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The Slow Demise of Race Preference

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THE SLOW DEMISE OF RACE PREFERENCE

MARK S. BRODIN[∞]

2014 SYMPOSIUM ISSUE

DIVERSITY IN EDUCATION AND THE FUTURE OF AFFIRMATIVE ACTION

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I recently saw an interview with cultural historian Richard Slotkin in which he was asked to explain the American obsession with guns. He attributed it, at least in part, to “a sense of lost privilege, that men and particularly white men in the society feel their position to be imperiled and their status called into question.”¹ He observed that “one way to deal with an attack on your status in our society is to strike out violently.”² A similar phenomenon may explain the backlash against affirmative action and race preference in recent years.

Public support for such programs is at an all-time low.³ In a 2009 Pew Research Center values survey, just thirty-one percent of those surveyed agreed that “we should make every effort to improve the position of blacks and minorities, even if it means giving them preferential treatment.”⁴ More than twice as many (sixty-five percent) disagreed.⁵ As of July 2013, two-thirds of Americans (and three-quarters of whites) believed college admissions should be based solely on “merit” and not special preference for certain groups.⁶

[∞] Professor & Lee Distinguished Scholar, Boston College Law School. B.A. & J.D., Columbia University, 1969, 1972. For a fuller treatment of the points herein, see Mark Brodin, *The Fraudulent Case Against Affirmative Action—The Untold Story Behind Fisher v. University of Texas*, 62 *Buffalo L. Rev.* 237 (2014).

1. *Moyers & Company: Segment on Guns and Violence with Richard Slotkin* (Public Affairs Television Dec. 13, 2013), available at <http://billmoyers.com/segment/richard-slotkin-on-guns-and-violence/>.

2. *Id.*

3. See Domenico Montanaro, *NBC News/WSJ Poll: Affirmative Action Support at Historic Low*, NBC NEWS (June 11, 2013, 1:41 AM), http://firstread.nbcnews.com/_news/2013/06/11/18885926-nbc-news-wsj-poll-affirmative-action-support-at-historic-low

4. *Public Backs Affirmative Action, but Not Minority Preferences*, PEW RESEARCH CENTER (June 2, 2009), <http://www.pewresearch.org/2009/06/02/public-backs-affirmative-action-but-not-minority-preferences/>.

5. *Id.*

6. Jeffrey M. Jones, *In U.S., Most Reject Considering Race in College Admissions*, GALLUP (July 24, 2014) <http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx>. We know, of course, how the framing of a question can dictate the results. Gallup asked:

Remarkably, a majority of whites now view anti-white bias as a bigger problem than anti-black bias.⁷ The face of racism has changed in the public mind. In Norman Rockwell's stunning 1964 cover illustration for *Look Magazine*, federal marshals escorted black student Ruby Bridges into a white school as angry demonstrators threw objects at her.⁸ Now, the face of racism is Abigail Fisher, a white applicant to the University of Texas and a "victim" of race preference.⁹

California, the first of several states to outlaw (by popular vote amending the state constitution in 1996) race preference in public university admissions and state hiring, recently refused to reconsider the prohibition when its Senate tabled a bill to do so.¹⁰ Affirmative action thus remains illegal in the Golden State. Now that the Supreme Court has ruled that race preference may be lawfully banned by ballot initiative,¹¹ will other states soon follow suit?

Two successive elections of the nation's first African American President have only exacerbated the fear among white males that their whole way of life and financial well-being is in jeopardy. This demographic gave their votes overwhelmingly to President Obama's opponents in both 2008 and 2012.¹² Given overwhelming white male dominance in business, government, and many professions, as well as the still racially polarized system of higher education that clusters white students at the elite institutions and those of color at open access and community colleges,¹³ this apprehension is irrational.¹⁴ Yet since the

"Some people say that to make up for past discrimination, women and minorities should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closer to how you feel on the subject?" Eighty percent, not surprisingly, selected "ability."

7. Jeffrey Rosen, *Affirmative Action and Public Opinion*, N.Y. TIMES, Sept. 6, 2011, <http://www.nytimes.com/roomfordebate/2011/05/22/is-anti-white-bias-a-problem/affirmative-action-and-public-opinion>; Asraa Mustafa, *Study: Whites Think "Reverse Racism" is on the Rise*, COLORLINES (May 24, 2011, 2:45 PM) http://colorlines.com/archives/2011/05/study_on_white_perceptions_of_racism.html.

8. Norman Rockwell, LOOK, Jan. 14, 1964.

9. See *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013); Mustafa, *supra* note 7.

10. Katy Murphy, *California Affirmative Action Revival Bill Is Dead*, SAN JOSE MERCURY NEWS (Mar. 18, 2014, 7:37:04 AM), http://www.mercurynews.com/education/ci_25361339/california-affirmative-action-challenge-is-dead.

11. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

12. See Jon Wiener, *The Bad News About White People: Romney Won the White Vote Almost Everywhere*, THE NATION (Nov. 7, 2012), <http://www.thenation.com/blog/171093/bad-news-about-white-people-romney-won-white-vote-almost-everywhere>.

13. Michael A. Fletcher, *Minorities and Whites Follow Unequal College Paths, Report Says*, WASH. POST (July 31, 2013), http://www.washingtonpost.com/business/economy/minorities-and-whites-follow-unequal-college-paths-report-says/2013/07/31/61c18f08-f9f3-11e2-8752-b41d7ed1f685_story.html.

14. The "old boy network" is always at the disposal of white males, as exemplified by a conversation between 1970s "All in the Family" conservative Archie Bunker and his liberal son-in-law Michael. Arguing about the Black Power movement, Archie sneers "I didn't have no million people out there marching and protesting to get me my job." "No," wife Edith interrupts,

Reagan Administration, the right-wing echo chamber has been abuzz with fear-mongering about blacks, Latinos, and immigrants taking jobs from deserving white men, as well as gross distortions about the political pendulum swinging wildly in favor of minorities and women.¹⁵

As evidence of the political power of this white apprehension, candidates have successfully appealed to these anti-affirmative action sentiments. In 1990, Republican Senator Jesse Helms of North Carolina won re-election against an African American opponent by running the now-infamous TV advertisement showing the hands of a white man opening and then crumpling a rejection letter. The narration read: “You needed that job, and you were the best-qualified. But they had to give it to a minority because of a racial quota. Is that really fair? Harvey Gantt says it is.”¹⁶ Some attributed the Republican sweep of the congressional elections in 1994 to the anger of white male voters against the preference programs of the Clinton Administration.¹⁷

The 2013 Supreme Court decision in *Fisher v. University of Texas*,¹⁸ which may ultimately spell the end (or at least severe restriction) of meaningful race-conscious efforts at inclusion, represents the culmination of the Reagan Administration’s agenda to reverse the civil rights gains of the 1960s (much as it endeavored to undo the social welfare structure of Franklin Delano Roosevelt’s New Deal). In the new paradigm, the victims of race discrimination are white men (and sometimes women), displaced across the economy by unqualified minorities, the beneficiaries of affirmative action.

I.

THE “REAGAN REVOLUTION”

We can trace the current precipice upon which race preference stands to the administration of Ronald Reagan. Whereas predecessors John F. Kennedy, Lyndon B. Johnson, and Jimmy Carter had originated and championed the idea of “wip[ing] away the scars of centuries” of egregious mistreatment by

“his uncle got it for him.” See Emily Nussbaum, *The Great Divide*, NEW YORKER, April 7, 2014, at 64, 66.

15. KATHLEEN HALL JAMIESON & JOSEPH N. CAPPELLA, *ECHO CHAMBER: RUSH LIMBAUGH AND THE CONSERVATIVE MEDIA ESTABLISHMENT* (2010); Nicholas Kristof, *Suffocating Echo Chamber*, N.Y. TIMES, Sept. 25, 2013, at A29; Danny Vinik, *The Right-Wing Echo Chamber Extends Far Beyond Fox News*, NEW REPUBLIC (October 21, 2014), <http://www.newrepublic.com/article/119922/pew-survey-finds-conservatives-mostly-watch-fox-news>.

16. A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593, 1598 (1994) (internal citation omitted). *But see, e.g.*, Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045 (2002) (refuting the widespread misconception that every rejected white male is the victim of affirmative action).

17. See Linda Chavez, *From Unequal Opportunity to Equal Results*, WASH. POST, Aug. 18, 1996, at N6.

18. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

accelerating opportunities for African Americans,¹⁹ high on Reagan's agenda was to reverse the public perception of, and the federal government's position on, civil rights. With chilling symbolism, Ronald Reagan launched his 1980 campaign for the Presidency in Philadelphia, Mississippi, site of the infamous killing of three civil rights workers by local law enforcement officers and the Ku Klux Klan in the summer of 1964. If elected, he promised to restore "states' rights."²⁰

Thus began the extended "dog whistle"²¹ to neo-Confederates and other disaffected whites. Reagan's choices for Attorney General, Chief of the Civil Rights Division at Justice, and Solicitor General were firmly committed to ending all remedial preference.²² Holding positions previously occupied by the likes of Robert F. Kennedy, John Doar, Burke Marshall, and Thurgood Marshall, all fierce proponents of federal intervention in support of civil rights for African Americans, Reagan's legal team set out to dismantle the heady achievements of the 1960s. Undeterred by the long line of precedent licensing non-quota preferences going back to Justice Powell's influential opinion in *Regents of the University of California v. Bakke*,²³ the Justice Department abruptly switched sides to stand with white males pursuing "reverse discrimination" cases.²⁴

One such case, *Martin v. Wilks*, proved a turning point in the equal rights narrative when the Supreme Court ruled in favor of white firefighters in their challenge to consent decrees that the Department of Justice itself had previously

19. As President Johnson put it:

You do not wipe away the scars of centuries by saying: Now, you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe you have been completely fair.

President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES LYNDON B. JOHNSON, 1965, 635, 636 (1966). See generally TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION (2005).

20. See Jack White, *Lott, Reagan, and Republican Racism*, TIME (Dec. 14, 2002), <http://content.time.com/time/nation/article/0,8599,399921,00.html>.

21. This phrase refers to the subtle code words used to draw on citizen's biases and prejudices. For an explanation of the concept, see IAN HANEY LOPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS (2014).

22. See generally CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1992); RAYMOND WOLTERS, RIGHT TURN: WILLIAM BRADFORD REYNOLDS, THE REAGAN ADMINISTRATION, AND BLACK CIVIL RIGHTS 5 (1969).

23. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that race may lawfully be one of a number of factors considered by a school in passing on applications).

24. See, e.g., *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) (holding that the district court erred in granting an injunction requiring white employees to be laid off before minorities); *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986) (rejecting a challenge to race-conscious consent decree for promotions in fire department).

negotiated in Birmingham, Alabama.²⁵ The diversity goals set in the decrees had only just begun to bring minorities into the fire department in the city dubbed “Bombingham” for its virulent and violent resistance to civil rights demonstrations in the 1960s.²⁶ When Justice Rehnquist cast aside the long-standing doctrine foreclosing such collateral challenges and permitted the white firefighters to reopen the final decrees, he violated his own oft-stated commitment to finality, and predictably opened the floodgates for hundreds of similar efforts across the nation.²⁷ The Civil Rights Division, going well beyond the Court’s ruling, proceeded to warn beleaguered local officials that preferences could only be granted to *actual identifiable victims* of discrimination.²⁸

What followed was a steady narrowing of the license for affirmative action by public actors,²⁹ interrupted only in 2003 by *Grutter v. Bollinger*,³⁰ which breathed new life into the practice by recognizing the compelling educational interest in student diversity. Justice O’Connor’s opinion for the Court upheld the modest weighing of race as a plus-factor in the “highly individualized, holistic review” of University of Michigan Law School applicants, along the lines of Powell’s opinion in *Bakke*.³¹ The companion case, *Gratz v. Bollinger*, predictably disapproved of the automatic point bump given minorities in undergraduate admissions, which effectively assured their admission over “more qualified” white applicants.³² Justice O’Connor envisioned that *Grutter* would remain good law for twenty-five years, after which affirmative action “would no longer be necessary.”³³ But she had not factored in the staying power of Reagan’s lawyers.³⁴

25. *Martin v. Wilks*, 490 U.S. 755 (1989).

26. See DIANE MCWHORTER, *CARRY ME HOME: BIRMINGHAM, ALABAMA: THE CLIMATIC BATTLE OF THE CIVIL RIGHTS REVOLUTION* (2001) (describing Birmingham’s violent response to civil rights actions).

27. See Mark S. Brodin, *Reflections on the Supreme Court’s 1988 Term: The Employment Discrimination Decisions and the Abandonment of the Second Reconstruction*, 31 B.C. L. REV. 1, 19 n.99 (1989).

28. See WOLTERS, *supra* note 22, at 239–42; Brodin, *supra* note 27, at 23 n.113; Howard Kurtz, *Judge Repulses U.S. Attempt to Undo Affirmative Action*, WASH. POST, Dec. 22, 1985, at A4.

29. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (challenge to federal highway project preference for disadvantaged businesses); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (challenge to minority contractor set-aside for city construction projects); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986) (challenge to provision in collective bargaining agreement giving lay-off protection preference to minority teachers).

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

31. *Id.* at 337.

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

33. *Grutter*, 539 U.S. at 343.

34. Ironically, Justice O’Connor herself had been appointed to the Court by Reagan, but it is highly doubtful that he ever envisioned her betraying his stubborn opposition to affirmative action.

II.

THE WHITE APPLICANT AS VICTIM

Abigail Noel Fisher, a white unsuccessful applicant to the University of Texas (“UT”), was recruited by anti-affirmative action activist Edward Blum³⁵ to challenge UT’s inclusion of race as a factor in the admissions process.³⁶ Although it was highly unlikely she would have been admitted regardless of race given her mediocre high school record,³⁷ the Court overlooked the standing issue³⁸ and proceeded to overturn the two lower court decisions in favor of UT.³⁹ Remarkably, six other justices signed onto Justice Kennedy’s opinion that equated, in the eyes of the Equal Protection Clause, UT’s use of race *to rectify* past discrimination and achieve diversity with the worst forms of racial discrimination in our past:

It is . . . irrelevant that a system of racial preferences in admissions may seem benign. Any racial classification must meet strict scrutiny, for when government decisions touch upon an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.⁴⁰

Although some Supreme Court justices had expressed this bizarre equation since *Bakke*,⁴¹ it had never commanded this level of consensus on the Court

35. See Morgan Smith, *One Man Standing Against Race-Based Laws*, N.Y. TIMES, Feb. 24, 2012, at A21A. Blum was also behind the successful challenge to Section 5 of the Voting Rights Act in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). See Ari Berman, *Conservatives Take Aim at Voting Rights*, THE NATION, Feb. 25, 2013, at 11, 12.

36. Recognizing how modestly race was weighed, the district judge described it as “a factor of a factor of a factor.” *Fisher v. Univ. of Tex.*, 645 F. Supp. 2d 587, 608 (W.D. Tex. 2009).

37. See Nikole Hannah-Jones, *Race Didn’t Cost Abigail Fisher Her Spot at the University of Texas*, THE WIRE, March 18, 2013, <http://www.thewire.com/national/2013/03/abigail-fisher-university-texas/63247/>. Fisher graduated eighty-second in a high school class of 674 and had undistinguished SAT scores. 168 minority applicants with higher index numbers than Fisher were also rejected, and white applicants with lower numbers were admitted.

38. See Mark S. Brodin, *Screening Out Unwanted Calls: The Hypocrisy of Standing “Doctrine”*, 15 NEV. L. J. (forthcoming 2015).

39. *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411 (2013).

40. *Id.* at 2417.

41. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978). *But see* *Gratz v. Bollinger*, 539 U.S. 244, 301 (2003) (Ginsburg, J., dissenting) (“[A]s I see it, government decisionmakers may properly distinguish between policies of exclusion and inclusion. Actions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated.” (citation omitted)); *Id.*, at 282 (Breyer, J., concurring) (“I agree . . . that, in implementing the Constitution’s equality instruction, government decisionmakers may properly distinguish between policies of inclusion and exclusion for the former are more likely to prove consistent with the basic constitutional obligation that the law respect each individual equally.”)

before. Justice Kennedy's opinion gained the approval of even the "liberal" Justices Breyer and Sotomayor. Only Justice Ginsburg balked at the equivalence between race *preference* and race *discrimination*. In her dissenting opinion, Justice Ginsburg stated that "[a]ctions designed to burden groups long denied full citizenship stature are not sensibly ranked with measures taken to hasten the day when entrenched discrimination and its aftereffects have been extirpated."⁴²

Purporting to see no difference between Jim Crow's segregated schools (which of course were intended to, and did, subjugate blacks) and UT's race preference to diversify its student body,⁴³ the Court vacated and remanded, imposing "the most rigid scrutiny," "searching," and "demanding" in its intensity, on UT's program.⁴⁴ After *Fisher*, a school must demonstrate not just a compelling necessity for the preference, but also prove that its method is "narrowly tailored," i.e., that race is not the defining feature of each applicant's disposition and that no workable race-neutral alternatives would yield the same educational benefits.

It remains to be seen which, if any, challenged programs can withstand this penetrating scrutiny,⁴⁵ and indeed which university administrators will have the stomach to continue their efforts in the face of likely litigation.⁴⁶ At the very

(citations omitted)); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society."); *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 301–02 (1986) (Marshall, J., dissenting) (noting that when dealing with an action to eliminate "pernicious vestiges of past discrimination," a "less exacting standard of review is appropriate."); *Fullilove v. Klutznick*, 448 U.S. 448, 518–19 (1980) (Marshall, J., concurring) (arguing that race-based governmental action designed to "remed[y] the continuing effects of past racial discrimination . . . should not be subjected to conventional 'strict scrutiny'"); *Bakke*, 438 U.S., at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) (noting that "racial classifications designed to further remedial purposes" should be subjected only to intermediate scrutiny).

42. *Fisher*, 133 S. Ct. at 2434 n.4 (Ginsburg, J., dissenting) (quoting *Gratz*, 539 U.S. at 301). Elena Kagan did not take part in the decision.

43. Justice Kennedy's opinion for the Court treats *all distinctions* based on race as "by their very nature odious to a free people" and "inherently suspect." *Fisher*, 133 S. Ct. at 2418 (citations omitted).

44. *Id.* at 2415, 2418–19.

45. On remand, the Fifth Circuit Court of Appeals ruled in favor of UT's weighing of race in admissions, concluding it was narrowly tailored in the unique context of its other admissions policies. *Fisher v. Univ. of Tex.*, 758 F.3d 633 (5th Cir. 2014). A petition for certiorari has been granted, 2015 WL 629286, U.S., June 29, 2015, and the case will be heard again next Term.

46. One university official lamented that *Fisher* requires schools to prove a negative, namely that there is no race-neutral alternative that would equally achieve diversity. See Marcella Bombardieri, *Court Wants High Bar for Affirmative Action*, BOSTON GLOBE, June 25, 2013, at A1. Immediately after *Fisher* was decided, Edward Blum (the force behind so many attacks on minority advancement) ominously threatened that "[t]hose universities that continue using race-based affirmative action will likely find themselves embroiled in costly and polarizing litigation." Adam Liptak, *Unofficial Enforcer of Ruling on Race in College Admissions*, N.Y. TIMES, Apr. 8,

least, universities will have to divert attention and resources from designing the best admissions program for their educational purposes to one most likely to pass inspection under *Fisher*.

In their concurring opinions in *Fisher*, Justices Thomas and Scalia stated that they would go even further than the holding of Justice Kennedy, strictly forbidding *any* race-conscious decision-making under *any* circumstances. Thomas, himself an admitted beneficiary of affirmative action at Holy Cross and Yale Law School, has turned his back on affirmative action, blaming race preference for forever stigmatizing himself and all African Americans in the eyes of their classmates and potential employers.⁴⁷ To Thomas' ear, the arguments in support of racial diversity sound just like those rejected in *Brown v. Board of Education* in support of segregated schools.⁴⁸ "The worst forms of racial discrimination in this Nation [including slavery]," Thomas states, "have always been accompanied by straight-faced representations that discrimination helped minorities."⁴⁹ To him, UT's affirmative action program follows "in [these] inauspicious footsteps."⁵⁰

Since UT's admissions process was modeled on the one approved in *Grutter* and *Bakke* before it, *Fisher*'s reversal of the lower court decisions clearly represents a new and fiercer hostility to affirmative action. And the assault continued in earnest with *Schuetz v. Coalition to Defend Affirmative Action*.⁵¹ Denying that the case was about affirmative action,⁵² Justice Kennedy reversed the Sixth Circuit decision that had struck down a voter-approved ban on race-conscious admissions in state universities that had been adopted in response to

2014, at A16. He set up a series of websites to solicit plaintiffs, offering to pay all litigation expenses. *Id.* One such site asks: "Were you denied admission to the University of North Carolina? It may be because you're the wrong race." *Id.* Other sites seek plaintiffs challenging denial of admission to the University of Wisconsin and Harvard University. *Id.*

47. Thomas believes that race preference creates a harmful dependency in its beneficiaries, represents an offensive paternalism on the part of do-gooder whites, and puts minorities in positions they are not qualified for and will inevitably fail in. See CLARENCE THOMAS, MY GRANDFATHER'S SON: A MEMOIR 56–57, 74–75, 148–49 (2007) ("I'd graduated from one of America's top law schools, but racial preference had robbed my achievement of its true value."). Sonia Sotomayor had quite the opposite personal experience with affirmative action at Princeton, where she was grateful for the chance to prove herself, as she certainly did, graduating summa cum laude. SONIA SOTOMAYOR, MY BELOVED WORLD 119, 145–46, 188–91 (2013).

I had no need to apologize that the look-wider, search-more affirmative action that Princeton and Yale practiced had opened doors for me. That was its purpose: to create the conditions whereby students from disadvantaged backgrounds could be brought to the starting line of a race many were unaware was even being run.

Id. at 191.

48. See *Fisher*, 133 S. Ct. at 2426–27.

49. *Id.* at 2429.

50. *Id.* at 2430.

51. *Schuetz v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

52. A wise person once observed that when someone says, "It's not about the money," you can bet that is precisely what it is about.

Grutter.⁵³ Michigan voters could constitutionally ban special preference, the Court held, despite the long line of precedent forbidding such electoral reversals of minority rights, because that is the democratic process.⁵⁴

The Court that has done more to undermine democracy than any of its predecessors—by converting elections into bidding wars for the purchase of politicians,⁵⁵ by green-lighting restrictive voter identification laws,⁵⁶ by overturning the fifty-year-old Voting Rights Act,⁵⁷ by legitimizing gerrymandering,⁵⁸ and, worst of all, by *itself* selecting the President in 2000 notwithstanding his substantial loss of the popular vote⁵⁹—that same Court has now cynically wrapped itself in the mantle of “enabl[ing] ‘greater citizen involvement’ in democratic processes.”⁶⁰ In accord with the Court’s new simple-minded analysis of cases,⁶¹ Justice Scalia concurred with the quip: “[Plaintiffs] cannot prove that the action here reflects a racially discriminatory purpose, for any law expressly requiring state actors to afford all persons equal protection of the laws does not—*cannot*—deny ‘to any person . . . equal protection of the laws.’”⁶²

Fisher and *Schuette*, taken together, leave race preference in its most precarious position since the Reagan administration first targeted it thirty years ago. Michigan’s public colleges and universities have seen a twenty-five percent

53. The adopted proposition at issue stated:

The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

See *Schuette*, 133 S. Ct. at 1629.

54. See *id.* at 1637–38.

55. See *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434 (2014); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

56. *Crawford v. Marion Cnty. Election Bd.*, 128 S. Ct. 1610 (2008).

57. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013).

58. See *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

59. See *Bush v. Gore*, 531 U.S. 98 (2000); Mark S. Brodin, *Bush v. Gore: The Worst (or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L. J. 563 (2012).

60. *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1630 (2014) (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011)). Even stranger is Justice Breyer’s concurrence on the theory that “this case involves an amendment that took decision-making authority away from unelected actors and placed it in the hands of the voters. Hence, this case does not involve a diminution of the minority’s ability to participate in the political process.” *Id.* at 1627.

61. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

62. *Schuette*, 134 S. Ct. at 1627 (quoting U.S. CONST. amend. XIV, § 1).

decline in minority enrollment since the ban took effect.⁶³ California has witnessed an even more dramatic impact, where race-neutral policies have woefully failed to achieve the diversity previously secured.⁶⁴ This past has become prologue.

III. PREFERENCE VERSUS “MERIT”

Together with the myth of the white victim of racism is the falsehood that race preference requires the sacrifice of “merit” selection. The cover story in *New York Times Magazine* on March 9, 2014, was titled “The SAT Is Not Fair.” It depicts what many have known for years: that standardized tests of this type have little if any predictive value. In reality, the SAT measures the applicant’s skill to take the SAT. The closest correlative to test scores is not success in college, or graduation rate, but family income—every increment of \$20,000 translates into proportionately higher scores.⁶⁵ Given the expense of test-prep classes, and particularly private tutors, this is not at all surprising. The Kaplan empire and similar private test preparation companies now comprise a \$4.5 billion-per-year industry “that caters largely to the worried wealthy in America.”⁶⁶ As Deborah C. Malamud has astutely observed, individual “merit” may actually be the product of economic and educational advantage transmitted from parent to child.⁶⁷ Moreover, the racial, gender, and ethnic biases of standardized tests are well documented.⁶⁸ “Color blind” selection by such measures is anything but.

Justice Blackmun long ago noted the irony that so many people are disturbed by race preference, yet perfectly fine with the pervasive preferences for “those possessed of athletic skills, 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.”⁶⁹ Legacy admits, overwhelmingly white and affluent, may actually arrive with significantly lower profiles than their classmates, and sometimes outnumber “affirmative action” admits.

63. *Id.* at 1678 (Sotomayor, J., dissenting).

64. *Id.* at 1679–80.

65. Todd Balf, *The SAT is Hated by: All of the Above*, N.Y. TIMES MAG., Mar. 9, 2014, at 27, 30.

66. *Id.* at 26, 29.

67. Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1881 (1996).

68. See, e.g., Mark S. Brodin, *Ricci v. DeStefano: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161, 222–25 (2011).

69. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 404 (1978) (Blackmun, J., dissenting). See also Daniel Golden, *An Analytic Survey of Legacy Preference*, in AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS 71, 89 (Richard D. Kahlenberg, ed., 2010) (demonstrating that various political leaders support legacy admissions).

Sonia Sotomayor recalls of her Princeton experience:

[N]o minority students had alumni for parents, and rare indeed were those who had not come from poor communities. The typical undergraduate had been guided to Princeton by relatives, by prep school guidance counselors, or else by teachers savvy about the system. Minority kids, however, had no one but their few immediate predecessors: the first to scale the ivy-colored wall against the odds, just one step ahead ourselves, we would hold the ladder steady for the next kid with more talent than opportunity.⁷⁰

IV.

CLOSING OBSERVATIONS

Can it be seriously contended that Abigail Fisher suffered the same indignity, humiliation, and stigmatization that the “Little Rock Nine” did when those young African Americans had to be escorted into Central High School in 1957 by the 101st Airborne Division of the U.S. Army, famed for its valiant role in liberating Europe from Nazi occupation? Thurgood Marshall answered this question persuasively nearly forty years ago:

The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.⁷¹

Justice Marshall recognized that race conscious corrective measures might disadvantage some whites,

but whites as a class lack the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. Because the consideration of race is relevant to remedying the continuing effects of past racial discrimination, and because governmental programs employing racial classifications for remedial purposes can be crafted to avoid stigmatization, . . . such programs should not be subjected to conventional “strict scrutiny”—scrutiny that is strict in theory, but fatal in fact.⁷²

70. SOTOMAYOR, *supra* note 47, at 146.

71. *Bakke*, 438 U.S. at 400–01.

72. *Fullilove v. Klutznick*, 448 U.S. 448, 518 (1980) (Marshall, J., concurring). In an opinion by Chief Justice Burger, who was appointed by the Republican President Richard Nixon, *Fullilove*

It is telling that in the United Kingdom and Canada, affirmative action is called “positive discrimination” or “employment equity,” not reverse discrimination.⁷³ The false equivalency between Abigail Fisher and Ruby Bridges that justifies the Court’s harsh assessment of race preference must be rejected. The Equal Protection Clause must be returned to its original design—the protection of minorities, *not* the white majority. Until the Court comes to its senses, any meaningful remedy for America’s long-standing sin of racism will be suspect in the eyes of the law.

upheld a Congressional set-aside of ten percent for minority contractors on federal projects. *Id.* at 484–85 (“It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such ‘a sharing of the burden’ by innocent parties is not impermissible. The actual ‘burden’ shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities. Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.”). How far we have come from those pre-Reagan era days!

73. See *Affirmative Action*, WIKIPEDIA (May 17, 2015 2:19 AM), http://en.wikipedia.org/wiki/Affirmative_action.