
THE FUTURE OF AFFIRMATIVE ACTION[†]

*Elise C. Boddie**

It is hard to remember a time in recent memory when the problems of racial injustice have been more visible and the need to promote opportunities for people of different racial and ethnic backgrounds has seemed more urgent. The very rawness and extent of these injustices are too disturbing to bear: videos of police killing unarmed African Americans;¹ reports by the Department of Justice documenting law enforcement's excessive force against, and harassment of, African Americans in Baltimore² and Ferguson;³ xenophobic targeting of American Muslims and Mexican Americans by a presidential candidate;⁴ judicial findings of overt minority voter suppression⁵ — to say nothing of systemic problems like disproportionately high unemployment⁶ and

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* Henry Rutgers University Professor, Professor of Law & Robert L. Carter Scholar, Rutgers Law School. I am grateful to Robin Lenhardt and to the editors of the *Harvard Law Review* for their insightful comments on earlier drafts of this Response.

¹ See, e.g., *Two Police Shootings, Two Videos, Two Black Men Dead*, CNN (July 7, 2016, 2:25 PM), <http://www.cnn.com/2016/07/07/us/shootings-alton-sterling-philando-castile/index.html> [<https://perma.cc/SNB6-NJFL>].

² See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3–11 (Aug. 10, 2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/2EKS-GHGS>] (describing racial disparities in the policing of Baltimore's African American neighborhoods).

³ See CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1–6 (Mar. 4, 2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/X9GQ-7R7A>] (describing racial disparities in the policing in Ferguson).

⁴ See, e.g., Lydia O'Connor & Daniel Marans, *Here Are 13 Examples of Donald Trump Being Racist*, HUFFINGTON POST (Feb. 29, 2016, 5:17 PM), http://www.huffingtonpost.com/entry/donald-trump-racist-examples_us_56d47177e4bc3260bf777e83 [<https://perma.cc/7JK8-3J7Q>].

⁵ See, e.g., N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. 2016) (concluding that voter restrictions “target[ed] African Americans with almost surgical precision,” and that such restrictions were intentionally discriminatory); cf. Veasey v. Abbott, 830 F.3d 216 (5th Cir. 2016) (concluding that Texas voter restrictions had discriminatory impact under the Voting Rights Act).

⁶ See Thomas J. Sugrue, *Less Separate, Still Unequal: Diversity and Equality in “Post-Civil Rights,”* in OUR COMPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY 39, 60–62 (Earl Lewis & Nancy Cantor eds., 2016) [hereinafter OUR COMPELLING INTERESTS] (describing blacks' comparatively high unemployment and citing a study that found that “job applicants with names like Emily and Greg were more likely to be hired than those with comparable credentials named Lakisha and Jamal,” *id.* at 61); Valerie Wilson, *State Unemployment Rates by Race and Ethnicity at the End of 2015 Show a Plodding Recovery*, ECON. POL'Y INST. (Feb. 11, 2016), <http://www.epi.org/publication/state-unemployment-rates-by-race-and-ethnicity-at-the-end-of-2015-show-a-plodding-recovery> [<https://perma.cc>

school⁷ and housing segregation⁸ that have long drained opportunities from communities of color. The list goes on and on.⁹

Given this persistent racism, we should put an end to the fiction fostered by the Supreme Court for the last several decades¹⁰ that colorblindness is an appropriate response to our racial problems.¹¹ Along with a growing body of evidence about the pervasiveness and impact of implicit bias,¹² these events counsel instead that we focus on building a society that is more open, inclusive, and welcoming of racial and ethnic differences. That project requires a measure of intentionality that only affirmative action can deliver.

*Fisher v. University of Texas at Austin (Fisher II)*¹³ is cause for celebration because it reinforces the legitimacy of the diversity rationale for affirmative action in higher education and, therefore, underscores a principle of racial inclusion that has otherwise been absent from the Court's equal protection doctrine.¹⁴ In this respect, *Fisher II* matters

/8UWZ-2KMU] (discussing comparatively high unemployment rates of African Americans and Hispanics in specific states).

⁷ See generally GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT, UCLA, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE* (May 15, 2014), [https://perma.cc/SX8V-LKME] (discussing the rise in the "double segregation" of students of color by race and class).

⁸ See Margery Austin Turner, *Why Haven't We Made More Progress in Reducing Segregation?*, N.Y.U. FURMAN CTR. (Apr. 2014), <http://furmancenter.org/research/iri/essay/why-havent-we-made-more-progress-in-reducing-segregation> [https://perma.cc/87TR-F52Z].

⁹ See Sugrue, *supra* note 6, at 59–60, 63–68 (discussing persistent income inequality, higher rates of poverty, and the racial wealth gap); cf. Christopher Ingraham, *Americans Say Racism Is a Bigger Problem Today Than at Any Point in the Past 20 Years*, WASH. POST: WONKBLOG (Aug. 5, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/08/05/americans-say-racism-is-a-bigger-problem-today-than-at-any-point-in-the-past-20-years> [https://perma.cc/5M6K-Y5U8] (commenting on a Pew Research poll that found that half of Americans think racism is a "big problem" in this country).

¹⁰ See, e.g., *Shaw v. Reno*, 509 U.S. 630, 643 (1993) ("Classifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'" (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943))).

¹¹ See Sugrue, *supra* note 6, at 47 ("Since the 1960s, it has become commonplace for Americans to express support for the ideal of 'colorblindness.'").

¹² See Kwame Anthony Appiah, *The Diversity of Diversity, in OUR COMPELLING INTERESTS*, *supra* note 6, at 161, 164–66 (discussing how implicit bias corrupts our judgment about merit, skewing our decisionmaking against socially disfavored groups); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1130–31 (2012) (describing implicit bias as "pervasive," "large in magnitude (as compared to standardized measures of explicit bias," *id.* at 1130, and "predict[ive] [of] certain kinds of real-world behavior," *id.* at 1131).

¹³ 136 S. Ct. 2198 (2016).

¹⁴ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 723–33 (2007) (declaring unconstitutional localities' use of race as a decisive factor in public school assignments as part of an effort to achieve the educational benefits of diversity, to "reduce the potentially harmful effects of racial isolation," *id.* at 786 (Kennedy, J., concurring in part and concurring in the judgment), and to avoid replicating racially segregated housing patterns in school enrollment, *id.* at 786–87); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995) (concluding that racial classifications in a federal contracting program are subject to strict scrutiny); *City*

because of what it was not: a loss that closed yet another door to opportunity for people of color.

Professor Kimberly Jenkins Robinson's Comment portrays *Fisher II* differently. She argues that the decision imposes a "demanding evidentiary burden" on universities that practice race-conscious admissions¹⁵ and, therefore, runs the risk of chilling affirmative action.¹⁶ More specifically, she contends that the Court in *Fisher I*¹⁷ and *Fisher II* tightened *Grutter v. Bollinger*'s¹⁸ narrow-tailoring standard.¹⁹

It is not clear, however, that the standard articulated in *Fisher I*, as applied in *Fisher II*, is meaningfully different from that in *Grutter*.²⁰ Rather, what the Court objected to in *Fisher I* was the Fifth Circuit panel's misinterpretation of language in *Grutter* that "the narrow-tailoring inquiry . . . must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher

of *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (plurality opinion) (rejecting use of race to remedy racial disparities in local contracting); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (opinion of Powell, J.) (rejecting "societal discrimination" as a justification for affirmative action in medical school admissions); *Washington v. Davis*, 426 U.S. 229, 239 (1976) (rejecting disparate impact standard under the Equal Protection Clause to challenge police exam that disadvantaged black applicants).

¹⁵ See Kimberly Jenkins Robinson, *The Supreme Court, 2015 Term — Comment: Fisher's Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 188 (2016) ("*Fisher II* offers some assistance to institutions that want to employ affirmative action, but also provides a cautionary tale about the demanding evidentiary burden that [they] must carry to prevail."); *id.* at 189 ("*Fisher II* may benefit universities that seek to consider an applicant's race among many factors to assemble a diverse class. . . . [A]t the same time, *Fisher II* may make it harder for universities that do so to withstand the Court's demanding evidentiary burden.").

¹⁶ See *id.* at 204 ("*Fisher II*'s insistence on such thorough data and research on these issues may chill the use of affirmative action on campuses that want to avoid the risks of litigation or the costs of preparing a potential defense.").

¹⁷ *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (2013).

¹⁸ 539 U.S. 306 (2003).

¹⁹ See Robinson, *supra* note 15, at 200 ("The Court in *Fisher I* moved away from [*Grutter*]'s deferential approach, and in *Fisher II* applied a more demanding evidentiary analysis than that of *Grutter*.").

²⁰ Compare *Grutter*, 539 U.S. at 339 ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." (citations omitted)), with *Fisher II*, 136 S. Ct. 2198, 2208 (2016) ("Though '[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative' or 'require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,' it does impose 'on the university the ultimate burden of demonstrating' that 'race-neutral alternatives' that are both 'available' and 'workable' 'do not suffice.'" (alterations in original) (first and second quoting *Grutter*, 539 U.S. at 339, and then quoting *Fisher I*, 133 S. Ct. at 2420)). At most, the Court in *Fisher II* clarified that the "serious, good faith consideration" requirement from *Grutter* meant that a university must "demonstrat[e]" the insufficiency of race-neutral alternatives.

education.”²¹ The court of appeals read that language to mean that it should defer to the university’s judgment about the necessity of using race.²²

A more plausible reading of the *Grutter* language is that the Court intended the narrow-tailoring inquiry to accommodate the unique educational benefits that accompany diversity-focused admissions policies in higher education. The *Grutter* opinion took pains to distinguish its diversity analysis — which focuses on ensuring consideration of all “pertinent elements of diversity in light of the particular qualifications of each applicant” — from its other (nondiversity-based) affirmative action jurisprudence where such concerns do not figure into the Court’s equal protection standard.²³ Understood in this way, *Fisher I* did not impose a *more* burdensome narrow-tailoring standard than

²¹ *Grutter*, 539 U.S. at 333–34.

²² See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 232 (5th Cir. 2011) (“[T]he narrow-tailoring inquiry — like the compelling-interest inquiry — is undertaken with a degree of deference to the University’s constitutionally protected, presumably expert academic judgment.”), *rev’d*, *Fisher I*, 133 S. Ct. 2411; see also *id.* at 233 (“*Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university’s good faith determination that certain race-conscious measures are necessary to achieve the educational benefits of diversity, including attaining critical mass in minority enrollment.”).

²³ *Grutter*, 539 U.S. at 334 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.)). The relevant portion of *Grutter* reads in full:

Since *Bakke*, we have had no occasion to define the contours of the narrow-tailoring inquiry with respect to race-conscious university admissions programs. That inquiry must be calibrated to fit the distinct issues raised by the use of race to achieve student body diversity in public higher education. Contrary to Justice Kennedy’s assertions, we do not “aband[o]n strict scrutiny.” Rather, as we have already explained, we adhere to *Adarand*’s teaching that the very purpose of strict scrutiny is to take such “relevant differences into account.”

To be narrowly tailored, a race-conscious admissions program cannot use a quota system — it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Instead, a university may consider race or ethnicity only as a “‘plus’ in a particular applicant’s file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.” In other words, an admissions program must be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”

We find that the Law School’s admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant.

Id. at 333–34 (alterations in original) (citations omitted) (first quoting *id.* at 394 (Kennedy, J., dissenting), second quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995), third quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.), and then quoting *Bakke*, 438 U.S. at 317).

Grutter but merely clarified that narrow tailoring was not *less* burdensome than what *Grutter* intended.²⁴

Other aspects of the *Fisher II* opinion also cast some doubt on the notion that the Court has imposed a more demanding burden of proof.²⁵ Indeed, the decision recognizes that some evidentiary uncertainty inheres in the educational nature of the diversity rationale. As Justice Kennedy observed, “[a] university is in large part defined by those intangible ‘qualities which are incapable of objective measurement but which make for greatness,’”²⁶ meaning that the benefits of inclusion cannot necessarily be captured with quantitative precision.²⁷ Of course, we can reasonably assume that future higher education cases might lead courts to compare the evidentiary record of defending institutions with that compiled by the University of Texas. And, from this perspective, *Fisher II* provides welcome guidance about the kinds of evidence that similarly situated universities might offer to justify their policies.²⁸ However, this does not mean that the Court has in

²⁴ See *Fisher II*, 136 S. Ct. at 2208 (“*Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university’s permissible goals.”). Robinson asserts that *Fisher I* “raised the evidentiary bar on the consideration of race-neutral alternatives” because it “held that a ‘court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.’” Robinson, *supra* note 15, at 200–01 (quoting *Fisher I*, 133 S. Ct. at 2420). Robinson’s claim might be read to suggest that a university must exhaust consideration of race-neutral policies to show that no “workable” and “available” race-neutral alternatives actually exist. *Fisher II*, however, emphasized that although a university bears “‘the ultimate burden of demonstrating’ that ‘race-neutral alternatives’ that are both ‘available’ and ‘workable’ ‘do not suffice,’” *Fisher II*, 136 S. Ct. at 2208 (quoting *Fisher I*, 133 S. Ct. at 2420), it need not “exhaust[] . . . every conceivable race-neutral alternative,” *id.* (quoting *Grutter*, 539 U.S. at 339). The Court stated that a university can satisfy its burden by showing that a given race-neutral alternative “would not promote its interest in the educational benefits of diversity ‘about as well and at tolerable administrative expense,’” *id.* (quoting *Fisher I*, 133 S. Ct. at 2420), because such an alternative would “require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,” *id.* (quoting *Grutter*, 539 U.S. at 339); *cf. id.* at 2212–13 (rejecting the petitioner’s argument that race-neutral alternatives existed because “none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought,” *id.* at 2212). Thus, while the university bears the burden of showing why a given alternative would not allow it to meet its educational objectives, the Court’s willingness to factor in a university’s reputational interests and broad commitment to providing educational opportunities appears to set a soft baseline for meeting this requirement.

²⁵ See Robinson, *supra* note 15, at 198 (“*Fisher II* increased the evidentiary burdens for universities and colleges to prove the interrelated requirements that the consideration of race is necessary and that they faithfully assessed workable race-neutral alternatives beyond the standard required in *Grutter*.”).

²⁶ *Fisher II*, 136 S. Ct. at 2214 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

²⁷ *Cf. Grutter*, 539 U.S. at 328 (“Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”).

²⁸ See Robinson, *supra* note 15, at 197 (“Most importantly, *Fisher II* provides much-needed guidance on the types of evidence that colleges and universities will need to present in court to

fact heightened the evidentiary standard beyond what *Grutter* required, as Robinson contends.²⁹

Robinson also cautions that we should be wary of *Fisher II* because Justice O'Connor's 2003 *Grutter* opinion sets an expiration date for affirmative action. Robinson points to Justice O'Connor's declaration that the Court "expect[s]" explicit uses of race to "no longer be necessary" in twenty-five years,³⁰ which, if taken literally, would mean that affirmative action would end in 2028.³¹

But Justice O'Connor's statement suggests goals that are more aspirational than mandatory.³² Her statement begins with the observation that "the number of minority applicants with high grades and test scores increased" in the twenty-five years between *Grutter* and *Regents of the University of California v. Bakke*,³³ where the diversity rationale first surfaced.³⁴ Justice O'Connor's twenty-five-year declaration likely reflects her assumption that such progress would continue through the next quarter century, obviating the need for race-specific measures to enhance minority representation in higher education.³⁵ As recent history illustrates, however, we are nowhere close to the kind of sustained improvement in opportunities for people of color that would jus-

survive a constitutional challenge given the minimal guidance in *Grutter*. . . *Fisher II* offers an instructive roadmap for university officials.").

²⁹ Cf. *id.* at 198 ("Despite [*Fisher II*'s] potential benefits, however, [it] also erected new hurdles.").

³⁰ *Grutter*, 539 U.S. at 343 ("It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." (citation omitted)).

³¹ See Robinson, *supra* note 15, at 186 ("[T]he Court in *Grutter v. Bollinger* stated that affirmative action to ensure diversity's educational benefits must eventually come to an end and suggested that that end point would be twenty-five years after *Grutter*."). But see *id.* at 196 ("*Fisher II* did not mention the need for a termination point for affirmative action."). At times Robinson appears to equivocate on the anticipated timeline for affirmative action. See, e.g., *id.* at 196 ("The Court's silence in *Fisher II* about any durational limits on affirmative action, rather than reaffirming the importance of a termination point or *Grutter*'s 2028 endpoint, may allow institutions to employ affirmative action beyond the 2028 deadline as long as they are engaging in periodic review.").

³² See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 731 (2007) ("The Ninth Circuit below stated that it 'share[d] in the hope' expressed in *Grutter* that in 25 years racial preferences would no longer be necessary to further the interest identified in that case." (alteration in original) (quoting *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162, 1192 (9th Cir. 2005), *rev'd on other grounds*, 551 U.S. 701)); see also Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 775-76 (2015) (observing that, unlike remedial rationales, "diversity is ageless in its reach into the future," *id.* at 776).

³³ 438 U.S. 265 (1978).

³⁴ *Grutter*, 539 U.S. at 343.

³⁵ See *id.*

tify Justice O'Connor's optimism.³⁶ The Court's recognition of this hard reality may explain why *Fisher II* nowhere mentions Justice O'Connor's hope for permanently sunseting affirmative action.³⁷

It is worth emphasizing that *Fisher II* embraces *Grutter's* central conclusion about the social benefits of diversity.³⁸ As Robinson notes, the decision approvingly cites the University of Texas's goals of reducing stereotypes, promoting cross-racial understanding, preparing the student body for diversity in the workplace and the rest of society, and cultivating leaders who have "legitimacy in the eyes of the citizenry" because of their diverse backgrounds.³⁹ Thus, as in *Grutter*,⁴⁰ *Fisher II* acknowledges that the benefits of diversity not only inure to students in institutions of higher education but also accrue more broadly to the workforce and to society as a whole.⁴¹

We should pause on the potential significance of this acknowledgment. Like *Grutter*,⁴² *Fisher II* recognizes that universities do not operate in isolation from other social institutions. The recognition that diversity can deepen our connections across different settings suggests that the diversity rationale should be extended beyond higher education. If preparing students to engage in an increasingly diverse society justifies the narrow consideration of race in college admissions, why not allow similar affirmative action policies in the workforce⁴³ and K-

³⁶ Cf. *Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring in part and concurring in the judgment) ("The enduring hope is that race should not matter; the reality is that too often it does."); Earl Lewis & Nancy Cantor, *Introduction: the Value of Diversity for Democracy and a Prosperous Society*, in OUR COMPELLING INTERESTS, *supra* note 6, at 1, 10-11 ("[W]e cannot simply presume progress, especially as patterns of residential, educational, and economic segregation have in many ways hardened over decades." *Id.* at 10.); Sugrue, *supra* note 6, at 46 (describing the half century following the civil rights movement of the 1960s as one of "gains and setbacks, of expanding opportunities and still-wrenching injustices, of disadvantages by race and ethnicity sometimes overcome, but just as often intensified and compounded").

³⁷ Robinson acknowledges this point. See Robinson, *supra* note 15, at 196. The permanent ban on affirmative action suggested by Robinson is not the same as requiring sunset provisions in affirmative action policies in order to incentivize institutions to revisit the necessity of such policies.

³⁸ *Fisher II*, 136 S. Ct. 2198, 2210 (2016) ("[A] university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'" (quoting *Fisher I*, 133 S. Ct. 2411, 2419 (2013)); *Grutter*, 539 U.S. at 327-32.

³⁹ *Fisher II*, 136 S. Ct. at 2211 (quoting Supplemental Joint Appendix at 1a, *Fisher II*, 136 S. Ct. 2198 (No. 14-981)).

⁴⁰ 539 U.S. at 327-32.

⁴¹ See *Fisher II*, 136 S. Ct. at 2211 ("All of these objectives, as a general matter, mirror the 'compelling interest' this Court has approved in its prior cases.")

⁴² See *Grutter*, 539 U.S. at 332 ("As we have recognized, law schools 'cannot be effective in isolation from the individuals and institutions with which the law interacts.'" (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950))).

⁴³ See Anthony Carnevale & Nicole Smith, *The Economic Value of Diversity*, in OUR COMPELLING INTERESTS, *supra* note 6, at 106, 108-23 (discussing diversity's benefits in the workplace). See generally Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1 (2000) (same).

12 education, for example? The nature of the diversity rationale — that our interactions provide opportunities to help us understand one another better⁴⁴ — should justify its constitutional legitimacy not only in colleges and universities but also across the institutional spectrum.⁴⁵

Of course, the Court has yet to uphold diversity policies outside higher education.⁴⁶ And, as the majority opinion notes, *Fisher II*'s somewhat unique facts may limit its future application.⁴⁷ But some optimism may be justified if we interpret *Fisher II* to shift equal protection's focus from eliminating affirmative action itself, as the Court's pre-*Grutter* cases suggest,⁴⁸ to ensuring the accountability of institutions that practice it. As *Fisher II* counsels, institutions that rely on race-conscious measures must articulate their institutional goals for diversity in "sufficiently measurable" terms,⁴⁹ thoughtfully demonstrate why race-neutral alternatives do not suffice for meeting those goals,⁵⁰ and ensure meaningful and ongoing deliberation about the continued necessity of using race.⁵¹ That burden is not light — it requires particular care when adopting and implementing race-conscious policies — as *Grutter*'s original "serious, good faith consideration" standard might indicate.⁵² But this rigor does not mean the death knell for affirmative action, as Robinson suggests, so long as institutions invest

⁴⁴ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 n.48 (1978) (opinion of Powell, J.) ("[I]nformal 'learning through diversity' [can occur through] the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government [and] can be subtle and yet powerful sources of improved understanding and personal growth." (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY., Sept. 26, 1977, at 9)).

⁴⁵ Cf. *Grutter*, 539 U.S. at 331–32 ("[E]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 16, *Grutter*, 539 U.S. 306 (No. 02-241))).

⁴⁶ See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

⁴⁷ *Fisher II*, 136 S. Ct. at 2208 (describing admissions program as "*sui generis*"); *id.* at 2209 ("The fact that this case has been litigated on a somewhat artificial basis . . . may limit its value for prospective guidance.").

⁴⁸ See *supra* note 14 (listing cases).

⁴⁹ *Fisher II*, 136 S. Ct. at 2211.

⁵⁰ *Id.* at 2208.

⁵¹ *Id.* at 2210 ("Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest."); *id.* at 2214–15 ("The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.").

⁵² *Grutter*, 539 U.S. at 339.

in the proper procedural safeguards to facilitate judicial scrutiny of race-conscious policies.⁵³

Indeed, *Fisher II* may give institutions that provide the same kinds of institutional safeguards some constitutional safe harbor to pursue race-conscious diversity policies beyond the context of higher education.⁵⁴ Justice Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*⁵⁵ hints at this possibility for K-12 education. Justice Kennedy joined in the Court's opinion that the Seattle and Jefferson County school districts' blunt racial classifications were neither properly conceptualized nor narrowly tailored.⁵⁶ A significant problem for Justice Kennedy was that it was difficult to understand precisely why and how the school districts were considering race.⁵⁷

Justice Kennedy departed, however, from the plurality's suggestion that diversity itself was not a constitutionally legitimate interest in K-12 education.⁵⁸ He asserted that promoting diversity and redressing racial isolation can be permissible objectives,⁵⁹ but that the school districts had fallen short because they did not clearly articulate their educational goals or their means for accomplishing them.⁶⁰ While indicat-

⁵³ See *Fisher II*, 136 S. Ct. at 2211 (stating that the institutions' goals should be "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them" by providing "a 'reasoned, principled explanation' for [their] decision[s]" (quoting *Fisher I*, 133 S. Ct. at 2419)).

⁵⁴ Cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 782 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (discussing the virtues of diversity in "[t]he Nation's schools").

⁵⁵ 551 U.S. 701.

⁵⁶ *Id.* at 735 ("Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.")

⁵⁷ See *id.* at 784-85 (Kennedy, J., concurring in part and concurring in the judgment) ("Jefferson County in its briefing has explained how and when it employs [racial] classifications only in terms so broad and imprecise that they cannot withstand strict scrutiny."); cf. *Grutter*, 539 U.S. at 327-28 ("Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining 'the educational benefits that flow from a diverse student body.'" (quoting Brief for Respondents at i, *Grutter*, 539 U.S. 306 (No. 02-241))).

⁵⁸ *Parents Involved*, 551 U.S. at 782 (Kennedy, J., concurring in part and concurring in the judgment) ("The Nation's schools strive to teach that our strength comes from people of different races, creeds, and cultures uniting in commitment to the freedom of all. In these cases two school districts in different parts of the country seek to teach that principle by having classrooms that reflect the racial makeup of the surrounding community. That the school districts consider these plans to be necessary should remind us our highest aspirations are yet unfulfilled."); see also *id.* at 782-83 (expressing agreement with the Court's judgment but noting that "[his] views do not allow [him] to join the balance of the [plurality's] opinion . . . , which seems . . . inconsistent in both its approach and its implications with the history, meaning, and reach of the Equal Protection Clause").

⁵⁹ *Id.* at 788-89.

⁶⁰ *Id.* at 784 ("The government bears the burden of justifying its use of individual racial classifications. As part of that burden it must establish, in detail, how decisions based on an individual student's race are made in a challenged governmental program.").

ing his continuing wariness of racial classifications,⁶¹ Justice Kennedy's concurrence suggests that appropriately calibrated policies that advance clear diversity goals may yet satisfy strict scrutiny in other contexts,⁶² if institutions are willing to do some homework on the front end. As a reliable indicator of the Court's center-right race jurisprudence, Justice Kennedy's *Parents Involved* concurrence hardly signals the end of diversity-based affirmative action,⁶³ particularly when we pair it with his majority opinion in *Fisher II*.

All that said, it is hard to ignore that the Court decided *Fisher II* against the backdrop of deep racial unrest, spurred by long-simmering frustrations over police brutality and the multiple failures of our institutions to address pervasive inequality,⁶⁴ including concentrated, racialized poverty.⁶⁵ The irony of *Fisher II*'s win for diversity-based affirmative action, therefore, is that it points to a broader problem, typically lost in the public conversation about race, that the Court over the last several decades has consistently blocked more robust race-conscious policies that could have helped match the expanse and intensity of our dynamic racial problems.⁶⁶

Eliminating entrenched racial disadvantage admittedly requires a different kind of affirmative action than diversity policies can deliver.⁶⁷ A more vigorous form of affirmative action — effectively disallowed by the Court since *Bakke* — would promote opportunity for African Americans, Latinos, Asians, and other racially marginalized groups through more race-targeted means. The road to the kind of doctrinal change that would allow such policies is surely long,⁶⁸ but *Fisher II* may hold clues for pushing equal protection in that direction.

⁶¹ *Id.* at 790 (“And individual racial classifications employed in this manner may be considered legitimate only if they are a last resort to achieve a compelling interest.”).

⁶² *Id.* at 783 (“Diversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue.”).

⁶³ In *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623 (2014), the Court voted to uphold a state constitutional amendment banning affirmative action, but this was enacted by voter referendum and is distinguishable from affirmative action policies that are voluntarily adopted by public institutions.

⁶⁴ See generally Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235 (2016) (discussing persistence of racial inequality over time).

⁶⁵ See, e.g., John Eligon, *Racial Violence in Milwaukee Was Decades in the Making, Residents Say*, N.Y. TIMES (Aug. 14, 2016), <http://www.nytimes.com/2016/08/15/us/racial-violence-in-milwaukee-was-decades-in-the-making-residents-say.html> [<https://perma.cc/8J5W-6THM>].

⁶⁶ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (opinion of Powell, J.).

⁶⁷ See Sugrue, *supra* note 6, at 39–41 (“Diversity is necessary but far from sufficient to ensure a more just and equal society.” *Id.* at 40.).

⁶⁸ Cf. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward.”).

If what really matters is the kind of institutional transparency that guarantees meaningful judicial review (and likely also public accountability), then why not allow racial considerations for the purpose of redressing racial disadvantage?

As in *Grutter*, such a shift would necessarily require the Court to recognize a new brand of compelling interest: promoting the inclusion of racial groups that historically have been abandoned at the margins of society. With some significant social pressure, perhaps from Black Lives Matter and other quarters, the Court may well be persuaded that the country would be best served by a more inclusionary focus than the diversity rationale alone can accommodate.

This leads me to what I take to be the central point of Robinson's Comment — that we should foster a more intentional focus on remedying educational disadvantage.⁶⁹ She is right to direct our attention — not only in this Comment, but in her larger body of work — to the searing racial inequality in our nation's public schools.⁷⁰ Her scholarship justly calls attention to federal constitutional barriers, like *San Antonio Independent School District v. Rodriguez*,⁷¹ that disable cities and towns from securing the necessary resources for chronically underfunded schools.⁷² The key lesson is that equal protection has precluded the very kinds of measures that would most meaningfully advance educational opportunity for students of color while at the same time limiting the kinds of affirmative action that would compensate for significant deficiencies in public education.

I agree with Robinson, therefore, that we should focus particular attention on educationally underserved populations, including African Americans and Latinos who are uniquely burdened by the disadvantages that accompany concentrated poverty.⁷³ But I am skeptical that we can get there through means that are strictly race-neutral, as Robinson suggests.⁷⁴ The extent of the problem is so deep and so pervasive that it calls for more targeted uses of race.

Effectuating the doctrinal shift that would allow such racially specific policies, however, would require the Court to confront the assumption, now deeply embedded in equal protection, that advancing

⁶⁹ Robinson, *supra* note 15, at 188 (“[M]uch greater care and attention must be paid to the educational opportunity gaps and resulting achievement gaps that prompt many colleges and universities to rely on affirmative action.”).

⁷⁰ See, e.g., Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787 (2010).

⁷¹ 411 U.S. 1 (1973).

⁷² See Robinson, *supra* note 15, at 230.

⁷³ See Sugrue, *supra* note 6, at 63–65 (discussing poverty).

⁷⁴ See Robinson, *supra* note 15, at 188 (recommending “that universities consider ‘educational disadvantage’ as a race-neutral alternative in admissions”).

racial equality can come only at the expense of anxious and resentful whites.⁷⁵ Justice Powell argued fairly explicitly in *Bakke* that broadening affirmative action would be racially divisive because it would cost whites, as a group, access and power.⁷⁶ His influential opinion concluded that strict scrutiny should apply even to racially benign government programs, such as affirmative action, and that redressing “societal discrimination” was not a sufficiently compelling interest to justify particularized uses of race.⁷⁷ In place of race-specific policies that targeted people of color, Justice Powell opted for a different path that gave birth to the modern diversity rationale that was affirmed by the Court in *Grutter*.⁷⁸ His opinion also laid the foundation for later equal protection decisions invalidating racial classifications designed to achieve racial diversity and to avoid racial isolation and promote equitable access to public schools;⁷⁹ to provide jobs for people of color in contracting at the state and local levels;⁸⁰ and to increase opportunities for racial minorities to elect candidates of their choice through majority-minority voting districts.⁸¹

In order to reshape equal protection to allow more robust affirmative action, the Court and the public itself must see that the fate of our increasingly diverse country is tied in significant part to the fate of people of color.⁸² As recent events make clear, racial inclusion, whether under the auspices of diversity or other race-conscious policies, ben-

⁷⁵ See Elise C. Boddie, *The Sins of Innocence in Standing Doctrine*, 68 VAND. L. REV. 297, 324–30 (2015) (discussing the Court’s conceptualization of white resentment as a racial injury); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1293–99 (2011) (discussing the Court’s concerns about white resentment over the use of racially explicit forms of affirmative action).

⁷⁶ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (opinion of Powell, J.); Boddie, *supra* note 75, at 324–35.

⁷⁷ *Bakke*, 438 U.S. at 310.

⁷⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (“[T]he Equal Protection Clause does not prohibit the Law School’s narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse study body.”). The Court also recognized the benefits of diversity, though in different terms, in *Sweatt v. Painter*:

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.

339 U.S. 629, 634 (1950).

⁷⁹ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

⁸⁰ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (plurality opinion); *cf.* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

⁸¹ *Shaw v. Hunt*, 517 U.S. 899, 918 (1996) (declaring majority-minority voting district unconstitutional).

⁸² See William H. Frey, *The “Diversity Explosion” Is America’s Twenty-First-Century Baby Boom*, in OUR COMPELLING INTERESTS, *supra* note 6, at 16, 16–35 (describing significant increase in populations of color and arguing that “demography is destiny,” *id.* at 28).

efits the country and whites as a whole; only by bringing all racial groups into the social, economic, and political fold can the country hope to move forward. Affirmative action, in other words, is not counter to the interests of whites, as the Court has long assumed. Rather, it aligns with their interests directly.⁸³

This takes me back to where this Response began, which is about how we align equal protection with the hard realities of entrenched racial inequality. As people of color become a majority of the population, it may become more self-evident to the Court that their future is this country's future. *Fisher II* may be a small, but meaningful, step in that direction.

⁸³ See Lewis & Cantor, *supra* note 36, at 6 (posing the question: "Is the perceived legitimacy of American institutions — from those that educate to those that adjudicate, from those that promulgate free expression to those that safeguard our security — at risk when so many are left behind in the 'land of opportunity'?").