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How Quickly We Forget: The Short and Undistinguished Career of Affirmative Action

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Diversity initiatives in higher education, also known as affirmative action are nearing their nadir. For those who have been watching the jurisprudence and the progression of events closely this should come as little surprise. These initiatives have been under attack since their very inception and now sit teetering on the brink of being declared unconstitutional as the United States Supreme Court considers *Fisher v. Texas.*

Beginning with *Regents of California v. Bakke* in 1978, the Supreme Court has gradually and consistently whittled away these higher education diversity programs, leaving them currently in a vulnerable and legally precarious position. The Court’s decision to accept *Fisher* on certiorari review will likely mark the culmination of its jurisprudential move away from even a reluctant endorsement of such programs to an outright prohibition on the grounds that they are unconstitutional and violate equal protection under the law.

There are two subtle but important problems with such a turn in the Court’s jurisprudence in this area. The first is one of definition. The Court’s definitions of equal protection under the law provided for by the Fourteenth Amendment and equal opportunity provided for by the Civil Rights of 1964 have become unmoored from their historical origins and purposes. Whereas both

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provisions were enacted to permit individuals from historically marginalized groups (typically racial minorities) greater opportunity for full participation in American society and thereby fostering more successful outcomes for members of those groups, those provisions have now been defined in such a way that they more often benefit individuals who are not members of minority groups to the detriment of the marginalized groups that were meant to be the original beneficiaries of such laws. Thus, and ironically, by defining the aim of these provisions as to promote a “color blind” society has served only to further marginalize the groups the Fourteenth Amendment and Civil Rights Act of 1964 were enacted to assist.4

Additionally, and the focus of this Article are the practical and sociological effects such a shift will cause. In this era of increased globalization and competition for jobs, it will be incumbent on those seeking to enter the middle class to attain a college education.5 The college degree has become prerequisite

4 See Eric Schnapper, Affirmative Action and The Legislative History of the Fourteenth Amendment, 71 VA. L. REV. 753, 784 (1985) (noting that the passage and consideration of race-conscious provisions such as the 1864 and 1865 Freedmen’s Bureau Bills, the 1866 Freedmen’s Bureau Act, the 1867 Relief Legislation for African Americans, as well as legislation passed by the Freedmen’s Bureau between 1868-70 alongside the 14th Amendment demonstrate an intent that the constitutional provision both permit race-conscious ameliorative measures and ensure the constitutionality of the aforementioned race-conscious provisions. See also Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens) (introducing the 14th Amendment in the House of Representatives and characterizing its purpose as “the amelioration of the condition of the freedmen”). This legislative history will be explored in greater detail in a subsequent article. 5 See Thomas L. Friedman & Michael Mandelbaum, That Used to Be Us: How America Fell Behind in the World It Invented and How We Can Come Back (2011)(quoting Harvard University’s Lawrence Katz and the Massachusetts Institute of Technology’s David Autor who found in a recent economic study that
for all but the most menial of jobs. Thus, any restriction on the ability of minority students to gain access to university education and training stands to also limit the number of minorities who will gain entrée into middle-class American society.

The ironic result of this being that the very constitutional and legislative tools meant to provide these marginalized groups with greater access to education and by extension—upward mobility, will be the means to ensure that these groups remain stratified in a position at the bottom rungs of the socio-economic ladder. And in effect, that the colorblind society that the conservative wing of the United States Supreme Court seeks to construct through its jurisprudence in this area will produce a society that is anything but. One’s membership in a racial minority group will in large part become yet again a significant determinant in where one finds his place within the larger society.

The first part of this Article will identify the roots of the Supreme Court’s jurisprudential shift in this area and trace the evolution of its philosophy on creating a color-blind society. Part two of the Article will examine some of the actual sociological consequences of this evolution in the realm of college admissions and extrapolate what these shifts will mean for minorities as they attempt to enter the workforce and middle class. To conclude, the Article will

6 See Bakke, 438 U.S. at 327 (Brennan J., dissenting) (cautioning that “claims that law must be ‘color blind’ or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as [a] description of reality . . . [and that] color blindness [can] 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.”)
suggest a means for reaffirming affirmative action in a manner that comports with its original aims.

**Part I—The Slow Onset of Blindness**

Beginning in the late 1970s, the Supreme Court has been intent on slowly dismantling affirmative action programs in higher education.\(^7\) In *Bakke* the Court took its first steps in limiting affirmative action programs and defining the equal protection clause in a manner where “colorblindness” of the law has supplanted any need to redress past discriminatory practices or provide an effective path of entry for minorities to elite colleges and universities. The result as I noted above is that what was once a tool for the greater integration of the races has become the principal means for their separation.

This slow creep began in *Bakke*, where the Court held that student body diversity was a compelling state interest, but such measures must be narrowly tailored and cannot “insulat[e] each category of applicants with certain qualifications from competition from all other applicants.”\(^8\) In *Bakke*, the Court approved the consideration of race as a “plus in a particular applicant’s file. . . .”\(^9\)

Roughly twenty-five years after *Bakke*, the Court further restricted the methods in which race can be used in making admissions decisions at institutions

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\(^{7}\) *See Bakke*, 438 U.S. at (holding that.

\(^{8}\) *Bakke*, 438 U.S. at 315.

\(^{9}\) *Id.* at 317.
of higher education. Such programs can no longer use “plusses” or “bonuses” on the basis on one’s membership in a racial or ethnic minority, but must now engage “in a highly individualized, holistic review of each applicant’s file, [while] giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.” Further, the Court again recognized in *Grutter* that “student body diversity is a compelling state interest that can justify using race in university admissions.”

Moreover, while the majority in *Grutter* predicted and hoped quite optimistically that such racial preferences would no longer be necessary in the twenty-five years following its decision, Justice Thomas in dissent artfully interpreted the majority’s statement as a holding providing a twenty-five year life span for such programs before they became illegal. Thus, such race conscious initiatives have seemingly been up for reconsideration by the Court every twenty-five years and the clock was set in 2003 for their ultimate demise when they would either be deemed no longer necessary or patently illegal.

Thus, the Court’s grant of certiorari in *Fisher v. Texas* was all the more alarming and telling given that it had granted such race conscious admissions initiatives a seeming reprieve only nine years earlier. A cursory reading of the tea leaves, including the Court’s changed membership since its last review of such a

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10 *Grutter*, 539 U.S. at 337.
11 *Id.* at 308.
12 *Id.* at 333 (stating “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today”).
13 *Id.* at 351 (Thomas, J., dissenting) (“I agree with the Court’s holding that racial discrimination in higher education admissions will be illegal in 25 years.”).
diversity program\textsuperscript{14} and the trajectory of its jurisprudence in this area all indicate that \textit{Fisher} presents the Court with an opportunity to finally outlaw these measures. \textit{Fisher} was in fact presaged by \textit{Grutter} and the Court’s decision in \textit{Parents Involved in Community Schools}\textsuperscript{15}—another case involving educational diversity—but at the primary and secondary levels.

The first clues can be found in Justice Thomas’s leading dissent in \textit{Grutter}. In it he notes that while desirous “to see all students succeed whatever their color. . . .”\textsuperscript{16} and sympathetic to “those who sponsor the type of discrimination advanced by the University of Michigan Law School,”\textsuperscript{17} was nonetheless restrained from supporting the diversity initiative under review in \textit{Grutter}, as the constitution neither “tolerates institutional devotion to the status quo in admissions policies when such devotion ripens into racial discrimination[,] . . . [n]or does [it] countenance the unprecedented deference the Court gives to [higher educational institutions, in] an approach inconsistent with the concept of

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\item \textsuperscript{14}In terms of Court demographics, the composition of the Court has shifted quite dramatically. Gone from the Court’s plurality upholding the University of Michigan Law School diversity initiative are Justices O’Connor, who wrote the controlling opinion, Stevens, and Souter. They have been replaced respectively with Justices Samuel Alito, Elena Kagan, and Sonia Sotomayor. Chief Justice Rehnquist, who cast his vote with the minority in \textit{Grutter} is also no longer on the Court and was replaced with Chief Justice Roberts. Thus, Justice O’Connor’s swing vote has been replaced with the more consistently conservative Justice Alito. Further, and due to her former role as Dean of Harvard Law School, Justice Kagan has recused herself from \textit{Fisher}. Even a cursory look at these numbers should put any person advocating for diversity initiatives in higher education that take in to consideration race pause and alert them to the real possibility that the Court as it is now constituted stands poised to severely limit or do away with such programs in the very near future.
\item \textsuperscript{15}551 U.S 701 (2007).
\item \textsuperscript{16}\textit{Id.} at 350 (Thomas, J., dissenting).
\item \textsuperscript{17}\textit{Id.}
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‘strict scrutiny.’”¹⁸ Insomuch, Justice Thomas attacked the Grutter decision as something far less than cogent legal analysis, but rather a response “to a faddish slogan of the cognoscenti.”¹⁹

The thrust of Justice Thomas’s critique, and one echoed throughout the dissenting opinions in Grutter, was that “[a] close reading of the Court’s opinion reveals that all of its legal work is done through one conclusory statement: [institutions of higher education have] a ‘compelling interest in securing the educational benefits of a diverse student body.’”²⁰ Indeed, Justice Thomas surmised that the Court had made “[n]o serious effort . . . to explain how these benefits [of diversity] fit with the state interests the Court has recognized as compelling.”²¹

Ensnarled within the web of his own logic, Justice Thomas additionally insisted that as “there is no pressing necessity in maintaining a public law school at all and, it follows, certainly not an elite law school [that, therefore,] marginal improvements in legal education [on the basis of a diverse student body] do not

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¹⁸ Id.
¹⁹ Id. Further, Justice Thomas, concluded quite forcefully that diversity itself “is more a fashionable catchphrase than it is a useful term, especially when something as serious as racial discrimination is at issue.” Id. at 335 n.3. Therefore, the institutional interest in diversity according to Justice Thomas is merely “aesthetic” and little different from other choices these institutions might make “from the shape of the desks and tables in its classrooms.” Id.
²⁰ Id. at 356 (Thomas, J., dissenting).
²¹ Id. Justice Kennedy was equally incredulous of the Court’s incredulity in his own dissent where he describes the majority’s review as “nothing short of perfunctory, [in its acceptance of] the University of Michigan Law School’s assurances that its admissions process meets with constitutional requirements.” Id. at 388 (Kennedy, J., dissenting).
qualify as a compelling state interest.”22 Justice Thomas identified only two broad circumstances wherein the state would have a compelling state interest in using race-conscious criteria. The first is to remedy past discrimination for which the government itself is responsible.23 The second category of circumstances that would be deemed compelling state interests in the eyes of Justice Thomas appear quite cataclysmic and include “measures the State must take to provide a bulwark against anarchy, or to prevent violence. . . .”24

Thus, what becomes apparent with even a brief review of the dissenting opinions in *Grutter* and principally, Justice Thomas’s is that those Justices who will likely compose the majority in the *Fisher* decision do not consider diversity a compelling state interest that would satisfy constitutional strict scrutiny review. Additionally, it seems clear that there is no diversity scheme that takes race into account that would pass muster under the Court’s current interpretation of the equal protection clause as colorblind and outlawing all distinctions on the basis of race, whether ameliorative or pernicious. This interpretation, while relegated to the minority in *Grutter*, would soon form the majority position in *Parents Involved in Community Schools* and will likely remain the Court’s position through *Fisher*.

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22 *Id.* at 357 (Thomas, J., dissenting).
24 *Id.* at 353 (Thomas, J., dissenting).
In Parents Involved in Community Schools v. Seattle School District No. 1,\textsuperscript{25} the Grutter minority found that the tables had turned and with a new numerical plurality that saw Justice O'Connor's swing vote replaced with that of Justice Alito sought to enshrine its interpretation of the colorblind constitution into law.\textsuperscript{26} Parents Involved was a consolidated challenge to the race-conscious student assignment plans of Louisville, Kentucky and Seattle, Washington.\textsuperscript{27} In the case of each school district students were assigned to schools in a manner that helped to ensure a predetermined ideal racial balance for each school.\textsuperscript{28}

It was perhaps not surprising then that the Court invalidated each of these plans as attempts to achieve racial balancing given that each school district sought to achieve such a balance through numerically predetermined percentages of white and non-white children.\textsuperscript{29} And while both the University of Michigan Law School and the University of Texas have been careful to avoid assigning numerical guidelines for their race-conscious admissions policies, Parents Involved sends a subtle, yet threatening message that even their attempts at achieving a “critical mass” may be in jeopardy.

\textsuperscript{25} 551 U.S 701 (2007).
\textsuperscript{26} See id. at 748 (noting that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”) See also id. (Thomas, J., concurring) (chastising the Parents Involved minority as “[d]isfavoring a color blind interpretation of the Constitution...”)
\textsuperscript{27} See id. at 711-19.
\textsuperscript{28} See id.
\textsuperscript{29} See id. at 728 (noting that “[the Court] has many times over reaffirmed that ‘racial balance is not to be achieved for its own sake.’”) See also Bakke, 438 U.S. at 307 (holding that any efforts to achieve racial balance through admissions policies is “patently unconstitutional.”)
Referring to *Grutter* directly, the Court charted its likely path forward in one sentence. After describing the split nature of the *Grutter* decision, Chief Justice Roberts concludes with respect to it that the Court’s previous approval of a policy that works “backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a *fatal flaw* under our existing precedent.”\(^{30}\) In that seemingly prosaic statement the Chief Justice not only identified the flaw endemic to the University of Michigan Law School admissions policy and those modeled upon it in his eyes, but also made it implicit that the Court with its newly constituted conservative majority would correct it once given the opportunity to do so.

That single sentence likely spells the end of *Grutter* and the race-conscious admissions paradigm. Accepting *Fisher* for certiorari has at last provided the conservative members of the Court with an opportunity to further implement its interpretation of the colorblind constitution. The progression to *Fisher* has been clear, which makes the outcome of the case little in doubt. Having espoused its colorblind constitution thesis as a minority position in *Grutter*, the conservative Justices were then able to begin implementing their philosophy in *Parents Involved*. With *Fisher*, the conservatives will be able to claim a complete victory in less than half the time it was predicted it might take.\(^{31}\)

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\(^{30}\) *Id.* at 729 (emphasis added).

\(^{31}\) See note 9 supra.
Thus, in the wake of the Court’s grant of certiorari in Fisher, it appears incontrovertible that race-conscious admissions will at the least be curtailed significantly, but more likely outlawed altogether. And with that it seems that the day Justice Brennan warned against will come to pass where “color blindness [has] 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.” 32 It is this reality of which Justice Brennan spoke of that we will wrestle with as a society for generations to come and raises two important questions. The first is what will be the practical effects of this myopic insistence on color blindness? The second is what can be done to revive affirmative action as an effective tool for social advancement? The remainder of this Article will explore the first question. It will close with a suggestion to address the second.

Part 2—The View From The Colorblind Society

As noted above, should the Supreme Court decide to place further restrictions on the use of race in university admissions or to fully outlaw such affirmative action programs, the repercussions will likely be far-reaching and immediate. The above conclusion is derived from two previous instances—one taken from Texas itself, the other from California—where affirmative action was outlawed and where each state saw a significant decrease in minority applications and enrollment immediately following such moves.

32 Bakke, 438 U.S. at 327 (Brennan J., dissenting).
In Texas, this move was precipitated by the Fifth Circuit Court of Appeals decision in *Hopwood v. Texas*, which held that “any consideration of race or ethnicity by the [University of Texas] law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.” The effect of the *Hopwood* decision was immediate. In the span of just one year after *Hopwood* was announced “[t]he number of African-American and Hispanic applicants dropped by nearly a quarter, while the total number of applicants decreased by only 13%.” In terms of actual numbers, and “[c]ompared to 1995 [and before *Hopwood*] African-American enrollment for 1997 dropped almost 40% (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen).” By contrast and during that same time period, “Caucasian enrollment increased by 14%.”

To staunch this decrease in minority enrollment, the Texas state legislature stepped in to introduce the Top 10% Law in 1997. The Top 10% Law is a race neutral provision that grants all high school seniors graduating within the top 10% of their class automatic admission into the state's colleges and universities. The measure has indeed been successful in increasing minority representation within the University of Texas system increasing “African American enrollment . . . [at the University of Texas at Austin] from 2.7% to 3.0%

33 78 F.3d 932, 944 (5th 1996).
34 *Diversity Levels of Undergraduate Classes at the University of Texas at Austin 1996-2002* at 6 (2003)
35 *University of Texas at Austin 1998-1999 Statistical Handbook.*
36 Id.
and Hispanic enrollment . . . from 12.6% to 13.2%,” in the year following its enactment.

Further, the enactment of a race-conscious admissions policy patterned after that approved of in *Grutter* has only served to augment the minority presence on the campuses of the University of Texas system. In upholding the University of Texas admission policy, the Fifth Circuit Court of Appeals in *Fisher* noted that “[i]n an entering class that was roughly the same size in 1998 as it was in 2008, the enrollment of African-American students doubled from 165 students to 335 students.” These numbers can additionally be compared to the minority enrollment figures for 2004, the last year before the University of Texas introduced its race conscious admissions policy to see what effect it has had. In 2004, the university’s “fall enrollment included only 275 African-Americans,” which is a percentage increase of approximately 22%.

What these numbers from Texas demonstrate is that removing race as a consideration in university admissions has a significant negative impact on minority enrollment at institutions of higher education. Specifically, when race cannot be considered, African-American matriculation decreases precipitously. Additionally, it also becomes clear from the numbers above that race neutral strategies targeted at increasing minority participation in higher education can have some beneficial effect, but that the most effective means of achieving a more

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38 *2008 Top Ten Percent Report* at 6 tbl. 1.
40 *Id.*
diverse student body is to take into consideration the racial or ethnic backgrounds of applicants.

Similarly, in California there has been a dramatic shift in minority enrollment in its public institutions of higher education following a ban on the consideration of race in admissions decisions. This move in California was brought about by California Proposition 209, which was adopted in 1996 and prohibits the state from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”

In the year preceding the adoption of Proposition 209, the admission rate of minority students at the three flagship University of California universities—UCLA, San Diego, and Berkeley—all admitted minorities at a rate greater than 50%. This figure is significant given the fact that both UCLA and Berkeley admitted less than 50% of all its applicants that year.

Nonetheless, “[t]he halting of affirmative action had an immediate impact on minority admissions at the University of California.” A significant drop in the admissions rates of black applicants promptly followed the introduction of

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42 David Card & Alan B. Krueger, Would the Elimination of Affirmative Action Affect Highly Qualified Minority Applicants? Evidence from California and Texas, 58 Indus. & Lab. Rel. Rev. 416, 418 tbl. 1 (2005) (showing that UCLA, San Diego, and Berkeley admitted 52.1%, 52.6%, and 53.6% of their minority applicants, respectively).
43 Id. (noting that UCLA and Berkeley admitted 43.1% and 39.9% of their total applicants, respectively).
44 Id. at 420.
Proposition 209. Between 1995-97 the “[a]dmission rates of black applicants at the three most selective campuses fell [by] 45-55%. . . .”45 That figure began to see some improvement in the period between 1998-2001 whereby African-American admissions numbers were only down 20-25% from their pre-Proposition 209 levels.46

What becomes evident from even the most cursory survey of the above statistics is that any change in the law as it currently stands will result in some diminution in the presence of minorities on college campuses. Those issues are merely compounded where race based criteria are outlawed altogether. When race is not permitted to be used as a criteria in university admissions, the number of minority applicants and consequently those admitted decreases at a significant rate. In that way color blindness has a very real and negative impact on racial minorities and merely produces increased hegemony for those already in the majority. Most distressing is that as the path to college and university education for minorities narrows, so too will their opportunities to attain the type of employment that will lead to membership in the middle class.

In the 20th century “education was a choice not a necessity—[one could] choose to be educated or not, but either way [one could] get a decent job and live a decent life.”47 However, in the 21st century “education is not an option” and “

45 Id. at 421.
46 Id.
47 Thomas L. Friedman & Michael Mandelbaum, That Used to Be Us: How America Fell Behind in the World It Invented and How We Can Come Back (2011)(quoting Andreas Schleicher, the senior education officer at the Organisation for Economic Co-operation and Development).
[indeed] a necessity for a middle-class standard of living.”48 The correlation between education and earning potential cannot be ignored whereby those who complete post-secondary education earn have increasingly outpaced the earning potential of those with only a high school degree or less. To wit, “[t]he hourly wage of the typical college graduate in the U.S. was approximately 1.5 times the hourly wage of the typical high school graduate in 1979.”49 By comparison, in “2009, this ratio stood at 1.95.”50

Beyond wages, one’s level of education bears directly on how likely one is to become unemployed during times of economic distress. According to a Brookings Institute study released in November 2010, it found that “during the Great Recession [of 2009] employment dropped much less steeply among college-educated workers than other workers.”51 In fact, in the two year period between 2007 and 2009, “[t]he employment-to-population ratio dropped by more than 2 percentage points . . . for working-age adults without a bachelor’s degree, but fell by only half a percentage point for college-educated individuals.”52 Thus, it has become clear that we now live in “a labor market that greatly rewards workers with college and graduate degrees but is unfavorable to the particularly less-educated. . . .”53

48 Id.  
49 Id.  
50 Id.  
51 Id.  
52 Id.  
53 Id. at
It is in this way that education and employment are inextricably linked. And it also demonstrates why competition for access to the former will mirror competition for the latter. As more jobs require college degrees, the premium for post-secondary education will only increase. Labor statistics bear this point out.

In 1977 and citing Labor Department statistics, Justice Marshall lamented that

[w]hen the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.54

To Justice Marshall “the relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied.”55

These numbers have only improved marginally over the last thirty years. In fact, “[w]hile about 12 percent of the nation’s working-age population is black, [only] about 5 percent of physicians and dentists in the United States are black—a share that has not grown since 1990. . . .”56 This holds true for black architects as

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55 Id. at 396 (Marshall, J., concurring in part, dissenting in part).
well, who comprise “3 percent of American architects . . ., [which is a figure that] has not increased in more than two decades.”

The numbers are no more encouraging in relation to African American educational attainment and employment measures when compared to whites. The percentages of African Americans attaining college degrees lag far behind that of white Americans. In 1978, the year Bakke was decided 20.7% of white males who were 25 years of age or older had completed 4 years or more, while the percentage for black males stood at 7.3%. While these percentages have improved in the last 30 years, the wide margin between the educational attainment of African Americans and whites persists. For instance, in 1999, 32.0% of white males between the ages of 25 to 29 had obtained a bachelor’s degree or higher, whereas only 13.1% of African American males between the same ages had reached this level of educational attainment.

These educational attainment numbers tell only half the story. Coupled with the respective unemployment rates for each group it becomes clear how closely related educational attainment is to one’s opportunity to find gainful employment and perhaps enter the middle class. What can be gleaned from the

57 Id.
59 U.S. Dep’t of Commerce, U.S. Census Bureau Educational Attainment Reports From 1990-1999. African American women have fared slightly better than their male counterparts in the last 30 years. Starting with a rate of college of 4-year college attendance of 7.1% for women over 25 in 1978, 16.5% of African American women between the ages of 25 to 29 had earned bachelor’s degrees in 1999. These numbers still lag far behind those of their white female counterparts; however, which stood at 12.6 and 35.1% respectively.
data is that the African American unemployment rate at nearly every yearly interval since 1977 is double that for white Americans. Further, where the unemployment rate for African American males with just a high school degree and those with a college degree in 2011 was 16.9 and 7.9% respectively compared to unemployment rates of 8.9 and 4.0% for white males in the same categories, it is clear that one’s race and educational attainment has a direct bearing on whether one can obtain and then retain gainful employment. These numbers also demonstrate that a need for some form of assistance at the higher educational level is still vitally necessary to allow African Americans an equal opportunity to compete for jobs in the changing economy.

For these reasons, this ever intensifying competition for jobs on the basis of education coupled with the Court’s abandonment of effective affirmative action for minorities will likely have far-reaching consequences for these groups. The irony being that at the historical moment when these types of assistance programs appear most necessary to allow minority group members to compete effectively within the current labor market they are being dismantled by the federal judiciary under the rationale that they have outlived their usefulness.

60 See U.S. Dep’t of Labor, Bureau of Labor Statistics, Labor Force Statistics From the Current Population Survey. For instance, while the annual unemployment rate for African Americans in 1978 was 12.8%, the annual rate of employment for whites that year was merely 5.2%. When the recession of 2009 hit, African American unemployment spiked at 16% in 2010, while white unemployment hit a ceiling of 8.7% in 2011.

However, what the matriculation statistics from the University of Texas and California systems makes clear is that affirmative action programs are crucial to maintaining access to university education for minority students, but they also serve as a bulwark against majority hegemony at these institutions. Further, and perhaps most important at this historical moment, these programs are necessary in affording minorities an opportunity to merely compete in the contemporary global labor market and to avoid the concomitant minority underrepresentation within the professional workforce and the middle-class.

**Part III—Moving Towards a Remedy**

It was intimated earlier in this Article that the path to reclaiming and revitalizing affirmative action is one of interpretation. That the Court’s current conservative majority interpretation of both the equal protection clause to the 14th Amendment and the equal opportunity mandate of the Civil Rights Act of 1964 is that these provisions provide for a “color blind” reading of both provisions in the hopes of creating a more equalized society.

This interpretation is myopic for the prescient reasons that Justice Brennan gave nearly 40 years ago and remain true to this day. Reading these provisions in the “color blind” fashion, which the contemporary majority insists upon does not recognize the plain reality of American society. Historically and in the present minority groups have struggled to close the socio-economic gap between themselves and white Americans. A “color blind’ reading of these
provisions merely serves to widen this gap and close a vital door to minority inclusion in the university and professional ranks.

Additionally, this trend is out of step with the logic and history for enacting such provisions in the first place. When one takes even a cursory appraisal of the historical impetus for the enactment of each provision, it seems clear that both were intended as a means to increase minority opportunities to participate as equals within American society. The irony now is that the very provisions meant to assist these groups in their efforts to ascend higher up the socio-economic ladder are the very tools now being used to impede that progress. And beyond irony, this result “pervert[s] the intent of the Framers [of the 14th Amendment and Civil Rights Act of 1964] by substituting abstract equality for the genuine equality the Amendment was intended to achieve.”

The solution then is to return to the original intent of these laws and to abandon the aspirational notion of color blindness until that aspiration is indeed an American reality. It is time to remind the Court that the purpose of these provisions was not to maintain the status quo but to actually lay the foundation and framework for a society where equal protection under the law and equal opportunity actually exist in a real way for those groups for whom those rights had been denied. This can be accomplished through direct challenge and by forcing the Court to confront the historical purpose and contemporary need for an interpretation of the 14th Amendment and 1964 Civil Rights Act that permits race to be considered for ameliorative purposes. It is when the Court begins to

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again engage with historical and contemporary reality rather than the world as it wishes it were, that we may as a nation again begin to move forward and beyond our difficult racial past.