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Racial Indirection

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RACIAL INDIRECTION

Yuvraj Joshi

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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. 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, in light of the rightward shift on the Court and the litigation over Harvard's admissions program, the Article expects affirmative action not to disappear but to be driven underground — with ever less conspicuous considerations of race.

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RACIAL INDIRECTION

Yuvraj Joshi*

“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.³ With Brett Kavanaugh on the Supreme Court, conservatives have secured the votes needed to prohibit race-sensitive admissions in public and private universities.⁴ 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.⁵ Because such practices commonly serve to perpetuate rather than alleviate racial stratification, a significant body of literature analyzes the disproportionate *harm* that racially neutral or covert practices inflict on racial minorities.⁶ This Article focuses on a different

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

² *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2207 (2016) (majority opinion) (Kennedy, J.) (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.”).

⁴ *Ilya Shapiro Discusses the Trump Administration Rescinding Guidelines for Affirmative Action on KUT Radio*, CATO INST. at 2:30 (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.”).

⁵ Racial indirection is conceptually distinct from “disparate impact” practices that are “fair in form but discriminatory in practice.” See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Racial indirection admits of practices that *harm* minorities (covering what is usually understood as disparate impact) as well as those that *benefit* them (covering several 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 these distinctive features, see *infra* Part I.

⁶ See, e.g., David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1289 (1995) (tracing how “particularly harsh federal penalties for trafficking in crack cocaine have a particularly disproportionate impact on black defendants”); 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); Samuel R. Sommers & Michael I. Norton, *Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure*, 31 LAW

version of racial indirection: affirmative action policies in higher education that are also racially neutral or covert but that inure to the *benefit* of racial minorities.

By analyzing the Supreme Court’s affirmative action cases, the Article explores *how* racial indirection 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. With a stable conservative majority on the Supreme Court, we can expect affirmative action not to disappear but to be driven underground — with ever less conspicuous considerations of race.

The first aim of this Article is to develop an analytic framework of racial indirection that is attentive to its many variations. Lawyers and legal scholars tend to assume that practices that diminish the salience of race lead to racially regressive policies and perpetuate non-racial ideologies.⁷ 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 the 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.⁸ Over time, as practices benefiting racial minorities became contested as unfair to individual 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.⁹ 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 affirmative

& HUM. BEHAV. 261 (2007) (finding that race influences the use of peremptory challenges in participants and that participants justified their use of challenges in race-neutral terms); 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 (2007) (finding evidence that black people in New York City are stopped and frisked at disproportionately high rates); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 132 (2010) (discussing how “race-neutral factors—such as location—operate in a highly discriminatory fashion.”).

⁷ Non-racial means “not of, relating to, or based on race.” See *Nonracial*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/nonracial>. Non-racial ideologies refers to purportedly race-neutral ideologies, such as colorblindness and post-racialism.

⁸ 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, 276 (2015).

⁹ See Daniel Hirschman & Ellen Berrey, *The Partial Deinstitutionalization of Affirmative Action in U.S. Higher Education, 1988 to 2014*, 4 SOCIOLOGICAL SCI. 449 (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 60 percent in 1994 to 35 percent in 2014).

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 the affirmative action jurisprudence does not address, or at least not in much detail. 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 that racial indirection implicates values like individual fairness, social cohesion, government transparency, principled reasoning, and racial justice. In doing so, we can shed new light on concerns that are hinted at but never fully developed in juridical accounts of affirmative action.

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. We learn that whereas the Justices at the political center of the Court embrace indirection in affirmative action decisions, Justices on the right and the left of the Court 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 thus 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.¹⁰ 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.¹¹ Its attention to indirection is

¹⁰ Harvard is not alone; for examples of institutions currently facing allegations of unconstitutional racial preferences, see *infra* note 264.

¹¹ For literature discussing indirection as a phenomenon without offering a comprehensive account of indirection, see, e.g., 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.”); 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.”); 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.”); Theda Skocpol, *Targeting within Universalism: Politically Viable Policies to Combat Poverty in the United States*, in *THE URBAN UNDERCLASS* 411, 414 (1991) (describing “targeting within universalism” as “universal policy frameworks for extra benefits and services that disproportionately help less privileged people without stigmatizing them”); 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

especially timely 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.¹² Far more importantly, it is timely as we face new challenges to affirmative action and further Supreme Court appointments by an administration fueled by racial resentment and hostility to 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 racially neutral or covert practices (their *racial form*) that produce racially disproportionate results (their *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 I.A thus explains how racial indirection presents a more complete picture of racial form than accounts focused 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 emphasizing the dangers of racially covert or neutral policies. These distinctive features become clearer in Part I.C, which distinguishes racial indirection from the two leading legal accounts of race: colorblindness and post-racialism. Fundamental questions 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. *Racial classification* means classifying individuals by race, and *race-consciousness* means considering race in decision-making.¹³ Since it is possible to consider race without classifying by race, race-consciousness covers a broader range of practices that consider race in more or less subtle ways — including *race-based* practices (in which race is the sole or predominant factor, e.g., racial quotas), *race-sensitive* practices (in which race is one of several factors, e.g., pursuing racial diversity in the student body), and *facially-neutral* practices (in which race is not an explicit factor but is an implicit consideration, e.g., employing non-racial factors as proxies for race).¹⁴

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.”); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1470 (2004) (tracing how conflict over the meaning and enforcement of *Brown v. Board of Education* has produced “indirection” in equal protection law); 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.”); 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).

¹² *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 271, 279 (1978) (Powell, J.).

¹³ 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”).

¹⁴ See *Schuetz v. Coal. To Defend Affirmative Action*, 134 S. Ct. 1623, 1652 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).

This reorientation is needed to make sense of affirmative action law. Because traditional scholarship has tended to focus on whether or not 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 as well as a broader set of practices that diminish the salience of race — practices that have constitutional significance under current affirmative action doctrine.¹⁵ To be precise, it is *indirection* in the reliance on race — rather than mere presence or absence of racial classification — that determines the constitutionality of affirmative action programs under current law.

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

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 that 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

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 11. 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. The concept of racial indirection I propose captures 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. His account does not allow us to differentiate between various forms of “preferential treatment,” since quotas, targets, goals and other preferences 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. 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.

¹⁶ See *Fisher II*, 136 S. Ct. at 2214-15.

¹⁷ *Id.* at 2207 (majority opinion) (Kennedy, J.) (emphasis added).

¹⁸ *Id.* at 2213; see also Reva B. Siegel, *Race-Conscious but Race-Neutral: The Constitutionality of Disparate Impact in the Roberts Court*, 66 ALA. L. REV. 653, 655-656 (2015) (“As the Court appreciated in *Fisher*, 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.”) (emphasis in original); 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.”).

frame to race-consciousness draws our attention to the many ways indirection structures affirmative action — when racial classifications are used *and* when they are not. Specifically, it alerts us to practices that render considerations of race more implicit and imprecise, even as programs continue to rely on race.¹⁹ Furthermore, it points to thus far overlooked commonalities between race-sensitive and facially-neutral forms of affirmative action.

B. Racial Impact

A second distinguishing feature of this account is that it acknowledges both invidious and benevolent forms of indirection. *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,²⁰ voting legislation and redistricting schemes that have deleterious effects on minority voters,²¹ or housing policies that have the effect of limiting minority access to housing²² — 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.²³ 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.²⁴ Other indirect practices include emphasizing non-racial factors in admissions as proxies for race or ethnicity²⁵ and curtailing “testocracy”²⁶ in admissions, which privileges standardized test scores over other metrics of merit and serves to exclude minorities and the poor.

¹⁹ See *infra* Part II.A.

²⁰ See Becky Pettit & Bryan Sykes, *Incarceration* (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).

²¹ See, e.g., *Abbott v. Perez*, 585 U. S. ____ (2018) (Sotomayor, J., dissenting) (describing Texas’ “use [of] electoral maps that, in design and effect, burden the rights of minority voters”).

²² 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).

²³ See *infra* Part II.

²⁴ See Catherine Horn & Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States’ Experiences* (2003); see also *infra* note 286.

²⁵ See Eboni S. Nelson, Ronald Pitner & Carla D. Pratt, *Assessing the Viability of Race-Neutral Alternatives in Law School Admissions*, 102 IOWA L. REV. 2187 (2017) (studying relationship between law students’ race and race-neutral aspects of their identities).

²⁶ “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 Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 (1996); 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 U.C. DAVIS L. REV. 593 (2001); William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving Elite College Students*, 89 CAL. L. REV. 1055 (2001); LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* (2015); Jonathan D. Glater, *A Prison of the Imagination: Higher Education in Bakke*, 52 U.C. DAVIS L. REV. __ (2019). For a fuller discussion of testocracy, see *infra* Part V.C.

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.²⁷ 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.²⁸ Racially regressive laws and policies dressed in neutral garb permeated every sphere of public life, including employment, education, housing, criminal law, and voting.²⁹

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.³⁰ This more comprehensive view of racial indirection does not deny the reality that indirection has been used to undermine racial equality.³¹ Nor does it deny the risk that indirect paths to racial equality can impede the more direct pursuit of racial justice.³² Rather, it recognizes and grapples

²⁷ For an argument from affirmative action supporters, see Brief for the National Association of Minority Contractors and Minority Contractors Association of Northern California, Inc. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“[I]ndirection should no more be required to preserve the legality of Davis’s 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?”).

²⁸ 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.”).

²⁹ See, e.g., *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.”); *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.”); *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, 133 S. Ct. 2612 (“[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 6, 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.”).

³⁰ For a similar argument in relation to racial classifications, see Barnes, Chemerinsky & Onwuachi-Willig, *supra* note 8, 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 regard all racial *indirection* as invidious.

³¹ See ALEXANDER P. LAMIS, SOUTHERN POLITICS IN THE 1990S 7-8 (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 byproduct of them is [that] blacks get hurt worse than whites.”).

³² To some progressives, the very 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 which 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.

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,³³ yet it allows admissions practices that disproportionately benefit racial minorities so long as they satisfy strict scrutiny.³⁴ 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 the two leading legal accounts of race: 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.³⁵ 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.³⁶ While legal scholars debate the constitutional meaning of equality, colorblindness dominates the constitutional jurisprudence.³⁷

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

³³ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971).

³⁴ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

³⁵ See *Color-blind*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/color-blind>.

³⁶ See 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 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.”); MICHAEL K. BROWN, MARTIN CARNOY, ELLIOTT CURRIE, TROY DUSTER, DAVID B. OPPENHEIMER, MARJORIE M. SCHULTZ & DAVID WELLMAN, *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 1-2 (2003) (arguing that colorblind social policies have produced “durable racial inequality”); Ian F. Haney-López, “*A Nation of Minorities*”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 988 (2007) (describing “reactionary colorblindness” as “an anti-classification understanding of the Equal Protection Clause that accords race-conscious remedies and racial subjugation the same level of constitutional hostility.”).

³⁷ 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, *supra* note 11, at 1477 (“[A]ntisubordination values live at the root of the anticlassification principle . . .”).

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.³⁸ 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 is more palatable to some liberals and even civil rights advocates, and is thus more potent as a force of racial retrenchment.³⁹

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-racialism, including the critique that diminished salience of race serves to obscure and facilitate racial oppression.⁴⁰ 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 thus offers a more nuanced account of how race actually functions in affirmative action law. While the law is discussed in more detail below,⁴¹ 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.⁴² Moreover, it rejected a number of justice-based rationales for pursuing affirmative action, including remedying the historic underrepresentation of minorities and "societal discrimination" against them.⁴³ 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.⁴⁴ In 2003, the Court in *Grutter v. Bollinger* endorsed Justice Powell's opinion in *Bakke*. Expressing post-racial aspirations, Justice O'Connor predicted that "25 years from now, the use of racial preferences will no longer be necessary to further the

³⁸ See *Post-racial*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/post-racial>.

³⁹ See IAN F. HANEY-LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 143 (2006) (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 (2009) (analyzing "post-racialism" 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) (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.").

⁴⁰ See HANEY-LÓPEZ, *supra* note 39, at 143 (suggesting that diminished reliance on race means that "law no longer contributes to racial justice but instead legitimates continued inequality.").

⁴¹ See *infra* Part II.

⁴² *Bakke*, 438 U.S. 265 at 289-90 (Powell, J.).

⁴³ *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").

⁴⁴ See BERNARD SCHWARTZ, *BEHIND BAKKE: AFFIRMATIVE ACTION AND THE SUPREME COURT* 151-156 (1988) ("The result has been that *Bakke* has, in practice, served to license, not to prohibit, race-conscious admissions programs."); Crenshaw, *supra* note 39, at 1277-78 ("*Bakke*, although an overall defeat, had left considerable room for civil rights advocates and sympathetic institutional actors to maneuver.").

interest approved today.”⁴⁵ Yet, 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.⁴⁶

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 when a dominant trend had been against *any* race-conscious remedies.⁴⁷ 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.

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 non-racialism 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 affirmative action jurisprudence. Part II.A revisits the landmark *Bakke* decision that placed affirmative action law on the path of indirection.⁴⁸ Parts II.B and II.C consider subsequent decisions in *Grutter–Gratz* and *Fisher* that entrenched indirect reliance on race as a constitutional requirement for affirmative action. As we will see, 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

⁴⁵ *Grutter*, 539 U.S. at 343.

⁴⁶ *Id.* at 334.

⁴⁷ See *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (1976) (barring the university from using race in the admissions process) <subsequent history>; *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding that diversity is not a compelling state interest).

⁴⁸ *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 Association of American Law Schools as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007.

for “qualified” minorities violated the United States and California constitutions, as well as Title IV of the Civil Rights Act.⁴⁹

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 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 the further “the attainment of a diverse student body.”⁵⁰ He concluded, however, that setting aside a specified number of seats was not an appropriate means to achieve the goal of diversity, because it failed to “consider all pertinent elements of diversity in light of the particular qualifications of each applicant” and “treat[] each applicant as an individual in the admissions process.”⁵¹

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.”⁵² 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.”⁵³

Justice Powell thus offered race-sensitive diversity as a *less direct* means to promote racial integration than racial quotas. The diversity-based paradigm in which Justice Powell’s later-controlling *Bakke* opinion reasoned promoted indirection in several ways. First, Powell’s diversity rationale rendered the function and functioning of affirmative action more *ambiguous*. Affirmative action won the day not as a policy promoting social justice for racial and ethnic minorities, but as a policy promoting educational diversity that could indirectly benefit racial and ethnic 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.

Second, Justice Powell 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 peoples.”⁵⁴ Furthermore, 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

⁴⁹ For a recent detailed analysis of *Bakke*, see Rachel F. Moran, *Bakke’s Lasting Legacy: Redefining the Landscape of Equality and Liberty in Civil Rights Law*, 52 U.C. DAVIS L. REV. ___ (2019).

⁵⁰ *Bakke*, 438 U.S. at 311-12 (Powell, J.).

⁵¹ *Id.* at 316-18.

⁵² *Id.* at 294 n.34; see also *id.* at 319-320 (“[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.”).

⁵³ *Id.* at 318.

⁵⁴ *Id.* at 313 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)) (internal citation omitted).

preferences and by how much.⁵⁵ 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.⁵⁶

The recognition of educational diversity as a compelling interest came with the corollary problem of how diversity should be measured. Yet, even as Justice Powell rejected outright quotas, he remained quiet about who benefited from diversity-based affirmative action and by how much. His silence was no accident: Justice Powell understood diversity’s imprecision to be its merit. 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.”⁵⁷ 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.”⁵⁸ 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. Professor Paul Mishkin, who had served as special counsel for UC Davis in *Bakke*, welcomed Justice Powell’s opinion heralding diversity, even though it had rejected the justice-based interests supporting affirmative action that he had put forward.⁵⁹ 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,”⁶⁰ and that “Justice Powell’s vehicle for accomplishing this feat was acceptance of the importance of ‘diversity’ in the academic setting.”⁶¹

Bakke thus secured a role for racial indirection in affirmative action.⁶² Of course, *Bakke* did not end the debate 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

⁵⁵ *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.”).

⁵⁶ *Id.* at 315-18.

⁵⁷ *Id.* at 316, 318.

⁵⁸ *Id.* app. at 323 (emphasis added) (quoting Brief for Columbia University *et al.* as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007, at app. *3).

⁵⁹ See Mishkin, *supra* note 11.

⁶⁰ *Id.* at 929.

⁶¹ *Id.* at 923; see also SCHWARTZ, *supra* note 44, at 151–156 (“[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.”).

⁶² 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 (2016) (showing that Justice Kennedy dissented in *Grutter* because it diverged from *Bakke* and wrote *Fisher* in ways that maintain fidelity to *Bakke*).

affirmative action as approved in *Bakke* was invalid, asserting that “educational diversity is not recognized as a compelling state interest.”⁶³ 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. With Texas’ Top Ten Percent Plan, indirection based on geography replaced indirection based on diversity. 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.⁶⁴ While the Office of Undergraduate Admissions considered a number of factors in trying to assemble a diverse class, it automatically awarded twenty of the 100 points needed to guarantee admission to applicants from certain racial or ethnic minority groups. 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”).⁶⁵ To obtain the educational benefits of diversity, the Law School considered race as one of several factors in a “holistic review” process without assigning 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.⁶⁶ 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.”⁶⁷

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.⁶⁸ 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*.⁶⁹

⁶³ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

⁶⁴ *Gratz*, 539 U.S. at 251–52.

⁶⁵ *Grutter*, 539 U.S. at 317.

⁶⁶ *Id.* at 318.

⁶⁷ *Id.* at 317.

⁶⁸ *Gratz*, 539 U.S. 244.

⁶⁹ *Id.* at 271–72; *see also Bakke*, 438 U.S. at 318 n.52 (“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.”).

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.⁷⁰ 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 alongside race in admissions decisions," it provided individualized review of applicants.⁷¹ Even a statistically significant relationship between race and admissions rates did not make race the "predominant factor" in admissions.⁷²

It is telling that 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."⁷³ 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."⁷⁴ 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."⁷⁵

While *Grutter* indeed diverged from *Bakke* in endorsing critical mass, the divergence was more form than substance. Justice Powell's endorsement of Harvard's admissions plan 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."⁷⁶ 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."⁷⁷ Yet even as Justice Kennedy's *Grutter* dissent admired Justice Powell's opinion in *Bakke* that endorsed Harvard's plan, it derided the Law School's use of critical mass. What was so different about critical mass? Did critical mass fall short in some important way of Harvard's admissions plan in *Bakke*?

The concept of racial indirection allows us to understand why critical mass proved controversial. Critical mass takes the numerical considerations of race that are otherwise *implicit* in affirmative action programs and makes those considerations more *explicit*.⁷⁸ 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 racial and ethnic origin

⁷⁰ *Grutter*, 539 U.S. at 343.

⁷¹ *Id.* at 337.

⁷² *Id.* at 320.

⁷³ *Id.* at 379 (Rehnquist, C.J., dissenting).

⁷⁴ *Id.* at 389 (Kennedy, J., dissenting).

⁷⁵ *Id.* at 391 (quoting *Bakke*, 438 U.S. at 289).

⁷⁶ *Bakke*, 438 U.S. app. at 323 (Powell, J.).

⁷⁷ *Grutter*, 539 U.S. at 318 (majority opinion) (O'Connor, J.).

⁷⁸ See, e.g., Brief for Respondents at 7, *Grutter*, 539 U.S. 306 (No. 02-241) ("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%.") (emphasis added).

— 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 committed to colorblindness and 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.”⁷⁹

Notwithstanding this controversy, *Grutter* continued to develop affirmative action doctrine in ways that require and incentivize indirection.⁸⁰ The Court expounded the narrowly 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.”⁸¹ Furthermore, narrow tailoring required “serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks,”⁸² 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 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.

Notably, Justice Souter’s dissenting opinion in *Gratz* described the difference between facially-neutral percentage plans and the College’s race-based points system in terms of their 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* . . .”⁸³ 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 the top high school students across the state. For the remaining spots,

⁷⁹ *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting).

⁸⁰ 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) (observing how “the Court in *Grutter* and *Gratz* constructs doctrine that in effect demands obscurity.”).

⁸¹ *Grutter*, 539 U.S. at 334 (majority opinion) (O’Connor, J.).

⁸² *Id.* at 339.

⁸³ *Gratz*, 539 U.S. at 298 (Souter, J., dissenting).

UT Austin employed 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 in violation of the Equal Protection Clause.⁸⁴

In *Fisher v. University of Texas* decision in June 2016, a 4-3 majority of the Court upheld race-sensitive admissions policies at UT Austin.⁸⁵ 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.⁸⁶ Second, Justice Kennedy emphasized the importance of exploring workable facially-neutral alternatives before resorting to race-sensitive measures.⁸⁷ Third, *Fisher* reinforced that a degree of imprecision remains a requirement of constitutionally permissible affirmative action under current law.⁸⁸

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."⁸⁹ 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."⁹⁰ Responding to Justice Alito, Justice Kennedy made clear that in an indirect regime of affirmative action, imprecision is a feature, not a bug. As he rightly pointed out, "since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained."⁹¹

⁸⁴ The district court upheld UT Austin's admissions process as constitutional, and the U.S. Court of Appeals for the Fifth Circuit affirmed. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011), aff'g 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 (Fisher I)*, 133 S. Ct. 2411 (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. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014). Fisher again appealed to the Supreme Court, which agreed to hear the case. See *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888 (2015) (mem.).

⁸⁵ *Fisher II*, 136 S. Ct. at 2198. When *Fisher II* was decided in June 2016, the Supreme Court was short one member since the Senate Majority Leader Mitch McConnell 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.

⁸⁶ *Id.* at 2207 (majority opinion) (Kennedy, J.) (emphasis added).

⁸⁷ *Id.* at 2214.

⁸⁸ For an analysis of how universities should proceed while *Fisher II* remains good law, see Yuvraj Joshi, *Measuring Diversity*, 117 COLUM. L. REV. ONLINE 54 (2017).

⁸⁹ *Id.* at 2222 (Alito, J., dissenting).

⁹⁰ *Id.*

⁹¹ *Id.* at 2210 (majority opinion) (Kennedy, J.).

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 — and then only to respond to Fisher’s critique of the concept.⁹² 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.”⁹³

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.”⁹⁴ From this pronouncement, it is possible to read *Fisher* as requiring universities to measure diversity in more precise and even numerical terms. On close reading, however, *Fisher* did not actually 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.”⁹⁵

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 required of future leaders.’”⁹⁶ Unconvinced, Justice Alito observed: “These are laudable goals, but they are not concrete or precise”⁹⁷

Reacting to conservative concerns about indirection, *Fisher* thus requires universities considering race in admissions to articulate “concrete and precise goals” that are “sufficiently measurable.”⁹⁸ But “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.”⁹⁹ Instead, it means articulating goals in terms of “the educational values [a university] seeks to realize through its admissions process.”¹⁰⁰ 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.

⁹² *Id.*

⁹³ Transcript of Oral Argument at 71, *Fisher I*, 133 S. Ct. 2411 (2012) (No. 11-345).

⁹⁴ *Fisher II*, 136 S. Ct. at 2211 (emphasis added).

⁹⁵ *Id.* at 2211 (fourth and fifth alterations in original) (quoting Joint Supplemental Appendix at 23a, *Fisher II*, 136 S. Ct. 2198 (2016) (No. 14–981), 2015 WL 8146395.).

⁹⁶ *Id.* (quoting Joint Supplemental Appendix at 23a).

⁹⁷ *Id.* at 2223 (Alito, J., dissenting).

⁹⁸ *Id.* at 2211 (majority opinion) (Kennedy, J.).

⁹⁹ *Id.* at 2210.

¹⁰⁰ *Id.* at 2211.

* * *

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 opinions 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,¹⁰¹ why their more progressive and conservative colleagues resisted it,¹⁰² and what happens when the political center of the Court shifts sharply rightward.¹⁰³

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 in affirmative action is grounded in concerns of public perception and social transition. Affirmative action doctrine rests on the explicit premise that indirection enhances the reality and appearance of fairness to individuals¹⁰⁴ and preserves social cohesion.¹⁰⁵ More implicitly, racial indirection is motivated by the need for effective¹⁰⁶ and viable¹⁰⁷ ways to move beyond past racial practices and toward a new social order.¹⁰⁸ Although these reasons for adopting indirection are presented as intuitive and even self-evident, none is without dispute over its meaning 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.¹⁰⁹ On this view, racial indirection enhances both the reality and appearance of

¹⁰¹ See *infra* Part III.

¹⁰² See *infra* Part IV.

¹⁰³ See *infra* Part V.

¹⁰⁴ See *infra* Part III.A.

¹⁰⁵ See *infra* Part III.B.

¹⁰⁶ See *infra* Part III.C.

¹⁰⁷ See *infra* Part III.D.

¹⁰⁸ See *infra* Part III.E.

¹⁰⁹ See *Bakke*, 438 U.S. at 294 n.34, 298, 308 (discussing affirmative action’s impact on “innocent persons”); *Grutter*, 539 U.S. at 324 (referring to “innocent third parties”).

fairness to individuals because it considers race in partial and implicit ways that neither guarantee nor preclude admission of any applicant based on their race, thus treating all applicants as individuals.

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,”¹¹⁰ 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.”¹¹¹ 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.”¹¹² This same concern with individual fairness underlies the Court’s reasoning in subsequent affirmative action cases.¹¹³

Several opinions and commentaries reject this focus on individual fairness as ahistorical, selective, and misguided.¹¹⁴ 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.”¹¹⁵ 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.¹¹⁶

While affirmative action law views itself as advancing fairness in the admissions process, its focus on individual fairness is narrow and selective. For instance, many have observed the inconsistency of rejecting preferences granted to a few Black, Latinx, and Native American applicants in the name of fairness while allowing preferences granted to the children of mostly white alumni and donors.¹¹⁷ More fundamentally, the individual-fairness-focused justification strikes many as misguided in its characterization of race and racial subordination. 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

¹¹⁰ *Bakke*, 438 U.S. at 319 n.53 (Powell, J.).

¹¹¹ *Id.* at 294 n.34.

¹¹² *Id.* at 318.

¹¹³ See *Grutter*, 539 U.S. at 341.

¹¹⁴ See *infra* text accompanying notes 115–122.

¹¹⁵ Lyndon B. Johnson, *Commencement Address at Howard University: “To Fulfill These Rights,”* 2 PUB. PAPERS 635, 636 (June 4, 1965).

¹¹⁶ *Bakke*, 438 U.S. at 305.

¹¹⁷ *Id.* at 404 (Blackmun, J.) (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.”).

disconnected from the present,”¹¹⁸ 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.”¹¹⁹

So, while the individual-fairness justification leads the Court to adopt racial indirection in affirmative action cases, the justification is concerned less with ensuring the overall fairness of the admissions process and more with mitigating perceptions of unfairness among 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.¹²⁰ 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.¹²¹ 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 particular stakes that racial minorities and society as a whole have in racial integration.¹²² The individual-fairness justification thus orients affirmative action law toward white citizens’ complaints over loss of automatically ordained and subtly proffered privilege and away from minority group claims of restorative justice, distributive justice, reparations, and representation.¹²³

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 posed 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

¹¹⁸ Kimberlé Williams Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 109, 128 (2007).

¹¹⁹ Haney-López, *supra* note 36, at 1063.

¹²⁰ See *supra* note 109.

¹²¹ See TIM J. WISE, AFFIRMATIVE ACTION: RACIAL PREFERENCE IN BLACK AND WHITE (2005) (examining white racial preferences in U.S. education); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063 (2006) (discussing ingroup and outgroup biases and their implications for affirmative action); 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”).

¹²² See, e.g., 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 L.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.”); Claude M. Steele, *The Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, in CONFRONTING RACISM: THE PROBLEM AND THE RESPONSE 203–04 (Jennifer L. Eberhardt & Susan T. Fiske eds., 1998) (“[S]tereotype 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.”).

¹²³ 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).

equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious.”¹²⁴ To mitigate the “deep resentment” likely to be felt by “innocent persons” who bear the cost of affirmative action, Justice Powell offered race-sensitive diversity as a less conspicuous means to promote racial integration than racial quotas.

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.”¹²⁵ 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.”¹²⁶ Justice Kennedy’s *Fisher* opinion revealed that he remained concerned about social cohesion, but that 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 used in a divisive manner*, could undermine the educational benefits the University values.”¹²⁷ *Fisher*’s rendering of “divisiveness” suggests that 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 particular, Reva Siegel has convincingly shown how in both preserving and limiting affirmative action measures, 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.”¹²⁸ 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.”¹²⁹

¹²⁴ *Bakke*, 438 U.S. at 294 n.34; *see also* Norman 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 (2008) (describing resentment as a form of anger that may be activated where someone else’s success is perceived to be undeserved); Stanley Feldman & Leonie Huddy, *Racial Resentment and White Opposition to Race-Conscious Programs: Principles or Prejudice?*, 49 AM. J. POL. SCI. 168 (2005) (finding resentment in relation to racial preferences to stem from ideological opposition to race-conscious programs and from racial prejudice).

¹²⁵ *Grutter*, 539 U.S. at 388 (Kennedy, J., dissenting).

¹²⁶ *Id.* at 394. *See also* Faye J. Crosby, Aarti Iyer & Sirinda Sincharoen, *Understanding Affirmative Action*, 57 ANNU. 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).

¹²⁷ *Fisher II*, 136 S. Ct. at 2210 (Kennedy, J.).

¹²⁸ Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1281 (2011); *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 (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, *supra* note 80, 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).

¹²⁹ Mishkin, *supra* note 11, at 928.

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. Darren Hutchinson critiques a “new equal protection” that rests on appeals to universal interests (rather than group identity) based on concerns about “pluralism anxiety” and “balkanization,” charging that “the Court appears to believe that social cohesion is more important than racial justice.”¹³⁰ 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.¹³¹ If we resist the dichotomy between social cohesion and racial justice and instead consider how limiting social divisiveness may further or frustrate the pursuit of racial justice, it is still striking how centrally concerned the Court has been with the disappointment and resentment of white applicants.¹³²

Empirical scholars have recently raised questions about the relationship between racial preferences 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.”¹³³ Kang poses a series of empirical questions to which the Court’s reliance on social cohesion arguments gives rise, and stresses the need for evidence-based constitutional doctrine.¹³⁴ 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*,¹³⁵ suggesting that the Court’s claims about social cohesion should be treated with caution.¹³⁶

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

¹³⁰ 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).

¹³¹ Reva B. Siegel, *The Supreme Court, 2012 Term—Foreword: Equality Divided*, 127 HARV. L. REV. 1 (2013).

¹³² Cf. *Bakke*, 438 U.S. at 361 (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.”).

¹³³ Jerry Kang, *Rethinking Intent and Impact: Some Behavioral Realism About Equal Protection*, 66 ALA. L. REV. 627, 650 (2015); see also Kimberlé Williams Crenshaw, *Introduction*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii, xxxii (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).

¹³⁴ See Kang, *supra* note 133, 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.”).

¹³⁵ See *Schuette*, 134 S. Ct. at 1638, 1635 (2014) (Kennedy, J.) (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.”).

¹³⁶ 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 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.”).

whose concerns are the focus of attention.¹³⁷ 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 held to be 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.¹³⁸ 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 often prefer direct to indirect uses of race based on an expectation of effectiveness. There is a perception that promoting racial integration requires tackling exclusion directly and decisively.¹³⁹ 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.

In contrast, the Supreme Court's affirmative action jurisprudence proceeds with the expectation that racial indirection does not necessarily preclude 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 suggested that "the assignment of a fixed number of places to a minority group is not a necessary means" toward achieving diversity,¹⁴⁰ since "an admissions program which considers race only as one factor is . . . *no less effective* [as a] means of according racial preference."¹⁴¹ Even Justice Blackmun, who dismissed Justice Powell's preoccupation with the form of racial remedies as constitutionally irrelevant, acknowledged that "under a program such as Harvard's one may accomplish covertly what Davis concedes it does openly."¹⁴²

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.¹⁴³ 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.¹⁴⁴ Since *Bakke* rendered racial quotas presumptively unconstitutional and as new indirect forms of affirmative action (like percentage plans) have emerged, the narrow tailoring question has shifted

¹³⁷ See *infra* Part IV.B.

¹³⁸ See Devon Carbado, *Strictly Scrutinizing Racial Justice (Or Why Bakke Was A Loss)*, 52 U.C. DAVIS L. REV. — (2019) (explaining how Equal Protection doctrine allows white people but not people of color to articulate their vision of racial justice).

¹³⁹ See Mishkin, *supra* note 11, at 917 (observing "the perception that remedial race-conscious programs are necessary means to achieve real equality.").

¹⁴⁰ *Bakke*, 438 U.S. at 316.

¹⁴¹ *Id.* at 318 (emphasis added).

¹⁴² *Id.* at 406 (Blackmun, J., concurring in part and dissenting in part).

¹⁴³ *Id.* at 316 (Powell, J.).

¹⁴⁴ *Id.*

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).¹⁴⁵

To date, the Court has refused to define what effectiveness means. Abigail Fisher, the white plaintiff who alleged that UT Austin improperly denied her admission based on her race, insisted that UT Austin had “already ‘achieved critical mass’ . . . using the Top Ten Percent Plan and race-neutral holistic review.”¹⁴⁶ 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.”¹⁴⁷ 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,”¹⁴⁸ 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.”¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ 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 preferences, and the fact that those cost bearers are not discrete wrongdoers poses an intractable political problem.¹⁵² 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 preferences in

¹⁴⁵ *Grutter*, 539 U.S. at 339.

¹⁴⁶ *Fisher II*, 136 S. Ct. at 2211 (quoting Brief for Petitioner at 46, *Fisher II*, 136 S. Ct. 2198 (No. 14-981), 2015 WL 5261568).

¹⁴⁷ *Id.* at 2211 (alterations in original) (citation omitted).

¹⁴⁸ *Id.* at 2210.

¹⁴⁹ *Id.*

¹⁵⁰ *Bakke*, 438 U.S. at 316 (“[A]n admissions program which considers race only as one factor is . . . no less effective” than programs based entirely on race.”).

¹⁵¹ *Fisher I*, 133 S. Ct. at 2420 (“[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.”).

¹⁵² *See Bakke*, 438 U.S. at 298 (Powell, J.) (“There is a measure of inequity in forcing innocent persons in respondent’s position to bear the burdens of redressing grievances not of their making.”); Hochschild, *supra* note 11, at 323 (comparing “quotas” in affirmative action to “forced busing” in school desegregation and arguing that “the two policies are unpopular and unsuccessful for similar reasons.”).

college admissions.¹⁵³ As their political 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 resentments.

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.”¹⁵⁴ 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.”¹⁵⁵

Several commentators similarly describe diversity as a compromise and debate whether it was necessary or desirable.¹⁵⁶ 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.”¹⁵⁷ Thus, “progress toward an integrated nation could continue, slowed down, on the indirect paths Justice Powell had sanctioned even if not on the direct road to freedom.”¹⁵⁸ For these authors, “[e]ven with all its limitations, . . . Justice Powell’s decision has met the test of history.”¹⁵⁹ 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

¹⁵³ 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 II*, 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*, 539 U.S. at 317 (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, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 21523737, at *33)); *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”).

¹⁵⁴ *Bakke*, 438 U.S. at 318 (Powell, J.).

¹⁵⁵ JOHN C. JEFFRIES, JR., LEWIS F. POWELL JR.: A BIOGRAPHY 485–500 (1994).

¹⁵⁶ *See, e.g.,* Mishkin, *supra* note 11, at 917 (observing 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,” and that “Justice Powell’s vehicle for accomplishing this feat was acceptance of the importance of ‘diversity’ in the academic setting.”); Reva B. Siegel, *supra* note 11, 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.”); Jack M. Balkin, Plessy, Brown, and *Grutter*: *A Play in Three Acts*, 26 CARDOZO L. REV. 102, 135 (2005) (“Powell allowed universities to admit members of previously disadvantaged groups without having to state directly that they were remedying past societal discrimination.”).

¹⁵⁷ Brief for Respondents Kimberly James *et al.* at 17, *Grutter*, 539 U.S. 306 (No. 02-241).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

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.¹⁶⁰

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."¹⁶¹ 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."¹⁶² 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."¹⁶³

Political viability is thus less a justification and more a motivating factor for the adoption of 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 seems 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.¹⁶⁴ For some supporters of affirmative action, political viability may thus represent the most powerful reason to embrace indirection, even as for others, it suggests a pragmatic lowering of expectations about justice.¹⁶⁵

E. Racial Transition

Perhaps surprisingly, the goal of facilitating racial transition animates the Supreme Court's adoption of racial indirection in affirmative action cases. Affirmative action is frequently justified as an interim measure that will become unnecessary once the racial transition is

¹⁶⁰ See Hochschild, *supra* note 11, 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.").

¹⁶¹ Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

¹⁶² *Id.* at 1632.

¹⁶³ *Id.* at 1622; see also Harris, *supra* note 122, at 22 (arguing that "although *Bakke* was 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 inclusion of the members of racial minority groups that continued to suffer the effects of historical and ongoing discrimination.").

¹⁶⁴ See 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/>.

¹⁶⁵ See 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) ("[P]olitical expediency ought not to excuse the elision of the injustices that have been visited upon racial minorities *because of their race.*") (emphasis in original).

complete, even if individual Justices disagree about how the endpoint of transition should be characterized and when it might be achieved.¹⁶⁶

Since the Second Reconstruction, affirmative action has been a central site of contestation over America's racial transition.¹⁶⁷ 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,"¹⁶⁸ a reliance on race suggests a continuation of the nation's racial past. Reasoning from this belief, many 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,"¹⁶⁹ a retreat from race suggests a disregard or even a denial of racial injustice and inequality. For this reason, some progressive Justices who have voted to uphold racially indirect affirmative action nevertheless lament limitations placed on direct considerations of race in admissions.

The Court itself has justified 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.¹⁷⁰ Once racial classification is understood as the harm 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 considerations 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.¹⁷¹

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.¹⁷² 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,"¹⁷³ he also

¹⁶⁶ Compare *Grutter*, 539 U.S. at 342 (majority opinion) (O'Connor, J.) (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.") 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, *Constitutionalizing and Defining Racial Equality: The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171 (2004).

¹⁶⁷ See Haney-López, *supra* note 36, at 1029-1043 (identifying *Bakke* as "a critical juncture when the Supreme Court fully engaged the debate over reactionary colorblindness.").

¹⁶⁸ *Parents Involved*, 551 U.S. at 748 (Roberts, C.J.).

¹⁶⁹ *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring in part).

¹⁷⁰ *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 (majority opinion) (O'Connor, J.).

¹⁷¹ See *Grutter*, 539 U.S. at 333 (majority opinion) (O'Connor, J.) (recognizing "the unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.").

¹⁷² See *Gratz*, 539 U.S. at 304 (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).

¹⁷³ *Bakke*, 438 U.S. at 403 (Blackmun, J., concurring in part and dissenting in part).

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.”¹⁷⁴

* * *

For a complex set of reasons relating to public perception and social transition, the Supreme Court 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 direct considerations of race.

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.¹⁷⁵ 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.

IV. CRITIQUING RACIAL INDIRECTION IN AFFIRMATIVE ACTION

Racial indirection in affirmative action has been criticized for impeding the pursuit of racial justice,¹⁷⁶ trading one form of social conflict for another,¹⁷⁷ sacrificing effectiveness for the sake of appearances,¹⁷⁸ condoning subterfuge over candor,¹⁷⁹ and valuing political compromise over principled reasoning.¹⁸⁰ These concerns are strongly implicated with respect to diversity-based affirmative action, even if people may 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 Court take issue even (or especially) with indirect reliance on race in admissions decisions — although they seem less troubled by facially-neutral measures that have a predictably disproportionate racial impact.¹⁸¹ In contrast,

¹⁷⁴ *Id.* (internal citation omitted).

¹⁷⁵ For a discussion about the distinctive concerns of centrist Justices in racial equality cases, see Siegel, *supra* note 128.

¹⁷⁶ See *infra* Part IV.A.

¹⁷⁷ See *infra* Part IV.B.

¹⁷⁸ See *infra* Part IV.C.

¹⁷⁹ See *infra* Part IV.D.

¹⁸⁰ See *infra* Part IV.E.

¹⁸¹ See, e.g., *City of 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

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 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.¹⁸²

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.

Progressive critics condemn racial indirection 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.¹⁸³ 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.”¹⁸⁴ 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.”¹⁸⁵ Furthermore, the shift away from 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.”¹⁸⁶

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 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

based on race.”); *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.”).

¹⁸² See *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part); *Fisher II*, 570 U.S. at 2215 (Thomas, J., dissenting).

¹⁸³ See Bridges, *supra* note 165, 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.”).

¹⁸⁴ *Bakke*, 438 U.S. at 400 (Marshall, J., concurring in part and dissenting in part).

¹⁸⁵ *Id.* at 327 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

¹⁸⁶ *Id.* at 400 (Marshall, J., concurring in part and dissenting in part).

resources from addressing poverty.¹⁸⁷ Focusing on the experiences of students, some scholars observe how the manner in which affirmative action promotes diversity calls on minority students to perform their racial identities and experiences while doing nothing to challenge and even fueling white students' sense of entitlement and victimhood.¹⁸⁸

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.¹⁸⁹ 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,"¹⁹⁰ and imagines an alternative affirmative action jurisprudence which is "neither subservient to popular views nor cabined by damaging precedent."¹⁹¹

Thus, for a significant constituency of progressives on and off the Court, the diminished salience of race in affirmative action is the antithesis of racial justice. 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 underrepresentation, including stronger preferences for minorities, 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 forms of racial integration. Justice Sotomayor underscored the synergies between educational diversity and racial integration when she wrote in *Schuetz* that "race-sensitive admissions

¹⁸⁷ Bell, *supra* note 161, at 1622.

¹⁸⁸ See, e.g., 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"); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014) (discussing how the diversity rationale for affirmative action supports white privilege and inhibits the development of white anti-racist identity formation); Barnes, Chemerinsky & Onwuachi-Willig, *supra* note 8, at 288 (discussing how "the end result of the [*Fisher I*] majority opinion was the reinforcement and fortification of white privilege."); 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."). 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 Chamber of Commerce of the United States of America as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 ("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.").

¹⁸⁹ 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).

¹⁹⁰ *Id.* at 282.

¹⁹¹ *Id.* at 285.

policies further a compelling state interest in achieving a diverse student body precisely because they increase minority enrollment, *which necessarily benefits minority groups*.¹⁹² 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.”¹⁹³ Thus, even as Justice Sotomayor explained how “race matters” in American social life¹⁹⁴ — declaring that “[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race”¹⁹⁵ — 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 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.”¹⁹⁶ 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.”¹⁹⁷ 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.¹⁹⁸

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.¹⁹⁹ 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

¹⁹² *Schuetz*, 134 S. Ct. at 1660 (Sotomayor, J., dissenting).

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1676.

¹⁹⁵ *Id.*

¹⁹⁶ WILSON, *supra* note 11, at 115; *see also* Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436 (2005) (identifying affirmative action in selective institutions of higher education as exemplifying how “elites’ priorities often have been privileged over theories and strategies of social justice that focused on the plight of working-class and poor.”).

¹⁹⁷ Hochschild, *supra* note 11, 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.”).

¹⁹⁸ *See* Goodwin Liu, *Racial Justice in the Age of Diversity*, 106 CAL. 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).”).

¹⁹⁹ *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, *supra* note 8, at 286 (“[T]he majority, concurrences, and dissent all failed to use the [*Fisher I*] case as a meaningful opportunity to explicate equal protection doctrine as a function of the lived experiences of racial minorities within the United States.”).

failing to explicate racial justice values, racial indirection may address inequalities in some ways and for some constituencies while fueling and facilitating inequalities in others.²⁰⁰ For this reason, 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.²⁰¹ The justification Justice Powell offered accepted the conservative claim that all classifications by race are divisive²⁰² — 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 and open reliance on 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- and racial-justice-based program as threatening social unity. After detailing the legacy and reality 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

²⁰⁰ See Crenshaw, *supra* note 39, 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, *supra* note 165, at 107–08 (“Perhaps being unconscious of race, racism, and racial inequality is precisely the mechanism by which they all are reproduced.”).

²⁰¹ See *supra* notes 109–112.

²⁰² See, e.g., Ernest Van den Haag, *Reverse Discrimination: A Brief Against It*, NAT’L REV. 492, 494 (Apr. 29, 1977) (“The implications of the new course are an increasing consciousness of the significance of group membership, an increasing divisiveness on the basis of race, color, and national origin, and spreading resentment among the disfavored groups against the favored groups.”); Brief for the Chamber of Commerce of the United States of America as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“Quotas are divisive and may lead to racial antagonism.”); Brief for the Fraternal Order of Police *et al.* as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“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 American Jewish Committee *et al.* as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“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 Young Americans for Freedom as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“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.”).

order,” warning that “[t]o fail to do so is to ensure that America will forever remain a divided society.”²⁰³

Furthermore, whereas Justice Powell centered his concern for social cohesion on resentment among whites, others emphasize resentment and estrangement among minorities. A brief in *Grutter* filed by Kimberly James, a black student at the University of Michigan, together with other student intervenors argued that striking down race-sensitive affirmative action would “re-segregate, divide, and polarize our country”²⁰⁴ and “inevitably lead to social explosion.”²⁰⁵ 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.”²⁰⁶

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 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.”²⁰⁷ Furthermore, “[a]ll members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training.”²⁰⁸ More recently, Justice Kennedy in *Fisher* did not depict all racial classifications as divisive, as he once did in *Grutter*.²⁰⁹ *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.²¹⁰

Affirmative action decisions thus appear to adopt racial indirection as a means of abating the social conflict associated with race-based affirmative action. 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.”²¹¹ Justice Kennedy rightly suggests that if the threat of affirmative action stems from explicit racial classifications (as legal conservatives have long argued²¹²), 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.

²⁰³ *Bakke*, 438 U.S. at 396 (Marshall, J., concurring in part and dissenting in part).

²⁰⁴ Brief for Respondents Kimberly James *et al.* at 8, *Grutter*, 539 U.S. 306 (No. 02-241).

²⁰⁵ *Id.* at 37.

²⁰⁶ *Id.* at 23; *see also* 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); Brief for the UCLA Black Law Students Association *et al.*, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“The racial discrimination which has historically permeated almost every aspect of American life is still a divisive and destructive element.”).

²⁰⁷ *Grutter*, 539 U.S. at 332–33 (majority opinion) (O’Connor, J.).

²⁰⁸ *Id.* at 332.

²⁰⁹ *Fisher II*, 136 S. Ct. at 2210 (Kennedy, J.).

²¹⁰ *See* Joshi, *supra* note 62 (discussing the role of social cohesion concerns in *Fisher II*).

²¹¹ *Parents Involved*, 551 U.S. at 797 (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.”).

²¹² *See supra* note 202.

Furthermore, it fails to truly account for the ways that de-emphasizing race may fuel resentment and estrangement among racial minorities.²¹³

Much in the affirmative action decisions celebrates the benefits of racial indirection for individual (white) applicants and the student body and 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. 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.²¹⁴ Additionally, it might be that these Justices consider minority interests to be appropriately addressed through 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 trade 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.²¹⁵

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 believe 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.²¹⁶

In contrast, affirmative action supporters often believe that direct reliance on race in the admissions process is necessary to achieve racial inclusion — and so they lament any restrictions on direct uses of race in admissions. As Justice Blackmun famously 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. . . . In order to get beyond racism, we must first take account of race. There is no other way.”²¹⁷

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

²¹³ 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.”).

²¹⁴ It was Justice Powell’s law clerk, John C. Jefferies, who first drew the Justice’s attention to Harvard’s admissions program, and another law clerk, Bob Comfort, whose memo to the Justice concluded that the diversity justification offers “the best opportunity for taking a middle course.” For an account of how the diversity rationale emerged, see David B. Oppenheimer, *Archibald Cox and the Diversity Justification for Affirmative Action*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2913310.

²¹⁵ See Rama Mani, *Balancing Peace with Justice in the Aftermath of Violent Conflict*, 48 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 . . .”).

²¹⁶ *Fisher II*, 136 S. Ct. at 2211 (quoting Brief for Petitioner at 46, *Fisher II*, 136 S. Ct. 2198 (No. 14-981), 2015 WL 5261568) (claiming that UT Austin had “already ‘achieved critical mass’ . . . using the Top Ten Percent Plan and race-neutral holistic review.”).

²¹⁷ *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring in part).

ability to achieve the best result with minimum effort or expense).²¹⁸ 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 over race-sensitive diversity 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 considerations of race, employing indirection is *inefficient* and impractical.²¹⁹

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 racial considerations into account."²²⁰ Raising 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: "why condemn a program which achieves the same end only in a more direct and efficient manner?"²²¹

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.²²² It was enough for him that racial indirection (as in Harvard's program) could conceivably produce a result similar to that of more direct considerations 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 refused to strike down 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."²²³

The Court has also been receptive to some efficiency concerns through its narrow tailoring analysis. While it has refused to uphold racial quotas, no matter how efficient, it has announced that narrow tailoring "does not require exhaustion of every conceivable race-neutral

²¹⁸ See *Efficacious*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/efficacious>; *Efficient*, MERRIAM-WEBSTER (2019), <https://www.merriam-webster.com/dictionary/efficient>.

²¹⁹ See, e.g., Brief for the National Council of Churches of Christ in the United States of America et al. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811) (arguing that UC Davis's program "should not be discarded in favor of indirect procedures . . . that are of questionable value in increasing the admission of minority students."); Brief for the Law School Admission Council as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811) ("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 Social Scientists as Amici Curiae, *Grutter*, 539 U.S. 306 (No. 02-241) ("[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."); Brief for the Association of American Medical Colleges et al. as Amici Curiae, *Grutter*, 539 U.S. 306 (No. 02-241) ("[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.")

²²⁰ Brief for the National Association of Minority Contractors and Minority Contractors Association of Northern California, Inc. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811).

²²¹ *Id.*

²²² *Bakke*, 438 U.S. at 318 (Powell, J.).

²²³ *Fisher II*, 136 S. Ct. at 2214 (Kennedy, J.).

alternative.”²²⁴ Rather, it is enough to show that “available” and “workable” race-neutral alternatives “do not suffice” to achieve a university’s diversity goals.²²⁵ But ultimately, 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.²²⁶

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.²²⁷

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.”²²⁸ 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.”²²⁹ 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.”²³⁰ 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 specific, openly stated number.”²³¹ 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.”²³² “If honesty is the best policy,” Justice Ginsburg added, “surely Michigan’s accurately described, fully disclosed College affirmative action program is preferable

²²⁴ *Id.* at 2208.

²²⁵ *Id.*

²²⁶ *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring).

²²⁷ For an account of how government transparency may serve both progressive and conservative interests, see David E. Pozen, *Transparency’s Ideological Drift*, 128 YALE L.J. 1 (2018).

²²⁸ *Grutter*, 539 U.S. at 383 (Rehnquist, C.J., dissenting).

²²⁹ Transcript of Oral Argument at 70–71, *Fisher I*, 133 S. Ct. 2411 (2012) (No. 11-345).

²³⁰ *Fisher II*, 136 S. Ct. at 2222 (Alito, J., dissenting).

²³¹ *Bakke*, 438 U.S. at 379 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

²³² *Gratz*, 539 U.S. at 303 n.10 (Ginsburg, J., dissenting).

to achieving similar numbers through winks, nods, and disguises.”²³³ 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,” suggesting that he would “give Michigan an extra point of its own for its frankness.”²³⁴ 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.”²³⁵

Racial indirection may 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.²³⁶ One of the most severe charges against indirection is that it 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.²³⁷ 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.²³⁸ The pursuit of racial equality in a stratified society seems to 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.²³⁹

²³³ *Id.* at 305; *see also* Brief for Association of American Law Schools as Amicus Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“[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.”).

²³⁴ *Id.* at 298 (Souter, J., dissenting).

²³⁵ *Id.*; *see also* Brief for the National Association of Minority Contractors and Minority Contractors Association of Northern California, Inc. as Amici Curiae, *Bakke*, 438 U.S. 265 (No. 76-811), 1977 WL 188007 (“[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.’”).

²³⁶ *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 just in case 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.”).

²³⁷ *See, e.g.*, Albert Breton *et al.*, *Introduction*, in *THE ECONOMICS OF TRANSPARENCY IN POLITICS* 4 (2007) (observing in the context of political institutions that “neither transparency nor obfuscation are all-or-nothing realities.”).

²³⁸ Russell Hardin, *Citizens’ Knowledge, Politicians’ Duplicity*, in *THE ECONOMICS OF TRANSPARENCY IN POLITICS* 37 (2007).

²³⁹ Jack M. Balkin & Reva B. Siegel, *Remembering How To Do Equality*, in *THE CONSTITUTION IN 2020*, at 93, 105 (Jack M. Balkin & Reva B. Siegel eds., 2009); *see also* Robert C. Post, *Introduction: After Bakke*, in *RACE AND REPRESENTATION: AFFIRMATIVE ACTION* 23, 24 (Robert C. Post & Michael Rogin eds., 1998) (conceding that it was “uncertain whether this [public culture] justification for affirmative action, if candidly expressed, would pass constitutional muster.”).

Demanding transparency of racial indirection can produce paradoxical outcomes.²⁴⁰ 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,²⁴¹ it may become *detrimental* when it exposes indirection that *benefits* racial minorities. Furthermore, such transparency demands may not effectively bring racial considerations to the fore and may even drive them further underground.

In concrete terms, a conservative Supreme Court could employ transparency to dismantle racially indirect affirmative action — and could do so by invoking the opinions of progressive Justices (like Ginsburg and Souter) who have encouraged candor about the functioning of such programs.²⁴² 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.²⁴³ 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.²⁴⁴ In so doing, the Court may incentivize universities to be 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.”²⁴⁵ However, another overarching criticism of the Court’s embrace of indirection in the affirmative action jurisprudence is that it is nothing more than a political compromise — a halfway point between colorblindness and race-consciousness that fully vindicates neither.²⁴⁶ 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

²⁴⁰ See generally Pozen, *supra* note 227, at 161 (discussing “how practically and politically complicated—and perverse—transparency mandates can be.”).

²⁴¹ See, e.g., *United States v. Blewett*, 746 F.3d 647 (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.”).

²⁴² 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, *supra* note 8, 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.”).

²⁴³ *Fisher II*, 136 S. Ct. at 2210 (majority opinion) (Kennedy, J.) (“[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.”).

²⁴⁴ See also Part V.B.

²⁴⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992).

²⁴⁶ 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 (1980) (offering “interest-convergence” as the principle underlying *Brown*).

unacceptable alternatives.”²⁴⁷ 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.²⁴⁸ “[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?”²⁴⁹

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 a principled justification for relying 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.”²⁵⁰ Others charge that the Court misconstrues its own precedent 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.’”²⁵¹

Some progressive Justices write separately to dismiss the Court’s distinction between racially direct and indirect forms of affirmative action as constitutionally irrelevant — believing that the Constitution allows both direct and indirect uses of race to remedy legacies of racial oppression. Rejecting indirection as a constitutional requirement, Justice Brennan 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 to the public.”²⁵² Justice Ginsburg in *Gratz* similarly saw “no constitutional infirmity”²⁵³ in race-based admissions programs and preferred “accurately described, fully disclosed” programs to “achieving similar numbers through winks, nods, and disguises.”²⁵⁴

Some legal theorists emphasize the ways indirection as a judicial technique stands in tension with principled legal reasoning.²⁵⁵ 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.”²⁵⁶ 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 institutions of government.”²⁵⁷ 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

²⁴⁷ Guido Calabresi, *Bakke as Pseudo-Tragedy*, 28 CATH. U. L. REV. 427, 431 (1979).

²⁴⁸ Mishkin, *supra* note 11, at 928.

²⁴⁹ *Id.* at 930.

²⁵⁰ *Grutter*, 539 U.S. at 357 (Thomas, J., dissenting).

²⁵¹ *Id.* at 386 (Rehnquist, C.J., dissenting).

²⁵² *Bakke*, 438 U.S. at 379 (Brennan, White, Marshall & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

²⁵³ *Gratz*, 539 U.S. at 303 (Ginsburg, J., dissenting).

²⁵⁴ *Id.* at 305.

²⁵⁵ Although this Article focuses on race and affirmative action, indirection is a judicial strategy in various areas of constitutional law. *See, e.g.*, Robert F. Nagel, *Indirect Constitutional Discourse: A Comment on Meese*, 63 LAW & CONTEMP. PROBS. 507 (2000); Hochschild, *supra* note 11.

²⁵⁶ Ronald Dworkin, *The Bakke Decision: Did It Decide Anything?*, N.Y. REV. BOOKS, Aug. 17, 1978, at 11.

²⁵⁷ Kahn, *supra* note 128, at 4–5.

the affirmative action issue . . . while at the same time failing to preempt processes of public discussion and debate.”²⁵⁸

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.²⁵⁹ Evoking the “passive virtues” of judicial decision-making,²⁶⁰ 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.”²⁶¹ 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.”²⁶² 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 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 an affirmative action doctrine founded on indirection allows, although they disagree about the implications. What happens once the Court’s decisive vote changes? The final Part of the Article takes up this question.

V. IMAGINING FUTURE (IN)DIRECTIONS

The retirement of Justice Kennedy has been described as “the most consequential event in American jurisprudence . . . probably since *Roe v. Wade* in 1973.”²⁶³ What are its implications for affirmative action? Looking to the future, I explore the challenges affirmative action faces in Part V.A, consider how a conservative Court could deal with these challenges in Part V.B, and reflect on new indirections that could and should emerge from these challenges in Part V.C. In

²⁵⁸ Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CALIF. L. REV. 1179, 1185–87 (1996).

²⁵⁹ Bell, *supra* note 161, at 1624; *see also* Bell, *supra* note 246 (introducing the interest-convergence theory).

²⁶⁰ *See* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111–98 (1962), and *compare with, e.g.*, Gerald Gunther, *The Subtle Vices of the “Passive Virtues”—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

²⁶¹ 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 (2007).

²⁶² Siegel, *supra* note 11, at 1545.

²⁶³ Jack Goldsmith, *Justice Kennedy’s retirement leaves the future of U.S. constitutional law entirely up for grabs*, WASH. POST (June 27, 2018), <https://www.washingtonpost.com/opinions/justice-kennedys-retirement-is-the-biggest-event-in-us-jurisprudence-in-at-least-15-years/2018/06/27/>.

this 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 America’s universities.

A. Current Challenges

Justice Kennedy’s retirement arrives at a moment when the battle over affirmative action is entering a new stage.²⁶⁴ Most prominently, Harvard College’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.²⁶⁵

“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.²⁶⁶ Drawing inferences from a sample of Harvard’s admissions data, SFFA alleges that Harvard’s admissions practices have “disproportionately negative effect on Asian Americans” compared to white applicants in violation of Title VI of the Civil Rights Act of 1964.²⁶⁷ Harvard denies any intentional discrimination, disputing SFFA’s selective reliance on available data and pointing out that the percentage of Asian Americans admitted has increased by twenty-nine percent in the last ten years.²⁶⁸

Even if SFFA’s analysis is valid (which is vigorously disputed), it does not impugn the racial indirection framework that structures affirmative action decisions. The law already requires treating race as one of several factors in a holistic review of applicants instead of the “predominant factor.”²⁶⁹ If SFFA could establish that Asian Americans are disadvantaged in relation to similarly-situated white applicants to Harvard, for instance, because biased perceptions about their abilities and experiences have become a predominant factor in admissions decisions, then the appropriate remedy would be to require Harvard to ensure that implicit bias against racial minorities does not become a barrier to their admission.²⁷⁰ Instead, SFFA proposes to end all consideration of race in admissions.

²⁶⁴ Institutions currently facing allegations of unconstitutional racial preferences include Harvard University, University of California, University of North Carolina-Chapel Hill, and Yale University. See 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*, THE NEWS & OBSERVER (Aug. 10, 2018), <https://www.newsobserver.com/news/local/article216485240.html>; 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>.

²⁶⁵ 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).

²⁶⁶ See Memorandum in Support of Plaintiff’s Motion for Summary Judgment, *Student for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 1:14-cv-14176-ADB.

²⁶⁷ *Id.*

²⁶⁸ See Memorandum in Support of Defendant’s Motion for Summary Judgment, *Student for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 1:14-cv-14176-ADB.

²⁶⁹ *Grutter*, 539 U.S. at 320.

²⁷⁰ On the experiences of Asian American students in higher education, see ROBERT T. TERANISHI, *ASIANS IN THE IVORY TOWER: DILEMMAS OF RACIAL INEQUALITY IN AMERICAN HIGHER EDUCATION* (2010). If SFFA were truly concerned about the treatment of minority applicants, it could also challenge preferences granted to so-called

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 allegation 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. Presumptively high-achieving minorities are likely to be more 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 for elite universities seem doubly unfair.²⁷¹ Furthermore, although surveys show the majority of Asian Americans support affirmative action programs, making Asian Americans out to be the victims may enlist new allies in the battle against affirmative action.²⁷² At the same time, focusing on Asian Americans gives certain opponents of affirmative action cover that their disdain for policies of racial integration is not itself racially motivated.²⁷³

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.²⁷⁴ 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.”²⁷⁵ *SFFA v. Harvard* presents an opportunity to use our understanding of how different Justices regard racial indirection to predict how the current, more conservative-leaning Court might change course on affirmative action.

“legacy” applicants: children of largely wealthy and white alumni who represent nearly one-third of Harvard’s class of 2021. See Jessica M. Wang & Brian P. Yu, *Makeup of the Class*, HARV. CRIMSON, <https://features.thecrimson.com/2017/freshman-survey/makeup/>.

²⁷¹ For critical perspectives on the “model minority” stereotype, see JENNIFER LEE & 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 (2016).

²⁷² See PEI-TE LIEN, M. MARGARET CONWAY & JANELLE WONG, *THE POLITICS OF ASIAN AMERICANS: DIVERSITY AND COMMUNITY* 17 (2004) (noting that “seventy percent [of Asian Americans] who report an opinion on affirmative action are in favor of it”).

²⁷³ 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>.

²⁷⁴ 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>

²⁷⁵ *Fisher II*, 136 S. Ct. at 2227 (Alito J., dissenting); see also *Fisher I*, 133 S. Ct. at 2431 (Thomas, J., dissenting) (“There can be no doubt that the University’s discrimination injures white and Asian applicants who are denied admission because of their race.”).

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.

The prospect we face today is of a durable conservative majority on the Supreme Court.²⁷⁶ The question is no longer whether but when and how the 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, the 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.²⁷⁷ 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.²⁷⁸

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”²⁷⁹ or because critical mass (however defined) is “a naked effort to achieve racial balancing.”²⁸⁰ 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 conservative Court could employ transparency to dismantle indirection in affirmative action — striking down 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.”²⁸¹ It has now been four decades since the Court first upheld race-sensitive affirmative action in *Bakke*,

²⁷⁶ 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 Justice to replace Justice Scalia, with more liberal appointments to follow. These Justices would not only vote to uphold race-sensitive affirmative action programs, but would likely seek to overcome the constraints posed by the framework of racial indirection — speaking more openly about race and perhaps even allowing more direct considerations of race in admissions. Conservative backlash and ballot measures prohibiting all racial preferences 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, colleges and universities in states that ban all considerations of race would need to find new indirect ways to achieve racial diversity.

²⁷⁷ See *Grutter*, 539 U.S. at 349 (Scalia, J., concurring in part and dissenting in part); *Fisher II*, 570 U.S. at 2215 (Thomas, J., dissenting).

²⁷⁸ *Fisher I*, 133 S. Ct. at 2429 (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, *supra* note 8; 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 (2015).

²⁷⁹ *Fisher II*, 136 S. Ct. at 2222 (Alito, J., dissenting).

²⁸⁰ *Grutter*, 539 U.S. at 379 (Rehnquist, C.J., dissenting).

²⁸¹ *Id.* at 342 (majority opinion) (O'Connor, J.).

and fifteen 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,”²⁸² 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,²⁸³ 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 racial preferences unnecessary, affirmative action critics are pivoting to challenge facially-neutral admissions programs.²⁸⁴ While such measures are not in immediate peril, a time may come when even facial-neutrality is no longer sufficient to sustain 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 evolve into other racially indirect forms. This raises the question of whether 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.²⁸⁵ 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.²⁸⁶ 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, because it may have a systemic impact and because it may align different perspectives and goals found in the affirmative action debate. 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.²⁸⁷ These progressive critiques of testocracy converge in striking ways with the views of individual Justices across the political spectrum in affirmative action cases.

²⁸² *Id.* at 346 (Ginsburg, J., concurring).

²⁸³ 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.”).

²⁸⁴ 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 *supra* note 264.

²⁸⁵ See *infra* notes 288–295.

²⁸⁶ For instance, because percentage laws depend on racial segregation in state schools to generate racial integration in state universities, their results are likely to vary depending on state demographics. For the same reason, percentage plans suffer from specific normative limitations. Focusing on their “perverse incentives,” Justice Ginsburg has explained how percentage plans “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.” See *Gratz*, 539 U.S. at 304 n.10 (Ginsburg, J., dissenting).

²⁸⁷ See *supra* note 26.

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,”²⁸⁸ and even proposed the abolition of the LSAT to consider applications in a racially neutral way.²⁸⁹ More significantly, Justice Powell’s later-controlling opinion in *Bakke* appeared to endorse using race in admissions in order to ensure “fair appraisal of each individual’s academic promise in the light of some cultural bias in grading or testing procedures.”²⁹⁰ 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.”²⁹¹

In contrast, some conservative Justices propose de-emphasizing standardized tests as a workable alternative to race-sensitive affirmative action.²⁹² 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.”²⁹³ Although the Court in *Grutter* did not compel the Law School to give up the LSAT,²⁹⁴ 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.’”²⁹⁵

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. Moving away from standardized tests is likely to provoke resentment among certain segments of society, particularly those with 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.²⁹⁶ However,

²⁸⁸ *DeFunis v. Odegaard*, 416 U.S. 312, 335 (1974) (per curiam) (Douglas, J., dissenting).

²⁸⁹ *Id.* at 340.

²⁹⁰ *Bakke*, 438 U.S. at 306 n.43 (Powell, J.).

²⁹¹ *Id.*

²⁹² Let us assume that such suggestions are not merely politically expedient ways to get rid of race-sensitive affirmative action.

²⁹³ *Grutter*, 539 U.S. at 370 (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.”).

²⁹⁴ *Id.* at 339 (majority opinion) (O’Connor, J.).

²⁹⁵ *Fisher II*, 136 S. Ct. at 2234 n.13 (Alito, J., dissenting).

²⁹⁶ 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> (“Pacific Legal is

revealing dynamics of educational privilege and unpacking myths about fairness and merit should be considered virtues rather than faults. Furthermore, by applying lessons from forms of racial indirection that have 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;²⁹⁷ (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.²⁹⁸

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,²⁹⁹ as well as a broader rethinking of what constitutes merit and how best to achieve it.³⁰⁰ Scholars have long demonstrated how traditional ideas of merit work to exclude people based on race, class, gender, and other social categories of distinction.³⁰¹ Although some have proposed a radical re-envisioning of merit, the liberal concern with preserving the constitutionality of diversity-based policies has largely taken the place of such re-envisioning.³⁰² The need to continue the work of racial integration in this period of racial retrenchment may yet yield more transformative, if indirect, forms of affirmative action.

asserting that, because Discovery could prevent some Asian-American students from gaining access to the schools, the program's expansion violates students' constitutional right to equal protection under the law.”).

²⁹⁷ In *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Court held 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 2681, 2676 (emphasis added).

²⁹⁸ In June 2018, the University of Chicago stopped requiring standardized test scores in order to “make sure [requirements] were fair to *every group*, that *everybody*, *anybody* could aspire to a place like UChicago.” 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> (quoting Jim Nondorf, Dean of Admissions) (emphasis added).

²⁹⁹ See Prudence L. Carter & Kevin G. Welner, *Achievement Gaps Arise from Opportunity Gaps*, in CLOSING THE OPPORTUNITY GAP: WHAT AMERICA MUST DO TO GIVE EVERY CHILD AN EVEN CHANCE 1, 3 (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.”).

³⁰⁰ See *supra* note 26; 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.”).

³⁰¹ See Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585 (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.”).

³⁰² 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) (questioning “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.”).

CONCLUSION

This Article has shown how racial indirection has allowed, and may continue to allow, efforts to desegregate America's universities. Yet, the Article has avoided reaching conclusions about the ultimate value of indirection, precisely because it is an approach that manifests across a variety of contexts and varies significantly in the consequences it produces and the concerns it vindicates. Indirection is not always invidious, as the case of affirmative action suggests. Moving forward, several questions demand answers. To what extent can indirection be a force of racial progress rather than retrenchment? How will indirection in affirmative action interact with and impact other bodies of law? Will a conservative Court distinguish benevolent from invidious forms of indirection, or will it treat them both as suspect, or worse, prohibit indirection that benefits minorities while allowing indirection that harms them?³⁰³ 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.

³⁰³ See *Trump v. Hawaii*, 585 U.S. _ (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.”).