reach them.” *Id.* at 2211. After penning such authoritative language, Justice Kennedy somehow approved of goals like “the destruction of stereotypes” or “the preparation of the student body ‘for an increasingly diverse workforce.’” *See id.* (quotations omitted). Justice Alito merely pointed out the obvious in attacking the majority’s generous deference to these goals. *See id.* at 2223 (Alito, J., dissenting) (citations omitted) (“These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences. For instance, how will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, . . . then the narrow tailoring inquiry is meaningless.”).

153. *See id.* at 2208 (majority opinion).

154. *See Joshi, supra* note 71, at 21 (quoting *Fisher II*, 136 S. Ct. at 2207).

rendered hollow the legal safeguard set by the rubric of strict scrutiny.<sup>155</sup>

In his lengthy dissent, Justice Alito characterized the university's scheme as a plea for greater deference in the face of strict judicial scrutiny and castigated the majority for failing to apply the very same standard it had just elaborated in the case's previous encounter with the Court.<sup>156</sup> Justice Alito described UT's scheme as "shifting, unpersuasive, and, at times, less than candid" because the concept of "critical mass" and the use of race seemed to morph into different forms so as to fit UT's self-defined—and therefore judicially unrestrained—goal of diversity.<sup>157</sup>

In applying strict scrutiny, Justice Alito was absolutely correct to raise the problematic nature of UT's broad categorization of racial and ethnic groups.<sup>158</sup> It is hard to miss the irony that the university's stated goal was the "destruction of stereotypes," yet the university crudely classified the country's confoundingly complex racial makeup into five rigid categories.<sup>159</sup> Not only is this problematic in the long term as the country's demographics shift and practical factors like interracial marriages befuddle the analysis, but the university also

155. See *supra* note 68; see also Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 430–31 (1979) ("Who, then, is to decide what is the appropriate degree of diversity? Not a jury, but the universities themselves . . . . If you are not blatant, if you cause no scandal, if you let us reconcile what you are doing with grounds that can be acceptable to most, we will let you work out your own quiet compromise between our deeply held, but irreconcilable, ideals. That is what the Court seems to be saying.").

156. *Fisher II*, 136 S. Ct. at 2217 (Alito, J., dissenting). Justice Alito's concern centered on the insulation of the university's program from judicial review by embracing "the educational benefits of diversity" as sufficient—shockingly generous for strict scrutiny—to justify the use of race and ethnicity in the university's admissions policy. See *id.* at 2215, 2217 ("What the majority has now done—awarding a victory to UT in an opinion that fails to address the important issues in the case—is simply wrong.").

157. *Id.* at 2115–16; see also *Grutter v. Bollinger*, 539 U.S. 306, 319–20 (2003). Justice Alito's protracted dissent points out several faults in UT's admissions policy. See *Fisher II*, 136 S. Ct. at 2215–43 (Alito, J., dissenting). At focus in this Comment is the conclusory nature of racial categorizations that shortchange non-dominant groups like Filipino-Americans.

158. See *Fisher II*, 136 S. Ct. at 2229 (Alito, J., dissenting) (citations omitted) ("UT's failure to provide any definition of the various racial and ethnic groups is also revealing. UT does not specify what it means to be 'African-American,' 'Hispanic,' 'Asian[-]American,' 'Native American,' or '[w]hite.' And UT evidently labels each student as falling into only a single racial or ethnic group without explaining how individuals with ancestors from different groups are to be characterized.").

159. *Id.* at 2223. Speaking about UT's Asian-American demographic comprising diverse groups that make up 60% of the world's population, Justice Alito argues it would be "ludicrous to suggest that all of these students have similar backgrounds and similar ideas and experiences to share." *Id.* at 2229. He mentions the particular plight of Filipino-Americans. *Id.* (citations omitted) ("And UT makes no effort to ensure that it has a critical mass of, say, 'Filipino[-]Americans' or 'Cambodian[-]Americans.' As long as there are a sufficient number of 'Asian[-]Americans,' UT is apparently satisfied.").

relied on self-identification.<sup>160</sup> Justice Alito pointed out the obvious fact that this was an invitation to “game the system.”<sup>161</sup>

Restricting racial classifications to these five arbitrary and ill-defined categorizations places groups like Filipino-Americans in a tenuous position.<sup>162</sup> Clumped with “peers” like Japanese-Americans, Chinese-Americans, and Korean-Americans who have fared better in the legal profession in particular, and higher education in general, Filipino-Americans could be disenfranchised by the very program that purports to help them.<sup>163</sup> The Asian American Legal Defense Fund filed an amicus curiae brief in support of the University of Texas, arguing that the university’s policy actually does support Asian-Americans.<sup>164</sup> The sixty-four page brief mentioned “Filipinos” twice, both in

160. *Id.* at 2229–30 (“UT assumes that if an applicant describes himself or herself as a member of a particular race or ethnicity, that applicant will have a perspective that differs from that of applicants who describe themselves as members of different groups. But is this necessarily so? If an applicant has one grandparent, great-grandparent, or great-great-grandparent who was a member of a favored group, is that enough to permit UT to infer that this student’s classroom contribution will reflect a distinctive perspective or set of experiences associated with that group? UT does not say. It instead relies on applicants to ‘classify themselves.’” (quoting *Fisher I*, 570 U.S. 297, 306 (2013))); see also Brest & Oshige, *supra* note 58, at 875 (demonstrating the failings of affirmative action even under critical race theory when identity and race overlap).

161. See *Fisher II*, 136 S. Ct. at 2229–30 (Alito, J., dissenting). Professor Randall Kennedy astutely observed that “racial fraud” is present but sufficiently low as to be considered an inevitable but negligible cost to gain affirmative action’s benefits. See KENNEDY, *supra* note 110, at 140. But this observation is indicative of the problem with the state’s use of such personally intrusive matters like race or identity. See *infra* Part VI. Like rare nuclear disasters eliciting apprehension among the public even with the remotest possibility of their occurrence, the possibility of racial fraud—no matter how minimal—invokes such a repugnant response from the public that it can contribute to an erosion of trust in the program. See *infra* Part VI.

162. See Romero, *supra* note 75, at 773–75 (demonstrating both positive and negative images from the Filipino-American experience on socio-legal issues, sharing experiences with both Asian-American and Hispanic-American demographics).

163. See *id.* at 774. Several articles underscore the experience of Filipino-Americans to stress the need for race-based affirmative action, yet make no distinction for Filipino-Americans when discussing their underrepresentation relative to overperforming Asian-Americans in higher education. See Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 89, 94 (2016) (discussing how Filipino-Americans “can” benefit from affirmative action without really explaining how that is the case given the undefined critical mass concept); Note, Cynthia Chiu, *Justice or Just Us?: SFFA v. Harvard and Asian Americans in Affirmative Action*, 92 S. CAL. L. REV. 441, 454 (mentioning Filipinos in the context of Asian-American discrimination but providing no clear framework on how Filipinos are assisted by affirmative action). It is not sufficiently clear how *Fisher II* helps Filipino-Americans aside from the plea for minorities to work together, which is easy—if not cavalier—to argue if one does not contemplate a demographic that is underrepresented in higher education. See Fang, *supra* note 99 (defending affirmative action while simultaneously arguing for elevated sophistication in the policy debate).

164. Brief of Asian American Legal Defense and Education Fund et al., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (No. 14-981).

largely general contexts as to how they *can* benefit from the affirmative action policy—just like any other group can as well.<sup>165</sup> For all the lip service the brief pays to “discrete” Asian-American communities like Filipino, Vietnamese, Hmong, and similar “Asian” subgroups that apparently share the same disadvantages as African-Americans and Hispanics, the brief provides no articulable connection to UT’s overarching concept of “critical mass” in attaining desirable underrepresented minority enrollment numbers for these groups.<sup>166</sup> Groups like Filipino-Americans, Hmong-Americans, and the like still run the risk of being associated with other, more successful “Asians” in forming a “critical mass” of minority enrollment.<sup>167</sup> Ironically, the amicus brief could not point to this “critical mass” connection as the university did not provide such a connection, and the Court made no effort to examine “critical mass” in the Court’s exercise of the “most exacting judicial examination.”<sup>168</sup> Instead, the majority’s holding permits UT to prevaricate in its conception of a critical mass, effectively deflecting meaningful scrutiny.<sup>169</sup> UT may indeed only use race as a “factor of a factor of a factor.”<sup>170</sup> But to permit this catchphrase to obscure an impermissible use of racial preference strains

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165. *Id.* at 38 (“Because the consideration of race in UT’s individualized admissions process can benefit any applicant, Asian[-]Americans and Pacific Islanders . . . can benefit from it as well.”). As a reminder, this Comment’s argument is not that affirmative action is unhelpful, but rather that the lack of sophistication in the discussion of “critical mass” precludes the possibility of sincere strict scrutiny analysis. See *supra* notes 156–60 and accompanying text. The Court’s acceptance of “critical mass” as a permissible use of racial preference runs afoul of the Fourteenth Amendment’s Equal Protection Clause. See *supra* notes 156–60 and accompanying text.

166. Brief of Asian American Legal Defense and Education Fund et al., *supra* note 164, at 28, 36 (describing the disparity in immigration histories of various “Asian” groups).

167. See *id.*; see also *supra* notes 96–99.

168. *Fisher II*, 136 S. Ct. 2198, 2221 (Alito, J., dissenting) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting)); see *supra* Section IV.A.

169. See Note, *The Harvard Plan That Failed Asian Americans*, 131 HARV. L. REV. 604, 611 (2017). This note brings about an example of UT’s prevarication: while each racial group’s “critical mass” varies dramatically with its population size, it is also supposed to be a number that has a noble but nebulous aim of encouraging “underrepresented [minorities] to participate in the classroom and not feel isolated.” *Id.* (quotations omitted). Yet the university points out “that more classes lacked Asian-American students than lacked Hispanic students.” *Fisher II*, 136 S. Ct. at 2219 (Alito, J., dissenting). These complications, which deserve to be highlighted, resist simple solutions—hence this Comment’s encouragement of a race-neutral approach that works around these seemingly unsolvable problems. See *infra* Part V; POSNER, *supra* note 137, at 400–02 (stressing the often-ignored reality that “not every group can achieve proportionate representation”).

170. *Fisher II*, 136 S. Ct. at 2207 (quoting *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608 (2009), *vacated*, 570 U.S. 297 (2013)). For an enlightening data-driven analysis that reveals the deficiencies of current affirmative action jurisprudence while proposing a scheme to develop a workable, constitutional alternative, see Ayres & Foster, *supra* note 45.

even the most generous version of what is supposed to be the Court's most exacting judicial scrutiny.<sup>171</sup>

### *B. Current Affirmative Action Jurisprudence Offers No Limiting Principle*

Even if one were to concede that affirmative action in higher education passes strict scrutiny, there is no true limiting principle to the policy.<sup>172</sup> Justice O'Connor qualified the majority opinion in *Grutter* with a sunset provision of twenty-five years.<sup>173</sup> In *Fisher II*, Justice Kennedy echoed this holding in quality, albeit not in quantity, by stressing the university's obligation to continuously assess its admissions policies.<sup>174</sup> Outside of the Court's idealistic dicta that commands no compliance, affirmative action jurisprudence has no limiting principle by design.<sup>175</sup>

This lack of a limiting principle equates to complete deference to the universities.<sup>176</sup> The Court has entrusted universities—particularly law schools—

171. See POSNER, *supra* note 137, at 366 & n.7 (“There is little connection between seeking *proportional* representation of minorities, on the one hand, and, on the other, enhancing the quality of the educational experience by providing *some* representation for members of minority groups who could not gain admission on the basis of academic promise alone.”). Depending on one's leanings, Judge Posner's terse tone in 1981 may not have aged well given today's debate on what constitutes “academic promise.” *Id.* However, Judge Posner's point still adds nuance in reconciling *Fisher II*'s “critical mass” with “diversity,” especially with UT touting the nature of its holistic, individualized review. See *supra* notes 67–73 and accompanying text.

172. See *Fisher II*, 136 S. Ct. at 2223 (Alito, J., dissenting) (“These are laudable goals, but they are not concrete or precise, and they offer no limiting principle for the use of racial preferences.”); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (finding the lack of a “logical stopping point” material in holding a race-conscious state action unconstitutional).

173. See *supra* note 57 and accompanying text.

174. See *Fisher II*, 136 S. Ct. at 2215 (“The Court's affirmance of the [u]niversity's admissions policy today does not necessarily mean the [u]niversity may rely on that same policy without refinement. It is the [u]niversity's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.”).

175. See *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring). Justice Scalia foresaw litigation “on behalf of minority groups intentionally shortchanged in the institution's composition of its generic minority ‘critical mass.’” *Id.* at 349 (Scalia, J., dissenting in part and concurring in part); see, e.g., Anemona Hartocollis, *Justice Dept. Sues Yale, Citing Illegal Race Discrimination*, N.Y. TIMES (Feb. 3, 2021), <https://www.nytimes.com/2020/10/08/us/yale-discrimination.html>.

176. See *Fisher II*, 136 S. Ct. at 2215 (Alito, J., dissenting) (“The [u]niversity has still not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve. Its primary argument is that merely invoking ‘the educational benefits of diversity’ is sufficient and that it need not identify any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving, those interests. This is nothing less than the plea for deference that we emphatically rejected in our prior decision.”).



with apportioning seats of power and influence to groups at their discretion.<sup>177</sup> While the Court properly invoked strict scrutiny and took articulable stances, such as banning racial quotas, the latitude given to universities is appallingly generous.<sup>178</sup> The lack of a limiting principle allows for race-driven programs to be held constitutional as a matter of framing.<sup>179</sup> For instance, the *Grutter* Court—which articulated the unconstitutionality of racial balancing—saw nothing wrong with an admissions team tracking admitted students’ racial composition as long as it was done in the name of pursuing diversity and its educational benefits.<sup>180</sup> The *Fisher II* Court, of the “no deference” infamy, permitted a university’s use of a loosely defined concept of “critical mass” based on a thirty-nine page proposal produced by none other than the university itself.<sup>181</sup> These decisions have far-reaching consequences because schools around the nation tailor their admissions programs based on guidance from the Supreme Court.<sup>182</sup>

Because there is no limiting principle, current affirmative action jurisprudence invites new solutions to the fore.<sup>183</sup> The elephant in the room is Justice Kennedy’s 2018 retirement, which seems to have swung the current Supreme Court’s roster to favor the *Grutter* and *Fisher II* dissenters.<sup>184</sup> Perhaps more importantly, the nation’s shifting demographics and increasingly complicated

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

178. See *infra* note 180 and accompanying text.

179. See *supra* note 148.

180. See *Grutter v. Bollinger*, 539 U.S. 306, 318, 343 (2003). During admissions season, the University of Michigan Law School Director of Admissions reviewed “daily reports” tracking the racial composition of admitted students. *Id.* at 318. The Director of Admissions testified that he did not do this for racial balancing but for the attainment of diversity and its educational benefits, and the Court—applying strict scrutiny—accepted this explanation. *Id.*

181. See *Fisher II*, 136 S. Ct. at 2204, 2208 (citation omitted) (“[N]o deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals.”). Justice Alito perfectly summed up an obvious observation to this irony. *Id.* at 2223 (Alito, J., dissenting) (citations omitted) (“[H]ow will a court ever be able to determine whether stereotypes have been adequately destroyed? Or whether cross-racial understanding has been adequately achieved? If a university can justify racial discrimination simply by having a few employees opine that racial preferences are necessary to accomplish these nebulous goals, then the narrow tailoring inquiry is meaningless. Courts will be required to defer to the judgment of university administrators, and affirmative-action policies will be completely insulated from judicial review.”).

182. See UROFSKY, *supra* note 25, at 435 (explaining that the Education and Justice Departments published a document urging schools to tailor their admissions policies based on the Court’s findings).

183. See *infra* Part VI.

184. See *SLS Con Law Faculty Discuss Justice Kennedy’s Legacy and Retirement*, STAN. L. SCH. BLOGS (June 27, 2018), <https://law.stanford.edu/2018/06/27/250442/> (“One of the things I will be watching is whether, long term, the consolidation of a more stable conservative majority on the Supreme Court changes the valence of the politics of opposing judicial activism.”).

racial makeup invite the principle illustrated in *Grutter* to pursue “serious, good faith consideration of workable race-neutral alternatives.”<sup>185</sup> Despite the plethora of scholarship on affirmative action, the *Fisher II* Court’s deference in allowing universities to neatly categorize the nation’s demographics into five categories has not been challenged head-on.<sup>186</sup> Perhaps this is because conflating racial categorizations with identity is inherently convoluted and ultimately unworkable when fashioned into public policy in a multiethnic country like the United States.<sup>187</sup> This alone is a strong argument to take race out of the equation in law school admissions.<sup>188</sup> Whatever the next iteration of the upcoming affirmative action cases may be, a conscientious court needs to scrutinize racial categorizations to hew out the least restrictive means to achieve diversity.<sup>189</sup> If not, the current scheme will continue to harm groups, like Filipino-Americans, that get homogenized in the concept of critical mass, while their peculiar interests are subordinated to more powerfully positioned groups.<sup>190</sup>

#### V. A NEW SENSIBLE APPROACH: SOLVING STATE PROBLEMS THROUGH REDEFINING LAW SCHOOL ADMISSIONS POLICY

In ratifying the Fourteenth Amendment, the 39th Congress sought to purge the original Constitution’s legacy of slavery—and the Fourteenth Amendment “remains an eloquent statement about the nature of American society, a powerful force for assimilation of the children of immigrants, and a repudiation of a long history of racism.”<sup>191</sup> Hence, the Court’s use of strict

185. *See Grutter*, 539 U.S. at 339.

186. *See Ayres & Foster, supra* note 45, at 518. Because *Fisher II* largely upheld the same policy in *Grutter*, the criticism in the study by Ayres & Foster still applies. *See id.* While studies focused on parsing UT’s racial categories have not been done, the challenge of reconciling such categorizations with affirmative action has long been acknowledged. Brest & Oshige, *supra* note 58, at 875 (noting the inherent challenge of the inevitable conflation of race and identity in affirmative action).

187. *See POSNER, supra* note 137, at 367 (articulating the dubious nature of correlating race with attributes that are arguably relevant to meaningful diversity).

188. *Id.* Judge Posner argues that the administrative costs of implementing a scheme of racial preferences should weigh against its implementation. *Id.* at 370; *see also* ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (“The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. . . . The cost [of using quotas] in efficiency, as well as the injustice, ought to be deemed unacceptable.”).

189. *See infra* Part V.

190. *See infra* Part V.

191. *See FONER, supra* note 24, at 71.

scrutiny is the guardian of the powerless when their immutable traits are used against them in violation of the equal protection of the laws.<sup>192</sup>

Laws are not supposed to pass strict scrutiny; this is an exceptionally difficult test designed to “smoke out” any illegitimate purpose.<sup>193</sup> Remediating past discrimination could hardly be described as an illegitimate purpose—and it should not be.<sup>194</sup> However, the present lack of sophistication in affirmative action jurisprudence could not only harm “whites” but also underrepresented minority groups that do not fit the current political hegemony’s preapproved groups.<sup>195</sup> Crafting a sensible solution requires lifting mental blinders imposed by two extremes: complete elimination of affirmative action on the one hand and covert unconstitutional racial balancing on the other.<sup>196</sup> We must eviscerate the excesses of both extremes while embracing their best elements.<sup>197</sup> With Justice O’Connor’s sunset provision drawing closer, there seems to be no clear end in sight.<sup>198</sup> Without a transparent definition of diversity as a compelling government interest, proponents of affirmative action can

192. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (citations omitted) (“A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race. Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns . . .”).

193. *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989); see also Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as “‘strict’ in theory and fatal in fact”).

194. See Abigail Nurse, *Anti-Subordination in the Equal Protection Clause: A Case Study*, 89 N.Y.U. L. REV. 293, 321. This Article makes an argument for anti-subordination as a function of the Equal Protection Clause. *Id.* at 321–22 (footnotes omitted) (“In *Loving v. Virginia*, the Court struck down Virginia’s miscegenation laws because they were ‘designed to maintain White Supremacy.’ To make this determination, the Court assessed the historical context in which these laws were implemented[] and determined that preventing interracial marriage could not be held constitutional under the Equal Protection Clause.”). While anti-miscegenation laws are certainly distinguishable from race-conscious law school admissions, the idea of an anti-subordination measure based on the Equal Protection Clause could hardly be illegitimate given even a cursory survey of American history. *Id.*

195. See POSNER, *supra* note 137, at 371 (“[U]sing race as a proxy for characteristics thought to be relevant to the educational experience results in discrimination against people who have the characteristics, but not the racial identity.”). While supporters of affirmative action may simply dismiss this criticism as a necessary transactional cost of the policy, this issue remains a reason for the public’s ambivalent attitude towards affirmative action. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 297 (1978).

196. See *infra* Part VI.

197. See KENNEDY, *supra* note 110, at 241 (“That the Texas plan and similar programs are termed ‘race neutral’ despite their clear purpose to assist racial minorities reflects a yearning to accommodate conflicting aims: an end to racially selective affirmative action and a simultaneous insistence that something be done to continue to advance the interests of racial minorities.”).

198. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

prevaricate on what constitutes diversity.<sup>199</sup> Preserving such power to prevaricate to purveyors of prestigious positions such as law schools has become a powerful political weapon—a beast that needs to be fed with an ever-expanding appetite.<sup>200</sup>

The Court’s disingenuous application of strict scrutiny has left us with an affirmative action jurisprudence that violates the Fourteenth Amendment’s Equal Protection Clause.<sup>201</sup> Yet affirmative action remains attractive, if not necessary, on compelling policy grounds.<sup>202</sup> Diversity in its current unexamined state cannot be the basis for a compelling government interest that would pass strict scrutiny.<sup>203</sup> A shift from “diversity” to the clearer interest in remedying past discrimination creates crisper and more narrowly tailored solutions.<sup>204</sup> To illustrate, some of the most prominent supporters of affirmative action in higher education point to the disparity in primary and secondary school quality among the races.<sup>205</sup> Current affirmative action jurisprudence does not address this germane issue, and that needs to change.<sup>206</sup>

If the Court is unwilling to apply strict scrutiny, a constitutionally sound

199. See *supra* Part IV.

200. See Cristina Beltrán, *Opinion: To Understand Trump’s Support, We Must Think in Terms of Multiracial Whiteness*, WASH. POST (Jan. 15, 2021, 1:44 PM), <https://www.washingtonpost.com/opinions/2021/01/15/understand-trumps-support-we-must-think-terms-multiracial-whiteness/> (discussing “whiteness” as an ideology that crosses racial lines); see also GAD SAAD, *THE PARASITIC MIND: HOW INFECTIOUS IDEAS ARE KILLING COMMON SENSE* 60–66 (2020) (observing the ideological conformity expected in programs of “Diversity, Inclusion, and Equity” prevalent in academia and media). For a comparative analysis of intellectual diversity across arbitrary boundaries of race, gender, and sexuality, see ANGELA D. DILLARD, *GUESS WHO’S COMING TO DINNER NOW? MULTICULTURAL CONSERVATISM IN AMERICA* (2001).

201. See *supra* Part IV.

202. See *supra* notes 30–32 and accompanying text; see also Lee C. Bollinger, *What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race in America*, 129 HARV. L. REV. F. 281 (2016) (defending affirmative action while arguing that the diversity rationale cannot be divorced from the reality of past and present discrimination); Roosevelt, *supra* note 107 (arguing that a diversity-enhanced educational experience “outweighs fundamental rights”).

203. See *supra* Part IV.

204. See *supra* Part IV.

205. See KENNEDY, *supra* note 110, at 146 (“I would be willing immediately to trade university-level affirmative action for an ironclad guarantee, no matter what the expense, of excellent primary and secondary schooling throughout the country.”); Rubinfeld, *supra* note 118 (“If I had to choose, I would probably vote to scrap the entire patchwork of affirmative action measures in this country in favor of a massive capital infusion into inner-city day care and educational facilities.”); Grutter v. Bollinger, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (“[S]chools in predominantly minority communities lag far behind others measured by the educational resources available to them.”).

206. See *supra* Part IV.

solution needs to work around the Court.<sup>207</sup> My proposal is to inoculate the system with a race-neutral approach that would bypass strict scrutiny analysis while achieving the compelling government interest of remedying past and present discrimination: dedicate 20% of law school seats to candidates who have participated in service programs that address the inadequate educational resources in underserved neighborhoods.<sup>208</sup> In other words, guarantee law school admission to alumni of state-sponsored programs who have served at the frontlines in the battle against unequal educational opportunities.<sup>209</sup> Teach For America, which enlists college graduates from top universities to serve two-year terms as teachers in low-income communities, provides a paradigmatic example of such a program.<sup>210</sup> Law schools, particularly the prestigious law schools, attract elite talent across several disciplines.<sup>211</sup> If top law schools guarantee admission to outstanding students who commit their talents to addressing this national issue, they will inject dynamic human capital into underserved communities to help solve the current crisis.<sup>212</sup> Devoting 20% of law school admissions to these candidates makes equitable nation building a

207. *See infra* Part VI.

208. *See infra* Part VI. The idea is to provide a state-sanctioned framework for addressing a state interest while incentivizing participation through a redistributive program similar to the Post-9/11 GI Bill. *See* Gilbert Cruz, *A Brief History of: The GI Bill*, TIME (May 29, 2008), [content.time.com/time/subscriber/article/0,33009,1810309,00.html](https://content.time.com/time/subscriber/article/0,33009,1810309,00.html); UROFSKY, *supra* note 25, at 23–24 (noting the GI Bill is “arguably the most massive affirmative action program in U.S. history,” as it provides benefits like training, loans, and scholarships to servicemen returning from war). While this Comment strongly suggests addressing the acute inequality in educational opportunities, this is a mere suggestion. *See supra* note 205 and accompanying text. States should be free to craft interests that are sensitive to states’ respective needs and incentivize participation as the state governments see fit. *See infra* Part VI.

209. *See infra* Part VI. Unlike current loan repayment assistance programs, which require a service obligation after law school along with income cap requirements, this proposal requires service on the front-end without imposing any obligations on a participant’s future career—making service a necessary, but not sufficient, condition for law school admission. *See generally* Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27 (2007) (describing the legal framework of loan repayment assistance programs and the public policy they serve).

210. *See Life as a Corps Member*, TEACH FOR AM., <https://www.teachforamerica.org/faqs/life-as-a-corps-member> (last visited Sept. 23, 2021).

211. *See* Jessica Bursztynsky, *Elon Musk: ‘Too Many Smart People Go into Finance and Law,’* CNBC (May 7, 2020, 2:57 PM), <https://www.cnbc.com/2020/05/07/elon-musk-too-many-smart-people-go-into-finance-and-law.html>.

212. *See supra* note 205. As a way of example, Teach For America was founded to “address a national teacher shortage and dire academic issues for low-income [children].” *See The History of Teach For America*, TEACH FOR AM., <https://www.teachforamerica.org/what-we-do/history> (last visited Sept. 23, 2021). Teach For America sustains its mission by deploying fresh graduates from universities all over the country to schools that cater to low-income communities. *Id.*

necessary condition to admission at our nation's elite "training ground[s]" for future leaders.<sup>213</sup>

There is no denying the tangible and admirable benefits reaped from affirmative action in education.<sup>214</sup> We stand today on the shoulders of those who challenged the status quo of the past toward building a more just society.<sup>215</sup> However, affirmative action's future requires a more nuanced approach that factors in the unique circumstances of all citizens within the country's changing ethnic tapestry.<sup>216</sup> Forty-four years ago in *Bakke*, Justice Powell warned that as affirmative action's "preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary."<sup>217</sup> This proposal steers us in a direction that avoids Justice Powell's vicious cycle, which is current affirmative action's inevitable logical endpoint.<sup>218</sup> More importantly, this proposal is unfettered with current affirmative action's constitutional defects as it completely bypasses strict scrutiny due to its race-neutral nature.<sup>219</sup> Beyond simply

213. See *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003).

214. See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment[,] and creation." (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957))).

215. See G. Todd Butler & Jason Marsh, *Foreword: Celebrating the Life and Legacy of Thurgood Marshall*, 27 MISS. C. L. REV. 289, 289 (2008) ("A child born to a [B]lack mother in a state like Mississippi—born to the dumbest, poorest sharecropper—by merely drawing its first breath in the democracy has exactly the same rights as a white baby born to the wealthiest person in the United States. It's not true, but I challenge anyone to say it is not a goal worth working for." (quoting Justice Thurgood Marshall)).

216. See *Fisher II*, 136 S. Ct. 2198, 2215 (2016) ("The Court's affirmation of the [u]niversity's admissions policy today does not necessarily mean the [u]niversity may rely on that same policy without refinement. It is the [u]niversity's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.").

217. *Bakke*, 438 U.S. at 297. Justice Powell further pronounced the prudential point that the judiciary should not be determining the propriety of race-based programs. *Id.* (footnote omitted) ("The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence—even if they otherwise were politically feasible and socially desirable.").

218. See *id.*

219. See *supra* Part IV. But see *Parents Involved Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment) ("The enduring hope is that race should not matter; the reality is that too often it does."). This Comment resonates with Justice Kennedy's wise words while highlighting that abandoning strict scrutiny to support sound public policy is an improper exercise of judicial review. See *id.* This Comment stresses the Court is in the best position to compel parties before the Court to craft a solution that will help the United States remedy past discrimination without violating the Fourteenth Amendment's Equal Protection Clause. *Id.* Race-neutrality is not an automatic virtue, and this Comment, unlike other advocates who support a "color-blind" constitution, does not lionize Justice Harlan in *Plessy v. Ferguson*, as Justice Harlan's

skirting strict scrutiny, this proposal also appropriately draws from the redistributive rubric of the Reconstruction Amendments.<sup>220</sup> Such state actions have repeatedly been approved over time.<sup>221</sup> Moreover, aligning affirmative action policy in law school admissions with the evils that it is actually supposed to combat has three main benefits on policy grounds.<sup>222</sup>

First, devoting 20% of law school admissions to those who fight education inequity wins the short-term battle.<sup>223</sup> This proposal directly addresses distressed communities that are currently in dire need of resources to break the cycle of poverty.<sup>224</sup> Supporters of affirmative action stress the urgency of the racial divide in education as a national challenge.<sup>225</sup> By leveraging human capital in the form of talented law school candidates, this proposal has the merit of addressing the problem right now by sending some of our nation's most competent young talent to the frontlines.<sup>226</sup>

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praise of a color-blind constitution included an unapologetic bias favoring the “white race.” 163 U.S. 537, 559, *overruled by* *Brown v. Board of Ed.*, 347 U.S. 483 (1954) (Harlan, J., dissenting) (“The white race deems itself to be the dominant race in this country. And so it is . . . . I doubt not, it will continue to be for all time.”). While this Comment finds this bias unacceptable, whether Justice Harlan’s comments should be contextualized to the political climate of his time is beyond the scope of this Comment. *Id.* And while this Comment uses the Filipino-American experience to add practical nuance to the discussion, the proposed solution detailed here does not claim to help any particular ethnic group. *Id.* The proposal invites Americans of all races, with no regard to their identity-markers, to join a constituency that would tackle the unfortunate reality of education disparity—one of the evils that creates the need for affirmative action. *See supra* note 205. Ultimately, this Comment cautiously champions a race-neutral solution to be the most prudent path for a multiethnic republic like the United States. *See infra* Part VI.

220. *See* Akhil Reed Amar, *Tenth Annual Rosenkrantz Debate: Resolved: Lochner v. New York: Still Crazy After All These Years*, 16 *GEO. J.L. & PUB. POL’Y* 433, 434–35 (2017). Yale Law Professor Akhil Amar explains that “the Thirteenth Amendment is redistributive,” as it took lawful property from slave masters and redistributed it to the slaves themselves. *Id.* Section Four of the Fourteenth Amendment is also redistributive because it deprived slaveholders, who lost what was otherwise lawful property (slaves) after the civil war, of compensation. *Id.*

221. *Id.* at 435 (arguing that the Sixteenth Amendment was designed to provide “a redistributive income tax”).

222. *See infra* text accompanying notes 223–37.

223. *See supra* Part II.

224. *See supra* note 212. This Comment operates on the assumption that education is the desirable state interest at play, but this is just an example and need not be the only interest worth pursuing. *See supra* note 205 and accompanying text. Teaching need not be the only service-program iteration: states should be free to name their own interests (e.g., nature conservation, energy, criminal justice reform, etc.) and fine-tune the program as they see fit. *See supra* note 207 and accompanying text.

225. *See The Challenge*, TEACH FOR AM., <https://www.teachforamerica.org/what-we-do/the-challenge> (last visited Sept. 23, 2021) (“Potential is equally distributed across lines of race and class, but in America today, opportunity is not. Teach For America is working to realize the day when every child has an equal opportunity to learn, grow, influence, and lead.”).

226. *Id.*

Second, rewarding coveted law school seats to nation builders wins the long-term war.<sup>227</sup> This proposal creates a multiracial polity that will be exposed to the realities and struggles of underrepresented minorities beyond academia's hallowed halls.<sup>228</sup> This is remarkably fitting given that the original rationale for affirmative action in college admissions began as an attempt to create a classless polity—a reaction to the nepotist nature of the Northeast's elite colleges.<sup>229</sup> Rewarding service to suffering communities will create stakeholders from all racial groups while creating a law school student body that “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.”<sup>230</sup> By exposing human capital to the root of the problem—unlike using race as a proxy to economize search costs in achieving desirable traits of “diversity”—this proposal produces sincere, sustainable allies from a larger section of American society.<sup>231</sup>

Finally, this proposal serves as an educational—and even a marketing—tool to the public.<sup>232</sup> Affirmative action has fallen out of favor with the general public in recent years.<sup>233</sup> This may simply be from of a lack of understanding of affirmative action's mechanics.<sup>234</sup> Universities prevaricating on the

227. *See supra* Part II.

228. *See* MICHAEL J. SANDEL, *THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD?* 156–59 (2020) (discussing the self-perpetuated perception of colleges as meritocratic institutions as an attempt to create a polity from the most promising students, regardless of their family backgrounds).

229. *Id.*

230. *Fisher II*, 136 S. Ct. 2198, 2210 (2016) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)); *see also* *Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”).

231. *See supra* Part II. This may sound idealistic, if not naïve, but so is the idea that the use of broad racial categorizations will naturally translate to proper representation in building a diverse student body. *See* POSNER, *supra* note 137, at 366–67 (“Race [per se]—that is, race completely divorced from certain characteristics that may be strongly correlated with but do not always accompany it—is also, and in a similar sense, irrelevant to diversity. There are [B]lack people (and Chicanos, Filipinos, and so on) who differ only in the most superficial physical characteristics from whites—who have the same tastes, manners, experiences, aptitudes, and aspirations as the whites with whom one might compare them . . .”). This Comment contends that a law school candidate's demonstrated service to underrepresented minorities is a far more probative trait of the candidate's considerations for diversity in the classroom than the melatonin level in said candidate's skin. *Id.*

232. *See infra* Part VI.

233. *See infra* Part VI.

234. *See* OiYan Poon, *How Do Colleges Use Affirmative Action? Even Some Activists Don't Understand*, *THE CONVERSATION* (Oct. 26, 2018, 6:43 AM), <https://theconversation.com/how-do-colleges-use-affirmative-action-even-some-activists-dont-understand-105453>.



meaning of diversity has created both fair and unfair criticism.<sup>235</sup> Disingenuous and divisive narratives about affirmative action have abounded, generating a distaste from the general public outside the ivory towers of academia.<sup>236</sup> Simply put, the best branding campaign for affirmative action could be one that explains the need for remedying past discrimination toward building a society that is both diverse and cohesive.<sup>237</sup>

As a practical matter, there has never been a better time to bring this proposal to bear.<sup>238</sup> While standardized exams like the Law School Admissions Test (LSAT) have always had skeptics, the criticism has never been louder.<sup>239</sup> Standardized exam scores figure most prominently among the multitude of factors for law school admissions.<sup>240</sup> The strong correlation between access to resources and performance on standardized exams adds an inescapable economic and racial disproportion to the picture.<sup>241</sup> Whether the LSAT is a desirable or appropriate measure for law school admissions depends largely on what one believes law schools ought to accomplish.<sup>242</sup> One thing is certain: squared in the context of Justice O'Connor's comment on the legal profession's unique function in generating national leaders, the LSAT is an

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235. *Id.*

236. *See infra* Part VI.

237. *See infra* Part VI.

238. *See infra* note 239.

239. *See* Karen Sloan, *Amid COVID-19, the Bar Exam Faces a Reckoning and a Revamp*, LAW.COM (Dec. 2, 2020, 11:26 AM), reprinted in Paul Caron, *Amid COVID-19, the Bar Exam Faces a Reckoning and a Revamp*, TAXPROF BLOG (Dec. 3, 2020), [https://taxprof.typepad.com/tax-prof\\_blog/2020/12/amid-covid-19-the-bar-exam-faces-a-reckoning-and-a-revamp.html](https://taxprof.typepad.com/tax-prof_blog/2020/12/amid-covid-19-the-bar-exam-faces-a-reckoning-and-a-revamp.html) (showing COVID-19 forced key players to expedite a reassessment of the standardized bar exam's merits); Phoebe A. Haddon & Deborah W. Post, *Misuse and Abuse of the LSAT: Making the Case for Alternative Evaluative Efforts and a Redefinition of Merit*, 80 SAINT JOHN'S L. REV. 41, 91 (2003) ("Law schools cannot continue to express a commitment to diversity and affirmative action while over-relying on and overusing the LSAT scores as a predictive measure."). This article also proposes interesting alternatives, like changing the way the LSAT is reported, involving more faculty in a holistic review process, and altogether disbandment of the LSAT. Haddon & Post, *supra* at 102–04. *See generally* Aaron N. Taylor, *The Marginalization of Black Aspiring Lawyers*, 13 FL. INT'L. U. L. REV. 489 (2019) (arguing that the LSAT significantly marginalizes Black people seeking to join the legal profession).

240. *See supra* note 239; Vault Education Editors, *Why the LSAT Is the Most Important Part of Your Law School Application*, VAULT (Sep. 20, 2010), <https://www.vault.com/blogs/admit-one-vaults-mba-law-school-and-college-blog/why-the-lsat-is-the-most-important-part-of-your-law-school-application> (citing a survey of law school admission officers with 65% indicating the LSAT is the "most important admissions factor").

241. *See* SANDEL, *supra* note 228, at 164 (observing that standardized test scores, which play a central role in admission to elite universities, entrench inequality).

242. *See supra* Part III.

inadequate measure.<sup>243</sup> And while law schools allow applicants to discuss their other qualifications in the form of personal statements, these variables are seldom closely vetted, if at all.<sup>244</sup> With an entire industry built around crafting the most persuasive personal statements by candidates who have the luxury to employ this service, the utility of personal statements is fairly questioned.<sup>245</sup> This proposal circumvents this problem by supplementing personal statements with demonstrated commitment to service.<sup>246</sup> Unlike personal statements that can be falsified, exaggerated, or augmented by expensive coaching, proven service in state programs signals leadership in an impactful way that advances state interests while also providing strong candidates for law schools.<sup>247</sup>

This proposal is a solution to a problem like medication is to an ailment.<sup>248</sup> As such, it has its unavoidable side effects.<sup>249</sup> The most prominent is the

243. See *supra* note 121.

244. See Anemona Hartocollis, *'They're Not Fact-Checking': How Lies on College Applications Can Slip Through the Net*, N.Y. TIMES (Dec. 16, 2018), <https://www.nytimes.com/2018/12/16/us/college-admission-applications.html> (“Some universities require students to sign a sworn statement that they are telling the truth, under pain of prosecution. But officials admit they are not seeking to be law enforcement.”).

245. See Dana Goldstein & Jack Healy, *Inside the Pricey, Totally Legal World of College Consultants*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/admissions-cheating-scandal-consultants.html> (narrating the way wealth can be leveraged to game the admissions process to top universities). The same is true for law school admissions. See, e.g., *Admissions Consultants: Third-Party Solutions for Law School Admissions*, ADMISSIONS DEAN, [https://www.admissionsdean.com/applying\\_to\\_law\\_school/admissions-consultants/](https://www.admissionsdean.com/applying_to_law_school/admissions-consultants/) (last visited Sept. 23, 2021) (listing a chart of law school admission consultants with prices ranging from \$2,495 to \$6,500).

246. See *supra* note 208 and accompanying text and note 245. Surely, there are law school admission offices out there that do scrupulously evaluate personal statements and see through some lies, but this proposal invites more concrete, and ultimately empirical, evidence of character. See *supra* note 245; see also Staci Zaretsky, *2 Quick Ways To Get Your Law School Acceptances Revoked*, ABOVE THE LAW (Mar. 20, 2017, 2:55 PM), <https://abovethelaw.com/2017/03/2-quick-ways-to-get-your-law-school-acceptances-revoked/> (discussing law school admissions offices identifying application irregularities and omissions).

247. See *supra* notes 244–46 and accompanying text.

248. See *supra* Part IV and note 137.

249. See *supra* Part IV; see also Daniel Bergerson, *Don't Teach For America, Teach for Real*, DAILY COLUMBIA SPECTATOR (Nov. 17, 2016, 6:00 AM), <https://www.columbiaspectator.com/opinion/2016/10/12/dont-teach-america-teach-real/> (discussing the harmful effects of Teach For America). But see The TFA Editorial Team, *Engaging with Critiques of Teach For America*, TEACH FOR AM. (May 22, 2018), <https://www.teachforamerica.org/stories/engaging-with-critiques-of-teach-for-america> (responding to criticism and concerns surrounding Teach For America). Public policy debates often involve a delicate dilemma between two good choices, each with their own imperfections. See *id.* The granular details on whether Teach For America, illustrated here simply to exemplify service-oriented programs, is worth emulating are beyond the scope of this Comment. *Id.*

reality that underrepresented minority students may not have the “luxury” of delaying their desired legal career by spending two years in service of schools in low-income areas.<sup>250</sup> This argument is fair but incomplete.<sup>251</sup> As a preliminary matter, it is crucial that these programs not only guarantee admission but offer partial, if not full, scholarships.<sup>252</sup> Moreover, law students who are underrepresented minorities would be particularly valuable role models to create a positive impact on underserved communities.<sup>253</sup> Ultimately, public policy debates can be a fraught exercise with competing interests always at play.<sup>254</sup> But the benefits of this program are tremendous and are worth their great cost.<sup>255</sup>

As for the remaining 80% of law school admissions, the status quo is the most viable option despite its obvious flaws.<sup>256</sup> Ideally, the status quo has to grapple with the glaring gap between the use of broad racial categorizations to economize search costs and the “individualized” review it claims.<sup>257</sup> So far, universities have dispelled this contradiction by incanting the magic of “diversity,” and that is not likely to change any time soon.<sup>258</sup> If the desire to craft a constitutional affirmative action policy is sincere, experimenting on 20% of law school admissions as a starting point is a step worth taking.<sup>259</sup> While this

250. *See infra* Part VI. This Comment uses two years to illustrate a typical length of a Teach For America term, but states should be free to fashion the length of their service programs as necessary. *See infra* Part VI; The TFA Editorial Team, *supra* note 249 (discussing the typical two-year length of teaching service used by Teach For America). The United States military grants 100% Post-9/11 GI Bill benefits (which include funding for tuition and a stipend) to service members who complete a three-year commitment. *See infra* note 254. The requisite length to “attain” the benefit of law school admission—along with other intricacies inherent to the service program—should be left for the states to decide. *See* 38 U.S.C. §§ 3311, 3313; *infra* Part VI.

251. *See infra* Part VI.

252. *See infra* Part VI; *see, e.g.*, Cruz, *supra* note 208 (describing the importance of the previous GI Bill’s provision of scholarship education benefits to increasing access to universities).

253. *See supra* note 117; Adeno Addis, *Role Models and the Politics of Recognition*, 144 UNIV. PA. L. REV. 1377, 1467 (1996) (“[T]he concept of role model as a version of the politics of recognition is not about assimilation in the sense of the group losing its agency, culturally or otherwise, but rather it is about providing marginal groups with the vocabulary, the voice, and the imagination to provide an effective counternarrative to the dominant narrative of exclusion and devaluation.”).

254. *See supra* note 220 and accompanying text. The Post-9/11 GI Bill provides an insightful analog to this service-related program that is also a redistributive use of state power. *See generally* Lora D. Lashbrook, *An Analysis of the “G. I. Bill of Rights,”* 20 NOTRE DAME L. REV. 122 (1944) (analyzing public policy considerations underpinning the Servicemen’s Readjustment Act of 1944).

255. *See supra* note 254.

256. *See supra* Part IV.

257. *See supra* Part IV.

258. *See supra* Part IV.

259. *See supra* Part IV.

proposal is not perfect, it need not outrun the proverbial bear; it is a better solution than what we have right now because current affirmative action jurisprudence is not only flawed, it is also unconstitutional.<sup>260</sup> Because the Court has repeatedly sidestepped questions on diversity, this proposal takes both the Court and the irreducible issues inherent in racial categorizations out of the equation.<sup>261</sup> This race-neutral approach is a compromise that will give us a chance to start moving in the right direction given our Constitution's safeguards on equal protection of the laws and the nation's ever-changing demographics.<sup>262</sup> It has the merit of achieving racial justice without the downside of an unconstitutional use of race.<sup>263</sup>

#### VI. CONCLUSION: YOU HATE WHAT YOU DON'T UNDERSTAND

California is one of the most liberal and diverse states in the union.<sup>264</sup> Affirmative action has long been associated with the more progressive Democrats—California's hegemonic party.<sup>265</sup> The 2020 defeat of Proposition 16, a ballot proposition repealing a 1996 popular-vote constitutional amendment prohibiting affirmative action in California, is both surprising and telling.<sup>266</sup>

On the one hand, Proposition 16's defeat is surprising given the overwhelming support of California's democratically elected state and federal officials, along with key players in media, academia, and activism.<sup>267</sup> But on

260. *See supra* Part IV.

261. *See supra* Part IV.

262. *See supra* Part IV.

263. *See supra* Part IV.

264. *See* Andrew Chamings, *Here's How California Has Voted in the Past 15 Presidential Elections*, SFGATE (Nov. 3, 2020, 7:15 PM), <https://www.sfgate.com/bayarea/article/who-did-California-vote-for-president-15694779.php> (noting California, America's most populous state, has voted for a Democratic candidate in every presidential election since 1992); Sara Clarke, *California Is the Most Diverse State, Report Says*, U.S. NEWS (Sept. 10, 2020), <https://www.usnews.com/news/best-states/articles/2020-09-10/california-is-the-most-diverse-state-in-the-us> (reporting on California's tremendous diversity under a variety of measures).

265. *See* UROFSKY, *supra* note 25, at 298–301 (discussing Bill Clinton's presidency and affirmative action).

266. *Compare* Ward Connerly, *Deep Blue and Overwhelmingly Against Racial Preferences: What's Going on in California*, USA TODAY (Nov. 15, 2020 3:23 AM), <https://www.usatoday.com/story/opinion/2020/11/13/proposition-16-california-affirmative-action-racial-preferences-column/6241580002/> (offering explanations for the 57% to 43% defeat of Proposition 16 in California), *with California President Results*, CNN POLITICS, <https://www.cnn.com/election/2020/results/state/california/president> (last updated Jan. 12, 2021, 12:28 PM) (reporting Biden's resounding 63.5% to 34.3% victory over Trump).

267. *Endorsements*, YES ON 16, <https://web.archive.org/web/20200803211032/>

the other hand, it is also telling: there seems to be something inherently repulsive in a judicially permitted equal protection policy that is intuitively unequal.<sup>268</sup> Politicians and the media have profited on race.<sup>269</sup> And while academia smugly pontificates with its own brilliance, its influence dissipates from the height of its ivory tower.<sup>270</sup> I contend the electorate is not racist—but the electorate is deeply misinformed about affirmative action, especially regarding affirmative action’s anti-subordination aspect as a remedy for past discrimination.<sup>271</sup> Given the Supreme Court’s “Don’t Tell, Don’t Ask” approach to affirmative action, who can blame them?<sup>272</sup> Affirmative action, which is so closely tied with identity, has never been short on complexity.<sup>273</sup>

This Comment is not a call to end affirmative action.<sup>274</sup> It is a reminder of our national obligation to “engage in constant deliberation and continued reflection” on a subject that intersects diversity and unity—one that invokes our traditional national motto of *E Pluribus Unum*.<sup>275</sup> It is a call to craft

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<https://voteyesonprop16.org/endorsements/> (last visited Sept. 23, 2021). Endorsers include Governor Gavin Newsom, U.S. Senator Kamala Harris, U.S. Representative Nancy Pelosi, the *Los Angeles Times*, the Co-Founder of the Black Lives Matter Movement, and many others. *Id.*; The Times Editorial Board, Opinion, *Endorsement: Yes on Prop. 16, Because the U.S. Is Not a Meritocracy*, L.A. TIMES (Sept. 11, 2020, 4:47 AM), <https://www.latimes.com/opinion/story/2020-09-11/endorsement-affirmative-action-ban> (reporting the Los Angeles Times’s endorsement of Proposition 16).

268. See *supra* Part IV.

269. See Jonathan Berr, *Media Companies Profit Handsomely from the Political Ads Voters Despise*, FORBES (Nov. 2, 2018, 5:44 AM), <https://www.forbes.com/sites/jonathanberr/2018/11/02/media-companies-profit-handsomely-from-the-political-ads-voters-despise/?sh=363e3b983828> (reporting on the economics of political advertisements).

270. See Andrew Marzoni, *Academia Is a Cult*, WASH. POST (Nov. 1, 2018), [https://www.washingtonpost.com/outlook/academia-is-a-cult/2018/10/31/eea787a0-bd08-11e8-b7d2-0773aa1e33da\\_story.html](https://www.washingtonpost.com/outlook/academia-is-a-cult/2018/10/31/eea787a0-bd08-11e8-b7d2-0773aa1e33da_story.html) (describing and critiquing the insular nature of academia and abusive and problematic dynamics arising within that culture). For a discussion of some of the challenges arising from academia’s dysfunction, see generally GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE* (2018).

271. See *supra* Parts IV–V.

272. See Ayres & Foster, *supra* note 45.

273. See *supra* Part V.

274. See *supra* Part V.

275. See *Fisher II*, 136 S. Ct. 2198, 2215 (2016); AKHIL REED AMAR, *THE WORDS THAT MADE US: AMERICA’S CONSTITUTIONAL CONVERSATION, 1760–1840*, at 676 (2021) (“We Americans are a famously diverse and contentious lot. Today’s citizens bear myriad ethnic backgrounds and skin colors. We profess a multitude of faiths, and some profess agnosticism or atheism. We speak countless different languages. Our forebears came to this land at wildly different times and in profoundly different ways, some with bullwhips, some in chains. Some of us are male, others female, still others neither or both; some are gay, others straight, still others in between or beyond. We passionately embrace a wide range of ideologies and viewpoints. But despite—or rather precisely because of—

affirmative action policies in a manner that remains grounded in the undeniable reality of past and present discrimination, while providing a state-based solution that promotes both cohesive nation building and individual agency for all Americans.<sup>276</sup> If the goal is to achieve diversity, and racial categorizations are a means to economize search costs to this end, then complications arising from the use of race are not worth their price in a country whose colors extend beyond black and white.<sup>277</sup> Because of the Court's spineless strict scrutiny, we are left in the dark as to whether universities are performing unconstitutional covert racial balancing.<sup>278</sup> We do not have the answers—but if our multiethnic republic's commitment to equal protection of the laws includes groups like Filipino-Americans—we cannot ignore the questions.<sup>279</sup>

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these differences, there must be a common core. . . . Without broad agreement on the constitutional basics—not on every detail, but on the big picture, the main narrative—we are lost. We are Babel.”).

276. See *supra* Part V; see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory . . . [in which to] try novel social and economic experiments without risk to the rest of the country.”).

277. See *supra* Part IV.

278. See *supra* Part IV.

279. See *supra* Part IV.

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