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Racial Indirection

Yuvraj Joshi*

Racial indirection describes practices that produce racially disproportionate results without the overt use of race. This Article demonstrates how racial indirection has allowed — and may continue to allow — efforts to desegregate America’s universities. By analyzing the Supreme Court’s affirmative action cases, the Article shows how specific features of affirmative action doctrine have required and incentivized racial indirection, and how these same features have helped sustain the constitutionality of affirmative action to this point. There is a basic constitutional principle that emerges from these cases: so long as the end is constitutionally permissible, the less direct the reliance on race to achieve that end, the less constitutionally problematic the means. The Article then discusses the potential benefits and costs of adopting indirection in affirmative action, and describes disagreements among Justices about the value of indirection that do not track along the usual ideological lines. Finally, anticipating a stable conservative majority on the Supreme Court, the Article expects affirmative action not to disappear but to be driven further underground — employing ever-less conspicuous considerations of race. In the American story of affirmative action, all paths lead to indirection — the task ahead is to determine the role that indirection may continue to play in desegregating universities.

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“The ‘percentage plans’ are just as race conscious as the point scheme . . . but they get their racially diverse results *without saying directly* what they are doing or why they are doing it.”¹

— Justice Souter’s dissenting opinion in *Gratz v. Bollinger*

“[R]ace, in this *indirect* fashion, considered with all of the other factors . . . can make a difference to whether an application is accepted or rejected.”²

— Justice Kennedy’s majority opinion in
Fisher v. University of Texas

INTRODUCTION

Justice Kennedy’s retirement spells the end of affirmative action as we know it. With Brett Kavanaugh on the Supreme Court, conservatives have secured the votes needed to prohibit race-sensitive admissions in public and private universities.³ With affirmative action’s potential demise at hand, this Article demonstrates how *racial indirection* has allowed — and may continue to allow — efforts to desegregate America’s universities.

Racial indirection describes practices that produce racially disproportionate results without the overt use of race.⁴ It includes practices that employ racial categories in subtle and partial ways as well as those that rely on ostensibly “neutral” factors and

¹ *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting) (emphasis added).

² *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2207 (2016) (emphasis added).

³ See Erwin Chemerinsky, *Trump, the Court, and Constitutional Law*, 93 IND. L.J. 73, 79 (2018) (“[I]f Trump gets to replace one more Justice later for Ginsburg, Breyer, or Kennedy, that will mean the end of affirmative action in the United States.”); *Ilya Shapiro Discusses the Trump Administration Rescinding Guidelines for Affirmative Action on KUT Radio*, CATO INST. at 2:22 (July 12, 2018), <https://www.cato.org/multimedia/media-highlights-radio/ilya-shapiro-discusses-trump-administration-rescinding-guidelines> (“I can see, with Brett Kavanaugh on the Court, an end to racial preferences in college admissions.”).

⁴ “Racially disproportionate” here means affecting one racial group more or less than another or more or less than its share of the relevant population. Racial indirection is conceptually distinct from “disparate impact” practices that are “fair in form, but discriminatory in operation.” See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). Racial indirection encompasses practices that *harm* minorities (covering forms of disparate impact) as well as those that *benefit* them (covering forms of affirmative action). Furthermore, it captures practices that are facially-neutral as well as those that retain race in diminished forms. For a discussion of the distinctive features of racial indirection, see *infra* Part I.

considerations to produce racial impact. Because such practices commonly serve to perpetuate rather than alleviate racial stratification, a significant body of literature analyzes the disproportionate *harm* that racially covert practices inflict on racial minorities.⁵ This Article focuses on a different version of racial indirection: affirmative action policies in higher education that are also racially covert but that inure to the *benefit* of racial minorities.

Affirmative action in higher education has a historic trajectory, from racially direct to indirect. By analyzing the Supreme Court's affirmative action cases, this Article explores *how* racial indirection emerged and how it functions, *why* decision-makers adopt or resist indirection, and *which* forms of indirection may be politically feasible and normatively desirable. Exploring the indirection that has shaped affirmative action until now sheds light on the indirection that might shape affirmative action in the future. Even if a stable conservative majority on the Supreme Court tries to dismantle admissions programs that explicitly take race into account, affirmative action would not disappear. It would, however, be driven further underground — employing ever-less conspicuous considerations of race.⁶

⁵ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 132 (rev. ed. 2012) (discussing how “race-neutral factors — such as location — operate in a highly discriminatory fashion”); Andrew Gelman et al., *An Analysis of the New York City Police Department's “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813, 813 (2007) (finding evidence that black people in New York City are stopped and frisked at disproportionately high rates); Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 103 (2006) (discussing the “significant racial and geographic concentration” of subprime and predatory lending); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1994) (tracing how “particularly harsh federal penalties for trafficking in crack cocaine thus have a particularly disproportionate impact on black defendants”); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW & HUM. BEHAV. 261, 272 (2007) (finding that race influences the use of peremptory challenges in participants and that participants justified their use of challenges in facially-neutral terms).

⁶ To be clear, this is an account of what I believe could happen given a politically conservative Supreme Court; this account is therefore contingent on the Court continuing to be at least as conservative as the present Court for the foreseeable future, and functioning as it has in recent decades. However, the future of the Court itself is uncertain. Some have proposed ways to save the Court from hyper-partisanship and an impending crisis of legitimacy. See generally Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. (forthcoming 2019). Others have long considered the Court illegitimate and questioned the faith placed in the Court to advance racial equality. See, e.g., Lewis M. Steele, *Nine Men in Black Who*

Given that indirection may represent the future of affirmative action, the first aim of this Article is to develop a framework of racial indirection that is attentive to its many variations. Lawyers and legal scholars tend to associate practices that diminish the salience of race with racially regressive policies and ideologies. Yet, as the case of affirmative action reminds us, racial indirection can be a force of racial retrenchment as well as progress. Expanding the frame in this way better enables us to recognize and differentiate between interventions that diminish the salience of race. This effort is the object of Part I, which sketches a model of racial indirection. By looking across social spheres and practices, it demonstrates the diverse forms indirection can assume and the disparate ends it can serve. Furthermore, it shows how racial indirection is distinct from colorblindness and post-racialism, and how there are important features of affirmative action doctrine that these other accounts cannot explain.

The Article's second aim is to employ this framework to trace the rise of indirection in affirmative action. Affirmative action emerged in the 1960s as an attempt to undo the effects of past racial discrimination and move away from racial wrongdoing.⁷ Over time, as practices that sought to level the playing field for racial minorities were challenged by White applicants, the form of affirmative action shifted from programs explicitly based on race toward those in which reliance on race is less conspicuous, and the justificatory rhetoric for affirmative action moved away from racial-justice-based reasons toward the more universal rationale of diversity.⁸ Where once there were programs based entirely on race, today there are programs in which race is one of several factors or in which race does not explicitly factor. Part II situates racial indirection in the Supreme Court's affirmative action decisions, demonstrating how specific features of

Think White, N.Y. TIMES (Oct. 13, 1968), <https://www.nytimes.com/1968/10/13/archives/a-critics-view-of-the-warren-court-nine-men-in-black-who-think.html>.

⁷ For a brief history of the emergence of affirmative action, 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, 278-84 (2015) [hereinafter *Judging Opportunity Lost*]. For justice-based rationales for affirmative action, see Owen M. Fiss, *Affirmative Action as a Strategy of Justice*, 17 PHIL. & PUB. POL'Y 37, 37-38 (1997).

⁸ See Daniel Hirschman & Ellen Berrey, *The Partial Deinstitutionalization of Affirmative Action in U.S. Higher Education, 1988 to 2014*, 4 SOC. SCI. 449, 449-50 (2017) (analyzing stated organizational policy in nearly 1,000 U.S. colleges and universities and finding that institutions that publicly declared that they considered race in undergraduate admissions dropped from sixty percent in 1994 to thirty-five percent in 2014).

affirmative action doctrine have required and incentivized racial indirection, and how these same features have helped sustain the constitutionality of affirmative action until now.

In analyzing affirmative action cases, the Article aims in Parts III and IV to examine the justifications for and critiques of racial indirection in affirmative action. By revisiting cases through the lens of racial indirection, we are better able to describe the concerns that have already shaped the development of affirmative action law. However, there are serious concerns presented by racial indirection that are hinted at but never fully developed in juridical accounts of affirmative action. By looking beyond case law to divergent disciplinary perspectives, ranging from political theory to critical race theory and social psychology, we can better appreciate the ways in which racial indirection implicates values like individual fairness, social cohesion, government transparency, principled reasoning, and racial justice.

The analysis in Parts III and IV does more than demonstrate the potential benefits and costs of adopting indirection in affirmative action; it also describes disagreements among Justices about the value of indirection that do not track along the usual ideological lines. Whereas centrist Justices embrace indirection in affirmative action decisions, conservative and progressive Justices are critical of indirection. Once we understand the reasons why Justices across the political spectrum adopt or resist racial indirection, we will be in a better position to think about the ways a differently constituted Court might treat affirmative action.

The Article's final aim is therefore to imagine the future of affirmative action. Harvard College's use of race in admissions faces an investigation by the Department of Justice and a lawsuit from anti-affirmative-action activist Edward Blum.⁹ In light of the shift from a Kennedy-centered Court to a Roberts-centered one and the movement of the *Students for Fair Admissions v. Harvard* litigation through lower courts, Part V reflects on the different paths that could lead to further indirection in affirmative action and the different forms that indirection could and should take.

This Article is the first to examine racial indirection as a systemic phenomenon and the first comprehensive account of racial indirection in affirmative action.¹⁰ Its attention to indirection is especially timely

⁹ Harvard is not alone; for examples of institutions currently facing allegations of unconstitutional admissions practices, see *infra* text accompanying note 268.

¹⁰ For literature discussing indirection as a phenomenon without offering a comprehensive account of indirection, see, e.g., Theda Skocpol, *Targeting within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in *THE*

as we mark the fortieth anniversary of Justice Powell's opinion in *Regents of the University of California v. Bakke*, which first sanctioned the indirect reliance on race in admissions.¹¹ Far more importantly, it is timely as we face new challenges to affirmative action and further Supreme Court appointments by an administration fueled by resentment and hostility toward racial minorities. This Article revisits affirmative action law at this critical juncture to consider whether racial indirection might have a progressive role to play during this period of racial retrenchment.

I. THEORIZING RACIAL INDIRECTION

The concept of racial indirection describes practices with a covert *racial form* that have a disproportionate *racial impact*. The distinctive features of racial indirection can best be understood by contrasting it with accounts that dominate our thinking about equal protection. Part

URBAN UNDERCLASS 411, 414 (Christopher Jencks & Paul E. Peterson eds., 1991) (describing "targeting within universalism" as "universal policy frameworks for extra benefits and services that disproportionately help less privileged people without stigmatizing them"); WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 155 (1987) (describing "the hidden agenda" of "improv[ing] the life chances of truly disadvantaged groups . . . by emphasizing programs to which the more advantaged groups of all races and class backgrounds can positively relate"); Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007) (describing a "'don't ask, don't tell' approach to race-conscious decisionmaking: use race, but don't be obvious about it"); Jennifer L. Hochschild, *Approaching Racial Equality Through Indirection: The Problem of Race, Class, and Power*, 4 YALE L. & POL'Y REV. 307, 330 (1986) (arguing that certain "indirect approaches to racial equality seem preferable to the flawed direct one if that is the array of available choices"); Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 913 (1983) (distinguishing "the use of a numerical set-aside . . . from more indirect methods"); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 503 (1993) ("Justice O'Connor's opinion in *Shaw* . . . permits noninvidious uses of race, as long as policymakers do not allow race to become — or appear to be — paramount to all other relevant values."); Daniel Sabbagh, *The Rise of Indirect Affirmative Action: Converging Strategies for Promoting "Diversity" in Selective Institutions of Higher Education in the United States and France*, 63 WORLD POL. 470, 472 (2011) (contending that admissions policies at the University of Texas and Sciences Po are "indirect" in that they "appear impartial but are designed to benefit (implicitly) designated groups more than others"); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470 (2004) [hereinafter *Equality Talk*] (tracing how conflict over the meaning and enforcement of *Brown v. Board of Education* has produced "indirection" in equal protection law).

¹¹ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271-72, 320 (1978).

I.A thus explains how racial indirection presents a more complete picture of racial form than accounts that focus on the presence or absence of a racial classification. Part I.B shows how racial indirection provides a more nuanced appreciation of racial impact than accounts that emphasize the dangers of racially covert policies. These distinctive features become clearer in Part I.C, which distinguishes racial indirection from two leading accounts of race in constitutional cases: colorblindness and post-racialism. Fundamental issues of law are at stake in appreciating these differences.

A. *Racial Form*

One distinguishing feature of racial indirection is its emphasis on race-consciousness over racial classification. *Race-consciousness* means considering race in decision-making, and *racial classification* means classifying persons on the basis of race.¹² Since considering race includes more acts than classifying individuals by race, race-consciousness covers a broader range of practices that consider race in more or less subtle ways. Race-conscious practices are *race-based* where race is the sole or predominant factor (e.g., racial quotas), *race-sensitive* where race is one of several factors (e.g., pursuing racial diversity in the student body), and *facially-neutral* where race is not an explicit factor but is an implicit consideration (e.g., employing non-racial factors as proxies for race).¹³ It is a mistake to understand these practices as either racial or non-racial based on whether or not they classify individuals by race; they are better understood as racial practices that employ *degrees* of directness in dealing with race, falling on a continuum from racially direct to indirect. Even *facially-neutral* practices can be more or less indirect depending on how strongly and obviously non-racial proxies (such as geography, income, or education) are correlated with race.¹⁴

This reorientation is needed to make sense of affirmative action law. For it is *indirection* in the reliance on race — rather than mere

¹² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring) (describing “mechanisms [that] are race conscious but do not lead to different treatment based on a classification”).

¹³ See *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 338 n.2 (2014) (Sotomayor, J., dissenting) (distinguishing “race-sensitive admissions policies” that “consider race in admissions in only a very limited way” from programs based solely on race).

¹⁴ Non-racial means “not of, relating to, or based on race.” *Nonracial*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/nonracial> (last visited Feb. 3, 2019).

presence or absence of racial classification — that determines the constitutionality of affirmative action programs under current law. The Supreme Court has for decades struck down admission programs setting aside seats for racial minorities or automatically awarding points on the basis of race, while upholding programs that consider race in more subtle and partial ways. There is a basic constitutional principle that can be distilled from these cases: *so long as the end is constitutionally permissible, the less direct the reliance on race to achieve that end, the less constitutionally problematic the means*. It follows that racial classifications are not unconstitutional in and of themselves; the *manner* in which classifications are employed matters for their constitutionality. Because traditional scholarship has tended to focus on whether or not racial classifications are used to effectuate policies, it has failed to notice the more or less overt ways in which race features in affirmative action programs while also overlooking a broader set of practices that diminish the salience of race — practices that have constitutional significance under current affirmative action doctrine.¹⁵

To appreciate this point, let us briefly consider the Supreme Court's decision in *Fisher v. University of Texas*, which upheld the race-

¹⁵ In the most detailed treatment of indirection to date, Daniel Sabbagh characterizes “direct” and “indirect” affirmative action in dichotomous terms based on whether or not programs are explicitly based on race. See Sabbagh, *supra* note 10, at 471-73. While useful in its focus on form, Sabbagh's concept of “direct” affirmative action lumps all “preferential treatment” based on race together without attending to important differences in how programs deal with race. Furthermore, his concept of “indirection” captures only one type of affirmative action, namely, universalist programs that disproportionately benefit the disadvantaged. As I show here, there is a continuum rather than a dichotomy between direct and indirect uses of race. The concept of racial indirection I propose thus emphasizes practices designed to render uses of race more implicit and imprecise, even as programs continue to rely on race. This concept of indirection is needed to make sense of the variation across affirmative action programs.

To take one example, Sabbagh classifies all “preferential treatment” in the United States as “direct affirmative action” because it depends on racial group membership for allocation of resources. *Id.* at 471. His typology does not allow us to adequately differentiate between various forms of “preferential treatment,” since quotas, targets, and goals are all “direct” types of affirmative action by virtue of their explicit reliance on race. By contrast, I show how diversity-based affirmative action in the United States is, in important respects, *indirect* in the use of race. For instance, a university cannot seek a “simple ethnic diversity” in the form of a racial quota; it has to consider racial or ethnic background as only one element in the selection process — and do so without allocating a specific weight to race. See *infra* Part I.A. These features of affirmative action doctrine diminish the salience of race in admissions decisions and point to a more complex story about indirection than Sabbagh's account suggests.

sensitive admissions program at the University of Texas at Austin (“UT Austin”).¹⁶ In describing UT Austin’s admissions program, Justice Kennedy emphasized that “race is but a ‘factor of a factor of a factor’ in the holistic-review calculus,” and “race, in this *indirect* fashion, considered with all of the other factors . . . can make a difference to whether an application is accepted or rejected.”¹⁷ In the same opinion, Justice Kennedy appeared to approve Texas’ Top Ten Percent Plan, which requires public universities to admit top high school students across the state, leveraging racial segregation in state schools to generate racial integration in state universities without overt reliance on race. Justice Kennedy accepted that “the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment.”¹⁸

Conventional constitutional wisdom tells us that these two programs are categorically different because the former employs racial classifications and so is constitutionally suspect, while the latter does not and so is presumed to be constitutional. This is an accurate description of current standards of scrutiny.¹⁹ But constitutionality is a terrain, not a bright line. On closer inspection, UT Austin’s admissions program, which relies on individual racial classifications, and Texas’ Top Ten Percent Plan, which does not, share more in common than at first appears. UT Austin employs diversity and Texas employs geography in ways that do not overtly rely on race but nevertheless disproportionately benefit underrepresented racial groups. Being overly concerned with racial classification draws our attention away from the indirect features that might render *both* these programs constitutional under current law. In contrast, expanding the frame to race-consciousness draws our attention to the many ways in which

¹⁶ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214-15 (2016).

¹⁷ *Id.* at 2207 (emphasis added).

¹⁸ *Id.* at 2213; see also Ralph Richard Banks, *Beyond Colorblindness: Neo-Racialism and the Future of Race and Law Scholarship*, 25 HARV. BLACKLETTER L.J. 41, 52-53 (2009) (“Any purportedly colorblind standard can always be understood in terms of the race consciousness that it permits.”); Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 655-56 (2015) (“As the Court appreciated, the University of Texas considers race when it admits students through the percent plan, even if the University does not consider the race of individual applicants.”).

¹⁹ Compare *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (racial classifications designed to benefit minorities “are constitutional only if they are narrowly tailored measures that further compelling governmental interests”), with *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (facially-neutral state action is subject to rational basis review absent evidence of discriminatory intent).

indirection structures affirmative action — when racial classifications are used *and* when they are not.

Shifting our focus from the mere fact of racial classification to the myriad forms of race-consciousness enables us to think differently about affirmative action. It alerts us to practices that render considerations of race more implicit and imprecise, even as programs continue to rely on race.²⁰ Furthermore, it brings into view thus far overlooked commonalities between race-sensitive and facially-neutral forms of affirmative action. Although these different forms of affirmative action share common traits (i.e., racial indirection), they are not currently treated the same way doctrinally. Suggesting that both race-sensitive and facially-neutral affirmative action employ indirection *does not* imply that both should suddenly be subject to strict scrutiny. On the contrary, it elucidates why facially-neutral affirmative action is not subject to strict scrutiny in the first place: because it involves the pursuit of a constitutionally permissible goal with none of the perceived risks associated with racial categorization.²¹ As we will see, even some conservative Justices who reject explicitly race-based affirmative action have adopted this logic, proposing measures that appear “neutral” on their face yet implicitly consider race and disproportionately benefit racial minorities.²² Furthermore, noticing racial indirection shows why race-sensitive affirmative action has survived strict scrutiny under current law: even if it poses some of the perceived risks associated with racial categorization, it is ultimately able to overcome those perceived risks through racial indirection.²³

²⁰ See *infra* Part II.A.

²¹ For arguments in favor of the constitutionality of facially-neutral affirmative action and against subjecting such affirmative action to strict scrutiny, see e.g., Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 870 (2010); Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1, 72-73 n.428 (2016); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L. REV. 2332, 2333-34 (2000); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039, 1047-52 (1998).

²² See *infra* Part V.B.

²³ I say “perceived risks” because it is possible to think differently about the impact of affirmative action on race relations. As Elise Boddie points out, although current equal protection doctrine assumes “that advancing racial equality can come only at the expense of anxious and resentful whites . . . the Court and the public itself must see that the fate of our increasingly diverse country is tied in significant part to the fate of people of color.” Elise C. Boddie, *The Future of Affirmative Action*, 130 HARV. L. REV. F. 38, 48-49 (2016).

B. Racial Impact

A second distinguishing feature of this account is its acknowledgment of both invidious and benevolent forms of indirection.²⁴ *Invidious* forms of racial indirection disproportionately *harm* racial minorities by facilitating their exclusion from societal institutions and by enabling abuse and discrimination at the hands of state and private actors. This strand of racial indirection is pervasive in the United States. Consider, for example, criminal justice policies and police practices that result in Black males being incarcerated at higher rates and for longer periods on average than White males,²⁵ voting legislation and redistricting schemes that impede minority access to the ballot,²⁶ or housing policies that limit minority access to housing²⁷ — all of which can be accomplished without overt reliance on race.

In contrast, *benevolent* forms of racial indirection disproportionately *benefit* racial minorities by promoting integration. Affirmative action is the paradigmatic example of benevolent racial indirection. For decades, the pursuit of diversity has allowed universities to consider race in admissions decisions while making these racial considerations less conspicuous.²⁸ In certain states that prohibit even diversity-based affirmative action, percentage plans leverage racial segregation in state schools to generate racial integration in state universities.²⁹ Other indirect practices include emphasizing non-racial factors in admissions as proxies for race³⁰ and curtailing “testocracy”³¹ in admissions, which

²⁴ See generally R. Richard Banks, *The Benign-Invidious Asymmetry in Equal Protection Analysis*, 31 HASTINGS CONST. L.Q. 573, 574 (2003) (observing that “characterization of a policy as benign or invidious often influences the level of scrutiny to which the policy will be subject”). Although the literature tends to discuss this distinction in terms of “invidious” versus “benign,” I prefer “benevolent” to “benign” because, at least in the case of affirmative action, the practices in question actually produce benefits as opposed to merely avoiding harms.

²⁵ BECKY PETTIT & BRYAN SYKES, STANFORD CTR. ON POVERTY & INEQUALITY, INCARCERATION 25 (2017), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2017_incarceration.pdf (finding that in 2015 young black men were incarcerated at a rate 5.7 times more than young White men).

²⁶ See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2360 (2018) (Sotomayor, J., dissenting) (describing Texas’ “use [of] electoral maps that, in design and effect, burden the rights of minority voters”).

²⁷ See, e.g., *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988) (striking down a zoning regulation with racial impact under the Fair Housing Act).

²⁸ See *infra* Part II.

²⁹ See CATHERINE L. HORN & STELLA M. FLORES, HARVARD UNIV. CIVIL RIGHTS PROJECT, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES 51 (2003); see also *infra* note 297.

³⁰ See Eboni S. Nelson, Ronald Pitner & Carla D. Pratt, *Assessing the Viability of*

privileges standardized test scores over other metrics of merit and serves to exclude minorities and the poor.

It is understandably difficult to imagine racial indirection as benevolent. In legal and popular imaginations, indirection has become associated with efforts to dismantle the civil rights victories of the 1950s and 1960s.³² While *Brown v. Board of Education* and the civil rights movement sought to eliminate overtly racist laws and policies, covert and indirect systems of racial subordination were left intact and exploited over the ensuing decades.³³ Racially regressive laws and

Race-Neutral Alternatives in Law School Admissions, 102 IOWA L. REV. 2187, 2194 (2017) (studying relationship between law students' race and race-neutral aspects of their identities).

³¹ "Testocracy" refers to a system in which standardized test scores are the most important measure of merit, and a heavy reliance on test scores benefits mainly wealthy and White applicants. See LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* 27 (2015); Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC Davis Should Abandon the LSAT (And Why Other Good Law Schools Should Follow Suit)*, 34 UC DAVIS L. REV. 593, 601-06 (2001); Jonathan D. Glater, *A Prison of the Imagination: Higher Education in Bakke*, 52 UC DAVIS L. REV. 2451, 2477-82 (2019); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 968 (1996). For a fuller discussion of testocracy, see *infra* Part V.C.

³² For an argument from affirmative action supporters, see Brief for the Nat'l Ass'n of Minority Contractors & Minority Contractors Ass'n of N. Cal., Inc. as Amici Curiae Supporting Petitioner, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187981, at *19 ("[I]ndirection should no more be required to preserve the legality of Davis' program than were efforts to mask racial animus through seemingly non-racial programs adequate to rescue those schemes which were in fact so motivated."). For an argument from affirmative action critics, see Roger Clegg, *Disappointing Decision with Some Silver Linings*, INSIDE HIGHER ED (June 24, 2016), <https://www.insidehighered.com/views/2016/06/24/supreme-court-ruling-fisher-while-disappointing-narrow-one-essay> ("[I]f a facially neutral plan is adopted for racial reasons . . . then it is unconstitutional. Put the shoe on the other foot: What if Ole Miss had, back in the day, put its demographers to work and then refused to admit anyone living in a (heavily black) zip code?").

³³ See Benjamin P. Bowser, *Racism: Origin and Theory*, 48 J. BLACK STUD. 572, 573 (2017) ("[A] civil rights movement shortcoming was not having a specific strategy to effectively combat the covert and indirect ways that racial hierarchy was maintained in the North and Midwest . . ."); *id.* at 578 ("[I]n urban centers with large Black populations, use of at-large elections was an indirect way to avoid 'minority dominance' of Whites — Black majority rule."). Indeed, indirection as a strategy of racial exclusion predates the Second Reconstruction. See MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 28-36, 52-55 (2004) (discussing disenfranchisement measures such as grandfather clauses, literacy tests, and poll taxes during the *Plessy* era); Charles Morgan, Jr., *Segregated Justice*, REP. ALABAMA JUST. 4, 4 (1966) (describing in 1880s West Virginia, "Southern whites, unable to exclude Negroes from jury duty by law, turned to indirection"); *The "Grandfather Clause"*, N.Y. TIMES (Aug. 19, 1905), <https://www.nytimes.com/1905/08/19/archives/the-grandfather-clause.html>

policies dressed in neutral garb permeated every sphere of public life, including employment, education, housing, criminal law, and voting.³⁴

Yet, there is no inherent reason why racial indirection should signal invidiousness; as the case of affirmative action reminds us, racial indirection is capable of serving benevolent ends.³⁵ This more comprehensive view of racial indirection does not deny the reality that indirection has been used to undermine racial equality.³⁶ Nor does it deny the risk that indirect paths to racial equality can impede the more direct pursuit of racial justice.³⁷ Rather, it recognizes and

(describing in 1900s Maryland, “an attempt to disfranchise by indirection voters who cannot be disfranchised directly”).

³⁴ See, e.g., *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (“Louisiana may not bar Negro citizens from offering themselves as candidates for public office, nor can it encourage its citizens to vote for a candidate solely on account of race” and “that which cannot be done by express statutory prohibition cannot be done by indirection.”); *Oyama v. State of California*, 332 U.S. 633, 660 (1948) (Murphy, J., concurring) (noting that Alien Land Law’s “expansion of the discrimination to include all aliens ineligible for citizenship” without specifying Japanese aliens “was only an indirect, but no less effective, means of achieving the desired end”); *Shelby Cty., Ala. v. Holder*, 811 F. Supp. 2d 424, 429 (D.D.C. 2011), *aff’d*, 679 F.3d 848 (D.C. Cir. 2012), *rev’d*, 570 U.S. 529 (2013) (“[T]actics aimed at reducing the ability of blacks to elect candidates of their choice — sometimes referred to as ‘[d]isenfranchisement by indirection’ — were widely employed throughout the South in the late nineteenth century, and they reemerged during the ‘Second Reconstruction’ of the mid-twentieth century as well.”); ALEXANDER, *supra* note 5, at 201 (“[P]oll taxes, literacy tests, and felon disenfranchisement laws were all formally race-neutral practices that were employed in order to avoid the prohibition on race discrimination.”).

³⁵ For a similar argument in relation to racial classifications, see Barnes, Chemerinsky & Onwuachi-Willig, *Judging Opportunity Lost*, *supra* note 7, at 305 (“[C]lassification itself is not necessarily a proxy for an invidious motive.”). One might say that just as some legal conservatives are wrong to depict all racial classifications as invidious — no matter their impact on racial minorities — so too some legal progressives are wrong to treat all racial indirection as invidious.

³⁶ See Alexander P. Lamis, *The Two-Party South: From the 1960s to the 1990s*, in *SOUTHERN POLITICS IN THE 1990s* 1, 7-8 (Alexander P. Lamis ed., 1999) (quoting Lee Atwater, advisor to Presidents Ronald Reagan and George H. W. Bush, as stating: “You start out in 1954 by saying, ‘Nigger, nigger, nigger.’ By 1968 you can’t say ‘nigger’ — that hurts you. Backfires. So you say stuff like forced busing, states’ rights, and all that stuff . . . and a by-product of them is [that] blacks get hurt worse than whites.”).

³⁷ To some progressives, the idea of *benevolent* racial indirection may seem misguided. Some might rightly emphasize how indirect reliance on race — even in the pursuit of racial equality — feeds on and fuels an environment that discourages open dialogue about race and racism. Others might caution that conferring intellectual legitimacy upon such indirection will only serve to legitimize more invidious forms of indirection. I share these concerns, which raise vital questions about the ultimate value of indirection. See *infra* Conclusion.

Nevertheless, I maintain the distinction between invidious and benevolent indirection for two reasons. First, even in its indirect racial form, affirmative action is

grapples with the reality that racial indirection can be a force of racial retrenchment as well as progress — and that there may be substantive legal differences between these forms of indirection. The law differentiates between licit and illicit forms of racial indirection when, for instance, it prohibits employment practices that disproportionately disadvantage racial minorities without proper justification,³⁸ yet it allows admissions practices that disproportionately benefit racial minorities so long as they satisfy strict scrutiny.³⁹ Abstracting across bodies of law encourages us to think about how racial indirection might operate across social spheres, with divergent legal and normative implications.

C. *Legal Accounts of Race*

Racial indirection is analytically distinct from two leading accounts of race in constitutional cases: colorblindness and post-racialism. *Colorblindness* refers to the belief that race should not matter in the United States if the nation is to transcend the racial divisions of the past.⁴⁰ Progressive race scholars reject colorblind racial ideology on the grounds that colorblindness de-historicizes race and divorces it from social meaning, obscures and legitimizes practices that maintain racial inequalities, and actively undermines rather than vindicates constitutional commitments to equality.⁴¹ While legal scholars debate

widely understood and experienced as a policy that disproportionately benefits members of racial minorities. The fact that indirect forms of affirmative action might also have some costs for racial justice does not negate the material and dignitary benefits that many members of racial minorities derive from them. Second, even if benevolent racial indirection ends up harming particular racial minorities and causes, those harms will be of a different kind from the harms of invidious racial indirection. In other words, indirection that promotes racial inclusion (e.g., affirmative action) does not impede racial justice in the same way as indirection that promotes racial exclusion (e.g., negative racial gerrymandering), even if they both impede racial justice.

³⁸ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

³⁹ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁴⁰ See *Color-blind*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/color-blind> (last visited Feb. 3, 2019).

⁴¹ See MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 1-2 (2003) (arguing that colorblind social policies have produced “durable racial inequality”); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1337 (1988) (describing “a formalistic, color-blind view of civil rights that had developed in the neoconservative ‘think tanks’ during the 1970’s” and “calls for the repeal of affirmative action and other race-specific remedial policies”); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 2 (1991) (arguing

the constitutional meaning of equality, colorblindness dominates the constitutional jurisprudence.⁴²

Post-racialism refers to the belief that race no longer matters in the United States because the nation has already transcended or is on the verge of transcending its racial past.⁴³ Scholars observe that whereas colorblindness is most clearly associated with conservative erasure of race and thus faces liberal opposition, the triumphalist narrative of post-racialism that emerged during the Obama years was more palatable to some liberals and even civil rights advocates, and thus more potent as a force of racial retrenchment.⁴⁴

Racial indirection shares some functional similarity with colorblindness and post-racialism in that each limits explicit consideration of race. As such, racial indirection is rightly subject to some of the same critiques as those leveled at colorblindness and post-

that the “United States Supreme Court’s use of color-blind constitutionalism — a collection of legal themes functioning as a racial ideology — fosters white racial domination”); Ian F. Haney-López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) [hereinafter *A Nation of Minorities*] (describing “reactionary colorblindness” as “an anticlassification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility”).

⁴² Constitutional scholars have debated whether the Equal Protection Clause is properly interpreted through a colorblind, anti-classification principle concerned with individual rights to equal treatment or a race-conscious, anti-subordination principle concerned with group inequalities. An important strand of this literature considers how these two principles overlap and interact in shaping the form of equal protection law. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 13 (2003) (“[A]ntisubordination values have played and continue to play a key role in shaping what the anticlassification principle means in practice.”); Siegel, *Equality Talk*, *supra* note 10, at 1477 (“[A]ntisubordination values live at the root of the anticlassification principle . . .”).

⁴³ *Post-racial*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/post-racial> (last visited Feb. 3, 2019).

⁴⁴ See IAN F. HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 143 (2006) [hereinafter *WHITE BY LAW*] (describing the claim that “race and racism will soon disappear altogether — that they have little power in the lives of average Americans, and soon will have none”); Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1589 (2009) (analyzing “postracialism” as an ideological successor of “colorblindness” and “identify[ing] four key features of the revamped ideology (racial progress or transcendence, race-neutral universalism, moral equivalence, and political distancing)”; Kimberlé Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1261 (2011) [hereinafter *Twenty Years of Critical Race Theory*] (observing how “post-racial pragmatism not only eschews the oppositionalist stance toward racial power, but it also recruits racial justice constituencies to participate in normalizing and even celebrating a morbidly unequal status quo”).

racialism, including the critique that diminished salience of race serves to obscure and facilitate racial oppression.⁴⁵ Yet, racial indirection's concern is with *retaining* (but *reducing the legible importance of*) race, not eliminating race. In so doing, racial indirection can preserve racial segregation and perpetuate racial stratification without overtly racist policies and rhetoric. But, perhaps counterintuitively, racial indirection can also promote racial integration without direct racial remedies. In these latter instances, racial indirection is capable of inuring to the benefit of minorities — and it is therefore worthy of consideration by progressive scholars and advocates, rather than being dismissed with conservative ideologies of race.

Racial indirection offers a more nuanced account of how race actually functions in affirmative action law.⁴⁶ While the law is discussed in more detail below,⁴⁷ let us briefly consider two cases to appreciate this point. Reasoning in colorblind terms, Justice Powell's 1978 opinion in *Regents of University of California v. Bakke* rejected the use of racial quotas designed to increase minority enrollment.⁴⁸ Moreover, it rejected a number of justice-based rationales for pursuing affirmative action, including remedying the historic underrepresentation of minorities and "societal discrimination"

⁴⁵ See HANEY-LÓPEZ, WHITE BY LAW, *supra* note 44, at 143 (suggesting that diminished reliance on race means that "law no longer contributes to racial justice but instead legitimates continued inequality").

⁴⁶ Some scholars have characterized the affirmative action jurisprudence in terms of "misdirection," "subterfuge," and "obfuscation." See, e.g., Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11 (2002); Daniel Sabbagh, *Judicial Uses of Subterfuge: Affirmative Action Reconsidered*, 118 POL. SCI. Q. 411 (2003). I prefer the term "indirection" for a number of reasons. First, indirection is responsive to the rhetorical and doctrinal features of affirmative action opinions, which refer (sometimes explicitly) to affirmative action's "indirect" use of race. See *supra* text accompanying notes 1–2. Second, indirection is not reducible to misdirection, subterfuge, or obfuscation. Even if certain forms of indirection entail distraction or even deception, considering race in subtle or partial ways is not necessarily the same as obscuring the use of race. See *infra* text accompanying note 248. Third, indirection, more so than other terms, captures the different forms and functions that diminished salience of race can have, illuminating which is one of the aims of this Article. See *supra* notes 32–36. I have written elsewhere about how the evocativeness of terms such as "quota" and "critical mass" matters in the affirmative action debate. See Joshi, *Measuring Diversity*, *infra* note 68, at 63. Although the term indirection is not "neutral" in the sense of being without a history or a politics (it has both), it is less morally loaded and more open-ended than some other terms used in the literature and thus allows us to focus on the ways in which race is actually being used within and across contexts.

⁴⁷ See *infra* Part II.

⁴⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289–90 (1978).

against them.⁴⁹ Nevertheless, Justice Powell allowed limited use of “racial preferences” in admissions decisions in the pursuit of a diverse student body, so long as such use satisfied strict scrutiny.⁵⁰ In 2003, the Court in *Grutter v. Bollinger* endorsed Justice Powell’s opinion in *Bakke*. Expressing post-racial aspirations, Justice O’Connor famously predicted that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today,” a timeline that she came to doubt after retiring.⁵¹ Still, the Court in *Grutter* upheld race-sensitive admissions and even allowed a policy of admitting a “critical mass” of minority students, so long as race did not become the “predominant factor” in admissions.⁵²

Racial indirection in these cases both relied on and contributed to colorblind and post-racial discourses, presenting itself as a temporary aberration from the non-racial values that must ultimately prevail. Yet, in contrast to these two discourses, racial indirection did not bring an immediate end to race-conscious measures based on a belief in racial progress or transcendence. Rather, it enabled *limited* race-conscious measures that disproportionately benefit minority groups at a time when a dominant trend had been against *any* race-conscious remedies.⁵³ In so doing, racial indirection was not merely instrumental but also responsive and, in some respects, counter to the ideologies of colorblindness and post-racialism.

⁴⁹ *Id.* at 306-11 (rejecting rationales for race-sensitive affirmative action including “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,” and “countering the effects of societal discrimination”).

⁵⁰ *Id.* at 311-12. See also BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 151-56 (1988) (“The result has been that *Bakke* has, in practice, served to license, not to prohibit, race-conscious admissions programs.”); Crenshaw, *Twenty Years of Critical Race Theory*, *supra* note 44, at 1277-78 (“*Bakke*, although an overall defeat, had left considerable room for civil rights advocates and sympathetic institutional actors to maneuver.”).

⁵¹ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). After retiring, O’Connor reportedly said that her twenty-five-year timeline in *Grutter* “may have been a misjudgment,” adding that: “There’s no timetable. You just don’t know.” See Evan Thomas, *Why Sandra Day O’Connor Saved Affirmative Action*, *THE ATLANTIC* (Mar. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/how-sandra-day-oconnor-saved-affirmative-action/584215/>.

⁵² *Grutter*, 539 U.S. at 334.

⁵³ See *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996) (holding that diversity is not a compelling state interest); *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1172 (Cal. 1976) (barring the university from using race in the admissions process), *aff’d in part, rev’d in part*, 438 U.S. 265 (1978).

In limited but important ways, *Bakke* and *Grutter* affirmed that the Constitution is *not* colorblind (even if it ought to be) and that society is *not* post-racial (even if it might one day be). So long as we view these decisions in solely colorblind and post-racial terms, it is easy to imagine eliminating race as their central imperative. Yet, if we notice the ways that racial indirection shapes opinions in affirmative action cases, then it is possible to see affirmative action law in a different light.

II. ANALYZING RACIAL INDIRECTION IN AFFIRMATIVE ACTION

With an understanding of racial indirection, we can examine the indirection that has shaped the Supreme Court's jurisprudence on affirmative action in higher education. Part II.A revisits the landmark *Bakke* decision that placed affirmative action law on a path of indirection.⁵⁴ Parts II.B and II.C consider subsequent decisions in *Grutter-Gratz* and *Fisher* that entrenched indirection as a constitutional requirement for affirmative action. These cases did not abolish the consideration of race in admissions but diminished it in particular ways — requiring and incentivizing racial indirection.

A. Bakke

Allan Bakke, a White man, applied to the University of California, Davis (“UC Davis”) Medical School in 1973 and 1974 and was rejected both times. Bakke brought a suit against the university's governing board and sought an order admitting him to the medical school and declaring that an admissions program that reserved sixteen of 100 places in each entering class for “qualified” minorities violated the United States and California constitutions, as well as Title IV of the Civil Rights Act of 1964.⁵⁵

In 1978, the Supreme Court in *Regents of the University of California v. Bakke* declared UC Davis' admissions program unconstitutional and required the medical school to admit Bakke. However, the Court

⁵⁴ *Bakke's* path of indirection was not inevitable. For instance, the Association of American Law Schools predicted in its amicus brief that “if the judgment of the court below in this case is affirmed, the publicly-supported law schools of this country will be obliged to conform their admissions practices to the principle that, in selecting among applicants, no consideration may be given to race, either explicitly or by indirection.” See Brief for Ass'n of American Law Schools as Amicus Curiae Supporting Petitioner, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 187968, at *6.

⁵⁵ For a recent retelling of *Bakke*, see generally Rachel F. Moran, *Bakke's Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 UC DAVIS L. REV. 2569 (2019).

stopped short of prohibiting all consideration of race in admissions decisions. Writing only for himself, Justice Powell approved a university's limited use of race in admissions to further "the attainment of a diverse student body."⁵⁶ He concluded, however, that attempting to achieve diversity by setting aside a specified number of seats was not appropriate because it failed to "consider all pertinent elements of diversity in light of the particular qualifications of each applicant" and did not "treat[] each applicant as an individual in the admissions process."⁵⁷

With an understanding of racial indirection, we can see that the Court in *Bakke* prohibited racial quotas because they were deemed *too direct* in requiring placement of a minimum number of minority students. Justice Powell rejected UC Davis' program because of "the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin."⁵⁸ Instead, he preferred the indirection of "an admissions program which considers race only as one factor [as] a subtle and more sophisticated — but no less effective — means of according racial preference than the Davis program."⁵⁹

Justice Powell thus offered the advancement of race-sensitive diversity as a *less direct* means to promote racial integration than racial quotas. Powell's diversity rationale promoted indirection in several ways. It rendered the function and functioning of affirmative action more *ambiguous*. Affirmative action won the day not as a policy promoting social justice for racial minorities, but as a policy promoting educational diversity that could indirectly benefit racial minorities. In this way, affirmative action became open to more than one interpretation; even though it continued to rely on race and result in racial diversity, it could no longer be characterized as solely serving racial ends.

Justice Powell also cast the benefits and beneficiaries of diversity-based affirmative action in *universal* terms, declaring that "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many

⁵⁶ *Bakke*, 438 U.S. at 311-12.

⁵⁷ *Id.* at 316-18.

⁵⁸ *Id.* at 294 n.34, 319-20 ("[Davis' special admissions program] 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 At the same time, the preferred applicants have the opportunity to compete for every seat in the class.")

⁵⁹ *Id.* at 318.

peoples.”⁶⁰ In contrast to racial quotas, whose benefits were taken to inure entirely to racial minorities, the diversity-based scheme Justice Powell endorsed allowed *all* students to bring diverse experiences or viewpoints into a classroom without specifying who benefited from “preferences” and by how much.⁶¹ If everyone could benefit from and contribute to diversity, affirmative action would no longer be primarily about race.

Finally, Justice Powell’s opinion rendered the consideration of race in admissions more *implicit* and *imprecise*. A university could no longer seek a “simple ethnic diversity” in the form of a racial quota; it had to consider racial or ethnic background as only one element in the selection process — and do so without assigning a specific weight to race.⁶² At the same time, Justice Powell quietly accepted some use of numbers in achieving the educational benefits of diversity. He endorsed Harvard College’s admissions plan as “[a]n illuminating example” of “[the] kind of program [that] treats each applicant as an individual in the admissions process.”⁶³ He reproduced a description of the Harvard plan in the appendix to his opinion that acknowledged “*some relationship* between numbers and achieving the benefits to be derived from a diverse student body.”⁶⁴ In so doing, Justice Powell seemed to recognize a numerical component to the educational benefits of diversity, so long as that numerical component remains implicit and imprecise.

Justice Powell’s maneuver did not go unnoticed. Paul Mishkin, special counsel to UC Davis in *Bakke*, highlighted the “significant advantages” of indirection over quotas.⁶⁵ Mishkin remarked that “[t]he Court took what was one of the most heated and polarized issues in the nation, and by its handling defused much of that heat,”⁶⁶ and that

⁶⁰ *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal citation omitted).

⁶¹ *Id.* at 317 (“Such qualities [relevant to educational diversity] could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.”).

⁶² *Id.* at 315-18.

⁶³ *Id.* at 316, 318.

⁶⁴ *Id.* at 323 (emphasis added) (quoting Brief for Columbia Univ. et al. as Amici Curiae Supporting Petitioner, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007, at app. *3).

⁶⁵ See Mishkin, *supra* note 10, at 928.

⁶⁶ *Id.* at 929.

“Justice Powell’s vehicle for accomplishing this feat was acceptance of the importance of ‘diversity’ in the academic setting.”⁶⁷

Bakke thus secured a role for racial indirection in affirmative action.⁶⁸ However, *Bakke* did not end the legal battle over affirmative action in college admissions. The decision was challenged, including in a lawsuit filed in 1992 by Cheryl Hopwood and three other White applicants to the University of Texas Law School. In the 1996 case *Hopwood v. University of Texas*, a three-judge panel of the Fifth Circuit suspended the law school’s admissions program and declared that affirmative action as approved in *Bakke* was invalid, asserting that “educational diversity is not recognized as a compelling state interest.”⁶⁹ With Texas’ Top Ten Percent Plan, indirection based on geography replaced indirection based on diversity. Between 1997 and 2000, three states — California, Washington State, and Florida — passed measures to ban state affirmative action measures, pressing universities in those states to maintain minority enrollment through indirect means. Elsewhere in the nation, the pursuit of diversity continued to function as an indirect path to desegregating universities. It was another twenty-five years before the constitutionality of race-sensitive admissions policies returned to the Supreme Court in a pair of cases from Michigan.

B. Grutter and Gratz

Jennifer Gratz and Patrick Hamacher, both White, applied for admission to the University of Michigan College of Literature, Science, and the Arts (“the College”) in 1995 and 1997, respectively.⁷⁰ While the Office of Undergraduate Admissions considered a number of factors in trying to assemble a diverse class, it automatically awarded applicants from certain racial or ethnic minority groups twenty of the

⁶⁷ *Id.* at 923; see also SCHWARTZ, *supra* note 50, at 151-56 (“[T]he Powell opinion permits admissions officers to operate programs which grant racial preferences — provided that they do not do so as blatantly as was done under the sixteen-seat ‘quota’ provided in Davis.”); Jack M. Balkin, Plessy, Brown, and Grutter: A Play in Three Acts, 26 CARDOZO L. REV. 1689, 1723 (2005) (“Powell allowed universities to admit members of previously disadvantaged groups without having to state directly that they were remedying past societal discrimination.”).

⁶⁸ Even Justice Kennedy, who dissented in *Grutter*, agreed with the indirect framework Justice Powell set forth in *Bakke*. See Yuvraj Joshi, *Bakke to the Future: Affirmative Action After Fisher*, 69 STAN. L. REV. ONLINE 17, 17-21 (2016) (showing that Justice Kennedy dissented in *Grutter* because it diverged from *Bakke* and wrote *Fisher* in ways that maintain fidelity to *Bakke*) [hereinafter *Bakke to the Future*].

⁶⁹ *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996).

⁷⁰ *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

100 points needed to guarantee admission. Both Gratz and Hamacher were denied admission and in 1997 filed a class action suit arguing that the College's policies discriminated against them because of their race in violation of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.

In 1996, Barbara Grutter, a White woman, applied for admission to the University of Michigan Law School ("the Law School").⁷¹ To obtain the educational benefits of diversity, the Law School considered race as one of several factors in a "holistic review" process that did not assign a specific weight to race. The Law School also had a policy of admitting a "critical mass" of minority students, which it described as "meaningful numbers" or "meaningful representation," without ascribing a particular number, percentage, or range.⁷² Grutter claimed she was rejected because the Law School gave applicants from certain minority groups "a significantly greater chance of admission than students with similar credentials from disfavored racial groups."⁷³

Handing down its decisions in both cases on the same day in 2003, the Court made clear that it preferred the Law School's policy of indirection in the use of race over the College's more direct reliance on racial metrics. In *Gratz v. Bollinger*, a 6–3 majority of the Court held that the College's policies were not sufficiently narrowly tailored to achieve its avowed interest in the educational benefits of diversity.⁷⁴ In the majority opinion, Chief Justice Rehnquist explained that automatically assigning twenty points to every applicant of "underrepresented minority" status failed to provide "individualized consideration," running afoul of Justice Powell's opinion in *Bakke*.⁷⁵

In contrast, in *Grutter v. Bollinger*, a 5–4 majority of the Court declared that the Law School's policy of admitting a "critical mass" of minority students was a narrowly tailored use of race.⁷⁶ In the majority opinion, Justice O'Connor explained that because the Law School's program did not award "mechanical, predetermined diversity 'bonuses' based on race or ethnicity," but rather ensured that "all factors that may contribute to student body diversity are meaningfully considered

⁷¹ *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

⁷² *Id.* at 318.

⁷³ *Id.* at 317.

⁷⁴ *Gratz*, 539 U.S. at 275.

⁷⁵ *Id.* at 271–72; see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 n.52 (1978) ("The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program.").

⁷⁶ *Grutter*, 539 U.S. at 343.

alongside race in admissions decisions," it provided individualized review of applicants.⁷⁷ Even a statistically significant relationship between race and admissions rates did not make race the "predominant factor" in admissions.⁷⁸

Despite the Law School's relatively indirect use of race, its explicit reliance on "critical mass" as the central measure of diversity proved controversial. As each of the four vehement dissents in *Grutter* illustrates, critical mass became a lightning rod for the concern that race-sensitive programs are thinly veiled racial quotas. In his lengthy and detailed attack on the Law School's admissions program, Chief Justice Rehnquist charged that "[s]tripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."⁷⁹ Echoing Chief Justice Rehnquist, Justice Kennedy rejected the term critical mass as "a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."⁸⁰ He appealed to Justice Powell's rule in *Bakke* when he argued that "[w]hether the objective of critical mass 'is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status,' and so risks compromising individual assessment."⁸¹

While *Grutter* indeed diverged from *Bakke* in endorsing critical mass, the divergence was more form than substance. Justice Powell's endorsement of Harvard's use of diversity in *Bakke* implied an acceptance of "some relationship between numbers and achieving the benefits to be derived from a diverse student body" in order to address "a sense of isolation among . . . black students."⁸² This sounds very much like the Law School's use of critical mass in *Grutter* as "a number [of students] that encourages underrepresented minority students to participate in the classroom and not feel isolated."⁸³ Yet, even as Justice Kennedy's *Grutter* dissent admired Justice Powell's *Bakke* opinion that endorsed Harvard's use of diversity, it derided the Law School's use of critical mass. What was so different about critical mass?

The concept of racial indirection allows us to understand why critical mass proved controversial. Critical mass takes the numerical

⁷⁷ *Id.* at 337.

⁷⁸ *Id.* at 320.

⁷⁹ *Id.* at 379 (Rehnquist, C.J., dissenting).

⁸⁰ *Id.* at 389 (Kennedy, J., dissenting).

⁸¹ *Id.* at 391 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978)).

⁸² *Bakke*, 438 U.S. at 323.

⁸³ *Grutter*, 539 U.S. at 318.

considerations of race that are otherwise *implicit* in affirmative action programs and makes those considerations more *explicit*.⁸⁴ Even as critical mass steers clear of numerical metrics that are presumptively unconstitutional after *Bakke*, it brings to mind a numerical system of allocating benefits on the basis of race — and thus cedes some of the implicitness required by the racial indirection that structures affirmative action decisions. In so doing, critical mass provokes the ire of the Justices on the right (like Scalia and Thomas) who are prepared to strike down *any* race-sensitive measures, and heightens the suspicion of the Justices in the center (like Kennedy) who allow *limited* race-sensitive measures yet fear that programs based on critical mass are “tantamount to quotas.”⁸⁵

Notwithstanding this controversy, *Grutter* continued to develop affirmative action doctrine in ways that require and incentivize indirection.⁸⁶ The Court expounded the narrow tailoring prong of the strict scrutiny test to require “truly individualized consideration” of applicants, which means that universities cannot employ racial quotas but can “consider race or ethnicity more flexibly as a ‘plus’ factor in the context of individualized consideration of each and every applicant.”⁸⁷ Furthermore, narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,”⁸⁸ which means that universities must contemplate facially-neutral forms of indirection (such as percentage plans) before resorting to race-sensitive indirection in the pursuit of racial diversity.

Grutter and *Gratz* thus marked the ascent of racial indirection in affirmative action law in several ways. In upholding the *Grutter* program and striking down the *Gratz* program, the Court made clear that the Law School’s more indirect reliance on race was critical to the

⁸⁴ See, e.g., Brief for Respondents at 7, *Grutter*, 539 U.S. 306 (No. 02-241) (emphasis added) (“An early draft of the policy expressly stated that the Law School was likely to obtain the benefits of a critical mass when minority enrollment ranged between 11 and 17%.”).

⁸⁵ See *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

⁸⁶ See Ian Ayres & Sydney Foster, *Don’t Tell, Don’t Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 519 (2007) (arguing that “[t]he *Grutter* and *Gratz* decisions establish a kind of ‘Don’t Tell, Don’t Ask’ regime”); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74-75 (2003) [hereinafter *Fashioning the Legal Constitution*] (observing how “the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity”).

⁸⁷ *Grutter*, 539 U.S. at 334.

⁸⁸ *Id.* at 339.

constitutionality of its affirmative action program. Yet, even as the Law School's more racially indirect program survived constitutional scrutiny, its explicit reliance on critical mass proved controversial, demonstrating the importance of implicitness in an affirmative action regime founded on racial indirection. Finally, the Court used the narrow tailoring requirement to give further doctrinal form to racial indirection, allowing affirmative action programs in which race is one of many factors, while at the same time incentivizing programs in which race does not explicitly factor.

In *Gratz*, Justice Souter's dissenting opinion notably described the difference between facially-neutral percentage plans and the College's race-based points system in terms of each program's relative indirection, observing that "percentage plans' . . . get their racially diverse results *without saying directly* what they are doing or why they are doing it," whereas "Michigan states its purpose *directly* . . ."⁸⁹ Thirteen years later, talk of indirection would move from dissent to the opinion of the Court in *Fisher*.

C. Fisher

Abigail Fisher, a White woman, was denied admission to UT Austin. UT Austin filled about three-quarters of its incoming class through Texas' Top Ten Percent Plan, which guarantees admission to top high school students across the state. Remaining spots were filled using a holistic admissions process that considered many factors, including an applicant's talents, leadership qualities, family circumstances, and race, while also seeking a "critical mass" of minority students. Fisher's grades were not strong enough to qualify for the Top Ten Percent Plan, and she also failed to gain acceptance under UT Austin's holistic admissions process. Recruited by anti-affirmative-action activist Edward Blum, Fisher sued UT Austin, alleging that it had discriminated against her in violation of the Equal Protection Clause.⁹⁰

⁸⁹ *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003) (Souter, J., dissenting) (emphasis added).

⁹⁰ The district court upheld UT Austin's admissions process as constitutional, and the U.S. Court of Appeals for the Fifth Circuit affirmed. *Fisher v. Univ. of Tex.*, 631 F.3d 213, 246-47 (5th Cir. 2011), *affg* 645 F. Supp. 2d 587 (W.D. Tex. 2009). Fisher appealed to the Supreme Court, which remanded the case by holding that the appellate court had not applied the strict scrutiny standard to UT Austin's admission policies. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2413 (2013). On remand, the Fifth Circuit again reaffirmed the lower court's decision by holding that UT Austin's use of race in the admissions process satisfied strict scrutiny. *Fisher v. Univ. of Tex.*, 758 F.3d 633, 637 (5th Cir. 2014). Fisher again appealed to the

In *Fisher v. University of Texas* in June 2016, a 4–3 majority of the Court upheld race-sensitive admissions policies at UT Austin.⁹¹ In the process, *Fisher* helped entrench racial indirection in affirmative action law in several ways. First, in describing what made UT Austin’s program constitutional, Justice Kennedy explicitly endorsed its indirect reliance on race, explaining that “race is but a ‘factor of a factor of a factor’ in the holistic-review calculus,” and “race, in this *indirect* fashion, considered with all of the other factors . . . can make a difference to whether an application is accepted or rejected,” thus allowing individualized consideration.⁹² Second, *Fisher* repeated the importance of exploring workable facially-neutral alternatives before resorting to race-sensitive measures.⁹³ Third, it reinforced imprecision as a requirement of constitutionally permissible affirmative action under current law.⁹⁴

The conservative fixation on critical mass that began in *Grutter* continued in *Fisher*. Justice Alito charged that “UT has not explained in anything other than the vaguest terms what it means by ‘critical mass’” and that “[t]his intentionally imprecise interest is designed to insulate UT’s program from meaningful judicial review.”⁹⁵ He went so far as to say that judicial scrutiny is impossible “without knowing in reasonably specific terms what critical mass is or how it can be measured.”⁹⁶ Responding to Justice Alito, Justice Kennedy made clear that imprecision is a feature, not a bug, of an indirect regime of affirmative action. As he rightly explained, “since the University is prohibited from seeking a particular number or quota of minority

Supreme Court, which agreed to hear the case. See *Fisher v. Univ. of Tex.*, 135 S. Ct. 2888, 2888 (2015) (mem.).

⁹¹ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2202 (2016). When *Fisher* was decided in June 2016, the Supreme Court was short one member as the Senate Majority Leader Mitch McConnell had refused to hold a confirmation hearing for President Obama’s nominee to replace Justice Scalia, Chief Judge Merrick Garland. Additionally, Justice Kagan abstained as she had worked on the case as the Solicitor General before joining the Court.

⁹² *Id.* at 2207 (emphasis added).

⁹³ *Id.* at 2214.

⁹⁴ For an analysis of how universities should proceed while *Fisher* remains good law, see Yuvraj Joshi, *Measuring Diversity*, 117 COLUM. L. REV. ONLINE 54, 63–69 (2017) [hereinafter *Measuring Diversity*]. See also Daniel Hirschman, Ellen Berrey & Fiona Rose-Greenland, *Dequantifying Diversity: Affirmative Action and Admissions at the University of Michigan*, 45 THEORY & SOC’Y 265, 266 (2016) (conceptualizing “dequantification as a process that has several component parts and admits to degrees”).

⁹⁵ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. at 2222 (Alito, J., dissenting).

⁹⁶ *Id.*

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.”⁹⁷

Nevertheless, Justice Kennedy tried to address Justice Alito’s concerns about imprecision in two ways. First, he tried to steer affirmative action jurisprudence away from the concept of critical mass and toward the diversity interest formulated in *Bakke*. While Justice Kennedy did not repudiate the concept of critical mass in *Fisher* as he did in *Grutter*, he did not endorse it either. In fact, the term did not appear until the final section of the *Fisher* opinion, where it appeared only to respond to Fisher’s critique of the concept.⁹⁸ It seems quite plausible that Justice Kennedy agreed with Donald Verrilli, the solicitor general arguing in support of affirmative action, who conceded during the oral argument in the first *Fisher* case: “[T]he idea of critical mass has taken on a life of its own in a way that’s not helpful because it doesn’t focus the inquiry where it should be.”⁹⁹

Second, Justice Kennedy introduced a measurability requirement for diversity goals, stipulating that “goals cannot be elusory or amorphous” and “must be sufficiently *measurable* to permit judicial scrutiny of the policies adopted to reach them.”¹⁰⁰ Even so, *Fisher* did not endorse numerical measures of diversity. Immediately after calling for “sufficiently measurable” goals, Justice Kennedy concluded:

[T]he University articulated concrete and precise goals . . . [by] identif[ying] the educational values it seeks to realize through its admissions process: the destruction of stereotypes, the “promot[ion of] cross-racial understanding,” the preparation of a student body “for an increasingly diverse workforce and society,” and the “cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.”¹⁰¹

Justice Kennedy further concluded that the program sought “an ‘academic environment’ that offers a ‘robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies

⁹⁷ *Id.* at 2210 (majority opinion).

⁹⁸ *Id.*

⁹⁹ Transcript of Oral Argument at 72, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2012) (No. 11-345).

¹⁰⁰ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. at 2211 (emphasis added).

¹⁰¹ *Id.* at 2211 (fourth and fifth alterations in original) (quoting Joint Supplemental Appendix at 23a, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 8146395).

required of future leaders.”¹⁰² Unconvinced, Justice Alito responded: “These are laudable goals, but they are not concrete or precise”¹⁰³

Reacting to conservative concerns about indirection, *Fisher* requires universities considering race in admissions to articulate “concrete and precise goals” that are “sufficiently measurable.”¹⁰⁴ However, “sufficiently measurable” does not mean “specify[ing] the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.”¹⁰⁵ Instead, it means articulating goals in terms of “the educational values [a university] seeks to realize through its admissions process.”¹⁰⁶ In other words, *Fisher* suggests that diversity should continue to be measured through non-numerical goals rather than numerical standards, and achieved through racial indirection rather than racial metrics.

The Supreme Court’s affirmative action jurisprudence, grounded in the rejection of racial quotas and the embrace of educational diversity, has been shaped by racial indirection. Admissions programs that disproportionately benefit racial minorities have survived constitutional scrutiny *because* they allow all students to bring diverse viewpoints into a classroom without specifying who benefits from “preferences” and by how much. These indirect features have allowed universities to consider race in admissions decisions while making these racial considerations less conspicuous.

The ascent of racial indirection in affirmative action law is the influence of moderate Justices — Powell, O’Connor, and Kennedy — who sought compromise between competing interests and principles. These Justices cast votes and authored decisions that rejected the decisive paths that many would have preferred and instead chose the middle path of indirection. By continuing to look closely at the affirmative action jurisprudence, the remainder of this Article explores why these centrist Justices adopted indirection,¹⁰⁷ why their more progressive and conservative colleagues resisted it,¹⁰⁸ and what

¹⁰² *Id.* (quoting Joint Supplemental Appendix at 23a).

¹⁰³ *Id.* at 2223 (Alito, J., dissenting).

¹⁰⁴ *Id.* at 2211 (majority opinion).

¹⁰⁵ *Id.* at 2210.

¹⁰⁶ *Id.* at 2211.

¹⁰⁷ *See infra* Part III.

¹⁰⁸ *See infra* Part IV.

happens when the political center of the Court shifts sharply rightward.¹⁰⁹

III. JUSTIFYING RACIAL INDIRECTION IN AFFIRMATIVE ACTION

With the indirect features of affirmative action doctrine in view, we can turn to the concerns that underlie and explain their adoption. The Supreme Court's embrace of racial indirection is grounded in concerns about public perception and societal transition. Affirmative action doctrine rests on the explicit premise that indirection enhances the reality and appearance of fairness to individuals¹¹⁰ and preserves social cohesion.¹¹¹ On this account, indirection is valuable not only for how it actually uses race but also for how its use of race is perceived by others. More implicitly, reliance on racial indirection is motivated by the need for effective¹¹² and viable¹¹³ ways to move beyond past racial practices and toward a new social order.¹¹⁴ Although these reasons for adopting indirection are presented as intuitive and even self-evident, there is significant dispute over their underlying assumptions and normative and practical implications.

A. Individual Fairness

The stated aim of indirection in affirmative action decisions is to secure fairness and the appearance of fairness for individual applicants. Justices have explained that programs allocating benefits solely and openly on the basis of race are, and are perceived as, unfair to individuals because "innocent persons" who are disfavored by such practices bear and feel the burden of "racial preferences."¹¹⁵ On this view, racial indirection enhances both the reality and appearance of fairness to individuals because it considers race in subtle and partial ways that neither guarantee nor preclude admission of any applicant based on their race; as a result, indirection treats all applicants as individuals.

¹⁰⁹ See *infra* Part V.

¹¹⁰ See *infra* Part III.A.

¹¹¹ See *infra* Part III.B.

¹¹² See *infra* Part III.C.

¹¹³ See *infra* Part III.D.

¹¹⁴ See *infra* Part III.E.

¹¹⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 323-24 (2003) (referring to "innocent third parties"); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34, 298, 308 (1978) (discussing affirmative action's impact on "innocent persons").

These individual fairness concerns supply the central justification for Justice Powell's opinion in *Bakke*. Justice Powell cautioned that UC Davis' race-based program "will be viewed as inherently unfair by the public generally as well as by applicants for admission to state universities,"¹¹⁶ and that "[o]ne should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin."¹¹⁷ Powell offered racial indirection as the antidote to what he considered the bitter pill of "racial preferences." He believed that considering race as only one element in the selection process would mean that an applicant "will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname," and so "his qualifications would have been weighed fairly and competitively."¹¹⁸ This same concern with individual fairness underlies the Court's reasoning in subsequent affirmative action cases.¹¹⁹

Several opinions and commentaries reject this focus on individual fairness as ahistorical, selective, and misguided. Critics consider it ahistorical because the original impetus for affirmative action was fairness of a very different sort — one more concerned with correcting the legacies of racial wrongdoing than with appeasing White applicants. As President Lyndon Johnson said in a 1965 speech that paved the way for affirmative action: "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, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."¹²⁰ This historically grounded account of fairness lost out in *Bakke*. In condemning UC Davis' program for unfairly benefiting members of historically oppressed minorities "at the expense" of White applicants, Justice Powell seemed to turn the imperative of fairness that had originally motivated affirmative action on its head.¹²¹

Although the Court views itself as advancing fairness in the admissions process, its focus on individual fairness is narrow and

¹¹⁶ *Bakke*, 438 U.S. at 319 n.53.

¹¹⁷ *Id.* at 294 n.34.

¹¹⁸ *Id.* at 318.

¹¹⁹ See *Grutter*, 539 U.S. at 341.

¹²⁰ Lyndon B. Johnson, President, Commencement Address at Howard University: "To Fulfill These Rights," in 2 PUB. PAPERS 635, 636 (June 4, 1965).

¹²¹ See *Bakke*, 438 U.S. at 305.

selective. In 2019, in the wake of a cheating scheme for college admissions, attention has been directed toward the unfair advantages that White and wealthy applicants have in the admissions process;¹²² less attention has been paid to how affirmative action decisions have helped sustain the current unfair system. Even as the Court has limited affirmative action benefiting a few Black, Latinx, and Native American applicants in the name of fairness, it has allowed the unfair advantages of White and wealthy applicants, such as those that stem from preferences given to alumni and donors and from a heavy reliance on test scores, to continue unquestioned.¹²³

More fundamentally, the individual-fairness-focused justification is misguided in its characterization of race and racial subordination in the United States. Critical scholars including Kimberlé Crenshaw and Ian Haney-López have shown how “the racial past” in the Supreme Court’s affirmative action opinions “has been pictured as a distant reality disconnected from the present,”¹²⁴ and how the Court has proceeded as if “blacks and other minorities faced the same social conditions as white ethnics, none more or less the victims of group discrimination.”¹²⁵

So, while the individual-fairness justification leads the Court to adopt racial indirection in affirmative action cases, this justification is

¹²² On the 2019 college admissions scandal’s lessons for higher education, see John Eligon & Audra D. S. Burch, “What Does It Take?: Admissions Scandal Is a Harsh Lesson in Racial Disparities,” *N.Y. TIMES* (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/college-admissions-race.html>; Anthony Abraham Jack, *I was a First-Generation College Student at an Elite College. The Admissions Scandal Reopens Old Wounds*, *WASH. POST* (Mar. 19, 2019), <https://www.washingtonpost.com/outlook/2019/03/18/i-was-first-generation-college-student-an-elite-college-admissions-scandal-reopens-old-wounds/>; Natasha Warikoo, *How the College Admissions Scandal Busts Racist Stereotypes About Who Gets into Elite Schools*, *VOX* (Mar. 15, 2019), <https://www.vox.com/first-person/2019/3/15/18267104/college-admissions-fbi-felicity-huffman-lori-loughlin>; Alia Wong, *Why the College-Admissions Scandal Is So Absurd*, *ATLANTIC* (Mar. 12, 2019), <https://www.theatlantic.com/education/archive/2019/03/college-admissions-scandal-fbi-targets-wealthy-parents/584695/>.

¹²³ *Bakke*, 438 U.S. at 404 (Blackmun, J., dissenting) (describing it as “somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness” despite knowledge of preferences given “to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful”); *Grutter v. Bollinger*, 539 U.S. 306, 369-70 (2003) (Thomas, J., dissenting) (“[N]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test.”).

¹²⁴ Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 *MICH. L. REV. FIRST IMPRESSIONS* 123, 128 (2007).

¹²⁵ Haney-López, *A Nation of Minorities*, *supra* note 41, at 1063.

concerned less with ensuring the overall fairness of the admissions process and more with mitigating perceptions of unfairness among White non-beneficiaries. In their rush to mitigate the disappointment of “innocent” applicants, some Justices imagine an otherwise level playing field in which White applicants are now disfavored by affirmative action.¹²⁶ In arriving at this conclusion, these Justices neglect or forget how racial favor works to privilege White applicants, within and beyond the admissions process, in individual and structural ways, even when race is not explicitly employed.¹²⁷ Moreover, they disregard the myriad ways that racial biases already shape the admissions process, the unique obstacles that racial minorities have to overcome in a racially stratified society, and the stakes that racial minorities in particular and society as a whole have in racial integration.¹²⁸ The individual-fairness justification thus orients affirmative action law toward White citizens’ complaints about loss of automatically ordained and subtly proffered privilege and away from minority group claims of restorative justice, distributive justice, reparations, and representation.¹²⁹

¹²⁶ See *supra* note 115.

¹²⁷ See TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE 38-67 (2005) (examining White racial preferences in U.S. education); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1211 (2008) (explaining why “it is likely impossible for admissions officers to be colorblind”); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1102-05 (2006) (discussing ingroup and outgroup biases and their implications for affirmative action).

¹²⁸ See, e.g., Claude M. Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 202, 203-04 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (explaining that “stereotype threat . . . is a situational threat — a threat in the air — that, in general form, can affect the members of any group about whom a negative stereotype exists”); Rachel D. Godsil & L. Song Richardson, *Racial Anxiety*, 102 IOWA L. REV. 2235, 2238 (2017) (“In addition to the copious literature focusing on implicit bias, legal academics have begun to explore how ‘stereotype threat,’ the concern about confirming a negative stereotype about one’s group, can undermine performance on cognitively challenging tasks.”); Luke Charles Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER J. 1, 22 (1994) (criticizing the “uncritical use of test scores” in college admissions because it “has an adverse impact on Black applicants” and because standardized tests are “inaccurate indicators even with respect to their limited stated objective of predicting students’ first-year grades in college and professional school”).

¹²⁹ See Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1160-67 (1996) (identifying the goals of affirmative action as remedying past discrimination, increasing minority political power, providing role models, and enhancing wealth and services provided in minority communities).

B. Social Cohesion

Although the Court has emphasized the value of individualized review out of concern for fairness to individual applicants, there are underlying social cohesion concerns that have steered affirmative action doctrine toward racial indirection. Justice Powell emphasized the threat that “racial preferences” pose to social cohesion when he wrote in a footnote in *Bakke*: “All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious.”¹³⁰ To mitigate the “deep resentment” likely to be felt by “innocent persons” who bear the cost of affirmative action, Justice Powell offered the pursuit of race-sensitive diversity as a less conspicuous means to promote racial integration than racial quotas.¹³¹

Echoing Justice Powell’s *Bakke* opinion, Justice Kennedy’s *Grutter* dissent argued: “Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.”¹³² Justice Kennedy worried that because admissions programs based on critical mass were (in his view) “tantamount to quotas,” they would “perpetuate the hostilities that proper consideration of race is designed to avoid,” and that “perpetuation, of course, would be the worst of all outcomes.”¹³³ Justice Kennedy’s *Fisher* opinion revealed that although he remained concerned about social cohesion, he was less concerned with *whether* racial classifications are used and more concerned with *how* they are used. As he wrote: “Formalistic racial classifications may sometimes fail to capture diversity in all of its dimensions and, when

¹³⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978); see also N.T. Feather, *Perceived Legitimacy of a Promotion Decision in Relation to Deservingness, Entitlement, and Resentment in the Context of Affirmative Action and Performance*, 38 J. APPL. SOC. PSYCH. 1230, 1234-35 (2008) (describing resentment as a form of anger that may be activated where someone else’s success is perceived to be undeserved).

¹³¹ *Cf. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (“Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities.”).

¹³² *Grutter v. Bollinger*, 539 U.S. 306, 388 (2003) (Kennedy, J., dissenting) (emphasis added).

¹³³ *Id.* at 394; see also Faye J. Crosby et al., *Understanding Affirmative Action*, 57 ANN. REV. PSYCHOL. 585, 595-97 (2006) (observing that attitudes toward affirmative action vary depending on how the policy and its practice are portrayed or understood, and characteristics of the attitude-holder).

used in a divisive manner, could undermine the educational benefits the University values.”¹³⁴ *Fisher*’s rendering of divisiveness implies that not all racial classifications are equally divisive; racial classifications may sometimes be used in a less divisive, or even non-divisive, manner that satisfies constitutional standards. *Fisher* therefore suggests that courts should not strike down appropriately race-sensitive affirmative action out of concern for social harmony — for it is the *form*, not merely the *fact*, of racial classification that poses a threat to social cohesion.

Constitutional scholars have traced how social cohesion concerns have modulated affirmative action decisions. In her study of racial equality cases, Reva Siegel has convincingly shown how the Justices in the political middle of the Court (like Powell and Kennedy) have reasoned from an “antibalkanization” perspective that is “more concerned with social cohesion than with colorblindness.”¹³⁵ Some posit that indirection may minimize some of the social divisiveness associated with race-sensitive admissions policies. In the wake of *Bakke*, Paul Mishkin thus predicted that “[t]he indirectness of the less explicitly numerical systems may have significant advantages” in terms of “the felt impact of their operation over time” and “in muting public reactions to, and possible resentment of, the granting of preference on racial lines.”¹³⁶

At the same time, scholars have reservations about the manner in which the Court deploys social cohesion concerns. Some read affirmative action opinions as unduly and selectively preoccupied with social cohesion at the expense of other values and concerns. In this vein, Darren Hutchinson critiques a “new equal protection” that rests on appeals to universal interests (rather than group identity) based on

¹³⁴ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016) (emphasis added).

¹³⁵ Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011) [hereinafter *From Colorblindness to Antibalkanization*]; see also Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1, 9 n.40, 17 (1987) (arguing that Justice Powell in *Bakke* “is placing the competing interests of the parties on an equal footing (both have cognizable claims that he acknowledges) and distributing weights” in order to achieve “political stability”); Post, *Fashioning the Legal Constitution*, *supra* note 86, at 74-75 (observing how “the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity” out of concern for “the likelihood of racial balkanization”); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 781-82 (2006) (analyzing how the requirement of individualized consideration responds to concerns about balkanization).

¹³⁶ Mishkin, *supra* note 10, at 928.

concerns about “pluralism anxiety” and “balkanization,” charging that “the Court appears to believe that social cohesion is more important than racial justice.”¹³⁷ Reva Siegel argues that the Court exercises “empathy” with White plaintiffs in affirmative action cases in ways that it does not with minorities subjected to racial profiling, leading to a “divided” equal protection law.¹³⁸

Empirical scholars have recently raised questions about the relationship between racial measures and social cohesion. Jerry Kang observes that the Court has forged affirmative action law “on the basis of its common sense assumptions about the nature and causes of balkanization” even though “[w]e know so very little . . . about what causes balkanization and what mitigates it.”¹³⁹ Kang poses a series of empirical questions to which the Court’s reliance on social cohesion arguments gives rise, and that need to be answered if constitutional doctrine is to be based on evidence rather than mere intuition.¹⁴⁰ Although direct evidence remains elusive, one recent study discredits the Supreme Court’s claims about the antibalkanization values served by Michigan’s ballot initiative banning affirmative action, which the Court upheld in *Schuette v. Coalition to Defend Affirmative Action*,¹⁴¹ suggesting that the Court’s claims about social cohesion should be treated with caution.¹⁴²

¹³⁷ Darren L. Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1, 7 (2015).

¹³⁸ Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 4 (2013).

¹³⁹ Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 649-50 (2015) [hereinafter *Rethinking Intent and Impact*]; see also Kimberlé Crenshaw et al., *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xxxii (Kimberlé Crenshaw et al. eds., 1995) (critiquing “common sense” cultural assumptions about race in the United States that exclude progressive thinking about race centered on the perspectives and interests of minority communities).

¹⁴⁰ Kang, *Rethinking Intent and Impact*, *supra* note 139, at 651 (“Whether some action is viewed by the relevant audience as ‘indirect’ and how much that matters are empirical questions A behavioral realist would not indefinitely trust gut feelings to answer such questions.”).

¹⁴¹ See *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 314, 310 (2014) (positing that “voters deemed a preference system to be unwise” because of “its latent potential to become itself a source of the very resentments and hostilities based on race that this Nation seeks to put behind it,” and that doing so would avoid “rancor or discord based on race”).

¹⁴² See Donald Kinder & Samuel Weiss, *Schuette and Antibalkanization*, 26 WM. & MARY BILL RTS. J. 693, 693 (2018) (finding that “[s]upport for the Michigan ballot initiative banning affirmative action arose principally from feelings of racial

The social-cohesion justification thus steers affirmative action doctrine toward racial indirection on the belief that direct uses of race are divisive. As we will see, social cohesion arguments run both for and against race-based admissions policies depending on which and whose concerns are the focus of attention.¹⁴³ Like the individual-fairness justification, the social-cohesion justification is concerned with assuaging resentment among White applicants more than estrangement among minorities. Even if social cohesion is viewed as an important value, we should be troubled if racial indirection aims to reduce racial discord by advancing narratives of White innocence while repudiating those of racial justice. Put differently, the manner in which certain forms of racial indirection cultivate social cohesion may be problematic, even if social cohesion itself is a worthwhile aim for constitutional jurisprudence.

C. Program Effectiveness

Affirmative action supporters generally prefer direct to indirect uses of race on the expectation that direct approaches are more effective.¹⁴⁴ Even those who concede that more direct reliance on race (like racial quotas) may be legally or politically unviable are inclined to regard directness as ideal and indirection as second-best or even detrimental.

The Supreme Court's affirmative action jurisprudence proceeds with a different expectation, that racial indirection does not necessarily preclude achieving the results of more direct approaches. Indeed, Justice Powell's *Bakke* opinion rationalized the decision to veer away from racial quotas and toward racial indirection based on indirection's equal effectiveness. Pointing to Harvard's diversity-based program, Justice Powell proposed that "the assignment of a fixed number of places to a minority group is not a necessary means" of achieving diversity,¹⁴⁵ since "an admissions program which considers race only as one factor is . . . *no less effective* [as a] means of according racial preference."¹⁴⁶ Even Justice Blackmun, who dismissed Justice Powell's preoccupation with the form of racial remedies as constitutionally

resentment, not a desire for racial comity" and that "[t]he ballot initiative did not mitigate racial divisiveness but did just the opposite, exacerbating racial division in the state").

¹⁴³ See *infra* Part IV.B.

¹⁴⁴ See Mishkin, *supra* note 10, at 917 (observing "the perception that remedial race-conscious programs are necessary means to achieve real equality").

¹⁴⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J.).

¹⁴⁶ *Id.* at 318 (emphasis added).

irrelevant, acknowledged that “under a program such as Harvard’s one may accomplish covertly what Davis concedes it does openly.”¹⁴⁷

The Court’s concern with effectiveness continues to shape its affirmative action decisions and assumes doctrinal form in the narrow tailoring requirement. In *Bakke*, the narrow tailoring inquiry focused on whether race-sensitive programs (in which race is one of many factors) could produce the educational benefits of diversity as effectively as programs based entirely on race.¹⁴⁸ Because he found that programs based partly on race could produce a similar result, Justice Powell concluded that programs based entirely on race were not narrowly tailored.¹⁴⁹ Since *Bakke* rendered racial quotas presumptively unconstitutional and as more indirect forms of affirmative action (like percentage plans) have emerged, the narrow tailoring question has shifted to whether facially-neutral alternatives (in which race does not explicitly factor) can be as effective as race-sensitive programs (in which race is one of many factors).¹⁵⁰

In *Fisher*, Abigail Fisher insisted that UT Austin had “already ‘achieved critical mass’ . . . using the Top Ten Percent Plan and race-neutral holistic review,”¹⁵¹ and therefore did not need race-sensitive review. In response, Justice Kennedy’s majority opinion glossed over the question of what it means to “achieve critical mass,” instead noting that “the University conducted ‘months of study and deliberation, including retreats, interviews, [and] review of data,’ and concluded that ‘[t]he use of race-neutral policies and programs ha[d] not been successful in achieving’ sufficient racial diversity at the University.”¹⁵² In finding that race-neutral measures alone were ineffective, Justice Kennedy emphasized that “[t]he University engages in periodic reassessment of the constitutionality, *and efficacy*, of its admissions program,”¹⁵³ and stipulated that “[g]oing forward, that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan.”¹⁵⁴

¹⁴⁷ *Id.* at 406 (Blackmun, J., concurring in part and dissenting in part).

¹⁴⁸ *Id.* at 316 (Powell, J.).

¹⁴⁹ *Id.* at 318.

¹⁵⁰ *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003).

¹⁵¹ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2211 (2016) (quoting Brief for Petitioner at 46, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (No. 14-981), 2015 WL 5261568).

¹⁵² *Id.* at 2211 (alterations in original) (citation omitted).

¹⁵³ *Id.* at 2210 (emphasis added).

¹⁵⁴ *Id.*

The effectiveness-focused justification thus enters affirmative action doctrine through the narrow tailoring inquiry and steers it toward racial indirection in two important ways. First, the Court rejects programs based entirely on race as unacceptable — that is, not narrowly tailored — in part because programs based partly on race can produce a similar result.¹⁵⁵ Second, the Court insists that programs in which race is one of many factors are acceptable only if programs in which race does not explicitly factor are not sufficiently effective.¹⁵⁶ The effectiveness-focused justification plays a central role when moderate Justices vote to uphold race-sensitive affirmative action on the ground that facially-neutral measures are simply not as effective in producing racial diversity.

D. Political Viability

The hidden but crucial reason behind the Supreme Court's embrace of racial indirection in affirmative action cases is political viability. Applying affirmative action policies in exact and explicit ways (like racial quotas) uncovers who will bear the cost of racial measures, and the fact that those cost bearers are not discrete wrongdoers poses a political problem.¹⁵⁷ This political problem becomes a legal problem when those cost bearers, typically White applicants who are denied admission, mobilize and bring cases to challenge racial measures before a judiciary sympathetic to their grievances.¹⁵⁸ As their political

¹⁵⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (Powell, J.) (observing that “an admissions program which considers race only as one factor is . . . no less effective” than programs based entirely on race).

¹⁵⁶ *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (“[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.”).

¹⁵⁷ See *Bakke*, 438 U.S. at 298 (Powell, J.) (“[T]here is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”).

¹⁵⁸ Key constitutional challenges to affirmative action have involved White applicants alleging that they bore the burden of consideration of race in admissions decisions. See, e.g., *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. at 2207 (describing petitioner Abigail Fisher, a White woman denied admission to the University of Texas at Austin in 2008, who “alleg[ed] that the University’s consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants”); *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (summarizing the allegations of Barbara Grutter, a White woman denied admission to the University of Michigan Law School in 1997, who claimed she was rejected because the school gave “applicants [from] certain minority groups ‘a significantly greater chance of admission than students with similar credentials from disfavored racial groups’” (quoting Joint Appendix at para. 20,

resistance becomes inscribed into law, it imposes constraints on permissible forms of affirmative action and may eventually proscribe the use of affirmative action altogether. Under these circumstances, race-sensitive affirmative action may be legally or politically sustainable only with a measure of indirection, which may render programs less likely to provoke, and more likely to withstand, racial resentment.

Racial indirection was thus adopted to help diffuse some of the political opposition to affirmative action and diminish the constitutional harms perceived by some Justices and potential litigants. Justice Powell believed that considering race as simply one factor in admissions would limit legal challenges, because an applicant “will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname,” and so “he would have no basis to complain of unequal treatment under the Fourteenth Amendment.”¹⁵⁹ John Jeffries, who served as law clerk to Justice Powell, later wrote in his biography of the Justice: “Harvard was simply Davis without fixed numbers [D]iversity was not the ultimate objective but merely a convenient way to broach a compromise.”¹⁶⁰

Debate continues over whether this diversity compromise was necessary or desirable. Some view political viability as a distinctive merit of racial indirection despite its other limitations. As a brief filed by Kimberly James and the other student intervenors in *Grutter* described: “To most Americans, uniting the nation on the basis of Justice Powell’s conception of diversity merged easily with the aspirations inspired by *Brown* to unite the nation on the basis of integration.”¹⁶¹ Thus, “progress toward an integrated nation could continue, slowed down, on the indirect paths Justice Powell had

Grutter, 539 U.S. 306 (No. 02-241), 2003 WL 21523737, at *33-34)); *Bakke*, 438 U.S. at 277-78 (explaining that Allan Bakke, a White man denied admission to the University of California, Davis School of Medicine in 1973 and 1974, “alleged that the Medical School’s special admissions program operated to exclude him from the school on the basis of his race”).

¹⁵⁹ *Bakke*, 438 U.S. at 318 (Powell, J.).

¹⁶⁰ JOHN C. JEFFRIES, JR., LEWIS F. POWELL JR.: A BIOGRAPHY 484 (1994); see also Siegel, *Equality Talk*, *supra* note 10, at 1572 (describing the reliance on diversity in affirmative action as “a master compromise . . . that would allow limited voluntary race-conscious efforts at desegregation to continue, in a social form that would preserve the Constitution as a domain of neutral principles”).

¹⁶¹ Brief for Respondents Kimberly James et al. at 17, *Grutter*, 539 U.S. 306 (No. 02-241).

sanctioned even if not on the direct road to freedom.”¹⁶² For these authors, “[e]ven with all its limitations, . . . Justice Powell’s decision has met the test of history.”¹⁶³ On this account, the primary virtue of racial indirection is that it enabled *some* race-sensitive affirmative action where none might otherwise have survived because of political backlash. The argument that racial indirection has prolonged the life of affirmative action is powerful in light of the enduring conflict over racial remedies. Even if indirection is not the most efficient way of pursuing affirmative action, there may be a need to account for political support in assessing effectiveness rather than looking at the operation of programs in a political vacuum.¹⁶⁴

For others, however, any political viability that racial indirection provides is temporary or illusory and gained at too great a cost. Reacting to the *Grutter* and *Gratz* decisions, Derrick Bell authored a powerful critique of the Court’s reliance on diversity, arguing that “far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, [diversity] is a serious distraction in the ongoing efforts to achieve racial justice.”¹⁶⁵ Diversity, for Bell, was “less a means of continuing minority admissions programs in the face of widespread opposition” and more “a shield behind which college administrators can retain policies of admission that are woefully poor measures of quality.”¹⁶⁶ Even as Bell conceded that he would have predicted *Grutter-Gratz* to invalidate *any* use of race in the admissions process, he doubted whether the compromise struck to render race-sensitive admissions viable was worthwhile — fearing that this “civil rights victory” will be “hard to distinguish from defeat.”¹⁶⁷

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Hochschild, *supra* note 10, at 322 n.37 (“If white opposition to it is (or becomes) strong enough, affirmative action policies could actually exacerbate and spread the racism that they are intended to ameliorate.”); Daniel Ibsen Morales, *A Matter of Rhetoric: The Diversity Rationale in Political Context*, 10 CHAP. L. REV. 187, 187-89 (2006) (cautioning against “affirmative action scholarship written in a political vacuum”).

¹⁶⁵ Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003) [hereinafter *Diversity’s Distractions*].

¹⁶⁶ *Id.* at 1632.

¹⁶⁷ *Id.* at 1622; see also Luke Charles Harris, *Rethinking the Terms of the Affirmative Action Debate Established in the Regents of the University of California v. Bakke Decision*, 6 RES. POL. & SOC’Y 133, 134 (1999) (arguing that “[w]hile *Bakke* was a ‘victory’ in that it made affirmative action programs constitutionally viable,” it was also “a ‘defeat’ for the advocates of affirmative action” in that “it cast into the shadows a variety of social justice arguments for promoting equal access and the greater

Political viability thus functions less as a justification and more as a motivation for adopting racial indirection in affirmative action cases. Of course, it is impossible to say how large a role indirection has played in sustaining the constitutionality of race-sensitive admissions over the decades. What is clear, however, is that treating race as one of several factors in a holistic review of applicants instead of the “predominant factor” has made claims of direct discrimination against individual applicants exceedingly difficult to prove.¹⁶⁸ For some supporters of affirmative action, political viability may thus represent the most powerful reason to embrace indirection, even as others view it as a pragmatic lowering of expectations about justice.¹⁶⁹

E. Racial Transition

Perhaps surprisingly, the goal of moving away from racial wrongdoing animates the Supreme Court’s adoption of racial indirection in affirmative action cases.¹⁷⁰ Affirmative action is frequently justified as an interim measure that will become unnecessary once America’s racial transition is complete.¹⁷¹ However, individual Justices disagree about how the endpoint of that transition should be characterized, when it might be achieved, and how it should be accomplished — through racial directness or indirection.

inclusion of the members of racial minority groups that continue to suffer the effects of historical and ongoing discrimination”).

¹⁶⁸ Yuvraj Joshi, *Jeff Sessions Can Try to Stop Affirmative Action, but He’ll Fail. Here’s Why*, WASH. POST (Aug. 7, 2017), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/07/jeff-sessions-can-try-to-stop-affirmative-action-but-hell-fail-heres-why/>.

¹⁶⁹ See, e.g., Khiara M. Bridges, *Class-Based Affirmative Action, or the Lies that We Tell About the Insignificance of Race*, 96 B.U. L. REV. 55, 107 (2016) [hereinafter *Class-Based Affirmative Action*] (“[P]olitical expediency ought not to excuse the elision of the injustices that have been visited upon racial minorities because of their race.”).

¹⁷⁰ See Yuvraj Joshi, *Affirmative Action as Transitional Justice* (unpublished manuscript) (draft on file with author).

¹⁷¹ Compare *Grutter v. Bollinger*, 539 U.S. 306, 341-43 (2013) (explaining that “race-conscious admissions policies must be limited in time” so as “to do away with all governmentally imposed discrimination based on race” and predicting that “25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today” (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984))), with *id.* at 346 (Ginsburg, J., concurring) (describing the timeline of twenty-five years as a “hope, but not firm[] forecast”). For a critical perspective on Justice O’Connor’s twenty-five-year timeline, see Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 182-90 (2004).

Since the Second Reconstruction, affirmative action has been a central site of contestation over these questions.¹⁷² In the sphere of education, people have debated whether race-sensitive admissions policies facilitate or impede the transition to a society in which race is no longer a source of discrimination. For conservatives who believe that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race,”¹⁷³ a reliance on race suggests a continuation of the nation’s racial past. Reasoning from this belief, some conservative Justices have consistently voted to strike down race-sensitive affirmative action programs in public schools and universities. For progressives who believe that “[i]n order to get beyond racism, we must first take account of race,”¹⁷⁴ a retreat from race suggests a denial of the histories and legacies of racial oppression. For this reason, some progressive Justices who have voted to uphold racially indirect affirmative action nevertheless lament limitations placed on direct consideration of race in admissions.

The Court itself justifies its adoption of racial indirection in transitional terms. Affirmative action decisions de-emphasize race because of the nation’s history of invidious racial classifications and in the hopes that race will become ever-less relevant over time.¹⁷⁵ Once racial categorization is understood as the principal evil of slavery and segregation, the history of racial persecution and hope of racial transition together steer affirmative action away from direct reliance on race. At the same time, the Court allows indirect consideration of race in order to increase minority enrollment with the understanding that — contrary to colorblind claims and post-racial aspirations — race remains salient in American society, and thus an element of race-consciousness is needed to move toward a world in which race no longer matters.¹⁷⁶ On this account, indirection is conducive to the contextual and dynamic social programming that may be needed to correct past social wrongs in a society in transition.

¹⁷² See Haney-López, *A Nation of Minorities*, *supra* note 41, at 991, 1029-43 (identifying *Bakke* as “a critical juncture when the Supreme Court fully engaged the debate over reactionary colorblindness”).

¹⁷³ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

¹⁷⁴ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part).

¹⁷⁵ See *id.* at 291 (Powell, J.) (“This perception of racial and ethnic distinctions is rooted in our Nation’s constitutional and demographic history.”); *Grutter*, 539 U.S. at 343.

¹⁷⁶ See *Grutter*, 539 U.S. at 333 (recognizing the “unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters”).

It is, of course, possible to share that Court's concern with racial transition and yet to disagree with the way the Court imagines that transition unfolding.¹⁷⁷ Even as Justice Blackmun wrote in *Bakke* that "I yield to no one in my earnest hope that the time will come when an 'affirmative action' program is unnecessary and is, in truth, only a relic of the past,"¹⁷⁸ he also added that "the story of *Brown v. Board of Education*, decided almost a quarter of a century ago, suggests that that hope is a slim one."¹⁷⁹ Justice Blackmun famously urged racial *directness* in pursuing racial transition, declaring: "In order to get beyond racism, we must first take account of race. There is no other way."¹⁸⁰

* * *

For a complex set of reasons relating to public perception and societal transition, the Supreme Court has veered away from racial quotas toward more indirect reliance on race. These reasons are intimately intertwined and reinforce each other. Which is to say: It is by depicting individual White applicants as unfairly disfavored and duly antagonized by affirmative action that the Court casts doubt on the viability and utility of race-based measures. Affirmative action law thus becomes oriented toward White citizens' complaints (and racial indirection) and away from minority group claims (and racial directness).

These reasons are grounded in the intuitions of individual Justices at the center of the Court who are interested in compromise between competing interests and principles.¹⁸¹ Their decisions de-emphasize race and racial justice concerns in order to mitigate resentment among White applicants, while at the same time upholding indirect reliance on race in order to continue racial integration. Yet, as becomes clear in Part IV, not everyone shares their appetite for compromise or agrees with the precise compromise they have struck through indirection. To see why, let us shift our attention from the controlling to the dissenting and concurring opinions in affirmative action cases.

¹⁷⁷ See *Gratz v. Bollinger*, 539 U.S. 244, 304 (2003) (Ginsburg, J., dissenting) ("The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital." (citation omitted)).

¹⁷⁸ *Bakke*, 438 U.S. at 403 (Blackmun, J., concurring in part and dissenting in part).

¹⁷⁹ *Id.* (citation omitted) (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 489 (1954)).

¹⁸⁰ *Id.* at 407.

¹⁸¹ For a discussion about the distinctive concerns of centrist Justices in racial equality cases, see Siegel, *From Colorblindness to Antibalkanization*, *supra* note 135, at 1293-99.

IV. CRITIQUING RACIAL INDIRECTION IN AFFIRMATIVE ACTION

Racial indirection in affirmative action decisions is criticized for impeding racial justice,¹⁸² substituting one social conflict for another,¹⁸³ sacrificing effectiveness for appearances' sake,¹⁸⁴ condoning subterfuge over candor,¹⁸⁵ and valuing compromise over principle.¹⁸⁶ These concerns are strongly implicated with respect to diversity-based affirmative action, even if people weigh them differently based on different views about the meaning and importance of the underlying value.

Another, perhaps more consequential feature of these critiques are the disagreements among Justices about the value of racial indirection. In contrast to the centrist Justices who embrace indirection in affirmative action decisions, both conservative and progressive Justices are critical of indirection. Some Justices on the right of the Supreme Court take issue even (or especially) with indirect reliance on race in admissions decisions — although they seem less troubled by indirection of a different sort, namely, facially-neutral measures that have a predictably disproportionate racial impact.¹⁸⁷ In contrast, some Justices on the left who join the Court's opinions upholding race-sensitive affirmative action nevertheless write separately to voice concerns about indirection. These critiques of indirection diverge and converge in important ways and shed light on how the current, more right-leaning Court might treat affirmative action.

A. Racial Justice

The most powerful critique of racial indirection is that it impedes the pursuit of racial justice. Some affirmative action opponents reject *any* consideration of race in admissions on the grounds that it

¹⁸² See *infra* Part IV.A.

¹⁸³ See *infra* Part IV.B.

¹⁸⁴ See *infra* Part IV.C.

¹⁸⁵ See *infra* Part IV.D.

¹⁸⁶ See *infra* Part IV.E.

¹⁸⁷ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 526 (1989) (Scalia, J., concurring in the judgment) (“A State can, of course, act ‘to undo the effects of past discrimination’ in many permissible ways that do not involve classification by race Such programs may well have racially disproportionate impact, but they are not based on race.”).

perpetuates and prolongs the existence of a racial world and is akin to practices that were historically used to oppress racial minorities. For the conservative Justices who hold these views, even indirect reliance on race is immoral and unconstitutional.¹⁸⁸

For quite different reasons, some affirmative action supporters dispute the value of racial indirection as a path to racial justice. There is a widely shared sense among progressives that securing racial justice requires tackling injustice directly and decisively. When one proceeds from this intuition, racial indirection is perceived to be a barrier rather than a bridge to racial equality.

Racial indirection is criticized for feeding the colorblindness myth that racism does not exist and race is meaningless. For many, the shift away from affirmative action programs directly based on race suggests a disregard or even a denial of racial inequality.¹⁸⁹ As Justice Marshall wrote in *Bakke*: “[T]oday’s judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins.”¹⁹⁰ Justice Brennan added that “we cannot . . . let color blindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”¹⁹¹ Furthermore, the shift away from racial-justice-based reasons for adopting affirmative action toward the more universal rationale of diversity strikes many as disingenuous and counterproductive. “It is because of a legacy of unequal treatment,” Justice Marshall explained, “that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.”¹⁹²

Racial indirection is also criticized for erecting barriers to remedying racial subordination and other systemic forms of inequality. Derrick Bell thus characterizes the Court’s reliance on diversity as “a serious distraction in the ongoing efforts to achieve racial justice” — one that

¹⁸⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 349-51 (2003) (Scalia, J., concurring in part and dissenting in part); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting).

¹⁸⁹ See Bridges, *Class-Based Affirmative Action*, *supra* note 169, at 106 (suggesting that “the reason why class-based affirmative action is so appealing to some is because it works to deny the enduring fact of racism and racial inequality”).

¹⁹⁰ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J., concurring in part and dissenting in part).

¹⁹¹ *Id.* at 327 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

¹⁹² *Id.* at 401 (Marshall, J., concurring in part and dissenting in part).

avoids directly addressing racial and class barriers, fuels further litigation, legitimizes traditional indexes of merit that privilege mainly well-off, White applicants, and diverts concerns and resources from addressing poverty.¹⁹³ Focusing on the experiences of students, some scholars underscore the manner in which affirmative action based on diversity calls on minority students to perform their racial identities and experiences while doing nothing to challenge (or even fueling) White students' sense of entitlement and victimhood.¹⁹⁴

Even some university administrators lament the constraints that racial indirection has imposed on colleges. Instead of discussing America's historical racism, "advocates for an integrated America have to content themselves with talking about the utility of 'diversity' and allowable ways to achieve it," complains Lee Bollinger, president of Columbia University and the named defendant in *Grutter* and *Gratz* as then-president of the University of Michigan.¹⁹⁵ He invokes the memory of *Brown v. Board of Education*, which marked "a powerful acknowledgement of this country's legacy of slavery and racism and of the lingering and pervasive effects of that past,"¹⁹⁶ and imagines an

¹⁹³ Bell, *Diversity's Distractions*, *supra* note 165, at 1622.

¹⁹⁴ See, e.g., NATASHA K. WARIKOO, *THE DIVERSITY BARGAIN AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES* 37 (2016) (describing "the diversity bargain, whereby white students in the United States reluctantly agree with affirmative action insofar as it benefits themselves, most commonly through a diverse learning environment."); Barnes, Chemerinsky & Onwuachi-Willig, *Judging Opportunity Lost*, *supra* note 7, at 288 (discussing how "the end result of the [Fisher] majority opinion was the reinforcement and fortification of white privilege"); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425, 453 (2014) (discussing how the diversity rationale for affirmative action supports White privilege and inhibits the development of White anti-racist identity formation); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2152 (2013) (tracing "racial capitalism," or the use by Whites and White institutions of "nonwhite people to acquire social and economic value," to affirmative action law and practice); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2343 (2000) (discussing how "the vision of diversity-oriented education that Justice Powell envisioned in *Bakke* has remained a theory"). Indeed, the U.S. Chamber of Commerce's amicus brief in *Bakke* appeared to argue against the use of racial quotas so as to accommodate White men's sense of entitlement. See Brief for the U.S. Chamber of Commerce as Amicus Curiae at 40, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 204794 ("Under a mentality of racial proportionality, every non-minority male who fails to get a promotion or job or grant which went to a minority individual has the luxury of believing himself to be discriminated against — whether his credentials were inferior or superior.").

¹⁹⁵ 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, 283 (2015).

¹⁹⁶ *Id.* at 282.

alternative affirmative action jurisprudence which is “neither subservient to popular views nor cabined by damaging precedent.”¹⁹⁷

The diminished salience of race in affirmative action is thus the antithesis of racial justice for a significant constituency of progressives on and off the Court. Racial indirection can impose constraints on the practical structuring of affirmative action and modulate the sorts of claims that advocates and beneficiaries can make. For instance, given the requirements of *Bakke* and its progeny, institutions can struggle to employ practices that would more directly address minority underrepresentation, and individuals and groups can struggle to make claims for proportional representation. While nothing in the *Bakke* line of cases proscribes conversations about race and racism in academic settings, the law can become an excuse for the absence of such conversations. The racial-justice-based concerns about indirection are thus wide-ranging and also implicate concerns about social cohesion and program effectiveness, as developed in more detail below.

At the same time, some legal progressives recognize that racial indirection can enable racial integration. Justice Sotomayor underscored the synergies between educational diversity and racial integration when she wrote in *Schuetz* that “race-sensitive admissions policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, *which necessarily benefits minority groups*.”¹⁹⁸ She concluded that such policies “can both serve the compelling interest of obtaining the educational benefits that flow from a diverse student body, and inure to the benefit of racial minorities,” because “[t]here is nothing mutually exclusive about the two.”¹⁹⁹ So, even as Justice Sotomayor explained how “race matters” in American social life²⁰⁰ — declaring that “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race”²⁰¹ — she appreciated the important inroads that racial indirection that “necessarily benefits minority groups” could make.

Different perspectives on the value of racial indirection reflect different understandings of the kinds of justice affirmative action could and should achieve. For instance, some literature observes how race-based affirmative action can end up helping the relatively

¹⁹⁷ *Id.* at 285.

¹⁹⁸ *Schuetz v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 352 (Sotomayor, J., dissenting) (emphasis added).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 380.

²⁰¹ *Id.*

privileged in the beneficiary group, rather than cutting across lines of race and class. In his influential study of the relationship between race and poverty, William Julius Wilson describes the “creaming” process whereby “those with the greatest economic, educational, and social resources among the less advantaged individuals are the ones who are actually tapped for higher paying jobs and higher education through affirmative action.”²⁰² In the context of affirmative action in employment, Jennifer Hochschild reflects that “our single-minded focus on race, to the exclusion of serious inequities of class and power, generates a policy that does little to benefit those blacks who need it most and does a lot to anger those whites who also suffer from economic and political inequity.”²⁰³ Thus, some commentators do not propose a retreat from race in affirmative action but instead consider how affirmative action may conceivably emphasize factors other than race to promote racially egalitarian ends — and how separate remedies may work in tandem to achieve racial justice goals.

Ultimately, if we expect affirmative action doctrine to express values grounded in the nation’s racial history and the lived experiences of racial minorities, then racial indirection may be unsatisfactory.²⁰⁴ Alternatively, if we see the primary purpose of affirmative action law as promoting racial integration in the face of racial resentment and opposition, then indirection may fare better. There is a complex relationship between what judicial language explicates and what it enables — *indirection can sometimes enable precisely by failing to explicate*. However, in failing to explicate racial justice values, racial

²⁰² WILSON, *supra* note 10, at 115; see also Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1475 (2005) (identifying affirmative action in selective institutions of higher education as exemplifying how “the priorities of elites often have been privileged over theories and strategies of social justice that focused on the plight of the working class and poor”); Goodwin Liu, *Racial Justice in the Age of Diversity*, 106 CALIF. L. REV. 1977, 1984 (2018) (“[T]he Black underclass’ is today defined by race together with socioeconomic status, geographic isolation, and ethnicity understood as immigrant background (voluntary versus involuntary).”).

²⁰³ Hochschild, *supra* note 10, at 322; see also *id.* at 329 (“Instead of focusing on divisive racial issues, blacks and whites should unite around a broad array of policy demands to lessen class and power inequalities for both races.”).

²⁰⁴ See Charles R. Lawrence III, *Each Other’s Harvest: Diversity’s Deeper Meaning*, 31 U.S.F. L. REV. 757, 767-68 (1996) (“I call this ‘the Big Lie.’ Despite overwhelming evidence of continuing racial discrimination, the Court tells us our nation has overcome its racism.”); Barnes, Chemerinsky & Onwuachi-Willig, *Judging Opportunity Lost*, *supra* note 7, at 286 (“[T]he majority, concurrences, and dissent all failed to use the [Fisher] case as a meaningful opportunity to explicate equal protection doctrine as a function of the lived experiences of racial minorities within the United States.”).

indirection may address inequalities in some ways and for some constituencies while fueling and facilitating inequalities in others.²⁰⁵ The benefits of racial indirection may be different in scope and kind from the benefits of more direct engagement with racial injustice. For these reasons, racial indirection may never be an adequate strategy for combating racial injustice, and more direct approaches may be needed to accomplish the work that indirection cannot undertake.

B. *Social Cohesion*

Although both affirmative action opponents and supporters have invoked social cohesion concerns, the Court has privileged understandings of social cohesion that limit the scope of affirmative action. In *Bakke*, as we saw, Justice Powell adopted racial indirection as a means to mitigate the “deep resentment” likely to be felt by “innocent persons” who bear the cost of affirmative action.²⁰⁶ The justification Justice Powell offered accepted the conservative claim that all classifications by race are divisive²⁰⁷ — even though the ultimate approach he offered did not prohibit all consideration of race.

In addition (or instead), Justice Powell could have invoked social cohesion concerns grounded in the perspectives and interests of racial minorities — concerns that counsel in favor of more direct reliance on

²⁰⁵ See Crenshaw, *Twenty Years of Critical Race Theory*, *supra* note 44, at 1346 (“[T]here are limits to the degree that racial justice can be finessed . . . at some point the rubber meets the road and the specific burdens of race must be addressed.”); Bridges, *Class-Based Affirmative Action*, *supra* note 169, at 107-08 (“Perhaps being unconscious of race, racism, and racial inequality is precisely the mechanism by which they all are reproduced.”).

²⁰⁶ See *supra* notes 115–18.

²⁰⁷ See, e.g., Brief for the American Jewish Committee et al. as Amici Curiae, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811), 1977 WL 188015, at *34 (“Petitioner’s theory, of course, would apply with equal validity to psychologists, social workers, bankers, businessmen, political officeholders and a broad spectrum of economic, professional and governmental occupations, with equally profound and divisive implications.”); Brief for the Fraternal Order of Police et al. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189549, at *3 (“The Court’s decision in the case *sub judice* will have a pivotal effect on the question of whether the racial quota, with all its divisive and arbitrary effects, is to become a fixed feature in our professions and occupations.”); Brief for the U.S. Chamber of Commerce as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189550, at *41 (“Quotas are divisive and may lead to racial antagonism.”); Brief for the Young Americans for Freedom as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187991, at *25 (“Such a spectre is self-defeating, divisive of society and contrary to the concept of individual liberty, that we should be judged and rewarded not for what our color or our race or ethnic group is, but for ourselves and our individual merit.”).

race and *against* de-emphasizing race. In the extensive judicial and academic discussions of affirmative action, these racial-minority-centered concerns have drawn less attention than the White-victim-focused justification Justice Powell offered. Uncovering these concerns allow us to better understand the choices made in shaping affirmative action and reconsider the ways racial indirection may strengthen or weaken social cohesion.

Several opinions and briefs in affirmative action cases argue that racial segregation is itself a threat to social cohesion and that race-based measures are needed to promote racial integration and ameliorate divisions. In *Bakke*, Justice Marshall characterized the Court's refusal to uphold UC Davis' race-based program as threatening social unity. After detailing the legacies and realities of racial subordination in the United States, Justice Marshall concluded that "bringing the Negro into the mainstream of American life should be a state interest of the highest order," warning that "[t]o fail to do so is to ensure that America will forever remain a divided society."²⁰⁸

Furthermore, whereas Justice Powell centered his concern for social cohesion on resentment among Whites, others emphasize resentment and estrangement among minorities. The brief in *Grutter* filed by Kimberly James and other student intervenors argued that striking down race-sensitive affirmative action would "re-segregate, divide, and polarize our country"²⁰⁹ and "inevitably lead to social explosion."²¹⁰ Referring to bans on affirmative action in California and Texas, the student intervenors reasoned that "giv[ing] special preferences 'to the children of alumni, to the affluent . . . , the famous, and the powerful,' while denying opportunities to the majority of young people who reside in these states, breed[s] understandable anger and resentment."²¹¹

The Court in *Grutter* was more open to understanding that the perceptions and concerns of minority communities also matter in healing social divisions. Justice O'Connor wrote that "[i]n order to

²⁰⁸ *Bakke*, 438 U.S. at 396 (Marshall, J., concurring in part and dissenting in part).

²⁰⁹ Brief for Respondents Kimberly James et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 716302, at *7-8.

²¹⁰ *Id.* at *37.

²¹¹ *Id.* at *23; see also Brief of the UCLA Black Law Students Association et al., *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187979, at *27 ("The racial discrimination which has historically permeated almost every aspect of American life is still a divisive and destructive element."); Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School*, 17 MICH. J. RACE & L. 63, 75-76 (2011) (discussing isolation and alienation of students of color on predominantly White campuses).

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.”²¹² Furthermore, “[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.”²¹³ More recently, Justice Kennedy in *Fisher* did not depict all racial classifications as divisive, as he once did in *Grutter*.²¹⁴ *Fisher* is consistent with the idea that in an American society where race matters, a rigid adherence to colorblindness may itself pose a threat to social cohesion.²¹⁵

Still, the Supreme Court has continued to adopt racial indirection as a means of abating the social conflict associated with racial measures. Justice Kennedy depicts racial indirection as the most secure legal framework for pursuing racial integration when he asserts that “the dangers presented by individual classifications,” which can “cause a new divisiveness” and “lead to corrosive discourse,” “are not as pressing when the same ends are achieved by more indirect means.”²¹⁶ Justice Kennedy rightly reasons that if the threat of racial remedies stems from explicit reliance on race (as legal conservatives have long argued²¹⁷), then a diminished reliance on race must be considered *less* problematic, if not *unproblematic*. At the same time, this view fails to acknowledge that racial indirection may be more palatable to certain segments of society precisely because it papers over the realities of race and racism in the United States. Furthermore, it fails to truly account for the ways in which de-emphasizing race may fuel resentment and estrangement among minorities.²¹⁸

Much in affirmative action decisions celebrates the benefits of racial indirection for individual (White) applicants, the student body, and

²¹² *Grutter*, 539 U.S. at 332.

²¹³ *Id.*

²¹⁴ See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (2016).

²¹⁵ See Joshi, *Bakke to the Future*, *supra* note 68, at 23-26 (discussing the role of social cohesion concerns in *Fisher*).

²¹⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring); see also *Bakke*, 438 U.S. at 318 (Powell, J.) (“No such facial infirmity exists in an admissions program where race or ethnic background is simply one element — to be weighed fairly against other elements — in the selection process.”).

²¹⁷ See *supra* text accompanying note 207.

²¹⁸ See Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2083 (2017) (describing “legal estrangement” as “a marginal and ambivalent relationship with society, the law, and predominant social norms that emanates from institutional and legal failure”).

the nation as a whole; much less acknowledges its limitations for racial minorities and justice. Of course, the racial indirection framework itself constrains how openly minority concerns may be discussed within these decisions. However, it might also be that the centrist, White Justices and their predominantly White law clerks who have crafted opinions in affirmative action cases are less attuned to minority concerns.²¹⁹ Additionally, it might be that these Justices consider minority interests to be appropriately or adequately addressed by the very continuation of race-sensitive programs, if only in diminished form. While these Justices embrace indirection as a means to broach compromise and mitigate conflict, their approach to indirection appears to privilege one set of concerns over another, and substitute one form of conflict for another. Racial indirection in this vein thus appears to promote a temporary, “negative” peace that entails racial obfuscation over a more enduring, “positive” peace that demands racial reckoning.²²⁰

C. Program Effectiveness

Effectiveness-focused critiques of racial indirection suggest that it considers race too much (from the right) and not enough (from the left). Affirmative action opponents contend that even indirect reliance on race in admissions is unnecessary to obtain the educational benefits of diversity — and they decry failures to define the level of minority enrollment that would constitute enough diversity.²²¹

²¹⁹ Justice Powell’s law clerk, John C. Jefferies, drew the Justice’s attention to Harvard’s admissions program, and another law clerk, Bob Comfort, wrote a memo to the Justice concluding that the diversity justification offers “the best opportunity for taking a middle course.” For an account of how the diversity rationale emerged in Justice Powell’s opinion, see David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, 25 VA. J. SOC. POL’Y & L. (forthcoming 2019). See generally Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (discussing how race informs perceptions of discrimination and how judges belonging to privileged groups enforce their own racially-informed perceptions).

²²⁰ See Rama Mani, *Balancing Peace with Justice in the Aftermath of Violent Conflict*, 48 SOC’Y FOR INT’L DEV. 25, 28 (2005) (“[I]gnoring justice claims may cause discontent and frustration among disenfranchised groups, and undermine longer term sustainable peace — or what is called ‘positive peace.’ . . . Overlooking justice claims may endanger short-term negative peace as well, if unmet grievances degenerate into renewed violence . . .”).

²²¹ See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2211 (2016) (quoting Brief for Petitioner, *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (No. 14-981), 2015 WL 5261568, at *46) (claiming that UT Austin had “already ‘achieved critical mass’ . . . using the Top Ten Percent Plan and race-neutral holistic review”).

In contrast, affirmative action supporters tend to treat direct reliance on race in admissions as a necessary means to achieve racial inclusion — and so they lament any restrictions on direct uses of race in admissions. As Justice Blackmun announced in *Bakke*: “I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful.”²²²

Affirmative action supporters’ effectiveness argument has two parts: one concerned with *efficacy* (the ability to ultimately produce the desired result) and the other with *efficiency* (the ability to achieve the best result with minimum effort or expense).²²³ First, affirmative action supporters argue that racial indirection is *ineffectual* because racial integration cannot be advanced without direct consideration of race. This argument was made in *Bakke* in order to justify the use of racial quotas and has since been made to justify race-sensitive diversity over facially-neutral alternatives. Second, affirmative action supporters contend that even if racial indirection could conceivably produce a result similar to that of more direct consideration of race, employing indirection is *inefficient* and impractical.²²⁴

Making both these arguments, an amicus brief filed by two minority contractors’ groups in *Bakke* argued that “an effective and ingenuous program intended to ameliorate race problems must, of necessity, take

²²² *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part).

²²³ See *Efficacious*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/efficacious> (last visited Feb. 3, 2019); *Efficient*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/efficient> (last visited Feb. 3, 2019).

²²⁴ See, e.g., Brief for the Ass’n of Am. Med. Colls. et al. as Amici Curiae, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 398338, at *26 (“[I]t does not make sense to pursue the acknowledged benefits of diversity through proxies and indirection. Doing so would simply trade a new universe of legal uncertainty and threatened litigation for the unsettled universe now confronting higher education, while producing far less satisfactory outcomes. Direct consideration of race is both intellectually honest and socially imperative.”); Brief for the Law Sch. Admission Council as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188017, at *39 (“Any indirect means, not framed in terms of the racial goal itself, will necessarily be more intrusive and overbroad, involving collateral costs and consequences extraneous to the specific purpose.”); Brief for the Nat’l Council of Churches of Christ in the United States et al. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189522, at *21 (arguing that UC Davis’ program “should not be discarded in favor of indirect procedures . . . that are of questionable value in increasing the admission of minority students”); Brief for Soc. Scientists as Amici Curiae, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 402129, at *8 (“[I]t is hard to see why a facially race-neutral and therefore indirect means would ‘fit’ a race-conscious goal better than means designed to reach those goals directly.”).

racial considerations into account.”²²⁵ Considering the possibility that an indirect program of minority recruitment, tutoring, and financial aid might produce a result similar to that of UC Davis’ more direct minority admissions program, the brief questioned: “[W]hy condemn a program which achieves the same end only in a more direct and efficient manner?”²²⁶

In adopting racial indirection, Justice Powell in *Bakke* took a different view of efficacy and proceeded as if “an admissions program which considers race only as one factor is . . . no less effective” than programs based entirely on race.²²⁷ It was enough for him that racial indirection (as in Harvard’s program) could conceivably produce a result similar to that of more direct consideration of race (as in Davis’ program), even if such a result was not certain to occur. Since *Bakke*, affirmative action supporters’ efficacy concerns have fared better; the Court has upheld race-sensitive admissions on the basis that facially-neutral alternatives (like percentage plans) are not enough to obtain the educational benefits of diversity. As Justice Kennedy explained in *Fisher*: “Wherever the balance between percentage plans and holistic review should rest, an *effective* admissions policy cannot prescribe, realistically, the exclusive use of a percentage plan.”²²⁸

The Court has also been receptive to some efficiency concerns through its narrow tailoring analysis. While refusing to uphold racial quotas, no matter how efficient, it has announced that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative.”²²⁹ Rather, it is enough to show that “available” and “workable” facially-neutral alternatives “do not suffice” to achieve a university’s diversity goals.²³⁰ Ultimately, however, this indirection does not value efficiency. When considering efforts to promote integration in school districting, Justice Kennedy was perfectly willing to accept the “inefficient result” of “indirection and general policies” in order to avoid “racial typologies [that] can cause a new divisiveness” and “lead to corrosive discourse,” suggesting that efficiency is subservient to other values.²³¹

²²⁵ Brief for the Nat’l Ass’n of Minority Contractors & Minority Contractors Ass’n of N. Cal. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189505, at *19.

²²⁶ *Id.* at *28 n.13.

²²⁷ *Bakke*, 438 U.S. at 318 (Powell, J.).

²²⁸ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214 (2016) (emphasis added).

²²⁹ *Id.* at 2208.

²³⁰ *Id.*

²³¹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701, 797 (2007)

D. Government Transparency

Whereas conservative Justices demand forthright considerations of race in admissions in order to subject programs to strict scrutiny that is “fatal in fact,” their progressive colleagues prefer candor as a means of smoking out invidious uses of race and meeting expectations of government transparency.²³²

In *Grutter*, as we saw, the conservative Justices rejected a concept of “critical mass” that has a numerical connotation yet defies numerical definition. Chief Justice Rehnquist charged that “the Law School’s disparate admissions practices with respect to these minority groups demonstrate that its alleged goal of ‘critical mass’ is simply a sham,” and that the “[p]etitioner may use these statistics to expose this sham, which is the basis for the Law School’s admission of less qualified underrepresented minorities in preference to her.”²³³ During the oral argument in the first *Fisher* case, Justice Scalia accentuated this lack of transparency when he quipped: “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.”²³⁴ In the second *Fisher* case, Justice Alito charged that “UT has not explained in anything other than the vaguest terms what it means by ‘critical mass’” and that “[t]his intentionally imprecise interest is designed to insulate UT’s program from meaningful judicial review.”²³⁵ These Justices demand greater transparency of a university’s ends and means in the hopes that critical-mass-based programs would be exposed as racial set-asides and deemed unconstitutional.

In contrast, some progressive Justices who vote to uphold race-sensitive affirmative action write separately to question the lack of candor involved in racial indirection. Justice Brennan thus criticized Justice Powell’s opinion in *Bakke* for preferring Harvard’s program that “does not also make public the extent of the preference and the precise workings of the system” over UC Davis’ program that “employs a

(Kennedy, J., concurring).

²³² For an account of how government transparency may serve both progressive and conservative interests, see generally David E. Pozen, *Transparency’s Ideological Drift*, 128 *YALE L.J.* 1 (2018) (tracing transparency’s roots from a progressive to more libertarian orientation).

²³³ *Grutter v. Bollinger*, 539 U.S. 306, 383 (2003) (Rehnquist, C.J., dissenting).

²³⁴ Transcript of Oral Argument at 71-72, *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2012) (No. 11-345), <https://archive.nytimes.com/www.nytimes.com/interactive/2012/10/14/us/fisher-vs-university-of-texas-austin-supreme-court.html>.

²³⁵ *Fisher*, 136 S. Ct. at 2222 (2016) (Alito, J., dissenting).

specific, openly stated number.”²³⁶ And when the United States brief in *Gratz* pointed to percentage plans as one example of a “race-neutral” alternative that would increase minority enrollment without direct reliance on race, Justice Ginsburg called this description “disingenuous.”²³⁷ “If honesty is the best policy,” Justice Ginsburg added, “surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises.”²³⁸ In a similar vein, Justice Souter explained that percentage plans “get their racially diverse results without saying directly what they are doing or why they are doing it,” adding that he would “give Michigan an extra point of its own for its frankness.”²³⁹ Summing up the transparency critique of racial indirection in a sentence, Justice Souter concluded: “Equal protection cannot become an exercise in which the winners are the ones who hide the ball.”²⁴⁰

Racial indirection may sometimes involve rendering aspects of affirmative action programs less transparent, for instance, by making the use of race in decision-making obscure, or even avoiding any mention of race. Consequently, indirect approaches may appear to fall short of expectations of government transparency and public reason.²⁴¹ One of the most severe charges against indirection is that it

²³⁶ *Bakke v. Regents of Univ. of Cal.*, 438 U.S. 265, 379 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part).

²³⁷ *Gratz v. Bollinger*, 539 U.S. 244, 303 n.10 (2003) (Ginsburg, J., dissenting).

²³⁸ *Id.* at 305; see also Brief for Ass’n of Am. Law Sch. as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 187968, at *5 (“[T]he practice of providing a degree of preference for blacks and other minorities in law school admissions is a necessary, and indeed the only honest method, to achieve certain very important social objectives.”).

²³⁹ *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).

²⁴⁰ *Id.*; see also Brief for the Nat’l Ass’n of Minority Contractors & Minority Contractors Ass’n of N. Cal. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 189505 (“[T]he suggestion made in the majority opinion below that petitioner should have attempted to achieve its objectives through less overtly racial means can only be viewed as a suggestion to the executive and judicial branches to, in effect, ‘hide the ball.’”).

²⁴¹ See JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 42 (Ciaran Cronin & Pablo de Greiff eds., 1998) (arguing that a moral norm “is valid when the foreseeable consequences and side effects of its general observance for the interests and value-orientations of *each individual* could be *jointly* accepted by *all* concerned without coercion.”); JOHN RAWLS, *POLITICAL LIBERALISM* 9 (1996) (describing the ideal of public reason as “a publicly recognized point of view from which all citizens can examine before one another whether their political and social institutions are just”). For a discussion of indirection’s threat to transparency (and vice versa), see Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional*

amounts to a form of duplicity. Duplicity means deliberately causing someone to believe something that is not true. Indirection might be said to cross a line where it causes dissonance between the articulated justification and the actual purpose of the law.

While these concerns are surely important, the transparency costs of indirection in affirmative action can be overstated. Transparency is never absolute, and there may be good reasons for public actors to be less transparent in specific instances.²⁴² Russell Hardin, for instance, distinguishes between “deceit” in and against the public interest, arguing that there are circumstances in which some obfuscation is beneficial and too much transparency may be harmful.²⁴³ The pursuit of racial equality in a stratified society may be precisely such a circumstance requiring some opaqueness. Jack Balkin and Reva Siegel explain how indirection facilitates egalitarian social change, observing that “[l]aws dismantling status hierarchies cannot redistribute opportunities to subordinate groups too transparently” because they provoke backlash from dominant groups unwilling to relinquish their privileged status.²⁴⁴

Demanding transparency of racial indirection can produce paradoxical outcomes.²⁴⁵ As racial considerations and consequences come into view, what was previously indirect becomes direct. While transparency may be considered *beneficial* when it uncovers indirection that *harms* racial minorities,²⁴⁶ it may become *detrimental* when it exposes indirection that *benefits* racial minorities. Furthermore, such transparency demands may not effectively bring

Meaning in the Administration of Fair Housing, 65 *BUFF. L. REV.* 163, 227-28 (2017).

²⁴² See, e.g., ALBERT BRETON ET AL., *Introduction to THE ECONOMICS OF TRANSPARENCY IN POLITICS* 1, 4 (Albert Breton et al. eds., 2007) (observing in the context of political institutions that “neither transparency nor obfuscation are all-or-nothing realities”).

²⁴³ Russell Hardin, *Citizens’ Knowledge, Politicians’ Duplicity*, in *THE ECONOMICS OF TRANSPARENCY IN POLITICS* 40-49 (2007).

²⁴⁴ Jack M. Balkin & Reva B. Siegel, *Remembering How to Do Equality*, in *THE CONSTITUTION IN 2020*, at 105 (Jack M. Balkin & Reva B. Siegel eds., 2009); see also Robert C. Post, *Introduction to RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 24 (Robert C. Post & Michael Rogin eds., 1998) (noting that it was “uncertain whether this [public culture] justification for affirmative action, if candidly expressed, would pass constitutional muster”).

²⁴⁵ See generally Pozen, *supra* note 232, at 161 (discussing “how practically and politically complicated — and perverse — transparency mandates can be”).

²⁴⁶ See, e.g., *United States v. Blewett*, 719 F.3d 482, 488 (6th Cir. 2013) (“The discriminatory nature of the old sentencing regime is so obvious that it cannot seriously be argued that race does not play a role in the failure to retroactively apply the Fair Sentencing Act. A ‘disparate impact’ case now becomes an intentional subjugation or discriminatory purpose case.”).

racial considerations to the fore and may even drive them further underground.

To put this in concrete terms, a conservative Supreme Court could employ transparency to dismantle racially indirect affirmative action — and do so by invoking the opinions of progressive Justices (like Ginsburg and Souter) who have encouraged candor about the functioning of such programs.²⁴⁷ Under current law, Justice Alito is wrong in conflating legally mandated imprecision with deliberate obfuscation and in demanding clearly and precisely articulated goals that likely run counter to the requirement of holistic and individualized consideration of applicants.²⁴⁸ However, once Justice Alito sits in the majority, the Court could strike down *less candid* admissions programs for want of transparency and *more candid* programs for relying too much on race, thwarting race-sensitive affirmative action even without formally prohibiting it.²⁴⁹ In so doing, the Court may incentivize universities to become more creative in their racial obfuscation rather than more committed to racial transparency.

E. Principled Reasoning

Supreme Court decisions routinely emphasize the value of principled legal reasoning on the belief that people accept their claims “as grounded truly in principle, not as compromises.”²⁵⁰ In this light, another overarching criticism of the Court’s embrace of indirection in affirmative action decisions is that it is nothing more than a political compromise — a halfway point between colorblindness and race-

²⁴⁷ See Ilya Somin, Fisher, *The Texas Ten Percent Plan, and “Race-Neutral” Alternatives to Affirmative Action*, VOLOKH CONSPIRACY (June 24, 2013, 12:41 PM), <http://volokh.com/2013/06/24/fisher-the-texas-ten-percent-plan-and-race-neutral-alternatives-to-affirmative-action/> (“Does such ‘camouflage’ make racially motivated admissions policies ‘race-neutral’? Ginsburg thinks not, and I agree.”); Barnes, Chemerinsky & Onwuachi-Willig, *Judging Opportunity Lost*, *supra* note 7, at 297 (“[C]ritics are likely to cite to Justice Ginsburg’s dissent [in *Gratz*] as a reason to interrogate admissions plans based on their presumed improper purpose rather than their facial neutrality.”).

²⁴⁸ See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2210 (“[S]ince 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.”).

²⁴⁹ See *infra* Part V.B.

²⁵⁰ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

consciousness that fully vindicates neither.²⁵¹ Following *Bakke*, Guido Calabresi traced the ways Justice Powell's opinion employed "subterfuge" in response to conflicting values and constituencies so that the decision "did not force us to choose between unacceptable alternatives."²⁵² Even Paul Mishkin, UC Davis' counsel who welcomed the decision in *Bakke* and highlighted the "significant advantages" of indirection over quotas, struggled to find a principle underlying Justice Powell's opinion.²⁵³ "[I]f I cannot find an analytically sound principle to support that result," Mishkin openly wondered, "what justification do I have to support such action by the Supreme Court?"²⁵⁴

Over the years and for different reasons, Justices across the political spectrum have accused the Court's affirmative action decisions of failing to meet the demands of principled legal reasoning. Some conservative Justices dismiss the educational benefits of diversity as a "trivial" rather than principled justification for reliance on race, with Justice Thomas arguing that "the majority's failure to justify its decision by reference to any principle arises from the absence of any such principle."²⁵⁵ Others charge that the Court misconstrues its own precedents in upholding race-sensitive admissions programs under strict scrutiny. In this vein, Chief Justice Rehnquist derided the Court in *Grutter* for upholding a critical-mass-based program that (in his view) was "precisely the type of racial balancing that the Court itself calls 'patently unconstitutional.'"²⁵⁶

Some progressive Justices write separately to reject indirection as a constitutional requirement, arguing that the Constitution allows both direct and indirect uses of race to remedy legacies of racial oppression and that the Court's distinction between these uses of race is therefore constitutionally irrelevant. Justice Brennan thus wrote in *Bakke* that "there is no basis for preferring a particular preference program simply because . . . it proceeds in a manner that is not immediately apparent

²⁵¹ There are longstanding debates over whether particular racial equality decisions are based on neutral principles. For the debate with respect to *Brown v. Board of Education*, compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959) (questioning the principle underlying *Brown*), with Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980) (offering "interest-convergence" as the principle underlying *Brown*).

²⁵² Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 431 (1979).

²⁵³ Mishkin, *supra* note 10, at 928.

²⁵⁴ *Id.* at 930.

²⁵⁵ *Grutter v. Bollinger*, 539 U.S. 306, 357 (2003) (Thomas, J., dissenting).

²⁵⁶ *Id.* at 386 (Rehnquist, C.J., dissenting).

to the public.”²⁵⁷ Justice Ginsburg in *Gratz* similarly saw “no constitutional infirmity”²⁵⁸ in race-based admissions programs and preferred “accurately described, fully disclosed” programs to “achieving similar numbers through winks, nods, and disguises.”²⁵⁹

Some legal theorists emphasize the ways indirection as a judicial technique stands in tension with principled legal reasoning.²⁶⁰ For reasons of intellectual coherence, Ronald Dworkin describes Justice Powell’s opinion in *Bakke* as “weak,” arguing that “[i]t does not supply a sound intellectual foundation for the compromise the public found so attractive.”²⁶¹ For reasons of political legitimacy, Paul Kahn criticizes “representative balancing” in cases like *Bakke* as unacceptable because it fails to provide principled explanations for results and, therefore, is “open to charges that it has usurped the functions of the political institutions of government.”²⁶² For concerns of public deliberation, Cass Sunstein argues that “*Bakke* was not an auspicious beginning for those seeking clear rules” and that “the Court has helped keep the nation’s eye on the affirmative action issue . . . while at the same time failing to preempt processes of public discussion and debate.”²⁶³

Not all commentators, however, would automatically reject indirection in the pursuit of egalitarian goals as an affront to principled legal reasoning. In a critical register, Derrick Bell describes the principle underlying affirmative action decisions in terms of “interest-convergence”: his theory that “[blacks] could not obtain meaningful relief until policymakers perceived that the relief blacks sought furthered interests or resolved issues of more primary concern,” such as the educational benefits of diversity.²⁶⁴ Evoking the

²⁵⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 379 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

²⁵⁸ *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting).

²⁵⁹ *Id.* at 305.

²⁶⁰ Although this Article focuses on race and affirmative action, indirection is a judicial strategy in various areas of constitutional law. *See, e.g.*, Hochschild, *supra* note 10, at 330 (discussing indirection in school desegregation); Robert F. Nagel, *Indirect Constitutional Discourse: A Comment on Meese*, 63 L. & CONTEMP. PROBS. 507, 509-11 (2000) (discussing indirection in school desegregation and reproductive rights, in addition to affirmative action).

²⁶¹ RONALD DWORKIN, *A MATTER OF PRINCIPLE* 309 (1985).

²⁶² Kahn, *supra* note 135, at 4-5.

²⁶³ Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CALIF. L. REV. 1179, 1185-87 (1996).

²⁶⁴ Bell, *Diversity’s Distractions*, *supra* note 165, at 1624; *see also* Bell, *supra* note 251, at 524 (introducing the interest-convergence theory).

“passive virtues” of judicial decision-making,²⁶⁵ Robert Post and Neil Siegel question the expectation of fully articulated and explicitly stated legal standards, proposing that “silent incorporation of implicit social values does not undermine the capacity of standards, or even necessarily of inarticulate intuitions, to fulfill rule-of-law values like consistency, predictability, stability, reliance, and transparency.”²⁶⁶ Reva Siegel observes how social conflict weighs on judges who author equality-promoting decisions and can lead them to “sacrifice normative clarity in the interests of securing change.”²⁶⁷ From these latter perspectives, the appropriate question is not whether but in what ways and to what ends might indirection legitimately shape judicial opinions.

Viewed through the lens of racial indirection, the Supreme Court’s affirmative action jurisprudence presents a new puzzle. We are accustomed to disagreements between conservative and progressive Justices on the issue of affirmative action. Yet, when it comes to indirection, these Justices may share more in common with each other than with their moderate colleagues who have authored affirmative action decisions. In particular, Justices at both ends of the political spectrum demand greater transparency about the reliance on race in admissions than the current indirect regime of affirmative action allows, although they disagree about the implications. What happens once the deciding vote in affirmative action cases changes? The final Part of the Article takes up this question.

V. IMAGINING FUTURE (IN)DIRECTIONS

Justice Kennedy’s retirement arrives at a moment when the battle over affirmative action is entering a new stage. Part V.A explores the challenges that affirmative action currently faces. Part V.B considers how a conservative Court could deal with these challenges. Part V.C reflects on new indirections that could and should emerge from these challenges. In the American story of affirmative action, *all paths lead to*

²⁶⁵ Compare ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962), with Gerald Gunther, *The Subtle Vices of the “Passive Virtues” — A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

²⁶⁶ Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul Mishkin*, 95 CALIF. L. REV. 1473, 1499 (2007).

²⁶⁷ Siegel, *Equality Talk*, *supra* note 10, at 1545.

indirection — the task ahead for scholars and reformers alike is to determine the role that indirection may continue to play in desegregating universities.

A. Current Challenges

Institutions currently facing allegations of unconstitutional admissions practices include Harvard University, University of California, University of North Carolina-Chapel Hill, and Yale University.²⁶⁸ Most prominently, Harvard's admissions program faces an investigation by the Department of Justice and a lawsuit from anti-affirmative-action activist Edward Blum, who brought Abigail Fisher's unsuccessful case before the Supreme Court.²⁶⁹ "I needed plaintiffs; I needed Asian plaintiffs . . . so I started . . . HarvardNotFair.org," Blum said about starting Students for Fair Admissions ("SFFA"), a group claiming that Harvard's admissions program discriminates against Asian Americans.²⁷⁰

SFFA alleges that Harvard's admissions practices have a "disproportionately negative effect on Asian Americans" compared to White applicants, in violation of Title VI of the Civil Rights Act of 1964.²⁷¹ Drawing statistical inferences from a sample of Harvard's

²⁶⁸ See Katie Benner & Erica L. Green, *U.S. Investigating Yale Over Complaint of Bias Against Asian-American Applicants*, N.Y. TIMES (Sept. 26, 2018), <https://www.nytimes.com/2018/09/26/us/politics/yale-asian-americans-discrimination-investigation.html>; Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html>; Anemona Hartocollis, *With Echoes of Harvard Case, University of California Faces Admissions Scrutiny*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/2018/11/15/us/university-of-california-admissions.html>; Jane Stancill, *UNC Has Spent \$16.8 Million on Affirmative Action Lawsuit*, NEWS & OBSERVER (Aug. 10, 2018), <https://www.newsobserver.com/news/local/article216485240.html>. Additionally, Texas Tech University Health Sciences Center reached an agreement with the Department of Education's Civil Rights Division to stop using race in its admissions process. See Anemona Hartocollis, *Texas Tech Medical School, Under Pressure From Education Dept., Will Stop Using Race in Admissions*, N.Y. TIMES (Apr. 9, 2019), <https://www.nytimes.com/2019/04/09/us/texas-tech-affirmative-action.html>.

²⁶⁹ See Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard*, N.Y. TIMES (Nov. 19, 2017), <https://www.nytimes.com/2017/11/19/us/affirmative-action-lawsuits.html> (profiling Edward Blum).

²⁷⁰ Memorandum in Support of Defendant's Motion for Summary Judgment on All Remaining Counts at 10, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 1:14-cv-14176-ADB (D. Mass. June 15, 2018).

²⁷¹ Memorandum in Support of Plaintiff's Motion of Summary Judgment at 1, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 1:14-cv-14176-ADB (D. Mass. June 15, 2018).

admissions data, SFFA alleges that Harvard intentionally discriminates against Asian Americans, engages in “racial balancing,” fails to use race only as a “plus factor” in admissions decisions and only to fill the final places in an incoming class, and fails to consider “race-neutral” alternatives.²⁷² More tangential to Harvard’s admissions program but in keeping with Edward Blum’s anti-affirmative-action efforts, SFFA asserts that the Supreme Court’s affirmative action jurisprudence “has been built on mistakes of fact and law.”²⁷³ In addition to a permanent injunction prohibiting Harvard from using race in admissions, SFFA seeks a catch-all ban on “any use of race or ethnicity in the educational setting”²⁷⁴ that is neither specific to admissions decisions nor limited to Harvard.

Harvard denies all of SFFA’s allegations, rejecting its statistical argument as “resting on a contrived model of the Harvard admissions process.”²⁷⁵ In addition, Harvard offers its own statistical analysis to refute SFFA’s allegations, pointing out, for instance, that the percentage of Asian Americans admitted has increased by twenty-nine percent in the last ten years.²⁷⁶

Whatever the merits of SFFA’s statistical argument, its legal argument for prohibiting all consideration of race does not follow. Supreme Court precedent already requires universities to treat race as one of several factors in a holistic review of applicants instead of the “predominant factor.”²⁷⁷ If SFFA could establish that Asian Americans are disadvantaged in Harvard’s admissions process because of their race, for instance, because biased perceptions about Asian Americans’ abilities and experiences have become a predominant factor in admissions decisions, then the appropriate course of action would be to restore compliance with affirmative action law. A responsive remedy would be to require Harvard to ensure that implicit bias against racial minorities does not become a barrier to their admission.²⁷⁸ Instead, SFFA proposes to end all consideration of race

²⁷² Complaint, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, No. 14-cv-14176 (D. Mass. Nov. 17, 2014), 2014 WL 6241935.

²⁷³ *Id.* at 116.

²⁷⁴ *Id.* at 119.

²⁷⁵ See Memorandum in Support of Defendant’s Motion for Summary Judgment, *supra* note 270, at 3.

²⁷⁶ *Id.* at 2.

²⁷⁷ *Grutter v. Bollinger*, 539 U.S. 306, 320-22 (2003).

²⁷⁸ On the experiences of Asian American students in higher education, see generally ROBERT T. TERANISHI, *ASIANS IN THE IVORY TOWER: DILEMMAS OF RACIAL INEQUALITY IN AMERICAN HIGHER EDUCATION* (James A. Banks, ed., 2010). If SFFA were truly concerned about the treatment of minority applicants, it could also challenge

in admissions — a remedy that would do nothing to alleviate bias against minorities and that would do more to exclude Black, Latinx, and Native American applicants than it would to include Asian Americans.²⁷⁹

The force of SFFA's argument is more rhetorical than legal. SFFA is using Asian Americans to shift the way people view affirmative action, from a practice that *benefits* racial minorities to one that *harms* them. Put another way, SFFA's argument against Harvard can be understood as a claim of *invidious* racial indirection that harms Asian Americans; it inverts the common understanding of affirmative action as a *benevolent* racial indirection that benefits racial minorities.

SFFA's strategy seems designed to serve several purposes. One is to bolster opposition to race-sensitive admissions by fueling sympathy for, and resentment among, unsuccessful minority applicants. Although surveys show that Asian Americans are more likely to support than oppose affirmative action programs, making Asian Americans out to be the victims may enlist new allies in the battle against affirmative action.²⁸⁰ "Presumed competent"²⁸¹ minorities are more likely to be appealing plaintiffs than mediocre White applicants. In relying on undisclosed Asian American plaintiffs, SFFA is thus tapping into the "model minority" stereotype that portrays Asian Americans as high achieving, making their exclusion from selective universities seem doubly unfair.²⁸² At the same time, focusing on

preferences granted to so-called "legacy" applicants: children of largely wealthy and White alumni who represent around fourteen percent of Harvard's class of 2022. See Alexandra A. Chaidez & Samuel W. Zwickel, *Makeup of the Class*, HARV. CRIMSON, <https://features.thecrimson.com/2018/freshman-survey/makeup-narrative/>.

²⁷⁹ See, e.g., Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. CHI. L. REV. 649, 656-57 (2008) ("Without preferences, the production of black lawyers — measured either in raw numbers or as a percentage of law school applicants — would fall dramatically."). For an argument that race-sensitive affirmative action benefits Asian Americans, see Janelle Wong, *Actually, Race-Conscious Admissions Are Good for Asian-Americans*, CHRON. HIGHER EDUC. (Oct. 4, 2018), <https://www.chronicle.com/article/Actually-Race-Conscious/244727>.

²⁸⁰ See Janelle Wong, Jennifer Lee & Van Tran, *Asian Americans' Attitudes Toward Affirmative Action: Framing Matters*, AAPI DATA (Oct. 1, 2018), <http://aapidata.com/blog/aa-attitudes-affirmative-action/> (finding that "in most cases, regardless of how the question is asked, Asian Americans are more likely to support than oppose affirmative action").

²⁸¹ Jennifer Lee and Van Tran have coined this term for an upcoming paper. See *Presumed Competent: Asian Americans and Affirmative Action*, COLUM. SCH. SOC. WORK, <https://socialwork.columbia.edu/events/presumed-competent-asian-americans-and-affirmative-action/>.

²⁸² For critical perspectives on the "model minority" stereotype, see JENNIFER LEE &

Asian Americans gives certain opponents of affirmative action cover that their disdain for policies of racial integration is not itself racially motivated.²⁸³

SFFA's argument is bound to be powerful in the court of public opinion. The plight of Asian American applicants resonates beyond the traditional opponents of affirmative action and draws the sympathies of liberals concerned about implicit racial bias.²⁸⁴ The argument also has enthusiastic friends on a conservative Supreme Court. Presumably in anticipation of SFFA's litigation, Justice Alito wrote in *Fisher* that UT Austin discriminates against Asian Americans and "seemingly views the classroom contributions of Asian-American students as less valuable than those of Hispanic students."²⁸⁵ *SFFA v. Harvard* presents an opportunity to consider how the current, more conservative-leaning Court might change course on affirmative action.

B. Conservative Court

Justice Kennedy's retirement did more than take away the decisive vote allowing affirmative action in public colleges and universities; it also took away perhaps the last centrist Justice from a body of law developed by centrist Justices who were interested in compromise.

Today, we face the prospect of a durable conservative majority on the Supreme Court.²⁸⁶ The question is no longer whether but when

MIN ZHOU, THE ASIAN AMERICAN ACHIEVEMENT PARADOX 11-12, 118 (2015); OiYan Poon et al., *A Critical Review of the Model Minority Myth in Selected Literature on Asian Americans and Pacific Islanders in Higher Education*, 86 REV. EDUC. RES. 469, 469-70 (2016).

²⁸³ See Nancy Leong, *The Misuse of Asian Americans in the Affirmative Action Debate*, 64 UCLA L. REV. DISC. 90, 91 (2016) (observing that "Asian Americans provide a convenient opportunity for affirmative action opponents to disguise their underlying motives"); Yuvraj Joshi, *Why the Affirmative Action Case Against Harvard Isn't Actually About Fair Treatment for Minority Students*, TEEN VOGUE (Oct. 16, 2018), <https://www.teenvogue.com/story/why-harvard-affirmative-action-lawsuit-isnt-about-fair-treatment-for-minorities>.

²⁸⁴ See Nancy Leong, *Preliminary Thoughts on the Summary Judgment Motions in the Harvard Affirmative Action Lawsuit*, TAKE CARE (June 18, 2018), <https://takecareblog.com/blog/preliminary-thoughts-on-the-summary-judgment-motions-in-the-harvard-affirmative-action-lawsuit>.

²⁸⁵ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2227 (2016) (Alito J., dissenting); see also *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 331 (2013) (Thomas, J., concurring) ("There can be no doubt that the University's discrimination injures white and Asian applicants who are denied admission because of their race.").

²⁸⁶ For a moment before the 2016 election, a durable progressive majority on the Supreme Court seemed possible. The election of Hillary Clinton and a Democratic Senate majority would mean the confirmation of Merrick Garland or a more liberal

and how a post-Kennedy Court will break with the constitutional precedent established in *Bakke* and its progeny. Given the opportunity to hear *SFFA v. Harvard* or a similar case, the Court could take different paths depending on the kinds of conservatives in the majority. At its most extreme, a conservative Court could prohibit *all* consideration of race in admissions. Some conservatives would prefer to expressly overrule *Grutter* on the grounds that diversity is not a compelling state interest and that the Equal Protection Clause prohibits the use of race in admissions decisions.²⁸⁷ Justice Thomas, who likens race-sensitive affirmative action to slavery and Jim Crow laws, could go so far as to say that the pursuit of racial diversity is itself an invidious discriminatory purpose.²⁸⁸

Without overruling *Grutter*, conservatives could subject race-sensitive affirmative action to strict scrutiny that is “fatal in fact.” As the dissents in *Grutter* and *Fisher* make clear, several conservative Justices would vote to strike down critical-mass-based programs for failing to satisfy strict scrutiny, either because critical mass is not defined “in reasonably specific terms”²⁸⁹ or because critical mass (however defined) is “a naked effort to achieve racial balancing.”²⁹⁰ To avoid this particular fate, universities would be wise to reconsider the use of critical mass to justify race-sensitive affirmative action. Yet, even without critical mass, the Court could create a transparency double bind to dismantle affirmative action — striking down

Justice to replace Justice Scalia, with additional liberal appointments to follow. Some of these Justices would not only vote to uphold race-sensitive affirmative action programs, but would also seek to overcome the constraints posed by the framework of racial indirection — speaking more openly about race and perhaps even allowing more direct consideration of race in admissions. Conservative backlash and ballot measures prohibiting all racial measures in public education would follow such a decision, at least while *Schuette* remained good law. Thus, even as affirmative action stood on more solid legal footing at the Supreme Court, colleges and universities in states that ban all considerations of race would need to find new indirect ways to achieve racial diversity.

²⁸⁷ See *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. at 2215 (Thomas, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part).

²⁸⁸ See *Fisher v. Univ. of Tex. at Austin*, 570 U.S. at 328 (Thomas, J., concurring) (“[T]he worst forms of racial discrimination in this Nation have always been accompanied by straight-faced representations that discrimination helped minorities.”). For critiques of Justice Thomas’s reasoning, see Barnes, Chemerinsky & Onwuachi-Willig, *Judging Opportunity Lost*, *supra* note 7, at 298; Khiara M. Bridges, *Race Matters: Why Justice Scalia and Justice Thomas (and the Rest of the Bench) Believe that Affirmative Action Is Constitutional*, 24 S. CAL. INTERDISC. L.J. 607, 645-46 (2015).

²⁸⁹ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. at 2222 (Alito, J., dissenting).

²⁹⁰ *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

admissions programs when they are fully candid about their reliance on race (claiming racial balancing) *and* when they are not (claiming deliberate obfuscation).

Finally, conservative Justices could invoke Justice O'Connor's twenty-five-year "sunset provision" arguing that race-conscious admissions policies "must be limited in time."²⁹¹ It has now been four decades since Justice Powell sanctioned race-sensitive affirmative action in *Bakke*, and sixteen years since Justice O'Connor predicted the end of the need for such measures in *Grutter*. Although Justice Ginsburg described the timeline of twenty-five years as a "hope, but not firm[] forecast"²⁹² (and Justice O'Connor herself came to doubt the timeline post-retirement²⁹³), conservatives could argue that the time for affirmative action has run out.

Even one of these radical reversals would not end challenges to affirmative action. With a Supreme Court willing to overturn precedent and undo compromises,²⁹⁴ the conservative legal movement is already setting its sights on ending a broader set of policies that indirectly benefit minorities. Having argued for decades that "race-neutral" alternatives render race-based measures unnecessary, affirmative action critics are pivoting to challenge facially-neutral measures that benefit minorities.²⁹⁵ While such measures are not in immediate peril, a time may come when even facial-neutrality is no longer sufficient to secure the constitutionality of affirmative action.

C. Future Indirections

As the Supreme Court prohibits or substantially limits race-sensitive admissions in public and private universities, efforts to desegregate America's universities would not disappear but rather would evolve into other racially indirect forms. This raises the question of whether

²⁹¹ *Id.* at 342 (majority opinion).

²⁹² *Id.* at 346 (Ginsburg, J., concurring).

²⁹³ See Thomas, *supra* note 51.

²⁹⁴ See Charles Fried, *Not Conservative*, HARV. L. REV. BLOG (July 3, 2018), <https://blog.harvardlawreview.org/not-conservative/> (characterizing the Roberts Court as "undermine[ing] or overturn[ing] precedents that embodied longstanding and difficult compromise settlements of sharply opposed interests and principles").

²⁹⁵ UCLA law professor and affirmative action critic, Richard Sander, recently filed a lawsuit demanding admissions data from the University of California, which has been prohibited from considering race in admissions decisions since 1996. See Hartocollis, *With Echoes of Harvard Case, University of California Faces Admissions Scrutiny*, *supra* note 268. See also *infra* note 307.

indirection may be structured in ways that render it both politically feasible and normatively desirable.

Individual Justices in affirmative action cases have deliberated alternatives to race-based programs, including intensifying outreach and financial aid efforts, placing greater weight on socioeconomic factors, introducing and uncapping percentage laws, and de-emphasizing standardized test scores.²⁹⁶ Each of these approaches involves racial indirection — inuring to the benefit of racial minorities — but not all indirect approaches have the same normative and practical implications.²⁹⁷ Judgments about indirect approaches are thus importantly context-dependent and cannot be made without particularized attention to their features and effects.

Let us briefly consider de-emphasizing standardized test scores, both because it may have a systemic impact and because it may align different perspectives and goals found in the affirmative action debate. Progressive legal and race scholars have criticized the rise of “testocracy” in college admissions — a system in which standardized test scores are the most important measure of merit, and a heavy reliance on test scores benefits mainly wealthy and White applicants.²⁹⁸ These progressive critiques of testocracy converge in striking ways with the views of individual Justices across the political spectrum in affirmative action cases.

Some progressive and moderate Justices justify race-sensitive affirmative action as a way to overcome existing biases in standardized testing. In 1974 in *DeFunis v. Odegaard*, a lawsuit against the University of Washington Law School that was declared moot, Justice Douglas argued that “the presence of an LSAT is sufficient warrant for a school to put racial minorities into a separate class in order better to probe their capacities and potentials,”²⁹⁹ and even proposed the abolition of the LSAT to consider applications in a facially-neutral way.³⁰⁰ More significantly, Justice Powell’s later-controlling opinion in *Bakke* appeared to endorse using race in admissions in order to ensure

²⁹⁶ See *infra* notes 299–306 and accompanying text.

²⁹⁷ For instance, because percentage laws depend on racial segregation in state schools to generate racial integration in state universities, their results may vary depending on state demographics. Furthermore, percentage plans are said to “encourage parents to keep their children in low-performing segregated schools, and discourage students from taking challenging classes that might lower their grade point averages.” *Gratz v. Bollinger*, 539 U.S. 244, 304 n.10 (2003) (Ginsburg, J., dissenting).

²⁹⁸ See sources cited *supra* note 31.

²⁹⁹ *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974) (per curiam) (Douglas, J., dissenting).

³⁰⁰ *Id.* at 340.

“fair appraisal of each individual’s academic promise in the light of some cultural bias in grading or testing procedures.”³⁰¹ Justice Powell set up another indirect path to constitutional affirmative action when he wrote in a footnote: “To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no ‘preference’ at all.”³⁰²

In contrast, some conservative Justices propose de-emphasizing standardized tests as a workable alternative to race-sensitive affirmative action.³⁰³ In *Grutter*, Justice Thomas observed that “no modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admission Test,” arguing that “[t]he Law School’s continued adherence to measures it knows produce racially skewed results is not entitled to deference by this Court.”³⁰⁴ Although the Court in *Grutter* did not compel the Law School to give up the LSAT,³⁰⁵ it did not preclude the ability to reduce or remove its reliance on standardized tests. More recently, Justice Alito in *Fisher* referred favorably to Wake Forest University’s decision to “drop[] standardized testing requirements based at least in part on ‘the perception that these tests are unfair to blacks and other minorities and do not offer an effective tool to determine if these minority students will succeed in college.’”³⁰⁶

A retreat from testocracy could, therefore, be a new form of affirmative action, continuing on the path of indirection charted by *Bakke* and its progeny. The current, more right-wing Supreme Court might be willing to uphold such indirect affirmative action precisely because it does not overtly classify individuals by race, and because any racial considerations involved are not plainly in view.

Moving away from standardized tests is likely to provoke resentment among certain segments of society, particularly those with

³⁰¹ *Regents of Univ. Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978).

³⁰² *Id.*

³⁰³ Let us assume that such suggestions are not merely politically expedient ways to get rid of race-sensitive affirmative action.

³⁰⁴ *Grutter v. Bollinger*, 539 U.S. 306, 369-70 (2003) (Thomas, J., dissenting); see also Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 805 (2005) (Justice Thomas “was concerned about structural inequality in the law school admissions process, perpetuated by the LSAT — a test that is said to be neutral and objective, but which in reality is racially stigmatizing.”).

³⁰⁵ See *Grutter*, 539 U.S. at 339.

³⁰⁶ *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2234 n.13 (2016) (Alito, J., dissenting).

the wherewithal to prepare for tests and whose sense of fairness and worth is tied to the ability to succeed in a testocracy. Anti-affirmative-action activists are already tapping into such resentment to bring lawsuits challenging admissions reform, claiming that ending tests is unfair to those who perform well on them — conjuring the image of model Asian American students.³⁰⁷ However, revealing dynamics of educational privilege and disadvantage and unpacking myths about fairness and merit should be considered virtues rather than faults. Furthermore, by applying lessons from the indirection that has structured affirmative action until now, future measures may proceed in ways that might help to mitigate and withstand resentment, for instance, by (1) phasing out rather than abruptly ending reliance on standardized tests, so that the legitimate expectations of test-takers are not unduly frustrated;³⁰⁸ (2) giving non-racial reasons for the adoption of new admissions policies, so that diminished reliance on tests does not become impugned as solely racially motivated; and (3) emphasizing the universal benefits of diminished reliance on tests, including benefits for disadvantaged Whites as well as racial minorities.

Some selective universities have already begun to take these steps. The University of Chicago recently stopped requiring standardized test

³⁰⁷ The Pacific Legal Foundation, a conservative legal group with a history of challenging affirmative action, recently brought a lawsuit challenging New York City Mayor Bill de Blasio's plan to eliminate the exam for admission into the city's elite specialized high schools. See Eliza Shapiro, *Challengers of Affirmative Action Have a New Target: New York City's Elite High Schools*, N.Y. TIMES (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/nyregion/affirmative-action-lawsuit-nyc-high-schools.html>. The argument that a retreat from standardized tests "could prevent some Asian-American students from gaining access to the schools" is inadequate. *Id.* Not every Asian American person scores highly on standardized tests, and nothing precludes currently high-scoring Asian American students from gaining admission under different criteria. A non-test-based approach could thus admit Asian American students (as well as other students) who may or may not gain admission through tests. More fundamentally, Asian Americans (like all students) deserve to be considered as whole people, not merely as test scores.

³⁰⁸ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 592-93 (2009) (holding that by discarding the results of a promotional exam that would have promoted a disproportionate number of White candidates in comparison to minority candidates after the test had been administered, the City of New Haven violated Title VII of the Civil Rights Act of 1964). Although *Ricci* involved a different body of law, it reinforces the lessons from affirmative action cases. New Haven failed the requirements of racial indirection when "the raw racial results became the *predominant rationale* for the City's refusal to certify the results," and "the firefighters saw their efforts invalidated by the City in *sole reliance* upon race-based statistics." *Id.* at 593, 584 (emphasis added).

scores in order to “make sure [requirements] were fair to *every group*, that *everybody, anybody* could aspire to a place like UChicago.”³⁰⁹ The University of California is currently revisiting its testing requirements so as to adopt “the best procedures that are the fairest.”³¹⁰

Ultimately, de-emphasizing tests in admissions decisions could prove fruitless if replaced with criteria that replicate privilege and disadvantage along racial and class lines. Moving away from tests must not only be part of a broader set of strategies designed to promote integration; it must also be part of a deeper conversation about how inequitable educational opportunities produce unequal outcomes,³¹¹ as well as a broader rethinking of what constitutes merit and how best to achieve it.³¹² Scholars have long demonstrated how traditional ideas of merit work to exclude people based on race, class, gender, and other social categories of distinction.³¹³ Although some have proposed a radical re-envisioning of merit and inclusion, preserving the constitutionality of diversity-based programs has largely taken the

³⁰⁹ See Dawn Rhodes, *University of Chicago to Stop Requiring ACT and SAT Scores for Prospective Undergraduates*, CHIC. TRIB. (June 14, 2018), <http://www.chicagotribune.com/news/local/breaking/ct-university-chicago-sat-act-20180614-story.html> (emphasis added) (quoting Jim Nondorf, Dean of Admissions).

³¹⁰ See Teresa Watanabe, *UC Faculty Leaders Announce Study on Whether SAT and ACT Tests Accurately Predict College Success*, L.A. TIMES (Sept. 26, 2018), <https://www.latimes.com/local/education/la-me-uc-regents-20180926-story.html>.

³¹¹ In the wake of *Hopwood's* prohibition of race-based affirmative action in Texas, William Forbath and Gerald Torres observed how Texas's Ten Percent Plan had placed “a renewed focus on the distributional aspects of public support for education.” See William E. Forbath & Gerald Torres, *Merit and Diversity After Hopwood*, 10 STAN. L. & POL'Y REV. 185, 189 (1999). See generally Kevin G. Welner & Prudence L. Carter, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 1, 3 (Prudence L. Carter & Kevin G. Welner, eds.) (2013) (proposing an “opportunity gap” frame that “shifts our attention from outcomes to inputs — to the deficiencies in the foundational components of societies, schools, and communities that produce significant differences in educations — and ultimately socioeconomic — outcomes”); Kimberly Jenkins Robinson, *Fisher's Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 188 (2016) (“Increased attention to greater equality and excellence in elementary and secondary education can help reduce or eliminate the need for affirmative action, which is an approach that fundamentally aims to ensure equality.”).

³¹² See Yuvraj Joshi, *The Trouble with Inclusion*, 21 VA. J. SOC. POL'Y & L. 207, 260-63 (2014) (discussing the ways “the notion of ‘merit’ and the belief in meritocracy themselves perpetuate exclusion and injustice”); sources cited *supra* note 31.

³¹³ See Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 590 (1996) (observing that “[p]roblems of exclusion are particularly acute for attorneys who labor under multiple disadvantages such as gender, race, ethnicity, disability, and sexual orientation”).

place of such re-envisioning.³¹⁴ The need to continue the work of racial integration in this period of racial retrenchment may yield new, if indirect, forms of affirmative action.

CONCLUSION

This Article has shown how racial indirection has allowed, and may continue to allow, efforts to desegregate America's universities. Indirection is not always invidious, as the case of affirmative action suggests, nor do all instances of indirection raise the same practical and normative concerns. Indirection might even be better than directness if indirection allows affirmative action programs to continue where directness would lead to their demise. As it becomes more difficult to defend even diversity-based programs at the Supreme Court, this Article has proposed indirection as one strategy for sustaining affirmative action.

The Article has highlighted the potential benefits and drawbacks of indirection in affirmative action. Yet, it has refrained from reaching conclusions about the ultimate value of indirection, precisely because indirection is an approach that manifests across a variety of contexts and varies significantly in the consequences it produces and the concerns it vindicates. Moving forward, several questions demand answers:

1. To what extent can indirection be a force of racial progress rather than retrenchment?
2. How will indirection in affirmative action interact with and impact other bodies of law?³¹⁵
3. Will a conservative Supreme Court distinguish benevolent from invidious forms of indirection, or will it treat them both as suspect? Or worse, will it prohibit indirection that

³¹⁴ See Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931 (2001) (cautioning against using "the diversity argument to defend affirmative action at elite universities and law schools without questioning the ways that traditional admissions criteria continue to perpetuate race and class privilege").

³¹⁵ Racial indirection has particular significance for gerrymandering practices with the overlap in the U.S. between racial identification and partisan affiliation. See *Wide Gender Gap, Growing Educational Divide in Voters' Party Identification*, PEW RES. CENTER (Mar. 20, 2018), available at <http://www.people-press.org/2018/03/20/wide-gender-gap-growing-educational-divide-in-voters-party-identification/>.

benefits minorities while allowing indirection that harms them?³¹⁶

4. Whatever may be constitutionally allowed, is it wise to pursue and legitimate an approach that commonly serves to entrench racial stratification rather than to alleviate it?

We still have much to learn about the value of racial indirection.

³¹⁶ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (“[I]t is wholly inapt to liken that morally repugnant order to a facially neutral policy denying certain foreign nationals the privilege of admission.”).