

Equal Protection and Affirmative Action; *Fisher's* Inapt attempt to Apply a Color-Blind
Interpretation

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The *Fisher v. University of Texas at Austin* case currently under consideration by the U.S. Supreme Court provides an opportunity for opponents of affirmative action to apply a race-neutral interpretation to the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution (*See* Bedi (2010); Bernstein (2011) and Clegg (2009) for recent advocacy of a race-neutral position). However, this interpretation of the Equal Protection Clause is not appropriate. The plain text of the Fourteenth Amendment, along with the clear intent of the Framers of this Amendment and the longstanding precedents of the Court interpreting this provision all assert that race-conscious measures enacted to ensure the equality of opportunity enshrined in the Equal Protection Clause are both legitimate and necessary. The first portion of this paper pursues this argument. The later half of the paper challenges the suggestion in the oral argument of *Fisher* that only race-neutral measures would be justifiable under the Equal Protection Clause. Repeatedly, the Justices suggest false arguments in oral testimony in a failed attempt to attest a race-neutral understanding of the Fourteenth Amendment. This paper concludes that such a suggestion is a misinterpretation of the Clause and a misunderstanding of the purposes originally forwarded for its adoption.

I. The Original Meaning of the Equal Protection Clause

The primary argument of the petitioners in *Fisher v. University of Texas* is that the use of race violates the central mandate of equal protection, ‘racial neutrality in governmental decision making.’ Pet. Br. At 24 (Quoting *Miller v. Johnson*, 515 U.S. 900, 904 (1995)). However, this is a basic misunderstanding of the Equal Protection Clause. This clause has

never meant that government must only use a color-blind procedure in any policy. The text, original intent, and historical precedent surrounding the Equal Protection Clause all suggest that the use of race in governmental decision-making is not only allowed but encouraged in certain situations. This section of the paper will outline each of the three methods used in argumentation surrounding the Equal Protections Clause and conclude that all three suggest that a colorblind reading of this clause is incorrect.

A. Textual Analysis of the Equal Protections Clause

The Fourteenth Amendment, in particular part, provides that “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws” U.S. CONST., amend. XIV, x1. Actively rejecting attempts to establish a constitutional provision solely designed to reject racial classification, the Framers of the Fourteenth Amendment wrote an extensive guarantee of equality that went well beyond racial classification. Justice Kennedy noted, “[t]hrough in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against ‘persons because of race, color, or previous servitude,’ the Amendment submitted for consideration and later ratified contained more comprehensive terms” (*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring)). Rather than focusing solely on race or previous condition of servitude, “[t]he fourteenth amendment extends its protections to races and classes, and prohibits any state legislation, which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.” *Civil Rights Cases*, 109 U.S. 3, 24 (1883).

In consciously and purposefully selecting the broader language of equal protection, the drafters of the Fourteenth Amendment established an all-encompassing guarantee of equality under the law in order to protect more than the recently freed slaves.¹ It also covered such divergent groups as Union sympathizers residing in the confederate South² and Chinese immigrants locating on the west coast.³ As the actual text of the Fourteenth Amendment makes clear, the protections guaranteed within are to be distributed to all individuals within the country. As Justice Harlan famously stated in dissent, “in the eye of the law, there is in this country no superior, dominant ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens.” *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). As the writers of the Fourteenth Amendment emphasized, the Equal Protection Clause “abolishes all class legislation,” “does away with the injustice of subjecting one caste of persons to a code not applicable to another,” and “establishes equality before the law.” Cong. Globe, 39th Cong., 1st Sess. 2766 (Sen. Howard). It was commonly understood at the time of its adoption, the “words caste, race, color,” were “ever unknown to the Constitution.” *Id.* at 630 (Rep. Hubbard).

¹ Report of the Joint Committee on Reconstruction xiii (1866) (explaining that “[i]t
² Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) (rep. Bingham)(“The adoption of this amendment is essential to the protection of union men” who “will have no security in the future except by force of national laws giving them protection against those who have been at arms against them”); *id.* at 1263 (rep. Broomall)(“[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country”).

³ Cong. Globe, 39th Cong., 1st Sess. 1090 (Rep. Bingham) (arguing that “all persons, whether citizens or strangers within this land” should “have equal protection in every State in this Union in the rights of life and liberty and property”): Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870)(Sen. Stewart) (“[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by all the laws and the same laws that other men are.”).

Such arguments have been used by the supporters of a color-blind interpretation of the Equal Protection Clause. However, in writing the text of the Fourteenth Amendment, the Framers recognized that following a history of enslavement and discrimination, the Constitution could not be color-blind. These Framers made clear that to ensure Lincoln's promise of a "new birth of freedom" race conscious action was both appropriate and sanctioned under the Fourteenth Amendment. Indeed, Justice Kennedy recognized that race conscious efforts were required to enhance "the legitimate interest government has in ensuring all people have equal opportunity regardless of their race." *Parents Involved in Community Schools v. Seattle School Dist., No. 1*, 551 U.S. 701, 787-88 (2007) (Kennedy, J. concurring).

B. Original Intent of the Equal Protections Clause

On a repeated basis, the Framers of the Fourteenth Amendment enacted measures based on racial classification contemporaneously with the enactment of the Equal Protection Clause. *See* (Schnapper 1985) (cataloguing race-conscious measures enacted by Framers of the Fourteenth Amendment); (Rubinfeld 1997) (same), and Balkan (2011) (same). The framers soundly recognized that beneficial race-conscious measures would be necessary to fulfill the promise of equality under the Equal Protection Clause. The majority of legislators in Congress during the reconstruction period, recognized that race-conscious measures are essential and in sync with the principle of the Equal Protection Clause. Of course, the principle means to assist the freed slaves was the creation of the Freedmen's Bureau. Enacted in 1865 prior to the ratification of the Fourteenth Amendment, and expanded in 1866 to ensure that "the gulf which separates servitude

from freedom is bridged over,” Cong. Globe, 39th Cong., 1st Sess. 2779 (1866) (Rep. Elliot), the Freedmen’s Bureau “provided its charges with clothing, food, fuel, and medicine; it built, staffed, and operated their schools and hospitals; it wrote their leases and labor contracts, [and] rented them land . . .” (Siegel 1998, 559). As the Framers explained at the time, “[h]aving made the slave a freedman, the nation needs some instrumentality which shall reach every portion of the South and stand between the freedman and oppression,” Cong. Globe, 39th Cong., 1st Sess. 585 (1866) (Rep. Donnelly), and “protect them in their new rights, to find employment for the able-bodied, and take care of the suffering . . .” *Id.* at 937 (Sen. Trumbull); *Id.* at 2779 (“[W]e have struck off their chains. Shall we not help them to find homes? . . . Shall we not let them know the meaning of the sacred name of home.”) (Rep. Eliot).

The Act’s provisions provided a broad range of benefits for a wide variety of clients. The Act, as amended in 1866, authorized the provision of ‘aid’ to the newly freed slaves in any manner “in making the freedom conferred by proclamation of the commander in chief, by emancipation of the laws of States, and by Constitutional amendment, “while providing ‘support’ to loyal Union supporters only to the extent “the same shall be necessary to enable them . . . to become self-supporting citizens . . .” (Freedmen’s Bureau Act, x2, 14 Stat. 173, 174 (1866)). The Act provided that Southern private property could be confiscated and sold for the benefit of providing funds for the education of freed slaves. (*Id.* at x12, 14 Stat. at 176).

With such a clear race-conscious policy, opponents of the Act and the Equal Protection Clause railed against the Act as discriminatory, suggesting that it “make[s] a distinction on account of color between the two races,” (Cong. Globe, 39th Cong., 1st

Sess. 397 (1866) (Sen. Willey)). Democrats remaining in Congress after the conclusion of the Civil War declared the Freedmen's Bureau Act as "class legislation," (*id.* at 2780 (Rep. LeBlond); *see also id.* at 649 (Rep. Trimble and Rousseau)), that treats "freedmen" not "equal before the law, but superior" directly "in opposition to the plain spirit . . . of the Constitution that congressional legislation should in its operation affect all alike." President Johnson, acquiescing to the Southern Democrats vetoed the legislation twice noting the "danger of class legislation," (Messages and Papers of the Presidents 422, 425 (James D. Richardson ed. 1897)).

The majority of Congressmen clearly rejected these arguments in support of an understanding of race-neutrality inherent in the Constitution. They explained that "the very object of the bill is to breakdown discrimination between whites and blacks" and to make feasible "the amelioration of the condition of the colored people," (Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (Rep. Moulton)). They concluded that race-conscious measures were appropriate "to make real to these freedmen the liberty you have vouchsafed to them," noting that "[w]e have done nothing to them as a race, but injury." (*Id.* at 2779 (Rep. Eliot)). By significant majorities, within weeks after sending the Fourteenth Amendment to the States for ratification, Congress overrode President Johnson's veto and enacted the Freedmen's Bureau Act.⁴

Of particular importance to the arguments forwarded in the *Fisher* case, the Freedmen's Bureau had an intense focus on the education of the freed slaves. There was a pervasive understanding that race-conscious measures were necessary to guarantee equal educational opportunities and integrate African-Americans into the civic life of America;

⁴ The vote totals for the enactment were 104-33 in the House of Representatives and 33-12 in the Senate.

as the Court has noted, education is “the very foundation of good citizenship,” (*Brown v. Board of Education*, 347 U.S. 483, 493 (1954)). The primary goal of the Freedmen’s Bureau was to provide for an equal educational opportunity for the freed slaves. As Eric Foner noted, educational equality created, “the foundation upon which all efforts to assist the freedmen rested . . .”(1988, 144). By 1869, less than a year after the ratification of the Fourteenth Amendment, “nearly 3000 schools, with over 150,000 pupils reported to the Bureau,” helping to “lay the foundation for Southern public education” (*Id.*). Among African-Americans, the conviction that “knowledge is power” drew “hundreds of thousands, adults and children alike to the freedmen’s schools, from the moment they opened . . .” (Lithwick, 1979, 473-74).

The Freedmen’s Bureau extended funding beyond primary and secondary education. Funds, land and other forms of assistance were provided for the establishment of post-secondary institutions across the South (Schnapper, 781). Perhaps most famous of these is Howard University in Washington, DC. In support of race-conscious efforts in advance of education, the Framers explained that “th[e] Bureau, while it protects and directs the negro, may educate him, and fit him to protect and direct himself . . .” (Cong. Globe, 39th Cong., 1st Sess. 585 (1866) (Rep. Donnelly)). Rep. Eliot suggested that the primary purposes of the Act were to “lift them from slavery into the manhood of freedom, to clothe the nakedness of the slave and to educate him into manhood” (*id* at 656). Education was seen as the primary mover enabling the freed slaves from a condition of servitude to equality in the civic sphere.

The Freedmen’s Bureau, although foremost, was not alone during the Reconstruction period to adopt race-conscious measures. As with the Freedmen’s Bureau, the intent of

these other enactments was not simply to end the status of servitude but to enable the former slaves to fully enjoy the benefits of citizenship. This could only be possible through the advancement of a proactive agenda on a race-conscious basis. All of these acts, including the Freedmen's Bureau, were designed to be forward looking to ensure the fulfillment of the Fourteenth Amendment's promise of equality not simply the eradication of slavery.

For example, in 1866 and 1867, Congress enacted legislation aimed to protect the rights of African-American soldiers to receive bounties for enlisting in the Union Army. Congress enacted race-conscious anti-fraud measures to prevent unscrupulous claim administrators from denying African-American union soldiers their just compensation (*see* Joint Resolution of July 26, 1866, No. 86, 14 Stat. 367, 368 (fixing the maximum fees allowed by an agent to collect a bounty on behalf of "colored soldiers")); Resolution of May 29, 1867, No. 25, 15 Stat. 26, 26-27 (providing for payment to agents of "colored soldiers, sailors, or marines" by the Freedmen's Bureau); and (Siegel, 561) (observing that these measures resulted in "the creation of special protections for black, but not white, soldiers"). The Framers stressed that "[w]e have passed laws that made it a crime for them to be taught, " the Reconstruction Framers concluded that it was permissible to enact race-conscious measures "to protect colored soldiers against the fraudulent devices by which their small bounties are taken away from them" (Cong. Globe, 40th Cong., 1st Sess. 79 (Rep. Scofield) (1867).

In addition, the Freedmen's Savings and Trust Company, was created for "persons heretofore held in slavery in the United States or their descendants" (Act of March 3, 1865, x5, 13 Stat. 510, 511). As Balkan (2011, 417 n. 20) noted, "because of the addition

of words ‘their descendants’ . . . the bill was not restricted to assisting only former slaves.” Along with the bank, the Framers appointed a chaplain “for each regiment of colored troops, whose duty shall include the instruction of the enlisted men in the common English branches of education, “ (Act of July 28, 1866, ch. 299 x 30, 14 Stat. 332, 337). Seigel (1998, 560-61) emphasizes that “chaplains for white troops had no similar responsibilities, and education for white troops remained an unfunded ‘optional service’ during and after Reconstruction.” A precursor of Aid to Dependent Children created during the Great Depression was also initiated to assist widowed African-American women as early as 1863 (Act of Feb. 14, 1863, ch. 33, 12 Stat. 650, 650). Like nearly all the other race-conscious legislation passed during the early post-Civil War period, each of these programs was solely designed to remedy past discrimination. Indeed, many provided benefits, irrespective of previous condition of servitude, in order to “ameriorat[e] the condition of the colored people. (Cong. Globe, 39th Cong., 1st Sess. 632 (1866) (Rep. Moulton)).

In writing the text of the Fourteenth Amendment and in adopting numerous race-conscious policies to ensure the fulfillment of that amendment, the Framers rejected “an all-too-unyielding insistence that race cannot be a factor,” (*Parents Involved*, 551 U.S. at 787 (Kennedy, J. concurring)), concluding that the state may properly take race into account to “ensure all people have equal opportunity regardless of their race” (*Id.* at 788 (Kennedy, J., concurring)). The concept that the Constitution is color-blind prohibiting any and all race-conscious enactment, is incompatible with “the history, meaning and reach of the Equal Protection Clause” (*Id.* at 782-83 (Kennedy, J., concurring)).

C. The Court’s Longstanding Acknowledgement of the Constitutionality of Race-Conscious Measures to Ensure Equality Guaranteed by the Equal Protection Clause

As is now clear, the text of the Equal Protection Clause does not institute a color-blind reading of the Constitution. The previous section displayed that the intent of the Framers was evidently on the side of race-conscious measures to ensure that the equality guaranteed by the Fourteenth Amendment would be available to the freed slaves and similarly disadvantaged individuals. Emphasizing that the Fourteenth Amendment protects “*persons*, not *groups*,” the Court held that “governmental action based on race – a group classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that *personal* right to the equal protection of the laws has not been infringed,” (*Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis in the original)). While the Court has long adopted the most heightened scrutiny to examine racial distinctions in the law, this has not meant that all race-conscious measures have been found insufficient. The Court has explicitly stated that “[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause,” (*Grutter v. Bollinger*, 539 U.S. 306, 327 (2003)). Strict scrutiny must be applied in all cases with consideration of context and history to ensure equality of opportunity for all persons in keeping with “our tradition . . . to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain,” (*Parents Involved*, 551 U.S. at 787 (Kennedy, J., concurring)). As the majority of the Court recognized, “[t]he unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups is an

unfortunately reality, and the government is not disqualified in acting in response to it,” (*Adarand*, 515 U.S. at 237).

The most famous and often repeated dissent from Justice Harlan suggesting the Constitution is to be ‘color-blind’ is contextually bound. Justice Harlan stated, “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens,” (*Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). The words that begin the paragraph in which this statement resides calls into question whether Justice Harlan truly supported a race-neutral interpretation of the Constitution⁵. He stated, “The white race deems itself to be the dominant race in this country. And so it is in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time if it remains true to its great heritage and holds fast to the principles of constitutional liberty.” (*Id.*) Surely Justice Harlan had knowledge of the race-conscious legislation that was enacted in the three decades prior to his writing. To acknowledge the preeminence of the white race at the time and its likely inertia to be displaced in the future without proactive race-conscious measures, Justice Harlan is implicitly accepting the forward looking legislation supported by the reform minded Reconstruction Congress. Justice Harlan believed the Constitution, in general, and the Equal Protection Clause, in particular, was color-blind in principle but race-conscious in application.

But one does not have to go as far back as the late 19th Century to witness the Court’s acceptance of race conscious measures to ensure the opportunity of the Equal Protection Clause in the circumstance of education policy. Thirty-five years ago, in *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 321 (1978), the Court held that “the State has a

⁵ A special thanks is given to Professor Randall Kennedy of Harvard Law School for bringing this distinction to the author’s attention.

substantial interest that legitimately may be served by properly devised admissions program involving the competitive consideration of race and national origin.”

Recognizing the compelling state interest in ensuring a diverse student body, Justice Powell’s controlling plurality opinion explained that an applicant’s race or ethnic background may be treated as “simply one element – to be weighed fairly against other elements – in the selection process,” thus “treat[ing] each applicant as an individual in the admissions process,” (*id.* at 318). As such, “[t]he applicant who loses out on the last available seat to another candidate receiving a ‘plus’ on the basis of ethnic background . . . would have no basis to complain of unequal treatment under the Fourteenth Amendment,” (*Id.*)

In the past decade, the Court upheld the fundamental holding of *Bakke*, in ruling that the University of Michigan Law School’s policy of using race as one factor in determining its first year class is constitutional. The university adopted this policy in an attempt to create a critical mass of diverse, academically accomplished students. In mirroring the wording of Justice Powell a quarter of a century earlier, the Court emphasized that the policy “ensure[d] that each applicant is evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application,” (*Grutter*, 539 U.S. at 337). The Court noted that “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible is to be realized” (*Id.* at 332). In stressing that universities are frequently the training ground of our future leaders, the Court recognized it is constitutionally permissible to take race into account to ensure that “the

path to leadership be visibly open to talented and qualified individuals of every race and ethnicity,” (*Id.* at 332, 333).

In its most recent foray into interpretation of the Equal Protection Clause in the context of education, the Court recognized that state and local government officials have authority to utilize race-conscious measures to combat racially isolated schools (*Parents Involved v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007)). While no opinion gained a majority in this case, five justices agreed that using forward-looking, race-conscious measures to fulfill the promise of “equal educational opportunity” is constitutionally valid. Importantly, while Justice Kennedy provided the decisive fifth vote striking down the race-conscious plan adopted by the Seattle school district to allocate children to differing schools, his concurring opinion flatly stated, “it is permissible to consider the racial makeup of schools” and to adopt “race-conscious measures to address the problem,” (*id.* at 788 (Kennedy, J., concurring)). He continued by stating that such policies including “general policies to encourage a diverse student body” as well as “more nuanced, individual evaluation of school needs and student characteristics that might include race as a component,” (*Id.* at 790 (Kennedy, J., concurring)).

Even some of the Court’s most ardent supporters of a color-blind, race neutral interpretation of the Equal Protection Clause, have allowed the federal government and even state and local governments to take race into consideration when enacting legislation. Justice Scalia states, there are circumstances “in which the States may act by race to ‘undo the effects of past discrimination:’ where that is necessary to eliminate their own maintenance of a system of unlawful racial classification,” (*City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 527 (Scalia, J., concurring)). Such an action is an

acknowledgement that purely race-neutral policies cannot ensure the equality of treatment enshrined in the Fourteenth Amendment. If the true meaning of the Fourteenth Amendment's Equal Protection Clause is the pure race neutral commandment that all policies must neither take race into consideration or have a racially disparate impact, none of the recent precedents surrounding this clause would be valid.

II. *Fisher's* Inapt Challenge to the Longstanding Utilization of Race-conscious Measures Accepted under the Fourteenth Amendment

The *Fisher v. University of Texas at Austin* case has been seen by some as a vehicle to undo the wrongs that had been enshrined in the Court's jurisprudence since Justice Powell's opinion in the *Bakke* case allowed for the use of race in admissions decisions to institutions of higher education. This portion of the paper suggests that as that vehicle, the *Fisher* case has significant flaws. Once these are identified, the paper examines the arguments presented by proponents of a race-neutral interpretation of the Equal Protection Clause in the oral argument before the Court on October 10, 2012. It is apparent that these proponents stretch the factual basis of *Fisher* to attain the desired outcome of a race-neutral understanding of the Fourteenth Amendment beyond the logical underpinnings of the Constitution.

A. The Factual Basis of *Fisher v. University of Texas at Austin*

Prior to 1996, the University of Texas at Austin employed two criteria for student admission. The first, still used today, is called the Academic Index. The Academic Index

rates a student's academic achievement according to their grade point average, SAT scores, and similar data (*Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 222 (5th Cir., 2011)). The second criteria, race, was dropped following its rejection in the *Hopwood* case in 1996 (*Hopwood v. Texas*, 78 F.3d 932, 934-35 (5th Cir. 1996)). In response to the *Hopwood* decision, the university developed new race-neutral admission criteria termed the Personal Achievement Index (PAI). The clear intent of the PAI was to increase minority enrollment without the explicit use of race. The following year, the Texas Legislature enacted the Top Ten Percent Law, which mandates that the top 10% of students graduating from each public high school be guaranteed admission to the University (Tex. Educ. Code Ann. x51.803 (1997)). This policy was slightly amended in 2010 to limit the number of guaranteed admissions to 75% of the spots reserved to Texas residents (*Id.* x 51.803(a-1) (2010)). Although the law is facially neutral in concerns of race, the increased admission of underrepresented minorities was its stated objective while under consideration (*Fisher*, 631 F.3d at 224). The admissions policy was altered again following the *Grutter* decision. The university commissioned two studies to determine if the Top Ten Percent Law had obtained a 'critical mass' of minority students (*Id.* at 224). The first study suggested that minorities accounted for one or less students in nearly 46% of all classes offered at the University (*Id.* at 225). The second study was based on student impressions of diversity on campus. "Minority students reported feeling isolated, and a majority of all students felt there was insufficient minority representation in classrooms for the full benefit of diversity to occur" (*Id.* at 225). Based on these findings, the University decided it had not yet achieved a critical mass of minority students necessary to fully gain the benefit of diversity in the classroom. In response, the

University adopted a new policy in which race would be considered as one factor in the admission of students (*Id.* at 226). Since this alteration, minority representation on campus has increased markedly (*Id.*).

Currently, the application process divides applicants into three pools: Texas residents, domestic non-Texas residents, and international students (*Id.* at 227). Applicants compete for admission only with those in their pool. Admission decisions for the later two categories are made using the Academic and Personal Achievement Indices. The students in the first category are subject to the Top Ten Percent Law. Those applicants in the Texas residents pool that do not gain admission under the Top Ten Percent Law are then evaluated using the Academic and Personal Achievement Indices (*Id.*). A small number of students are admitted solely based on their Academic Index score (*Id.*).

The Personal Achievement Index is based on scores from two essays and a third score, called the “personal achievement score,” based on the applicants entire file (*Id.* at 227-28). Each set of scores is graded 1 to 6 with the personal achievement score accorded a slightly higher weight than those obtained from the two essays. The personal achievement score takes into account a “special circumstances” component “that may reflect the socioeconomic status of the applicant and his or her high school, the applicant’s family status and family responsibilities, the applicant’s standardized test score compared to the average of her high school, and – beginning in 2004 – the applicant’s race” (*Id.*). As such, race is considered as but one factor in the admissions process of a small percentage of students admitted to the University of Texas at Austin.

Ms. Abigail Fisher and Rachel Michalewicz, both of whom are Caucasian, were high school seniors when they applied for admission to the University of Texas in 2008. They

did not qualify for admission to the school under the Top Ten Percent Law.⁶ In 2008, students admitted under the Top Ten Percent Law made up eighty-one percent of the freshman class. Fisher who became the named plaintiff was not awarded one of the remaining slots in the class. Ms. Fisher had a composite maximum 1180 SAT score obtained after taking the examination twice. This score placed her above the median SAT score of all racial minorities admitted to the University of Texas at Austin in 2005 (the most recent year data was available) but well below the median SAT score of all admitted students to the university. Ms. Fisher filed a lawsuit challenging the policies used by the university to fill their admission slots. Fisher's lawsuit alleges that this additional affirmative action plan which takes into account an applicant's race via the personal achievement score violates the Fourteenth Amendment under the Equal Protection Clause and injures her by excluding her and allowing others with weaker academic records to be admitted instead. It is unclear whether Ms. Fisher would have been able to gain admission to the University even if the policy of accounting for an applicant's race had not been adopted by the University. While a strong student, her credentials did suggest automatic admission to the flagship campus of the University of Texas system.

The issue of standing has been raised concerning the plaintiff Ms. Fisher. Having already graduated from Louisiana State University by the time of the oral argument before the Court this past fall and indicating that she had no plans to attend the University of Texas undergraduate system, there is some question as to whether a remedy can be provided by the Court should they deem Ms. Fisher's challenge worthy of overturning the Fifth Circuit's ruling against her. However, it seems unlikely the Court would grant

⁶ These students finished in the top thirteen and eleven percent of their graduating classes, respectively.

certiorari and then simply dismiss the case as lacking standing. This issue was immediately addressed in the opening minutes of oral argument before the U.S. Supreme Court in *Fisher*. Attorney Bert Rein, acting in behalf of Ms. Fisher, noted that the matter of standing was addressed in the *Bakke* case. In that case Justice Powell stated, “[S]everal amici suggest that Bakke lacks standing, arguing that he never showed that his injury -- exclusion from the Medical School -- will be redressed by a favorable decision, . . . but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected” (*Bakke* 438 U.S. at 231). As such, it is unlikely the Court will issue a decision suggesting that Ms. Fisher lacks standing within this litigation.

B. The Justices’ Misuse of Oral Argument in *Fisher v. Univ. of Texas at Austin*

As we await the release of the opinion in *Fisher* we can examine the comments and questions presented by the members of the Court during the oral argument on October 10 2012 to gain traction into understanding where the members of the Court are concerning the meaning of the Equal Protection Clause. Most notably, some members of the Court clearly misunderstand the original meaning of the Fourteenth Amendment as outlined above and suggest implicitly that only a color-blind, race neutral admissions policy is acceptable under the Constitution. Leading this argument is Chief Justice Roberts. In contrast with his passive response to Bert Rein’s presentation of the argument on behalf of Abigail Fisher, the Chief Justice aggressively pressed Gregory Garre, counsel for the University (*Fisher v. Univ. of Tex. at Austin*, 11-345, Respondent’s original oral argument, transcript page 13, lines 12 – 27). He began by asking whether somebody who is only one-quarter Hispanic, or even one-eighth Hispanic, could claim that ethnicity at

the University. Such a question seems more appropriate for the *Plessy* era. He continually expressed concerns about the University's methods for identifying minorities, staging a duet with Justice Scalia on the subject that suggested that the University was not being sufficiently objective in its data collection. As Mr. Garre noted, no university can know for certain the ethnic makeup of its student body since ethnic classification is done through self-identification (*Id.* at 14, lines 17-20). To do so by differing means is illogical. As Justice Scalia took over question, he attempted to create a 'strawman' argument by suggesting the university seeks a critical mass of minority students to achieve the benefits of diversity in each and every class and classroom. Mr. Garre made clear, "[t]he university has never asserted a compelling interest in any specific diversity in every single classroom" (*Id.* line 21). Justice Scalia remained unsatisfied ("I do not know what you are talking about" (*Id.* line 22)). The suggestion that every instance of student contact must contain a sufficient composition of 'diversity' throughout the campus is nonsensical. Soon Justice Alito picked up the thread of the argument in attempting to discover what the exact level of minority concentration within a specific class fulfills the critical mass needed to obtain the benefits of diversity. The Court has never suggested that a 'critical mass' is a numerical entity that can be accounted through a numerical adjudication. In addition, as Mr. Garre stated, the establishment of a numerical quota equating to a 'critical mass' to ensure the benefits of diversity is is not a goal of the university's admissions policy.

The Chief Justice also led the charge on the critical mass discussion, asking: "What is the critical mass of African-Americans and Hispanics at the university that you are working toward?" (*Id.* at 16, line 7). When Garre responded that the University did not

have a specific number in mind, Roberts pressed the point: “So how are we supposed to tell whether this plan is narrowly tailored to that goal?” (*Id.* line 10) (The requirement of a narrowly tailored means to achieve a compelling state interest is the basic understanding of strict scrutiny, the level of review long applied by the Court to evaluate racial discrimination). Garre responded correctly that the Court in *Grutter* did not expect there to be a specific number or percentage (*Id.* line 12). The Chief Justice continued to beat that drum throughout Garre’s presentation – as well as that of Solicitor General Donald Verrilli – arguing on multiple occasions that under the Court’s precedent, judges are charged with evaluating a university’s progress toward critical mass and cannot engage in meaningful judicial oversight unless that goal is well defined. However, as noted in section I, the Equal Protection Clause has never required such specificity. To do so would impose a burden on the government beyond reason. Justice Sotomayor correctly notes that the role of the Court is not to determine the exact percentage of minority enrollment that is sufficient to achieve a critical mass (*Id.* at 20, line 1-3). To do so would be to set a quota, a process specifically forbid by precedents running from *Bakke* to *Grutter*.

The Chief Justice was likewise hostile to other aspects of the university’s argument. He suggested that the university’s holistic admissions process might be little more than a smokescreen for racial preferences, noting “race is the only one of your holistic factors that appears on the cover of every application” (*Id.* at 21, line 38). While it is true that race is the only factor that appears on the cover of every admissions application, it is not clear whether or not a factor appeared on the cover of the university’s application made any difference in the admissions decision process.

Justice Scalia suggests that Mr. Garre is ‘cherry-picking’ from the materials in the *Grutter* opinion in order to best support his argument in favor of the admissions policy implemented by the University of Texas at Austin (*Id.* at 20, line 16). Scalia marks the time dimension famously inserted by Justice O’Connor in her majority opinion for *Grutter*; “[A]ll governmental use of race must have a logical end point,” and “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today” (*Grutter*, 539 U.S. at 342, 343). Scalia teases Mr. Garre in response to the attorney’s suggestion that the critical mass threshold is not numeric with the assertion “But that only holds for only – only another what, 16 years, right? Sixteen more years and your going to call it all off” (*Fisher*, 11-345, Respondent’s original oral argument, transcript page 20, lines 12 – 14). The twenty-five year timetable has attracted widespread attention and has aroused considerable confusion and controversy.⁷ The Court had previously spoken of time limits as a relevant feature of affirmative action plans (*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 238 (1995)). In those instances, however, the plans under review had explicitly or implicitly included durational features. In *Grutter*, the Court itself introduced the limit (Katyal (2004). “At first blush, the Court’s pronouncement seemed overly optimistic, if not woefully out of place in a judicial opinion,” observed Professor Kevin R. Johnson (2004). As Professor

⁷ See Mark W. Cordes, *Affirmative Action After Grutter and Gratz*, 24 N. ILL. U. L. REV. 691, 739 (2004) (describing the twenty-five year timetable as the “most curious part” of the opinion), as well as, Stuart Taylor, Jr., *The Affirmative Action Decisions*, in A YEAR AT THE SUPREME COURT 90, 91 (Neal Devins & Davison M. Douglas, eds., 2004) (accusing Justice O’Connor of “willful blindness to inconvenient facts”); Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251, 265 (2004) (describing the twenty- five year timetable as “careless, disingenuous”).

Johnson's comment signaled, the twenty-five year timetable raised questions regarding its justification. It should be emphasized that Justice O'Connor's language in the *Grutter* decision does not impose a twenty-five year requirement but an expectation. As the authors cited above note, this expectation is largely unrealistic as is Justice Scalia's attempt to use the twenty-five year criteria as a stop-gap against the use of race-conscious measures to increase a university's diversity.

Justice Alito goes directly to the understanding of the Equal Protection Clause when U.S. Solicitor General Donald Verrilli Jr. continues the argument of the respondents. Mr. Verrilli Jr. echoes the words of the majority opinion in *Grutter* by stating, "[t]he core of our interest is in ensuring that the Nation's universities produce graduates who are going to be effective citizens and effective leaders in an increasingly diverse society" (*Fisher*, 11-345, Respondent's original oral argument, transcript page 24, lines 7 – 8). He is immediately questioned by Justice Alito through a hypothetical suggesting that race must be the deciding factor if two identically similar applicants aside from race apply for admission and one is admitted and the other is not. Mr. Verrilli repeatedly insists race is not the deciding factor to the point of frustration to several of the Justices. Mr. Verrilli's protests to the nature of the question are unfounded. While he steadfastly resists the suggestion forwarded implicitly by his questioners that the Equal Protection Clause only sanctions race-neutral measures, we now know that such an understanding is inappropriate. As has been shown by the original meaning of the Equal Protection Clause, race-conscious measures are in accord with the primary purpose of this clause.

A Failed Attempt to Inappropriately Constrain the Expansive Original Interpretation of the Equal Protection Clause through the *Fisher v. University of Texas at Austin* case

The University of Texas' admissions process accords race as one of many factors in determining a percentage of its incoming class. To do so is not only allowed by the U.S. Constitution but sanctioned by the words of the Equal Protection Clause. It is clear that the intent of the Framers of the Fourteenth Amendment was directly aimed at benefitting those who had been disadvantaged prior to its enactment and to enhance the competitiveness of those who remain enmeshed in racial disparity. This paper has shown that the Framers of the Fourteenth Amendment fully intended for this legislation to be enhanced through the use of race-conscious measures to ensure the equality to all contained in its broad language. Instead of only remedying the stain of racial servitude, the Framers of the Equal Protection Clause fully understood that this portion of the Fourteenth Amendment was an active commitment to ensure liberty through equality of opportunity. To suggest otherwise ignores the text of the Amendment, the intent of the Framers and the precedents of Supreme Court over the past century. It appears that the opponents of the University of Texas admissions policy have not heeded this lesson. These individuals include a number of Justices on the Supreme Court who repeatedly misutilized and mischaracterized the intent and purpose of the Equal Protections Clause. While we await the release of the written opinion in the *Fisher v. University of Texas at Austin* case, it is hoped these individuals will recognize their error and properly apply the tenets of the Fourteenth Amendment to this case and those policies affected by it.

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