

RACE MATTERS: WHY JUSTICE SCALIA AND JUSTICE THOMAS (AND THE REST OF THE BENCH) BELIEVE THAT AFFIRMATIVE ACTION IS CONSTITUTIONAL

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At the heart of the Constitution’s guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.¹

Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals.²

I. INTRODUCTION

This Article builds an argument about the constitutionality of race-based affirmative action in university admissions from a very simple fact: *all of the Justices currently sitting on the Supreme Court believe that race matters in the contemporary United States*. While they may disagree, sometimes vehemently, about the extent to which race still matters, the mechanisms that make race matter, and the route that society should take in order to make race matter less in the future, the Justices nevertheless all agree that race matters in modern society.

Since the 1960s, race-based affirmative action in university admissions has been proposed as a method for making race matter less in future iterations of American society.³ If we employ affirmative action, proponents argue, then racial minorities will be included in institutions from which they have been historically excluded. The result is that, over

1. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting)).

2. *Hopwood v. Texas*, 78 F.3d 932, 945 (5th Cir. 1996).

3. See Corinne E. Anderson, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 190 (1999) (discussing how “[t]he modern era of affirmative action began in 1961” and, though focused mostly on employment, also extended to higher education admissions).

time, people of all races will have access to the jobs, wealth, and power that these institutions afford. The consequence is that, in the future, race will no longer determine fundamental aspects of a racial minority's life—such as whether they will live in poverty, be incarcerated, die while giving birth, or die earlier than counterparts with race privilege. Supporters argue that affirmative action will produce this change—that it will make race matter less.

The Court is currently divided on the constitutionality of race-based affirmative action. Four Justices believe that the Equal Protection Clause mandates colorblindness, thus prohibiting state actors from ever consciously considering race; accordingly, these Justices believe that affirmative action programs are inevitably and invariably unconstitutional.⁴ Five Justices reject the notion that the Equal Protection Clause mandates colorblindness.⁵ However, one of those five, Justice Kennedy, is so wary about the dangers that race-conscious laws present that he consistently has voted to strike down the affirmative action programs that the Court has reviewed.⁶

If what this Article proposes is true, and if all of the Justices currently sitting on the Bench believe that race matters in the contemporary United States, then the following must also be true: those Justices who are predisposed to striking down affirmative action programs believe that while race still matters, the Constitution ties state actors' hands and prohibits them from using race-conscious laws, such as affirmative action programs, to make race matter less.⁷

4. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 772 (2007) (“Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution.”) The plurality's opinion in *Parents Involved* reflects the viewpoints of Justices Roberts, Thomas, Alito, and Scalia.

5. *Id.* at 828 (Breyer, J., dissenting) (“Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated—*i.e.*, that the government may voluntarily adopt race conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so.”); *id.* at 788 (Kennedy, J., concurring) (stating that Justice Harlan's color-blind Constitutionalism “cannot be a universal constitutional principle”).

6. See Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 NW. U. L. REV. 74, 78 (2012) (“Although repeatedly voting with the conservatives in affirmative action cases, Kennedy has always conspicuously avoided signing on to more sweeping denunciations of all government consideration of race.”); Nelson Lund, *Justice Kennedy's Stricter Scrutiny and the Future of Racial Diversity Promotion*, 9 ENGAGE 20 (2008) (discussing how, in his *Parents Involved* opinion, “Kennedy has reaffirmed his strong reluctance to approve direct discrimination against individuals except as a last resort”).

7. The Constitution ties hands to the extent that it prohibits state actors from using race conscious measures. Accordingly, state actors are compelled to use race neutral measures to remedy

The primary intervention of this Article is to dispute that it is possible to reconcile the position that race matters with the position that the Constitution prohibits state actors from explicitly considering race when attempting to remedy the fact that race still matters. More precisely, the primary intervention of this Article is to argue that if race matters, then the Constitution allows state actors to consider race when endeavoring to ameliorate the negative effects that race has in contemporary society.

If one reads the jurisprudence of those Justices who subscribe to the notion that the Constitution ties the hands of state actors interested in ameliorating the effects of race, one can see that one of the principal reasons why they subscribe to this notion is because they view race as deindividuating. Specifically, in the context of race-conscious admissions programs, these jurists believe that when admissions offices consider the race of the individual seeking admission, they can no longer see the individuality of the applicant. The admissions file purportedly already allows third parties to see the applicant's individuality. However, when third parties consider race, the argument goes, the consideration thereof *prevents* third parties from seeing the individuating particularities contained within the file—test scores, grades earned, languages spoken, leadership positions held, and so forth.

Their argument is that race is deindividuating because when state actors consider it, it prevents them from seeing the individual and only allows them to see the individual's racial group. Moreover, the corollary assumption is that admissions offices will admit, waitlist, and deny individuals on the basis of their racial group and not on the basis of their individual particularities. For those Justices who are predisposed to striking down affirmative action programs, this deindividuating nature of race is problematic. Indeed, it is fatal. This is because of the largely undisputed notion that the Equal Protection Clause demands that citizens be treated as individuals.⁸ If the consideration of race deindividuates insofar as it

racially salient problems. *See* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509–10 (1989) (arguing that the city of Richmond could remedy the fact that only 0.67% of its contracting dollars went to minority owned businesses by increasing “the accessibility of city contracting opportunities to small entrepreneurs of all races,” perhaps through “[s]implification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races”); *Grutter v. Bollinger*, 539 U.S. 306, 355 (2007) (Thomas, J., dissenting) (arguing that the University of Michigan Law could successfully admit more students of color without being race conscious in admissions if it changed its admissions standards altogether).

8. *See* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 231 (1991) (“Beginning with *McCabe*, though, the Court consistently dismissed such

prevents persons from being treated as individuals, then the Equal Protection Clause prohibits state actors from considering race.

This Article challenges the contention that race deindividuates, instead arguing that race is individuating in admissions, and profoundly so. This is for one important reason: race matters. Race plays a profoundly important role in producing individuals who are the sum of the particularities compiled and revealed in an application for admission.

If race matters, then race is individuating in the context of university admissions. If race is individuating in that context, then considering it is consistent with the claim that the Equal Protection Clause requires the state to “treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class.”⁹ Accordingly, if race matters, as all Justices on the Bench believe, then race-conscious admissions programs can be constitutional.

Two points are noteworthy: First, there is little disagreement among the current nine Justices that, when it comes to the Equal Protection Clause, it is the individual that matters, not the group.¹⁰ Indeed, most, if not all, of the Justices on the current Court agree that all uses of race trigger strict scrutiny.¹¹ Moreover, most, if not all, of the current Justices on the Court

arguments with the rhetorically resonant, but analytically unsatisfying, maxim that the Equal Protection Clause guarantees ‘personal,’ not group rights.”).

9. Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting*, 497 U.S. at 602 (O’Connor, J., dissenting) (emphasis added) (internal quotations omitted)).

10. Engquist v. Oregon Dep’t. of Agric., 553 U.S. 591, 597 (2008) (“It is well settled that the Equal Protection Clause ‘protect[s] persons, not groups.’” (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995))).

11. See *Fisher v. Univ. of Texas at Austin*, 133 S.Ct 2411, 2415 (2013) (remanding the case because the lower court “did not apply the correct standard of strict scrutiny” to a race conscious university admissions policy—a program that a jurist like Justice Marshall would have termed a “benign” or “inclusive” use of race and, as a result, would have reviewed with intermediate scrutiny). Notably, liberal Justices Breyer and Sotomayor signed onto the majority opinion along with the conservative bloc: Chief Justice Roberts and Justices Alito, Kennedy, Thomas, and Scalia (Justice Kagan recused herself from the case). While Justice Ginsburg dissented, it was not because she thought that benign uses of race trigger something less than strict scrutiny, but rather because she believed that the lower court had already appropriately applied strict scrutiny when reviewing the admissions program and had already appropriately found it sufficiently narrowly tailored to achieve the end of producing the educational benefits that accrue from a diverse student body. See *id.* at 2434 (Ginsburg, J., dissenting).

Notably, Justice Ginsburg is open to the possibility that the Constitution does not demand that benign uses of race be reviewed with strict scrutiny. See *id.* n.4 (Ginsburg, J., dissenting) (“Because the University’s admissions policy, in my view, is constitutional under *Grutter*, there is no need for the Court in this case ‘to revisit whether all governmental classifications by race, whether designed to benefit or to burden a historically disadvantaged group, should be subject to the same standard of

would agree that it is the commitment to individuals, and not to groups, that makes all governmental uses of race trigger strict scrutiny.¹² Thus, it is unfair when one *solely* attributes to “conservatives” the contention that the Equal Protection Clause demands that persons be treated as individuals. Instead, the attribution ought to be made to current Equal Protection jurisprudence as a whole. Moreover, to the extent that all the jurists on the current Bench concede that the Equal Protection Clause privileges the individual above the group, all jurists on the current Bench ought to be supplied with information about race that demonstrates that actors can privilege individuals while simultaneously considering their race. This Article endeavors to supply that information.

Second, it is important to observe that the assertion that “the Equal Protection Clause demands that persons be treated as individuals” requires some unpacking. Essentially, some argue against affirmative action by claiming that the consideration of race denies persons their individuality, while the consideration of other characteristics—like test scores and grades—does not. However, an individual’s test scores and grades, like an individual’s race, are simply traits that he possesses.¹³ Accordingly, solely considering an applicant’s test scores and grades does not treat him as an individual any more than considering his race. Ken Simons explains this position clearly:

Consider a white employee who demonstrates that he would have received a promotion based on job ability if not for an affirmative action preference. He has been disadvantaged based on race, at least over the short-term. But

judicial review.”). She is likely the only one in that regard. Indeed, in *Parents Involved*, Justice Breyer articulated his comfort with the use of strict scrutiny even for benign uses of race, although he was careful to state that strict scrutiny should not lead invariably to the striking down of race conscious laws. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 832–33 (2007) (Breyer, J., dissenting) (“[N]o case . . . has ever held that the test of ‘strict scrutiny’ means that all racial classifications—no matter whether they seek to include or exclude—must in practice be treated the same [Our cases] apply the strict scrutiny test in a manner that is ‘fatal in fact’ only to racial classifications that harmfully *exclude*; they apply the test in a manner that is *not* fatal to racial classifications that seek to *include*.”).

12. See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 299 (1978) (“[I]t is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights”); *Johnson v. California*, 543 U.S. 499, 507 (2005) (“The need for strict scrutiny is no less important here As we have recognized in the past, racial classifications ‘threaten to stigmatize individuals by reason of their membership in a racial group and to *incite racial hostility*.”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (“[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection has not been infringed.”).

13. Kenneth W. Simons, *Overinclusion and Underinclusion: A New Model*, 36 UCLA L. REV. 447, 501 (1989).

considering his job ability and not his race would not be treating him purely as an individual. Job ability is a trait like any other—education, physical size, friendship with the boss, or race.¹⁴

Therefore, the claim cannot be that consideration of some traits, like race, does not allow persons to be treated as individuals; rather, the claim is that some traits are only *illegitimately* considered. In this way, the claim that any admissions program “treats applicants as individuals” should be read as asserting that the admissions program solely considers traits that those making the claim deem legitimately considered. The inverse is also true: the claim that any admissions policy does not “treat applicants as individuals” should be read as asserting that the program considers traits that those making the claim deem illegitimately considered.

Moreover, some opponents of affirmative action have augmented the claim that race is only illegitimately considered—that is, deindividuating—by arguing that the consideration of race makes irrelevant individuating (read: legitimately considered) traits, like test scores and grades.¹⁵ The goal of this Article is to dispute this characterization of race. Instead of functioning to make invisible or inconsequential other legitimately considered traits that applicants possess, race actually functions to bring those traits into greater relief, providing a context for otherwise decontextualized facts. Race serves to provide even more information about those traits that those who oppose affirmative action claim are legitimately considered in admissions—that is, are individuating. Inasmuch as race further illuminates traits that those who oppose affirmative action claim are individuating, race could be understood to individuate further those characteristics that are individuating. As such, race is *profoundly* individuating—a description of race that many opponents of affirmative action stringently deny. Accordingly, this Article attempts to perform a sort of intellectual jujitsu¹⁶ insofar as it uses the weight of the arguments that some have made to oppose affirmative action against the persons making those arguments—reformulating anti-affirmative action arguments into those in favor of affirmative action.

14. *See id.* (noting that when persons assert that applicants should be treated as individuals in the hiring context, they are actually arguing that the hiring process should only consider certain characteristics (like job ability) to the exclusion of others (like race)).

15. *See infra* notes 38–41 and accompanying text.

16. Thanks to Jonathan Khan for colorfully, and flatteringly, using this phrase to describe this Article.

This argument that race-conscious admissions programs are consistent with the Constitution proceeds in two Parts. Part II explores the jurisprudence authored by those Justices who are predisposed to striking down affirmative action programs in university admissions. The exploration reveals that those Justices believe that race is deindividuating in admissions—largely because they believe that the admissions file successfully allows third parties to see the individuality of the candidate submitting the application. These Justices believe that the consideration of race, on the other hand, prevents third parties from seeing the individuality contained therein, allowing them only the ability to see race.

Part III explores the Justices' philosophies about race, noting the divergences and convergences among them. While the divergences are many, one of the points at which they converge is fundamental: all of the Justices believe that race matters in the United States. This Part documents that point of convergence. It then underscores that if race matters, as all of the Justices correctly believe, then the consideration of race is consistent with the Equal Protection Clause's mandate that government treat citizens as individuals. This is because if race matters, then race is individuating insofar as it provides context for the other individuating information contained in the admissions file. A brief conclusion follows in Part IV.

II. THE (IMAGINED) DANGERS OF USING RACE IN LAW

Justices who are suspicious of—and are predisposed to condemning—racial classifications in their various iterations (whether designed to benefit or burden historically disadvantaged groups) believe that such classifications are unconstitutional for a multitude of reasons. They are envisioned as ultimately causing more harm than good inasmuch as they are thought to stigmatize the purported beneficiaries of the race-based laws,¹⁷ to foment racial “tribalism” and the development of racial hatred as

17. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (O'Connor, J., dissenting) (“Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize these groups singled out for different treatment”); *Bakke*, 438 U.S. at 298 (arguing that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth”). Even the white persons disadvantaged by racial preferences are stigmatized, as they are constructed as having been perpetrators of racial discrimination in earlier historical periods. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516–17 (Stevens, J., concurring) (arguing that racial preferences “stigmatize[] the disadvantaged [white] class with the unproven charge of past racial discrimination”).

In *Grutter*, Justice Thomas passionately argued against the constitutionality of the use of race in law; among his many reasons for opposing racial “preferences” was his fear that even those minorities who

well as race-based violence,¹⁸ and to perpetuate race-thinking—an end that is itself undesirable, as the hoped for teleology of the Nation ends with the irrelevance, and possible disappearance, of racial categories.¹⁹ Less utilitarian arguments against racial classifications claim that they are unconstitutional because they are immoral.²⁰ Other more pragmatic arguments contend that they are unconstitutional because individuals would have to be assigned to racial groups, which may be repugnant and reminiscent of lamentable historical moments.²¹ Finally, others argue that they are simply and inherently anathema to the United States

would have been admitted to educational institutions like the University of Michigan Law School (or who would receive coveted employment positions) without race-conscious laws are stigmatized, as they are assumed to have been beneficiaries of race conscious programs. *See Grutter*, 539 U.S. at 373 (2003) (Thomas, J., dissenting). Of course, the original iteration of the stigma argument appeared in *Brown v. Board*; it is notable that the concern there was not that racial classifications would lead to others thinking less of racial minorities, but rather that racial classifications would lead to racial minorities thinking less of themselves. *See Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 494 (1954) (“[T]o separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”).

18. *See, e.g., Metro Broadcasting*, 497 U.S. at 603 (O’Connor, J., dissenting) (“[Racial classifications] endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”).

19. *See, e.g., Croson*, 488 U.S. at 495 (arguing that the “ultimate goal” is to “eliminat[e] entirely from governmental decisionmaking such irrelevant factors as a human being’s race” and conjecturing that upholding the constitutionality of racial classifications “effectively assures that race will always be relevant in American life”); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (arguing that racial classifications “reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred”).

20. *See, e.g., Adarand* 515 U.S. at 240–41 (Thomas, J., concurring) (“I believe that there is a moral [and] constitutional equivalence . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality In my mind, government-sponsored racial discrimination . . . is just as noxious as discrimination inspired by malicious prejudice.”) (internal quotations omitted); *Croson*, 488 U.S. at 521 (Scalia, J., concurring) (“I share the view expressed by Alexander Bickel that [t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.” (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 132 (1975) (internal quotations omitted)). *Compare Croson* 488 U.S. at 518 (Stevens, J., concurring) (“The moral imperative of racial neutrality is the driving force of the Equal Protection Clause.”), *with Adarand*, 515 U.S. at 243 (Stevens, J., dissenting) (“There is no moral or constitutional equivalence between a policy designed to perpetuate a caste system and one that seeks to eradicate racial subordination.”).

21. *Holland v. Illinois*, 493 U.S. 474, 507 n.6 (1990) (Stevens, J., dissenting) (“In determining precisely what ancestry would qualify a defendant as black, white, brown or red, courts might find guidance in some older decisions of states that practiced *de jure* segregation, in the opinions of South African tribunals, and in the precedents of Nazi Germany.” (quoting Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 191–92 (1989)).

Constitution—“just because.” As Justice Powell wrote in his influential opinion in *Bakke*, “[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.”²²

However, the imagined harm that is most interesting in light of the interpretation of the Equal Protection Clause as demanding that government treat citizens as individuals is the sense that such classifications are injurious because they deny the *individuality* of the persons who constitute the racial groups. That is, the imagined harm is that racial classifications, and race itself, are *deindividuating*. The next section explores this claim.

A. THE INJURY OF RACIAL CLASSIFICATIONS: THE DENIAL OF INDIVIDUALITY

Perhaps it was Justice Murphy in *Korematsu v. United States*, dissenting from the Court upholding the constitutionality of laws facilitating the internment of Japanese persons during World War II, who first articulated the argument that the consideration of race inevitably deindividuates.²³ He wrote of his sense that racial classifications “destroy the dignity of the individual.”²⁴ The Court’s post-*Korematsu* jurisprudence has expanded upon Murphy’s intuition that racial classifications injure individuals by making it clear that the Equal Protection Clause protects individuals, not groups.²⁵ And perhaps it is because of the interpretation of the Equal Protection Clause as a defender of the individual that Justices, when voting to strike down a racial classification, always have at least one eye trained on the harm caused to individuals by the use of race in law. Readers of *Parents Involved in Community Schools v. Seattle School District No. 1* learn about Andy Meeks, a ninth grader who “suffered from attention deficit hyperactivity disorder and dyslexia, but who had made

22. *Bakke*, 438 U.S. at 307.

23. *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

24. *Id.*

25. *Engquist v. Oregon Dep’t. of Agric.*, 553 U.S. 591, 597 (2008) (“It is well settled that the Equal Protection Clause ‘protect[s] persons, not groups.’”) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, (1995), 515 U.S. at 227). That the Equal Protection Clause protects individuals and not groups is an interpretation of the text with which Justice Thurgood Marshall strongly disagreed. *See Bakke*, 438 U.S. at 400 (Marshall, J., concurring in part, dissenting in part) (“[I]t is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today’s judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins.”).

good progress with hands-on instruction. [H]is mother and middle school teachers thought that [a] smaller biotechnology program held the most promise for his continued success.”²⁶ Andy got into the program that seemed perfectly suited for his needs. However, solely because of his race, he was denied assignment to the school.²⁷ Readers learn that the first name of the plaintiff in *Grutter v. Bollinger* is Barbara and that she was a fairly competitive student with a 3.8 grade point average (“GPA”) and 161 Law School Admission Test (“LSAT”) score. The only thing that seemed to sink her application to the University of Michigan Law School was her white racial ascription and identification.²⁸ Readers learn that the plaintiff in *Richmond v. J. A. Croson Co.* was a man named Eugene Bonn, who seemingly did everything that he could have possibly done to hire a minority subcontractor. However, it was only after he had exhausted all of the available avenues, and after the lucrative contract that he had been awarded initially had been taken away from him and given to a business that Bonn had attempted to engage as a subcontractor, that Bonn challenged the constitutionality of the law.²⁹ The humanization of these plaintiffs is more than a rhetorical parlor trick; it emphasizes that real people—*individuals*—have been injured by racial classifications.

But, exactly how have they been injured?³⁰ What is the injury that the racial classifications at issue have inflicted on them? On one level, the injury is very specific: the refusal of enrollment at a preferred grade school,

26. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 713–14 (2007).

27. *Id.* at 714. Readers also learn about Joshua McDonald, a *kindergartner*, who, also because of his race, was denied admission to a preferred elementary school. *Id.* at 717.

28. *See Grutter*, 539 U.S. at 306, 316.

29. *Croson*, 488 U.S. at 481–83 (1989).

30. It is worth noting here that there is a strong argument that Andy Meeks, Barbara Grutter, and Eugene Bonn had not been injured at all. This argument contends that individuals are injured by racial classifications only when the racial classification functions to mark them as inferior to another racial group and/or reinforce racial hierarchies in this country. *See, e.g., Bakke*, 438 U.S. 265, 357–58 (1978) (Brennan, J., concurring in part, dissenting in part) (contending that the “cardinal principle” of the Equal Protection Clause is that “racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more”). Justice Brennan, for one, argued in *Bakke* that the Equal Protection Clause only prohibits uses of race that mark individuals as inferior to other classes of individuals; insofar as U.C. Davis’s admission program did not have such an effect on the white student denied admission to his medical school of choice, it did not run afoul of the Constitution. *See Bakke*, 438 U.S. at 375 (Brennan, J., concurring in part, dissenting in part) (“Nor was Bakke in any sense stamped as inferior by the Medical School’s rejection of him Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that, wherever they go or whatever they do, there is a significant likelihood that they will be treated as second-class citizens because of their color.”).

the denial of admission to a top law school or medical school, the rejection of a contracting bid, and the loss of a desirable employment contract.³¹ However, a more general injury arguably underlies these specific injuries: the denial of individuality.³² Justices who are most hostile to racial classifications worry that race-conscious laws deny the particularities of individuals and reduce them to just one of their many facets: their race.³³

B. RACE: INDIVIDUATING OR DEINDIVIDUATING?

The frequently polemical debate about the diversity rationale for the use of race in university admissions can be traced to a disagreement about the nature of race in admissions.³⁴ Many who support the diversity

31. See, e.g., *Parents Involved*, 551 U.S. at 759 (“[E]very time the government uses racial criteria to ‘bring the races together’ someone gets excluded, and the person excluded suffers injury.”).

32. See R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. Rev. 1075, 1096 (2001) (“Stereotyping, which treats individuals on the basis of group generalization that might not apply to any particular individual, perhaps represents the paradigmatic harm that antidiscrimination law, including [the] Equal Protection Clause, is thought to guard against.”); Kimani Paul-Emile, *The Regulation of Race In Science*, 80 GEO. WASH. L. REV. 1115, 1152 (2012) (“[T]he Court has evinced the most concern about the uses of race that group people into racial categories without acknowledging individual differences within the group . . .”).

33. Those Justices who are most hostile to racial classifications are not alone in believing that racial classifications could deindividualize persons. Even some defenders of affirmative action and other race conscious remedial programs conceptualize the harm of racial and gender classifications, when wrought, as the denial of individuality. See Ian F. Haney-López, “*A Nation of Minorities*”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1052 (2007) (arguing that Brennan’s opinion in *Bakke* has a focus on individualism and that “Brennan described racism’s central harm, as he had the harm of sexism in *Frontiero*, as a derogation of individuality”). Haney-López goes on to argue that “describing this as the central harm wreaked by these illegitimate hierarchies missed their core dynamic. Racism and sexism gain social meaning and destructive power from the ubiquitous deployment of force, violence, degradation, coercion, and dominance, not merely through the tendency to make distinctions on the basis of criteria outside individual control.” *Id.* at 1053.

34. To say that the debate around the diversity rationale and its sanctioning of the use of race in college admissions is, at bottom, a disagreement about the nature of race is to take the debate at face value. This may be unwarranted. It is no secret that some proponents of the diversity rationale support it solely because the language of diversity is the only language that the Court has accepted to sanction affirmative action and other race conscious programs. Critical Race Theory pioneer Professor Charles R. Lawrence comfortably can be placed in this camp:

When a university’s administration or legal counsel consults me concerning how best to frame or defend affirmative action policies; when one of the parties to a case asks me to serve as an expert witness in litigation or to write an amicus brief; when I speak to my colleagues at lunch or in faculty meetings, or address a student rally or demonstration; I must ask myself whether I can in good conscience recommend and support the liberal strategy. The diversity defense may prove most attractive to the center of a conservative Court, and therefore most likely to withstand legal attack, but should not I take a critical stance that challenges the strategy’s inherent racism?”

rationale and the use of race in admissions believe that race *individuates*. Race individuates applicants who are, due to the nature of the application process, deindividuated. When admissions offices are allowed to know and consider the race of persons submitting applications, they have access to an aspect of the applicant that allows the university to know the uniqueness of him or her—making him or her into a person, as opposed to an accumulation of staid numbers and impersonal stories. The application may provide a wealth of information about the applicant; however, without knowing the race of the applicant, that information is not enough to let admissions officers distinguish the applicant, as an individual, from the host of other applicants with similar information. Race, then, is a mechanism to provide context and depth to an individual represented on paper.

In contrast, many who oppose the diversity rationale and the use of race in admissions deny that race individuates. Rather, they insist that race does the precise opposite: it deindividuates and essentializes. They argue that when admissions offices know and consider race, the consideration renders invisible and irrelevant the characteristics of the applicant that make him or her an individual—like grades earned, scores achieved on standardized tests, special talents possessed, multiple languages spoken, and adversities overcome. In effect, many opponents of race-conscious admissions programs contend that the application process successfully allows applicants to present themselves as individuals. The consideration of race defeats this feat of individuation, reducing the applicants into deindividuated persons to be admitted, waitlisted, or rejected outright on the basis of one overriding trait: race.

Justice Powell's opinion in *Bakke* is a good place to begin the analysis. In it, he articulates the possibility that race is not inherently and invariably a deindividuating entity. He praises the Harvard Plan, in which a racial minority applicant received a "plus" in the admissions process because of his racial membership, as a demonstration that race could allow persons to retain their individuality even when race was considered.³⁵ The

Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 962–63 (2001). While Lawrence and other proponents like him argue in favor of race conscious programs by using diversity rhetoric, they actually support race conscious programs because they view them as efforts to remedy past societal discrimination against members of groups who have not enjoyed racial privilege. *See id.*

35. *See Bakke*, 438 U.S. at 318 ("This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate

majority in *Grutter* picked up where Justice Powell left off, holding that race does not inevitably conceal all of the other characteristics that an applicant possesses; rather, race can be one of many characteristics that admissions offices see and weigh.³⁶ *Grutter* argued that considering race does not necessarily prevent admissions offices from considering the other range of qualities and attributes that make an individual an individual.³⁷ Rather, it may be used in a way that respects the individuality of applicants seeking admission into institutions of higher education.³⁸

The dissents written by Chief Justice Rehnquist and Justice Kennedy in *Grutter* disagreed. Where the majority saw “critical mass,” Chief Justice Rehnquist saw a quota—a system that Justice Powell once identified as paradigmatically unconstitutional insofar as it denies applicants their individuality as a matter of course.³⁹ Similarly, Justice Kennedy saw the law school’s close consultation with reports indicating how many racial minorities had been admitted to the school as evidence that the law school was not using race in a way that was consistent with evaluating applicants as individuals.⁴⁰ As such, neither opinion categorically condemns race as

receiving a ‘plus’ on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.”).

36. *Grutter*, 539 U.S. at 336–37 (“When using race as a ‘plus’ factor in university admissions, a university’s admissions program must remain flexible enough to ensure 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.”).

37. *See id.* at 338 (noting that the Law School’s use of race also allows it to consider other “possible bases for diversity admissions,” including the fact that candidates “have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields,” and observing that the “[t]he Law School seriously considers each applicant’s promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic—*e.g.*, an unusual intellectual achievement, employment experience, nonacademic performance, or personal background”) (internal quotations omitted).

38. In contrast, the majority in *Gratz* did not believe the University of Michigan admissions process considered race in a way that respected the individuality of the applicants seeking admission to the University’s undergraduate program. The institution utilized race in way that obscured the raced person’s individuality, rendering irrelevant all the other facets that make him or her an individual. *See Gratz v. Bollinger*, 539 U.S. 244, 255 (2003) (noting that applicants received a fifth of the total points needed to guarantee admission to the school if they were part of an underrepresented racial or ethnic minority group and observing that the point system made it impossible for applicants to receive “individualized consideration”).

39. *Regents of the University of California v. Bakke*, 438 U.S. 265, 317 (opinion of Powell, J.) (writing that the Harvard admissions program, which Justice Powell deemed constitutional, did not act as a quota and did not “insulate the individual from comparison with all other candidates for the available seats”).

40. *Grutter*, 539 U.S. at 392 (Kennedy, J., dissenting) (“The consultation of daily reports during the last stages in the admissions process suggests there was no further attempt at individual review save

inevitably essentializing. Indeed, Justice Kennedy's opinion expresses a real hope that race could be used in a way that is individuating.⁴¹

Justice Thomas' spirited dissent, joined only by Justice Scalia, represents an emphatic disagreement with the other Justices about whether race could ever be individuating.⁴² In Justice Thomas' ontology of race, race is always deindividuating. This sense of the nature of race is captured by his denigration of the law school's pursuit of a diverse student body by calling it a pursuit of "aesthetics." He writes, "I refer to the Law School's interest as an 'aesthetic.' That is, the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them."⁴³ Here, Justice Thomas articulates his belief that considering race allows an admissions office to know nothing about a person but his race. The Law School does not admit individuals, but rather blocks of color that complement the desks and tables in a classroom.⁴⁴

for race itself. The admissions officers could use the reports to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass. The bonus factor of race would then become divorced from individual review; it would be premised instead on the numerical objective set by the Law School.").

41. See *id.* at 389 (Kennedy, J., dissenting) (noting that "the numerical concept of critical mass has the real *potential* to compromise individual review") (emphasis added).

42. This disagreement about the nature of race is not the only disagreement that Justice Thomas has with his colleagues on the Bench. Justice Thomas' dissent clearly establishes that he would loathe race conscious admissions programs even if he believed that race could be individuating. Indeed, it would appear that the Law School's admissions policy represents many things that Justice Thomas detests: elitism and patronizing (and, ultimately, counterproductive) racial paternalism. See *id.* at 372 n.11 (Thomas, J., dissenting) (characterizing supporters of the Law School's admissions program as "know-it-all elites" who do not really care about "real problems like the crisis of black male underperformance"); *id.* at 372 (Thomas, J., dissenting) ("The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition."). See also *Fisher v. Texas*, 133 S.Ct. 2411, 2431 (2013) (Thomas, J., concurring) (arguing that racial minorities admitted to the University of Texas as a result of its race conscious admissions programs are "overmatched" and, as a result, migrate to less competitive majors (like social work and education), and conjecturing that these students might have pursued careers in science or engineering had they attended less elite schools for which they were better prepared). Justice Thomas' racial philosophy is explored in Part III.

43. *Id.* at 355 n.3 (Thomas, J., dissenting).

44. Indeed, Justice Thomas' dissent should be read as denoting his belief that the Law School is not even interested in knowing raced individuals beyond their races. For him, the Law School is only interested in creating a visually pleasing landscape; the individual qualities of those who comprise the landscape are irrelevant because they are ineffective in actually producing any educational benefits. *Id.* at 354 n.4 ("If the Law School is correct that the educational benefits of 'diversity' are so great, then achieving them by altering admissions standards should not compromise its elite status. The Law

Thus, when commentators actually engage with the diversity rationale and debate it on its own terms, the polemic around the rationale mirrors the disagreement between the majority and the dissents in *Grutter*. Supporters argue that race can be individuating when used properly. Opponents argue that race is necessarily deindividuating, making only race visible while rendering the individuals behind the race invisible.⁴⁵

It bears repeating that, when speaking of university admissions or employment decisions, those who are presumptively opposed to affirmative action describe characteristics that they deem to be legitimately considered as “individuating” while describing characteristics that they deem to be illegitimately considered as “deindividuating.”⁴⁶ Moreover, they consider race to be grossly deindividuating (and, therefore, grossly illegitimately considered) because its consideration renders invisible other individuating (read: legitimately considered) traits. Although “individuating” is shorthand for the conclusion that a trait is legitimately considered, and vice versa, this Article takes seriously the language that equal protection jurisprudence uses. That is, the notion that the Equal Protection Clause demands that people be treated as “individuals” and that race can deny individual treatment is ubiquitous and clearly articulated as such within the jurisprudence, as demonstrated by the epigraphs that open this Article. This Article engages this language of individuation and deindividuation and argues that, on the terms that the jurisprudence has established, race is not what opponents of its consideration claim it to be. Race *is* individuating. As such, it is legitimately considered in several settings, with university admissions being the specific setting explored in this Article.

1. The Case for the Deindividuating Nature of Race

For those who argue that race is deindividuating, the denial of individuality comes, in part, from the assumption that individuals think a particular way because of their racial identity and ascription. This position was extensively argued in Justice O’Connor’s dissenting opinion in *Metro Broadcasting, Inc. v. FCC*.⁴⁷ In *Metro Broadcasting*, a five Justice majority used intermediate scrutiny to uphold an FCC program that sought to

School’s reluctance to do this suggests that the educational benefits it alleges are not significant or do not exist at all.”).

45. See, e.g., Transcript of Oral Argument at 79, *Fisher v. Texas*, 133 S.Ct. 2411 (2013) (No. 11-345) (“[A]t the point of admission, [the college is] not admitting people; [it is] admitting categories, boxes.”).

46. See *supra* notes 13–15 and accompanying text.

47. *Metro Broadcasting*, 497 U.S. at 603 .

promote minority participation in the broadcasting industry by giving preferences to minority-owned companies in the granting of broadcast licenses.⁴⁸ The government argued, and a majority of the Court agreed, that it had an important interest in programming diversity.⁴⁹ Furthermore, the government endeavored to promote that interest by increasing the number of racial minority voices on the airwaves, as it was assumed that racial minorities would offer different programming than their white counterparts.⁵⁰ Justice O'Connor took exception to this assumption. She argued that it rested on the belief that an individual's racial ascription or identification correlates with a particular (raced) viewpoint, writing that the FCC was essentially attempting to advance viewpoint diversity by purporting to identify a "black viewpoint," an "Asian viewpoint," or an "Arab viewpoint."⁵¹ She was disturbed by both the over-inclusiveness of the law (that some racial minorities would receive preference under the program although they do not possess the "minority viewpoint") and the under-inclusiveness of the law (that some white people would not receive preference under the program despite possessing a "minority viewpoint").⁵² She argued that the law was based on stereotypes and generalizations about individuals and their race.⁵³ In essence, Justice O'Connor dissented because of her sense that the race-conscious law deindividuated individuals. Race

48. *Id.* at 564–65 (“We hold that benign race conscious measures mandated by Congress – even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”).

49. *Id.* at 566 (“Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.”).

50. *Id.* at 579 (“A broadcasting industry with representative minority participation will produce more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group.”).

51. *Id.* at 615 (O'Connor, J., dissenting).

52. *Id.* at 621 (O'Connor, J., dissenting) (“The policy is overinclusive: Many members of a particular racial or ethnic group will have no interest in advancing the views the FCC believes to be underrepresented, or will find them utterly foreign. The policy is underinclusive: It awards no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views.”).

53. *Id.* at 615, 619–20 (O'Connor, J., dissenting) (contending that the law rests on “generalizations impermissibly equating race with thoughts and behavior,” and arguing that the law is objectionable because it rests on a “stereotype: [t]he racial generalization inevitably does not apply to certain individuals”).

functioned to deny the individuality of those individuals thought of in terms of their race.⁵⁴

Justice Brennan, writing for the majority, disputed Justice O'Connor's claims that the FCC's policy was based on stereotyping and that it rested on the assumption that individuals share the same viewpoint as others in their racial group.⁵⁵ Looking to empirical data demonstrating that minority-owned stations sometimes expressed viewpoints that non-minority-owned stations did not express and sometimes covered news in a way that was distinct from the coverage that non-minority-owned stations provided,⁵⁶ Brennan thought it safe to defer to Congress' and the FCC's judgment that an increase in minority ownership would result in an increase in viewpoints expressed on the airwaves.⁵⁷ As such, Brennan's defense of the FCC's policy relied on data about how persons of different races think and behave *in the aggregate*. Accordingly, it is wrong to describe Brennan's position as one that sanctions race *even though* it denies the individuality of raced persons. (However, one could certainly criticize Brennan's position for valuing persons only insofar as *they produce a value when they are amassed with other individuals*. Racially classified individuals are means to an end—a quieting assessment of individuals, perhaps.)

This fear of the way that race could function to deny the individuality of persons that Justice O'Connor articulated in *Metro Broadcasting* did not dissipate in the two decades that have elapsed since the case was decided. Indeed, opponents of the diversity rationale continue to articulate this conceptualization of race. When admissions offices claim that they need to be conscious of the race of applicants in order to admit a class of students who have different perspectives and viewpoints, opponents counter that

54. See *id.* at 618 (O'Connor, J., dissenting) ("The policies impermissibly value individuals because they presume that persons think in a manner associated with their race.").

55. See *id.* at 579 ("The judgment that there is a link between expanded minority ownership and broadcast diversity does not rest on impermissible stereotyping. Congressional policy does not assume that in every case minority ownership and management will lead to more minority-oriented programming or to the expression of a discrete 'minority viewpoint' on the airwaves.").

56. See *id.* at 580–81 ("Evidence suggest[s] that an owner's minority status influences the selection of topics for news coverage and the presentation of editorial viewpoint [M]inority ownership does appear to have specific impact on the presentation of minority images in local news").

57. See *id.* at 582–83 ("While we are under no illusion that members of a particular minority group share some cohesive, collective viewpoint, we believe it a legitimate inference for Congress and the Commission to draw that as more minorities gain ownership and policymaking roles in the media, varying perspectives will be more fairly represented on the airwaves.").

these offices impermissibly equate race with viewpoint.⁵⁸ This is a racial stereotype, they say.⁵⁹ It is a generalization about race.⁶⁰ So generalized, persons are denied their individuality.⁶¹

The fear is that race functions to deny the individuality of the black person who does not have the imagined “black viewpoint”: the black man who disagrees with President Obama’s policies and voted against him in the 2012 presidential election.⁶² Race denies the individuality of the Arab person who does not have the imagined “Arab viewpoint”: the Arab woman

58. See, e.g., Joshua P. Thompson & Damien M. Schiff, *Divisive Diversity at the University of Texas: An Opportunity for the Supreme Court to Overturn its Flawed Decision in Grutter*, 15 TEX. REV. L. & POL. 437, 470 (2011) (noting that *Grutter* “assumes that increasing racial diversity will increase viewpoint diversity” and arguing that this assumption treats “people according to race on account of outmoded or unsubstantiated stereotypes about what members of certain races think or believe”); Stamenia Tzouganatos, *Law School’s Race Conscious Admissions Policy Survives Equal Protection Analysis – Grutter v. Bollinger*, 539 U.S. 306 (2003), 38 SUFFOLK U. L. REV. 733, 738 (2005) (arguing that “[b]y allowing the Law School to target specific racial and ethnic groups in promoting a student body with diverse perspectives, the Court equated race with viewpoint and undermined the significance of other individual characteristics that contribute to diversity”).

59. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 946 (5th Cir. 1996) (“To believe that a person’s race controls his point of view is to stereotype him. . . . Instead, individuals, with their own conceptions of life, further diversity of viewpoint.”); Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.–C.L. L. REV. 381, 425 (1998) (noting the view that the “use of race to achieve educational diversity impermissibly equates race with thoughts and behavior and thereby promotes improper racial stereotyping” (citing *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 615 (1990) (internal quotations omitted))).

60. Those who believe that race is inevitably essentializing would look at the Harvard Plan that Justice Powell approvingly cited in *Bakke* as a race conscious program that nevertheless respected the individuality of applicants and argue that it, too, is incapable of preventing race from deindividuating applicants. For example, in justifying the pursuit of racial and other diversity, the Plan notes, “A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.” *Bakke*, 438 U.S. 265 at 323 (emphasis added) (attaching the Harvard Plan as an addendum to Justice Powell’s opinion). Are individual persons who self-identify as black essentialized insofar as the Harvard Plan constructs them as “usually” different from white persons? Are white persons similarly essentialized? Opponents of the diversity rationale would likely answer the question in the affirmative, even though the Plan goes on to describe blackness in fairly antiessentialist terms. See *id.* (“Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States.”) (emphasis added).

61. Some commentators describe this perceived result in rather harsh terms. See, e.g., Thompson & Schiff, *supra* note 58, at 484 (arguing that “by sanctioning a lumping of individuals into these broad racial categories, the *Grutter* Court permits universities to dehumanize the individual students” and claiming that the diversity rationale “dehumanizes the very individuals it is designed to aid”).

62. Trip Gabriel, *Romney Makes a Push for Black Voters*, N.Y. TIMES, July 10, 2012, <http://www.nytimes.com/2012/07/11/us/politics/romney-courts-black-vote-an-obama-strength-in-08.html> (“Four years ago, Barack Obama captured 95 percent of the black vote. . . . Surveys show that black voters still overwhelmingly support the president. In the latest Gallup weekly tracking poll, 87 percent approved of the job Mr. Obama is doing.”).

who is a Zionist and supporter of Israel.⁶³ The fear is that racial classifications may construct all black persons as Obama devotees and all Arab persons as anti-Zionists.⁶⁴ The law's assumption of sameness and its inability to recognize individuals' uniqueness is argued to be an unconstitutional indignity to the individuals comprising these racial groups.

However, there is language in Equal Protection jurisprudence suggesting that racial classifications deny the individuality of the black Obama *supporter* and the Arab *anti-Zionist* as much as they deny the individuality of the black Obama opponent and the Arab Zionist. That is, one can hear echoes of a belief that persons are denied their individuality by simply being *thought of* in terms of their racial identity or ascription. Consider the Court's argument in *Parents Involved*: "The fact that it is possible that children of group members will not be denied admission to a school based on their race . . . does not eliminate the injury claimed As we have held, one form of injury under the Equal Protection Clause is being forced to compete in a race-based system."⁶⁵ This is to say that one is injured by simply being inserted into a system in which race is considered at all—a system in which individuals are referred to by their racial ascription or identity. The black Obama supporter is injured by his construction as a "*black* Obama supporter"; instead, he is better understood as simply an "Obama supporter." Analogously, the Arab anti-Zionist is injured by her construction as an "*Arab* anti-Zionist"; instead, she is better

63. Natasha Gill, *The Original "No": Why the Arabs Rejected Zionism, and Why It Matters*, MIDDLE EAST POLICY COUNCIL (June 19, 2013), <http://www.mepc.org/articles-commentary/commentary/original-no-why-arabs-rejected-zionism-and-why-it-matters> ("The Palestinian Arabs said no to the idea that in the 20th century . . . highly secularized Jews arriving from Europe, who seemed to abjure religious life, manners and practices, could use the Bible to support a *political* project of a Jewish state in an already populated and settled land.").

64. Of course, proponents of race conscious admissions programs dispute that such programs use race such that members of racial groups are stereotyped; indeed, they argue that admissions offices use race to look for members of racial groups that *defy* stereotypes. See, e.g., Transcript of Oral Argument at 61, *Fisher v. Texas*, 133 S.Ct. 2411 (2013) (No. 11-345) (arguing that the University of Texas and other universities that have race conscious admissions programs "will look for individuals who will play against racial stereotypes just by what they bring: The African American fencer; the Hispanic who has – who has mastered classical Greek.").

65. *Parents Involved*, 551 U.S. 701 at 718–19. See also *Ne. Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993) ("[T]he 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (holding that the injury in fact was the denial to certain citizens of "the opportunity to compete for a fixed percentage of public contracts based solely upon their race"); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) ("[T]he injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'").

understood as simply “anti-Zionist.” Thus, the argument is that an injury occurs when one is simply thought of in reference to one’s racial ascription and identity.⁶⁶

In essence, this line of cases stands for the proposition that when a person’s race is used to describe her, the person is harmed. Something irrelevant about her has been invoked. She has been summoned in a way that is offensive. The offense may be that she has been described in terms with which she would not describe herself. The way she actually thinks of herself has been subordinated to the way that the race-conscious law and its administrators think of her. Her individual sense of self—her individuality—is denied.

2. *The Case for the Individuating Nature of Race*

Supporters of the diversity rationale and affirmative action generally dispute the claim that race denies the individuality of persons. They charge that race-conscious admissions programs do not assume that individual members of a racial group will possess a particular viewpoint. Instead, they argue that such programs assume that individual members of a racial group will possess a *multiplicity* of viewpoints—none of them identifiable as “the racial group’s viewpoint.”⁶⁷ The value of this diversity of viewpoints to the educational environment is that those who are participants in the environment both will be exposed to a wide range of viewpoints and disabused of the notion that all members of a racial group think alike.⁶⁸ As one commentator describes it:

66. See Thompson & Schiff, *supra* note 58, at 485 (“By labeling students as either ‘Hispanic’ or ‘African-American’ . . . , the law school in Grutter rejects the individuality of its students.”) Many commentators disagree that simply being thought of in terms of one’s race (or gender) is an injury. See, e.g., Richard A. Wasserstrom, “Racism, Sexism, and Preferential Treatment: An Approach to the Topics,” 24 UCLA L. REV. 581, 591–92 (1977) (“[R]acism and sexism should not be thought of as phenomena that consist simply in taking a person’s race or sex into account, or even simply taking a person’s race or sex into account in an arbitrary way. Instead, racism and sexism consist in taking race and sex into account in a certain way, in the context of a specific set of institutional arrangements and a specific ideology which together create or maintain a *system* of unjust institutions and unwarranted beliefs and attitudes.”).

67. See Jonathan R. Alger, *The Educational Value of Diversity*, 83 ACADEME: BULLETIN OF THE AAUP 20, 21 (Jan.–Feb. 1997) (“The range of similarities and differences within and among racial groups is precisely what gives diversity in higher education its educational value.”). Liu, *supra* note 59, at 426 (“[T]he diversity rationale rejects not only the notion that race is the sole determinant of one’s perspectives and life experiences, but also any assumption ‘that a particular and distinct viewpoint inheres in certain racial groups’ This [is an] open-ended, non-essentialist valuation of race . . .”).

68. See Alger, *supra* note 67, at 21 (“For example, by seeing firsthand that all black or Hispanic students do not act or think alike, white students can overcome learned prejudices that may have arisen in part from a lack of direct exposure to individuals of other races.”). Moreover, social scientists have

One can imagine the impact on a white student from a homogenous white suburban background, whose views regarding blacks have been shaped primarily by television and movies, of a law school class featuring arguments from black students as diverse as Thurgood Marshall and Clarence Thomas. Likewise, the recently immigrated Asian American student in the same class, who assumes that most white Americans think alike, may be surprised by white students with opinions as diverse as Antonin Scalia and Ruth Bader Ginsburg.⁶⁹

This example is helpful for revealing how race can be a mechanism for individuating applicants. Supporters of race conscious programs argue that it may be possible for admissions officers to perceive the contours of the individual as presented by his or her file. However, race individuates not because it tells the admissions officer whether the applicant is a Justice Ginsburg or a Justice Scalia (one of two white people). Rather, race individuates because it tells the admissions officer whether the applicant is a Justice Ginsburg or a Justice Marshall: a white liberal or a black liberal. Similarly, race individuates not because it tells the admissions officer reading the file whether the applicant is a Justice Thomas or a Justice Marshall (one of two black people); rather, race individuates because it tells the admissions officer whether the applicant is a Justice Thomas or a Justice Scalia: a black conservative or a white conservative. In the latter example, without the use of race, an applicant would remain to the admissions officer reading the file a compilation of facts revealing a conservative political philosophy. The officer may even stereotype him as a “standard Republican”; as such, he would be a generalization in the mind of the officer. However, with the use of race, the generalization would be destroyed. He would be individuated. And he would emerge as a *black* conservative – a Justice Thomas. Similarly, in the example involving Justices Marshall and Ginsburg, without the use of race, an applicant would remain to the admissions officer reading the file a compilation of facts revealing a liberal political philosophy. The officer may even stereotype

conducted empirical studies that attempt to demonstrate that this assumption—that students will be disabused of the notion that all members of a racial group think alike if actually exposed to members of a racial group who do not think alike—really occurs on the ground in classrooms. *See, e.g.,* Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 360–61 (2002) (citing research showing that students do become aware of “within-group variability” as long as the group is not too small and concluding that “[d]iversity enables students to perceive differences both within groups and between groups and is the primary reason why significant numbers of students of various groups are needed in the classroom”).

69. *See* Alger, *supra* note 67, at 21.

him as a “standard Democrat”]; as such, he would be a generalization in the mind of the officer. However, with the use of race (and gender), the generalization would be destroyed. *She* would be individualized. And she would emerge as a *white, female* liberal – a Justice Ginsburg.

This is precisely how race functions in admissions. Race is individuating because it provides context for the facts, narratives, and other data contained in an application for admission. In our racially stratified society, where one’s race predicts and influences so many aspects of one’s life—such as where one will live,⁷⁰ who one will marry,⁷¹ whether one will marry at all,⁷² whether one will live in poverty,⁷³ whether one will die while giving birth,⁷⁴ whether one’s infant will die during its birth or shortly thereafter,⁷⁵ whether one will be incarcerated,⁷⁶ whether one will be sick,⁷⁷

70. Lincoln Quillian, *Segregation and Poverty Concentration: The Role of Three Segregations*, 77 AM. SOC. REV. 354, 355 (2012) (“About one in three poor white families live in poor neighborhoods and send their children to high-poverty schools, compared to two in three poor black and Hispanic families.”).

71. Wendy Wang, *The Rise of Intermarriage: Rates, Characteristics Vary by Race and Gender*, THE PEW RESEARCH CENTER (Feb. 16, 2012), <http://www.pewsocialtrends.org/files/2012/02/SDT-Intermarriage-II.pdf> (“The share of new marriages between spouses of a different race or ethnicity from each other increased to 15.1% in 2010, and the share of all current marriages that are either interracial or interethnic has reached an all-time high of 8.4%.”).

72. R. RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 6 (2011) (“Black women are only half as likely as white women to be married, and more than three times as likely as white women never to marry.”); Darrick Hamilton et al., *Shedding “Light” on Marriage: The Influence of Skin Shade on Marriage for Black Females*, 72 J. ECON. BEHAV. & ORG. 30, 34 (2009) (“[T]he average white woman is more likely to have been married at some point in her life (84 percent) than the typical black woman (68 percent).”).

73. *Poverty in the United States: Frequently Asked Questions*, NATIONAL POLICY CENTER, available at <http://www.npc.umich.edu/poverty/> (“Poverty rates for blacks and Hispanics greatly exceed the national average. In 2010, 27.4 percent of blacks and 26.6 percent of Hispanics were poor, compared to 9.9 percent of non-Hispanic whites and 12.1 percent of Asians.”).

74. U.S. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 85, Table 115 (131st ed. 2012) available at <http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf> (reporting maternal mortality rates for black and white mothers between 1980 and 2007 wherein black mothers were two to four times more likely than white mothers to die during childbirth).

75. Cheryl L. Giscombé & Marci Lobel, *Explaining Disproportionately High Rates of Adverse Birth Outcomes Among African Americans: The Impact of Stress, Racism, and Related Factors in Pregnancy*, 131 PSYCHOL. BULL. 662, 662 (2005) (“In the United States, infants born to African American mothers are more than twice as likely to die during the first year of life than are infants born to mothers of European descent.”).

76. Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 88S (2011) (discussing disparate incarceration rates amongst races and how “[c]ommunities of color are disproportionately affected . . . by incarceration”).

77. Margaret T. Gee Hicken, *A Novel Look at Racial Health Disparities: The Interaction Between Social Disadvantage and Environmental Health*, 102 AM. J. PUB. HEALTH 2344, 2344 (2012)

or whether one will die earlier than others⁷⁸—a person’s race provides a lot of insight into who that person is and what he or she has experienced over the course of becoming the person presented in an admissions application.

This is absolutely true for those who do not enjoy racial privilege, who tend to be more aware than those with racial privilege of how their race has shaped the contours of their lives—how race is something that has helped to constitute them as the individuals they are.⁷⁹ But race also shapes the contours of the lives of those *with* racial privilege.⁸⁰ The difference between those with racial privilege and those without racial privilege may be just an awareness of the role that race has played in their lives.

Thus, race is an individuating mechanism insofar as it so often plays an extensive role in making persons into the individuals that they are. It may be that a person’s lack of racial privilege has made her want to be successful in spite of the odds. As a result, she has become the sum of all of the information that is contained in her application for admission: a speaker of three languages, a classically trained ballet dancer, the valedictorian of her high school and college classes, and a writer of spoken word poetry. It may be that a person’s whiteness has made him aware of the injustice of a country so stratified by race. As a result, he has become the sum of all of the information that is contained in his application for admission: a speaker of four languages, a community organizer, a political activist, and the valedictorian of his high school and college classes.

(discussing disparities in hypertension rates among black and white adults); Linda M. Julian Niccolai, *Geographic Poverty and Racial/Ethnic Disparities in Cervical Cancer Precursor Rates in Connecticut, 2008-2009*, 103 AM. J. PUB. HEALTH 156, 156 (2013) (“Women living in poverty and racial/ethnic minorities continue to bear a disproportionate burden of cervical cancer incidence and mortality.”); Narayan Sastry & Jesse Gregory, *The Effect of Hurricane Katrina on the Prevalence of Health Impairments and Disability Among Adults in New Orleans: Differences by Age, Race, and Sex*, 80 SOC. SCI. & MED. 121, 127 (2013) (analyzing post-Katrina data showing higher rates of bad health effects from the storm in black than white residents of New Orleans).

78. Patrick M. Krueger et al., *Race/Ethnic Differences in Adult Mortality: The Role of Perceived Stress and Health Behaviors*, 73 SOC. SCI. & MED. 1312, 1312 (2011) (explaining differences in mortality ages and rates between whites, blacks, and Hispanics in the United States).

79. See Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1469 (2002) (“Persons of color have written extensively on how their racial identity—shaped by experiences with subordination—gives them valuable experiential knowledge for challenging racial injustice.”) (internal quotation marks omitted).

80. See JERRY V. DILLER, *CULTURAL DIVERSITY: A PRIMER FOR THE HUMAN SERVICES* 54 (2011) (“*White privilege* encompasses the benefits that are automatically accrued to European Americans just on the basis of their skin color. Most insidious is that to most Whites, it is all but invisible. For them, it is so basic a part of daily experience and existence and so available to everyone in their ‘world’ that it is never acknowledged or even given a second thought.”).

There are so many other variations and possibilities: it may be that a black person's class privilege has reduced substantially the effect that her lack of racial privilege would otherwise have had. As a result, she has become the sum of all the information that is contained in her application for admission: a player of several instruments, a competitive distance runner, the president of the Student Government Association at her college, and an avid traveler. It may be that a white person's lack of class privilege has reduced substantially the effect that his racial privilege would otherwise have had. As a result, he has become the sum of all of the information that is contained in his application for admission: a success story despite having attended an underfunded public school, having lived in a neighborhood afflicted by poverty, and not having enjoyed the opportunities that those with class privilege enjoy as a matter of course. It may be that a Japanese person's lack of citizenship privilege has substantially reduced the effect that his racial privilege, in some respects, and lack of racial privilege, in other respects, would otherwise have had. It may that a Dominican person's identification as a sexual minority has had an effect on the racial privilege that she would have had in some respects, and the lack of racial privilege that she would have had in other respects.

The permutations are endless. Yet, the constant in all of the permutations is that race inevitably informs whatever the result is—whatever the compilation of facts, stories, data points, and observations that is contained in an application for admission. This is neatly conceptualized by Solicitor General Donald Verilli's oral arguments in *Fisher v. Texas*:

But the key . . . is the way [race] makes a difference. And it makes a difference by casting the accomplishments of the individual applicant in a particular light, or the potential of an individual applicant in a particular light. What—what universities are looking for principally with respect to this individualized consideration is what is this individual going to contribute to our campus? And race can have a bearing on that because *it can have a bearing on evaluating what they've accomplished . . .*⁸¹

Inasmuch as race illuminates the characteristics that opponents of affirmative action understand as individuating, race individuates individuating characteristics. As a result, race ought to be conceived of as *profoundly* individuating. Moreover, if this is what race is and what race

81. Transcript of Oral Argument at 66–67, *Fisher v. Texas*, 133 S.Ct 2411 (2013) (No. 11-345) (emphasis added).

does, then the consideration of race is consistent with the Equal Protection Clause's command that governments treat persons *as individuals*. Thus, when properly executed, race conscious admissions programs are consistent with the Equal Protection Clause.

This argument, of course, depends on the assumption that race matters in our society. In order for race *inevitably* to inform the compilation of information in every application for admission, race *has* to matter—and it has to matter for everyone. It is imperative to note that this position does not depend on the assertion that race matters for everyone *equally*. That is, race does not affect all similarly raced people in the same way. Race does not disadvantage all black people equally, just as it does not advantage all white people equally. Nor does it advantage or disadvantage all non-black, non-white people equally. An argument that race affects all similarly raced people equally makes problematic—indeed, *unconstitutional*—generalizations about individuals. Such an argument, when put in practice in an institution's admissions program, certainly deindividuates applicants insofar as it assumes a commonality of experience because of a group-based characteristic.

The more nuanced argument that this Article makes is that race matters in the contemporary United States. Yet, the extent to which it has mattered for an individual (how much, in what ways, positively or negatively, etc.) will vary depending on the other characteristics that the individual possesses, such as socioeconomic status, immigration status, citizenship status, sexual orientation, age, gender, gender identity, and the region of country in which the individual resides. If admissions officers endeavor to evaluate applicants as individuals, then they must consider the nuanced ways that race intersects with the totality of an individual's characteristics.

Significantly, no Justice on the present Court denies that race continues to matter in our society. Part III documents this fact.

III. 9—0: A UNANIMOUS COURT BELIEVES THAT RACE MATTERS

This Part demonstrates that all of the Justices on the current Court believe that race matters in the contemporary United States. They certainly disagree about the extent to which race matters, the mechanisms that make race matter, and the tools that society should use in order to make race matter less in the future. But they all agree on the answer to what is probably the most fundamental question: Does race remain an important

fact of life in modern society? All of the current Justices would answer this question in the affirmative.

Those Justices who are most skeptical about the constitutionality of race conscious admissions programs, who are inclined to strike them down, must argue that *even though race continues to matter*, the Constitution does not permit state actors to consider race consciously. However, this Article argues that is an improper interpretation of the Constitution. It is *because* race matters that the conscious consideration of race in admissions is constitutional. Because race matters, applicants become individuated when admissions officers consider race. Thus, because race matters, race is individuating—thereby making the consideration of race consistent with the Equal Protection Clause’s command that persons be treated as individuals.

Now, if we have become a post-racial society—a teleological end where race is entirely irrelevant and has no influence at all on the opportunities that are available to individuals, the likelihood that they will have certain experiences, the meanings that are attributed to their race, and the treatment that they will receive as a result of their race—then it would be inaccurate to argue that race still matters. However, no Justice currently sitting on the Bench believes that the United States has become a post-racial society. All nine Justices—including those who have expressed the most opposition to affirmative action, who have argued most persistently, passionately, and unequivocally that race-conscious admissions policies are unconstitutional, and who have consistently voted to strike down affirmative action programs when given the opportunity—believe that race remains a relevant fact of life in the United States. Accordingly, all Justices believe that race can provide context for the information contained in an application for admissions. This means, crucially, that all the Justices believe that race can be individuating in admissions.

It may be counterintuitive to argue that even those Justices who are vehemently opposed to affirmative action believe that race continues to matter in the United States. The intuition may be that if a person believes that race can and does negatively impact some individuals’ life chances, then that person will also believe that something should be done to address the significance of race. The most accessible thing a Supreme Court Justice can do to address the continuing significance of race, it would seem, is to vote in favor of an interpretation of the Equal Protection Clause that allows states to use race conscious means for addressing the fact that race still matters. This, of course, is what the Justices who have been identified as

“liberals” on the Court have done: explicit in their belief that race matters,⁸² they would hold that states’ pursuits of race-conscious means to remedy this fact does not run afoul of the Fourteenth Amendment’s edict that no state deny “any person within its jurisdiction the equal protection of the laws.”⁸³

Of course, the more conservative Justices on the Court would interpret the Equal Protection Clause as prohibiting most, if not all, race conscious laws.⁸⁴ Some commentators have concluded that these Justices interpret the Equal Protection Clause in this way because they believe that race no longer matters; they believe that we have become a post-racial society.⁸⁵ However, this Article disagrees. These Justices hardly dispute that race continues to matter. Instead, these Justices ground their opposition in the belief that, irrespective of the continuing significance of race, the

82. See, e.g., *Schuetz v. BAMN et al.*, 134 S. Ct. 1623, 1676 (2014) (Sotomayor, J., dissenting) (“Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities.”); *Gratz v. Bollinger*, 539 U.S. 244, 299–301 (2003) (Ginsburg, J., dissenting) (discussing remaining racial inequalities as a result of the past racial caste system); *Grutter*, 539 U.S. at 338 (“By virtue of our Nation’s struggle with racial inequality, [underrepresented minority] students are both likely to have experiences of particular importance to the Law School’s mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.”).

83. See, e.g., *Schuetz*, 134 S. Ct. at 1676–77 (2014) (Sotomayor, J., dissenting) (“Race matters The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary . . . , we ought not sit back and wish away, rather than confront, the racial inequality that exists in our society.”).

84. See, e.g., *Grutter*, 539 U.S. at 351 (Thomas, J., dissenting) (discussing his opinion that the use of race in admissions is broadly unconstitutional and “that the Law School’s current use of race violates the Equal Protection Clause”). *Id.* at 349 (Scalia, J. dissenting) (“The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”).

85. See, e.g., Helen Norton, *The Supreme Court’s Post-Racial Turn Towards A Zero-Sum Understanding of Equality*, 52 WM. & MARY L. REV. 197, 209 (2010) (describing Justices who would strike down most race conscious laws, whether designed to benefit or burden historically marginalized racial groups, as subscribing to “anticlassification theory,” arguing that “anticlassification theory . . . finds support in post-racial understandings that conclude, as a descriptive matter, that the United States has achieved a racially transcendent event that authorizes the retreat from race,” and going on to note that “[u]nder a post-racial view, it is not only wrong but also irrelevant and counterproductive to consider race because race doesn’t matter any more in significant ways”) (internal quotation marks omitted); Ian F. Haney-López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1062 (2010) (discussing how “[t]he majority reasoned as if racial discrimination did not exist unless the record included a racial epithet or a confession of evil intent” and how the system of post-racism “entails upholding as ‘not-racism’ gross racial disparities corresponding directly to longstanding racial hierarchies, today typical of structural racism”).

Constitution commands colorblindness, largely because the costs of allowing states to be race-conscious outweigh the benefits.⁸⁶

Consider Chief Justice Roberts's recent concurrence in *Schuette v. BAMN*, which upheld the constitutionality of a Michigan law prohibiting Michigan's public universities from considering race in admissions. Responding to Justice Sotomayor's claim that colorblind constitutionalists deny the continuing significance of race by forbidding states to use race-conscious means to remedy race-salient problems, he wrote:

[I]t is not 'out of touch with reality' to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely [the negative associations that are attached to racial identities], and—if so—that the preferences do more harm than good. To disagree with the dissent's views on the costs and benefits of racial preferences is not to 'wish away, rather than confront' racial inequality.⁸⁷

Two things are important in Roberts's argument. First, he articulates his opposition to race-conscious laws because of his utilitarian calculus that the costs of such laws outweigh the benefits. Second, and significantly, *he acknowledges the existence of racial inequality*. When he denies Sotomayor's claim that he and other colorblind constitutionalists are "wishing away" racial inequality, it is imperative to denote precisely what Roberts is denying here. He denies that the jurisprudence that he has helped to construct is engaged in a project of "wishing away" racial inequality. Critically, he does not deny the existence of the racial inequality that he has been accused of "wishing away."

Thus, the colorblind constitutionalists' position is that the Constitution ties the hands of the state with respect to pursuing race-conscious measures to deal with the fact that race matters. However, the most important aspect of this approach to constitutional interpretation, at least as it relates to the argument that this Article makes, is that it concedes that race still matters. Thus, the jurisprudence of those Justices that would strike down most race-conscious laws does not reflect a philosophy that posits that race in contemporary society is irrelevant. Instead, it reflects a philosophy about what the Constitution demands of race.

86. There are other reasons they Justices who are opposed to affirmative action programs believe that the Constitution commands colorblindness. One frequently articulated reason is the belief that the state acts immorally whenever it treats individuals differently on account of race. *See supra* note 20 and accompanying text.

87. *Schuette*, 134 S. Ct. at 1638–39.

Critical Race Theory pioneer Kimberlé Crenshaw has come to a similar conclusion. She arrives at this conclusion by focusing on *Shelby County v. Holder*, in which a majority voted to strike down section 4(b) of the Voting Rights Act (“VRA”).⁸⁸ Section 4(b) contained the formula that determined which jurisdictions, due to their documented history of discrimination in voting, had to obtain preclearance before changing their voting laws.⁸⁹ Many commentators view *Shelby* as evidence that a majority of the Court believes that racism is over: hence, the unconstitutionality of a provision designed to identify which voting districts are more racist than others.⁹⁰ However, Crenshaw disagrees. She compares the Court’s approach in *Shelby* to that adopted by earlier cases that wrestled with the legacy of racial discrimination. Quoting *Green v. New Kent County*, in which the Court held that a school district’s “freedom of choice” desegregation plan was inconsistent with the Court’s ruling in *Brown v. Board II* that districts had to desegregate “with all deliberate speed,”⁹¹ Crenshaw writes that *Shelby* demonstrates that “[n]o longer is the realization of the goal framed as the ‘elimination of the vestiges of racial discrimination root and branch’ The message seems to be that although we might not be there yet, we can coast our way forward.”⁹² Significantly, Crenshaw attributes to the Court the belief that “we might not be there yet.” That is, Crenshaw would ventriloquize the majority voting to strike down Section 4(b) of the VRA as saying, “Racism, racial discrimination, and racial inequality persist. Race still matters. We might not be there—that is, in a post-racial society—yet. Nevertheless, the Constitution demands colorblindness.”

That this is clearly Crenshaw’s position is demonstrated by her quote of Justice Ginsburg’s dissent, in which Ginsburg wrote that striking down

88. See Kimberlé Crenshaw, *The Court’s Denial of Racial Societal Debt*, 40 HUM. RTS. 12, 13 (2013).

89. *Id.*

90. See, e.g., Gabrielle Dunkley, *Shelby County, Alabama V. Holder Ruling: Politicians React*, HUFFINGTON POST (June 25, 2013) available at http://www.huffingtonpost.com/2013/06/25/shelby-county-alabama-v-holder-ruling_n_3434899.html (documenting responses to the *Shelby County* decision including Senator Brian Schatz, who said of the Court’s decision, “some might think that discrimination is an act of the past”); Shanoor Seervai, *Shelby County v. Holder: An Ironic Supreme Court Case During Black History Month*, February 26, 2013, available at <http://www.policymic.com/articles/28071/shelby-county-v-holder-an-ironic-supreme-court-case-during-black-history-month> (noting that “to cite the election of the first black president as proof that America has moved beyond racial divisions is ludicrous”).

91. *Brown v. Board II*, 391 U.S. 430, 436 (1968).

92. Crenshaw, *supra* note 88.

the VRA is “like throwing away your umbrella in a rainstorm because you are not getting wet.”⁹³ Writes Crenshaw, “*The Court does not suggest that discrimination is fully a thing of the past*—some would-be voters may still need umbrellas. Yet, the Court operates as though the greater harm is maintaining measures that may overreach in their prevention of racial discrimination rather than creating a playing field of under-protection against the growth of vote suppression.”⁹⁴ Indeed, the conservative majority that voted to strike down section 4(b) of the VRA was not motivated by the idea that racism is over. To the majority, race still matters. However, the costs of using race-conscious measures to address the fact that race still matters outweigh any benefits.⁹⁵

One can also look to what the Justices have said about race directly to support the conclusion that even those who are opposed to race conscious laws believe that race matters. Indeed, one can start with *Croson*.⁹⁶ As the first case in which the Court held that laws designed to benefit historically subordinated racial groups should be reviewed with the same strict scrutiny as laws designed to burden those same groups, some have identified *Croson* as inaugurating the current era of colorblind constitutionalism.⁹⁷ However, Justice O’Connor’s plurality opinion, which three of the Justices signed,⁹⁸ clearly does not stand for the proposition that the Equal Protection

93. *Id.* at 14 (internal quotation marks omitted).

94. *Id.* (emphasis added).

95. See Alexandra Natapoff, *Madisonian Multiculturalism*, 45 AM. U. L. REV. 751, 754 (1996) (“The Court has reasoned that race consciousness causes racial factionalism, and in particular, that racially sensitive legislation such as the Voting Rights Act . . . create rather than alleviate racial divisiveness.”).

96. *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

97. See, e.g., Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1825 (2012) (discussing how *Croson* led “to the installation of that analysis as the cornerstone of today’s colorblind constitutionalism”); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191, 247 (1997) (explaining that in *Croson* “the Court . . . began the doctrinal course that inevitably led to Adarand” as “colorblind constitutionalism [sic] displaced constitutional analysis of caste”); David P. Stoelting, *Minority Business Set-Asides Must Be Supported by Specific Evidence of Prior Discrimination: City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989), 58 U. CIN. L. REV. 1097, 1121 (1990) (discussing how *Croson* “advances the colorblind approach”).

98. Interestingly, the Justices who signed on to this portion of O’Connor’s opinion—Chief Justice Rehnquist along with Justices White, Kennedy, and Stevens—may not all properly be described as “conservative.” See John Nichols, *Justice Stevens, Senior Liberal, Will Leave High Court*, April 9, 2010, THE NATION, <http://www.thenation.com/blog/justice-stevens-senior-liberal-will-leave-high-court#axzz2XMmQil00> (last visited June 26, 2013) (describing Justice Stevens as “the senior member of what is now identified as the liberal wing of the Supreme Court”). It is for this reason that it is inaccurate to refer to those who vote to strike down race conscious laws as “conservatives” and to argue that “conservatives” are in favor of interpreting the Constitution to require colorblindness. Nevertheless,

Clause demands a constitutional equivalence between “invidious” and “benign” race conscious laws because we have entered into a post-racial society. Quite the contrary, O’Connor’s opinion explicitly notes the continuing fact of racism, racial discrimination, and racial inequality.⁹⁹ She states quite clearly that “past societal discrimination in education and economic opportunities” may explain the fact that racial minorities received only 0.67 [percent] of city contracting dollars in a city in which minorities composed more than half of the population.¹⁰⁰ She, and those who joined her opinion, did not vote in favor of strict scrutiny for all governmental uses of race because they believed that race is an insignificant feature in contemporary life. Instead, they voted this way because of their fear that race would remain significant—indeed, it could become *more* significant—if the government consciously considers it.¹⁰¹ For Justice O’Connor, if the hoped-for teleology of race relations ends in the irrelevance of race, then race-conscious laws like the one at issue in *Croson* would move us dramatically far away from that end because governments might have to consider race in perpetuity.¹⁰²

Importantly, while the Court in *Croson* spent a lot of time denying that individual acts of discrimination produced the dramatic underrepresentation of racial minorities in Richmond’s construction industry, it did not spend *any* time denying the existence of racial discrimination that is the result of historical practices, macro forces, and institutional inertia—something we

this Article uses “conservative” as a shorthand to refer to the more politically conservative Justices on the current Court: Justices Alito, Kennedy, Thomas, and Scalia, as well as Chief Justice Roberts.

99. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 532 (1989) (discussing how “Congress further found that minorities seeking initial public contracting assignments often faced immense entry barriers which did not confront experienced nonminority contractors”).

100. *Id.* at 471. *See also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (noting that the “unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality”).

However, one should not ignore that, in *Croson*, Justice O’Connor was not willing to attribute “the dearth of minority participation” in the construction industry in Richmond *entirely* to the effects of past societal discrimination. She was also open to the possibility that the incredible underrepresentation of racial minorities in an incredibly lucrative field may have been caused by “both black and white career and entrepreneurial choices.” *Croson*, 488 U.S. at 471. Stating that “Blacks may be disproportionately attracted to industries other than construction,” Justice O’Connor and her colleagues rejected the paradigm in which racial coercion explains racial difference in favor of a paradigm in which racial choices *also* offer a convincing explanation. *Id.* at 503.

101. *Croson*, 488 U.S. 469 at 505–06 (discussing concerns that with continued use of race “[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs”).

102. *Id.*

can comfortably term “structural racism.”¹⁰³ The Court made it clear that race-conscious laws attempting to address the effects of individual racism—a type of racial discrimination for which the Court found no proof—were constitutional since the benefits outweighed the costs.¹⁰⁴ However, the Court’s opinion also made it clear that race-conscious laws attempting to address structural racism, *a type of racial discrimination that the majority was willing to concede existed*, would be too far-reaching and never-ending in scope.¹⁰⁵ Therefore, the costs of such a tool outweighed the benefits. The point is that for the *Croson* majority, structural racism exists. Race matters. But, the Fourteenth Amendment ties states’ hands, preventing them from addressing it with race-conscious means.¹⁰⁶

A criticism that may be leveled at this argument is that it is unfair to claim that *all* Justices who would strike down race conscious laws hold the position that race matters while concurrently holding the position that the Constitution forbids states from using race-conscious measures to deal with the fact that race matters. Instead, some may argue that only the swing voters hold these intuitively contradictory positions.¹⁰⁷ It is certainly true

103. *See id.* at 502 (criticizing the fact that “[t]o a large extent, the set-aside of subcontracting dollars seems to rest on the unsupported assumption that white prime contractors simply will not hire minority firms” and approvingly citing a lower court’s decision to “decline to assume . . . that male Caucasian contractors will award contracts only to other male Caucasians”). *See id.* at 516 (Stevens, J., concurring) (criticizing the Richmond law because “it stigmatizes the disadvantaged class [white people] with the unproven charge of past racial discrimination”). Again, the displeasure of Justices O’Connor and Stevens can be traced to their perception that Richmond ordinance accuses white people of being racists. Their charge is individual racism does not exist (unless proven). *Neither argues that structural racism does not exist.*

104. *Id.* at 509 (“Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.”).

105. *Id.* at 505 (“To accept Richmond’s claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for ‘remedial relief’ for every disadvantaged group.”).

106. Because O’Connor concluded that the Constitution prohibits states from addressing with race conscious means the structural racism that she and the rest of the Court knew existed, Gottlieb writes, “*Without denying that discrimination may have changed the position of racial classes*, O’Connor argues that it is impossible to quantify discrimination and that remedial measures disproportionate to the precise extent of harm are unfair to those persons forced to take a backseat. Her position implies that there is no right to a level playing field, but, rather, a right to defend whatever society has provided.” Stephen E. Gottlieb, *The Moral Agendas of Justices O’Connor, Scalia and Kennedy*, 49 RUTGERS L. REV. 219, 246 (1996) (emphasis added).

107. For example, Norton would attribute this belief system only to the Court’s swing voters, namely Justices Kennedy, O’Connor, and Powell. *See Norton, supra* note 85, at 197–98. She writes:

In recent decades, the Court’s swing Justices expressly rejected claims of post-racial success even while moving towards an insistence that government remain color-blind in its actual treatment of individuals. [Swing voters have been u]ncomfortable with the use of race-based

that the swing voter on the current Court, Justice Kennedy, believes that racial discrimination persists and race matters, yet has voted to strike down most of the race conscious laws that he has reviewed.¹⁰⁸ Indeed, Justice Kennedy has, sometimes quite eloquently, expressed his belief that racism endures. Recently, in *Parents Involved*, he wrote, “[t]he enduring hope is that race should not matter; the reality is that too often it does.”¹⁰⁹ Even more recently, in *Schuette v. BAMN*, he wrote about how voters in Michigan “acted in concert and statewide to seek consensus about a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and *persisting injustice*.”¹¹⁰ While Kennedy knows that race matters, he has yet to meet a race conscious law that he likes, largely because of his utilitarian calculus that the costs of such laws generally outweigh the benefits.¹¹¹

Nevertheless, while swing Justices’ explicit statements make it easy to attribute to them the position that race matters, the most politically conservative members of the Court—Justices Thomas and Scalia—also hold this position. Many observers of the Court fail to appreciate this fact. Proponents of race-conscious laws contend that the jurisprudence of Justices Thomas and Scalia, as well as other proponents of constitutional

classifications to further a governmental interest in addressing long-standing racial subordination, yet reluctant to dismiss the strength of that interest given its view of the continuing relevance of race to American life

Id.

108. See Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104 (2007) (discussing how “[Justice Kennedy] has always been one of the . . . members of the colorblindness camp” and “he has . . . taken a hard line”).

109. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007). See also Norton, *supra* note 85, at 214 (noting Kennedy’s concurrence in *Parents Involved* that “[a]s a normative matter, Justice Kennedy shared anticlassification advocates’ moral and instrumental condemnation of race-based differences in treatment,” yet also observing that Kennedy “rejected both a descriptive post-racial claim that race no longer significantly shapes the distribution of American life opportunities”).

110. *Schuette*, 134 S. Ct. at 1637.

111. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (arguing that “[r]ace-based assignments . . . cause society serious harm” and that “[r]acial classifications with respect to voting carry particular dangers, [as r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions [and] it threatens to carry us further from the goal of a political system in which race no longer matters”) (internal quotation marks omitted). Interestingly, the statement that racial classifications in voting laws threaten “to carry us further from the goal of a political system in which race no longer matters” carries within it the clear assertion that we have not yet arrived at a political system in which race no longer matters. A political system in which race no longer matters is a “goal” to Justice Kennedy. If he believed that we had arrived at this goal, he would have amended his statement to read that race conscious voting laws threaten “to carry us away from our political system in which race no longer matters.”

colorblindness, is dangerous and socially disastrous because they confuse colorblindness as a means instead of a desired end—that is, they believe that if we want to produce a colorblind society, we must require state actors to be colorblind even though society is very much color conscious.¹¹² This Article largely agrees, but also disagrees in a foundational way. That is, while commentators are correct insofar as colorblind constitutionalists confuse colorblindness as a means for colorblindness as a desired end, this Article suggests that commentators incorrectly answer the question of whether these Justices believe that race still matters. Commentators confuse the methodology that conservative Justices employ to address the fact that race still matters (that is, colorblindness) with their beliefs about race. Essentially, commentators confuse the Justices' *prescription* for race with their *description* of race. Conservative Justices would treat laws that burden whites as constitutionally equivalent to laws that burden nonwhites not because they believe that the races are socially, politically, and economically equivalent, but rather because that is what the Constitution demands. There is a theory of constitutional interpretation, not a theory about the (in)significance of race in the contemporary United States.

While commentators frequently lump together the jurisprudences of Justices Thomas and Scalia, their beliefs about race and racial difference are in fact quite distinct. Accordingly, the next sections of this Part discuss their racial worldviews separately and in turn.

A. THE JURISPRUDENCE OF JUSTICE THOMAS

While Justice Thomas arguably may be “the most colorblind member” of the current Court,¹¹³ his predisposition to striking down race-conscious laws such as affirmative action programs is not a product of a belief that racial inequality no longer exists. Instead, coursing beneath and, at times, on the surface of Justice Thomas' jurisprudence is a firm belief that race matters. The strength of Justice Thomas' conviction in the continuing significance of race, however, is matched by the strength of his conviction that race-conscious laws are the most disastrous tools that governments can use to remedy the continuing significance of race. It is only by ignoring

112. Cheryl I. Harris, *Too Pure an Air: Somerset's Legacy from Anti-Slavery to Colorblindness*, 13 TEX. WESLEYAN L. REV. 439, 445 (2007) (“Just as opposition to slavery was conflated with opposition to slaves, under some conceptions of colorblindness, opposition to racism is conflated with opposition to the concept of race itself.”).

113. Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, n.205 (1997).

critical elements of his opinions discussing race that one can reach the conclusion that Justice Thomas believes in a colorblind Constitution because he believes that we have entered a post-racial society.

Tomiko Brown-Nagin has also observed that Justice Thomas believes in the enduring significance of race, reaching this conclusion by looking to his dissent in *Grutter*.¹¹⁴ Buried between Justice Thomas' railing against the majority's holding that diversity is a compelling state interest¹¹⁵ and his deeply damning characterization of black beneficiaries of affirmative action¹¹⁶ is a recognition that *racial inequality* has produced the happenstance that racial minorities are not admitted in significant numbers to the University of Michigan Law School pursuant to traditional indicia of merit. Brown-Nagin notes that Justice Thomas is highly critical of the fact that the law school continued to privilege LSAT scores in its admissions process even with full knowledge that racial minorities do not perform as well on the test as white test takers.¹¹⁷ Moreover, Brown-Nagin notes that Justice Thomas is also highly skeptical of the ability of the LSAT to measure merit.¹¹⁸ Accordingly, Brown-Nagin argues that Justice Thomas sees "structural inequality"—not unfairly called "structural racism"—in elite law schools' nonnegotiable use of a test that does not accurately predict future success, yet disproportionately constructs test takers of color as "unqualified." She concludes, "Justice Thomas's analytical approach in

114. Tomiko Brown-Nagin, *The Transformative Racial Politics of Justice Thomas?: The Grutter v. Bollinger Opinion*, 7 U. PA. J. CONST. L. 787, 792 (2005).

115. *Grutter v. Bollinger*, 539 U.S. 306, 356 (2003) (Thomas, J., dissenting) ("A close reading of the Court's opinion reveals that all of its legal work is done through one conclusory statement: The Law School has a 'compelling interest in securing the educational benefits of a diverse student body.' No serious effort is made to explain how these benefits fit with the state interests the Court has recognized (or rejected) as compelling . . .").

116. *Id.* at 372 ("While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less 'elite' law school for which they were better prepared.").

117. See Brown-Nagin, *supra* note 114, at 800 (quoting Thomas' argument in *Grutter* that "[n]o modern law school can claim ignorance of the poor performance of blacks, relatively speaking, on the Law School Admissions Test (LSAT)" and that the Law School continued to adhere "to measures it knows produce racially skewed results").

118. *Id.* at 804 (arguing that Justice Thomas was skeptical "that traditional admissions' criteria measure merit"). Brown-Nagin observes that this represents a point of departure between Justices Thomas and Scalia, as Scalia appears uncritically to buy into the belief that the LSAT measures aptitude. See *id.* at 803 ("Whereas the Court's conservatives, especially Justices Thomas and Scalia, are sometimes lumped together without distinction by critics, Justice Thomas's advocacy of race neutral criteria in *Grutter* was, in fact, different from the meritocratic platitudes of Justice Scalia. Justice Scalia uncritically accepted the plaintiffs' simplistic views of merit and their corresponding narrative of entitlement to admission.").

Grutter was concerned about structural inequality in the law school admissions process, perpetuated by the LSAT—a test that is said to be neutral and objective, but which in reality is racially stigmatizing.¹¹⁹ In essence, Justice Thomas sees the macro, institutional forces that produce racial inequality. He sees structural racism. He sees that race matters.

Justice Thomas' comments within the context of school desegregation also illustrate his view that race matters. Consider his concurrence in *Parents Involved*, which struck down two school boards' plans to achieve racially integrated schools by assigning students to schools on the basis of race.¹²⁰ In his opinion, Justice Thomas sought to draw a distinction between illegal "racial segregation," produced by virtue of law, and legal "racial imbalance," which is not.¹²¹ While he acknowledged that the schools that were the subject of the litigation were either predominately black or predominately white and were never evenly racially mixed, he argued that the schools might have been imbalanced (legally) and not segregated (illegally).¹²² The racially unmixed schools might have simply reflected the racially unmixed neighborhoods within which they were situated.¹²³ And why were these neighborhoods racially unmixed, according to Justice Thomas? "Although *presently observed racial imbalance might result from past de jure segregation*, racial imbalance can also result from any number of innocent private decisions, including voluntary housing choices."¹²⁴

This statement is quite significant. While problematically suggesting that racial ghettos are produced by the *choices* that racial minorities make to live in disinvested neighborhoods plagued by higher crime rates, environmental hazards, underfunded schools, and food deserts Justice Thomas also acknowledges the possibility that *de jure* segregation might have caused racial imbalance. He—the jurist who might be correctly described as the Justice most opposed to race-conscious admissions

119. *Id.* at 805.

120. *Parents Involved*, 551 U.S. at 711 (striking down the school boards' plans).

121. *Id.* at 749 (Thomas, J., concurring) ("In the context of public schooling, segregation is the deliberate operation of a school system to carry out a governmental policy to separate pupils in schools solely on the basis of race. Racial imbalance is the failure of a school district's individual schools to match or approximate the demographic makeup of the student population at large.") (internal quotation marks omitted).

122. *Id.* at 750 (Thomas, J., concurring) (arguing that statistics showing school districts across the nation are becoming more and more racially unmixed "show a national trend toward classroom racial imbalance," but "racial imbalance without intentional state action to separate the races does not amount to segregation").

123. *Id.* at 750 (Thomas J., concurring).

124. *Id.* (Thomas, J., concurring) (emphasis added).

programs among the current Court—concedes the possibility that this country’s history of racial apartheid and racial second-class citizenship has had enduring effects. Underneath Justice Thomas’s jurisprudence is an acknowledgment of the omnipresence of race and the fact that race can, and frequently does, impact individuals’ lives without respect to individuals’ choices.

Brown-Nagin also cites statements that Thomas made in another school desegregation case as evidence that he believes race continues to matter. In *Zelman v. Simmons-Harris*, the Court upheld a school voucher program against a First Amendment challenge.¹²⁵ Justice Thomas voted to uphold the constitutionality of the program after noting that “failing urban public schools disproportionately affect minority children” and “[m]ost black people have faced too many grim, concrete problems to be romantics.”¹²⁶ Again, Justice Thomas knows that racial inequality exists and that race matters. Agreeing with this assessment, Brown-Nagin writes, “Justice Thomas’s objections to the agenda favored by liberal civil rights groups seem to turn on remedial considerations rather than on indifference to bias.”¹²⁷

Accordingly, Justice Thomas champions colorblind constitutionalism not because he believes we have arrived at a colorblind, post-racial nation, but rather because he believes that the costs of race conscious remedies invariably outweigh the benefits.¹²⁸ His opposition to affirmative action in *Grutter* was due in part to his sense that the stigma that such programs conferred upon Black beneficiaries (as well as Black non-beneficiaries) was considerable.¹²⁹ It is possible that Justice Thomas might have been

125. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

126. Brown-Nagin, *supra* note 114, at 791 (quoting *Zelman*, 536 U.S. at 681–82).

127. *Id.*

128. Because he believes that, due to the costs, the law needs to get out of the business of helping racially disadvantaged people overcome their disadvantages, he champions self-help measures that operate entirely independent of the law. *See also* Kendall Thomas, *Reading Clarence Thomas*, 18 NAT’L BLACK L.J. 224, 236 (2005) (stating that Justice Thomas embraces a “vision of muscular self-help as the royal road to racial uplift in the post-civil rights era”); Gottlieb, *supra* note 106, at 245–46 (“Discrimination is just a social fact. Scalia’s position is consistent with a survival-of-the-fittest perspective. Thus, difficulties serve only as challenges, not injustices. Character is required to surmount those challenges.”). Essentially, Justice Thomas (and Justice Scalia, as the next section argues) argue that race matters; people just have to help themselves.

129. *See Grutter*, 539 U.S. at 373 (Thomas, J., dissenting) (arguing that affirmative action programs stigmatize even those Black people who may not have been beneficiaries of the programs). It may be worth quoting Thomas at length:

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. Who can differentiate between those who

able to live with these costs had they been dwarfed by the benefits of affirmative action; that is, he might have been able to live with the costs of this stigma if he believed that affirmative action would actually “work.” This he does believe. He remains opposed to affirmative action because of his (not at all unreasonable) sense that the disaster that is racial stratification in this country will not be solved by the admission of a few racial minorities to the University of Michigan School of Law every year. He writes that race-conscious admissions programs like the one at issue in *Grutter* do not “address the real problems facing ‘underrepresented minorities.’”¹³⁰ It is entirely reasonable to conclude that the “real problems” that he references are those large-scale processes that are the enduring effects of this country’s history of racism.¹³¹ Thomas knows that race matters.

Thus, this Article agrees with much of the insightful literature that analyzes how Justice Thomas’s jurisprudence requires that race be treated and conceptualized. Critical Race Theory forefather Kendall Thomas offers a particularly astute and convincing interrogation of Justice Thomas’s jurisprudence. Kendall Thomas writes:

belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the “beneficiaries” of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma – because either racial discrimination did play a role, in which case the person may be deemed “otherwise unqualified,” or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

Id.

130. *Id.* at 372; *see also id.* at 372 n.11 (arguing that the Michigan Law School’s program was not directed at “solving real problems like the crisis of black male underperformance”).

131. Moreover, there is a similar moment in *Fisher* in which Justice Thomas acknowledges the fact that race can and does impact individuals’ lives. In articulating his sense that the University of Texas’ race conscious admissions program should be struck down and *Grutter* overruled, he noted the impotence of such programs in addressing the macro problems facing racial minorities. He writes, “[T]he University’s discrimination does nothing to increase the number of blacks and Hispanics who have access to a college education generally.” *Fisher v. Texas*, 133 S. Ct. 2411, 2431 (2013). While Justice Thomas could be arguing that “blacks and Hispanics” *choose* not to access college education, it is more likely that he is acknowledging that there are some large-scale processes that have made it impossible for scores of “blacks and Hispanics” to even dream of acquiring a college education. If this is what Justice Thomas is doing—if he is acknowledging the large-scale processes that have made it impossible for many “black and Hispanics” to access college education—then it is fair to say that he recognizes that racial inequality exists and that race continues to matter.

It would be a mistake, then, to construe Thomas's identitarian color-blindness as a judicial episteme in which the notion of race has no meaning [His color-blindness] requires a categorical denial of the historical and contemporary connections between racial identity, on the one hand, and racial power and powerlessness (supremacy and subordination), on the other.¹³²

He further states:

[Justice] Thomas reductively refigures race to produce what appears to be an abstracted, etiolated understanding of constitutional equality. 'Race' is no longer an arena or instrument of political domination, but the mere marker of benign cultural difference. The contraction of race to a purely cultural signifier is Thomas's first, crucial move. This rearticulated conception of 'culture-race' divests racial significations of political content or consequence. The second important move is to declare that this depoliticized definition of 'culture-race' (to borrow a term from Neil Gotanda) signifies nothing for (or in) constitutional law. Race and racial identity are pre- or extra-political matters that lie beyond the domain of the Constitution, and thus cannot sustain a cognizable claim of rights under it. Indeed, race consciousness and judicial consciousness are hostile to one another at all points. The third, decisive move is to read the Fourteenth Amendment as a rule of racial non-recognition.¹³³

Kendall Thomas is undoubtedly correct. However, this Article's intervention is to clarify that what Kendall Thomas speaks of is Justice Thomas' conceptualization of race *within law*. Justice Thomas's jurisprudence requires a *legal* construction of race that is distinct from something that we can call *social* race.¹³⁴ Justice Thomas's *legal* race is one

132. Thomas, *supra* note 128, at 237.

133. *Id.* at 237–38.

134. Neil Gotanda's influential schematization of the various possibilities of what "race" can denote is helpful here. See generally Neil Gotanda, *A Critique of 'Our Constitution in Color-Blind'*, 44 STAN. L. REV. 1, 3 (1991). Gotanda writes that pursuant to theories of colorblind constitutionalism, "race" signifies something he calls "formal race." *Id.* at 6. Gotanda's "formal race" is equivalent to this Article's "legal race." "Formal race," like legal race, "implies that 'Black' and 'white' are mere racial classification labels, unconnected to social realities." *Id.* However, Gotanda notes, "calling someone white or Black in ordinary life has obvious social implications. Color-blind constitutional analysis ignores this ordinary lived experience of race as a highly charged concept with complex historical and social implications." *Id.* at 6–7. What this Article calls "social race" is the "ordinary lived experience of race" that has "obvious social implications." Thus, this Article agrees with Gotanda's seminal study. This Article's intervention, however, is to note that, to the extent that colorblind constitutionalists like Justice Thomas subscribe to formal race/legal race, this is an understanding of what race means *within*

that is divorced from context—historical and contemporary.¹³⁵ Legal races do not exist in a hierarchy; nor does one race dominate the other. Accordingly, laws that benefit one to the exclusion of the others are constitutionally anathema. However, Justice Thomas is quite aware that *social* race is entirely different from legal race. This section has endeavored to prove that Justice Thomas realizes that the races are not equivalent, that racial inequality is a social reality, and that the effects of past and present racial discrimination exist and persist. That is, Justice Thomas knows that race matters—even while he constructs a jurisprudence that is forced to deny that simple fact time and time again.

Justice Thomas's jurisprudence requires a willful closing of the eyes to the fact that race still matters, even though he is well aware that race actually matters in society. Arguably, this is the same move that the Court performed in *Plessy*. Chris Edelson writes,

As Goodwin Liu observes, part of *Plessy*'s failure involved 'the radical formalism of constitutional interpretation in the face of contrary social facts.' Or, to enlist language from a Supreme Court decision handed down forty years after *Plessy* and involving different issues, the *Plessy* Court essentially 'shut [its] eyes to the plainest facts of . . . life and deal[t] with the [issues before it] in an intellectual vacuum.'¹³⁶

The analogy to Justice Thomas, though provocative, is apropos: the *Plessy* Justices, writing a little more than three decades after the end of the Civil War and the emancipation of the slaves, could not deny that laws that required apartheid between white and black people were designed, and

law. This legal ideology of race exists beside their social ideology of race. Thus, they can manipulate race as if it is empty of content within law while knowing that race is full of content—it matters—outside of law.

135. Justice Thomas thus finds the social science that documents racial inequality to be irrelevant. Kendall Thomas notes that Justice Thomas has criticized *Brown v. Board* by arguing that the opinion did not “need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental truth that the Government cannot discriminate among its citizens on the basis of race.” Thomas, *supra* note 128, at 235. Kendall Thomas suggests that Justice Thomas is critical of social science because he “is urging is a return to the golden age of judicial ‘know-nothingism’ in racial equality jurisprudence. Thomas seeks to secure this revanchist ideological agenda by appealing to ‘the simple, yet fundamental truth[s]’ of the color-blind ‘common sense’ that has increasingly come to govern the legal and political discourse on racial power in the post-civil rights era.” *Id.* While this may be true, this Article suggests that the reason Justice Thomas embraces judicial “know-nothingism” is because social race, which social science documents, is utterly irrelevant to his legal race.

136. Chris Edelson, *Judging in A Vacuum, or, Once More, Without Feeling: How Justice Scalia's Jurisprudential Approach Repeats Errors Made in Plessy v. Ferguson*, 45 AKRON L. REV. 513, 515 (2012).

functioned, to render black people into second-class citizens; nevertheless, they constructed a jurisprudence that was blind to social facts and insisted that such laws did not have that effect. Similarly, Justice Thomas cannot deny that the races are differentially situated or that racial inequality endures; nevertheless, he has constructed a jurisprudence that is blind to such social facts. Edelson's ruminations on *Plessy* are helpful here:

Justices on the Plessy Court, being residents of the United States, Planet Earth, and having full access to the relevant history and surely their own personal understanding of what race meant in the United States at the time, could have reached a fuller, more accurate conclusion had they moved outside the confines of their contextual vacuum [T]hese Justices . . . had the ability to perceive enough of the relevant context to reach a different conclusion.¹³⁷

Analogously, Justice Thomas, a resident of the United States, Planet Earth, having full access to the relevant history and his own personal understanding of what race means in the United States, has chosen to construct and participate in a jurisprudence that pretends that the races do not exist in social, economic, and discursive hierarchies. There is no question that he has the ability to perceive the relevant context. Rather, he allows his jurisprudence to exist in this contextual vacuum because he believes that participating in a jurisprudence that reflects the context is more harmful than beneficial.

B. THE JURISPRUDENCE OF JUSTICE SCALIA

Where there are clear acknowledgements of racial discrimination and racial inequality in Justice Thomas' jurisprudence, Justice Scalia's jurisprudence contains only indirect, veiled references to this country's present struggle with racial domination. Interestingly, Justice Scalia tends to make those references only as he proclaims that the Constitution is properly interpreted to forbid race-conscious mechanisms of addressing racial domination. For example, in his *Croson* concurrence, Justice Scalia argued that "[t]he benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly [sic] benign purposes we have repeatedly rejected."¹³⁸ Here, in Justice Scalia's

137. *Id.* at 522.

138. *Croson.*, 488 U.S. at 520 (Scalia, J., concurring).

disavowal of the constitutionality of governments' race-conscious pursuits of correcting social disadvantages acquired on account of race, *there is an acknowledgment of the fact that people are socially disadvantaged on account of race because of prior discrimination*. Consider in this vein his argument in *Croson* that a government entity can only employ racial classifications when remedying *de jure* discrimination that the specific government entity itself has perpetrated and his denial that government participation in private acts of discrimination is properly cognizable as this type of *de jure* discrimination: "Our analysis [in the past] reflected our unwillingness to conclude, outside of the context of school assignment, that the continuing effects of prior discrimination can be equated with state maintenance of a discriminatory system."¹³⁹ Again, in Justice Scalia's disavowal of the constitutionality of the use of racial classifications to undo the continuing effects of prior discrimination is an *acknowledgment of the fact that there are continuing effects of prior discrimination*. This suggests that, like Justice Thomas, Justice Scalia is well aware that racial inequality persists and that, as a result, race matters—even though his interpretation of the Equal Protection Clause requires a denial of that fact within law.

Although the two most conservative Justices on the current Court are similar in that both are aware that race continues to matter, it would be wrong to say that the two agree about *why* race continues to matter. While Justice Thomas appears aware that structural forces partially explain the enduring significance of race, Justice Scalia may believe that "ethnicity theory"—a philosophy in which racial differences (and racial inequalities) are explained in terms of cultural differences—has more explanatory force.¹⁴⁰ Consider Justice Scalia's reflection on his immigrant father's experience with race:

My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history—Italians, Jews, Irish, Poles—who not only took no part in, and derived no profit from, the major historic suppression of the

139. *Id.* at 525.

140. See Ian F. Haney-López, 'A Nation of Minorities': Race, Ethnicity, and Reactionary Colorblindness, 59 STAN. L. REV. 985, 990 (2007) (describing ethnicity theory as a philosophy that "suggest[s] that racial subordination was largely past and that social inequalities, if any, reflected the cultural failings of minorities themselves, while further postulating that there existed no dominant white race as such, but instead only a welter of competing cultural groups defined in national origin terms, for instance, Irish- or Italian-Americans").

currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority.¹⁴¹

Ian F. Haney-López's exposition on ethnicity theory and its role in our present constitutional moment in which there is a legal equivalence between laws burdening white people and laws burdening people of color is a helpful place to begin unpacking this quote's significance.¹⁴²

Haney-López looks to the social science that likely influenced jurists who would later embalm ethnicity theory into law.¹⁴³ He discusses a tome written by sociologists Nathan Glazer and Daniel Patrick Moynihan, *Beyond the Melting Pot*, which attributed the subordination of Black and Puerto Rican people to neither individual nor structural racism, but cultural inadequacies.¹⁴⁴ Haney-López describes:

As applied to blacks and Puerto Ricans, ethnicity erased the enormous differences in historical experience between white immigrants and racial minorities, and gave new legitimacy to the belief that not structural disadvantage but inability, now cultural rather than innate, explained the social and material marginalization of racial minorities in the United States.¹⁴⁵

When making the case that affirmative action programs were unwise, futile, or unfair, it was useful for opponents to argue that racial

141. Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L. Q. 147, 152 (1979).

142. See generally Ian F. Haney-López, *supra* note 140.

143. See *id.* at 1004–13.

144. *Id.* at 1007.

145. *Id.* at 1009–10. Moynihan would later expand upon the “insights” made in this work in his infamous “Moynihan Report,” which identified Black families—and not structural or individual racism—as the cause of Black people’s relegation to the most dispossessed tiers of society. In the Moynihan Report, Haney-López explains:

Moynihan framed the report around the civil rights movement’s increasing demands for equality. These demands, he warned, could not be met—because of failings in the black community itself. Moynihan’s deepest concern was the black family. It was the “Negro family,” Moynihan asserted, that “is the fundamental source of the weakness of the Negro community at the present time.” Dysfunction in the black family originated in racism and structural subordination, Moynihan conceded, but he argued that group dynamics within the black community perpetuated black misery without any external help from white racism. “At this point,” Moynihan concluded, “the present tangle of pathology is capable of perpetuating itself without assistance from the white world.”

Id. (quoting *The Moynihan Report* (1965) available at <http://www.blackpast.org/primary/moynihan-report-1965>).

discrimination had very little explanatory value with respect to the social fact of the subordination of people of color; ethnicity theory, which offered “culture” as an explanation for the inferior status of racial minorities, was attractive for that very reason.¹⁴⁶ However, when making the case that affirmative action programs were *unconstitutional*, opponents had to argue that racial minorities were essentially “the same as” those in the racial majority; thus, when governments treated the two groups differently, the Equal Protection Clause was violated. Ethnicity theory supplied the support for this argument by disaggregating the white majority into a collection of white ethnic groups.¹⁴⁷ Glazer first performed this move in a work titled *Affirmative Discrimination*, in which he observed that “[s]ome may be ‘whites,’ pure and simple. But almost all have some specific ethnic or religious identification.”¹⁴⁸ Moreover, just as people of color had been victims of discrimination in the past, white ethnic groups had similarly been victims of discrimination.¹⁴⁹ It was unfair, and unconstitutional, for governments only to remedy discrimination against the former—especially when such remedies resulted in burdening the latter:

Most immigrant groups have had periods in which they were discriminated against . . . [T]here is little reason for [members of white ethnic groups] to feel they should bear the burden of the redress of a past in which they had no or little part, or to assist those who presently receive more assistance than they did.¹⁵⁰

Ethnicity theory ultimately made it into constitutional law in the form of Justice Powell’s influential opinion in *Bakke*.¹⁵¹ But more importantly, at

146. I have argued elsewhere that “culture” is an intensely problematic concept inasmuch as it does the work of race and racism under more acceptable guises. See KHIARA M. BRIDGES, *REPRODUCING RACE: AN ETHNOGRAPHY OF PREGNANCY AS A SITE OF RACIALIZATION* 134 (2011) (“Culture has become the entirely defensible position to which dispossession in a ‘post-racial America’ can be ascribed.”).

147. Haney-López, *supra* note 140, at 1026.

148. *Id.* (quoting *Affirmative Discrimination*).

149. *Id.* at 1027–28 (arguing that “proclaiming that minorities no longer faced race-specific structural impediments was not enough; instead, completely flipping the status of whites and blacks proved the key move.”).

150. *Id.* (quoting *Affirmative Discrimination*).

151. See *Bakke*, 438 U.S. at 292.

By [the end of the *Lochner* era in the late 1930s,] it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and, to some extent, struggles still—to overcome the prejudices of not of a monolithic majority, but of a “majority” composed of various minority

least for the purpose of demonstrating that all of the current Justices believe that race still matters, Justice Scalia embraces ethnicity theory, as clearly reflected in his ruminations on why the Equal Protection Clause demands that laws that benefit historically subordinated groups be treated as indistinguishable from laws that burden them:

There are, of course, many white ethnic groups that came to this country in great numbers relatively late in its history . . . who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority.¹⁵²

Thus, one can conclude quite reasonably that, although Justice Scalia may not be entirely convinced that one must look to macro, diachronic, institutional, and structural, practices to explain current racial stratification, he nevertheless believes that race matters. Race continues to matter because individuals continue to be born into cultures with which they identify and around which they build identities. Individuals presumably embrace the values and practices of “their” cultures—values and practices that may be either well or ill-suited to facilitating political, social, or economic success for the individuals that embrace them. According to ethnicity theory, it is these cultural values and practices that explain contemporary racial stratification. If Italian Americans, Jewish Americans, Irish Americans, and Polish Americans, do not find themselves on the bottom tiers of the United States’ socioeconomic and discursive hierarchy, it is because their respective cultural values enable their success. Conversely, if African American, Dominican Americans, Mexican Americans, and Puerto Ricans find themselves mired in poverty and its accompanying hardships (such as shorter life spans, higher rates of morbidity, and higher incarceration rates), then it is because their respective cultural values disable their success. For subscribers to ethnicity theory, the answer to racial-cum-cultural subordination is not that the law should attempt to undo the racial hierarchy; instead, individuals must reject the cultural values and practices corresponding to the cultures into which they have been born.

groups of who it was said, perhaps unfairly, in many cases, that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.

Id.

152. Scalia, *supra* note 141, at 152.

It is important to keep in mind that even for ethnicity theorists like Justice Scalia, race matters. Race matters because there are identifiable racial-cum-cultural differences that produce identifiable outcomes amongst and between racial-cum-cultural groups. Haney-López addresses ethnicity theorists:

[P]ure ethnicity theory . . . not only [strips] race of history and hierarchy while tying races to group cultures, but [it also gives] credence to racial stereotypes in the process: race is empty (pause . . .), but racial minorities display dysfunctional pathologies while white groups exhibit normatively valuable attributes.¹⁵³

Moreover, ethnicity theorists do not—they *cannot*—deny the racial stratification that makes race matter. They may shunt responsibility to individuals, and away from society, for deconstructing our extant racial hierarchy but they have to recognize—even if never explicitly—our extant racial hierarchy. Consider Crenshaw’s response to Justice Scalia’s claim of racial non-indebtedness: “I owe no man anything, nor he me, because of the blood that flows in our veins.”¹⁵⁴ She writes, “If there is nothing owed and nothing due—if the current distribution of access, power, privilege, and disadvantage is just the way things are—then efforts to reform our institutions so as not to reinforce historical exclusions are morally bankrupt.”¹⁵⁵ Alongside the claim of Justice Scalia and other ethnicity theorists that the current *unequal* distribution of access, power, privilege, and disadvantage is just the way things are is an acknowledgement that there is a current unequal distribution of access, power, privilege, and disadvantage. This unequal distribution is that which makes race matter.¹⁵⁶

153. Haney-López, *supra* note 140, at 1018.

154. Of course, in his reference to “blood” as the site upon which racial differences are built, Scalia problematically invokes dangerous notions of biological race. See generally Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 *FORDHAM L. REV.* 21 (2013) (discussing the theory of biological race and the dangers of its “resuscitation” in law, an idea to which Justice Scalia has demonstrated an intellectual fondness in the past). See Gotanda, *supra* note 134, at 32 (referencing Justice Scalia’s description during oral arguments of the affirmative action policy at issue in *Metro Broadcasting* as a matter of “blood . . . blood, not background and environment,” noting that blood “is a rich metaphor and includes, in this context, the suggestion of biological lines of descent,” and observing that “Justice Scalia’s implication is that race, as a category of biology and science, has no relation to ‘background and environment.’”).

155. Crenshaw, *supra* note 88, at 12.

156. *Id.* at 13 (“In all these efforts, and many subsequent thereto, yawning asymmetries in race, deeply structured into society and its institutions, have been framed as natural, nondistributable [sic], and defensible.”). Again, in the framing of yawning asymmetries in race as natural, non-distributable, and defensible is an *acknowledgement* of the yawning asymmetries in race that make race matter.

This Part has endeavored to document that all of the Justices currently on the Court, including Justices Scalia and Thomas, believe that race matters. And if race matters, it can provide context—bringing into greater relief—all of the individuating information contained in an application for admission. That is, race can be individuating in university admissions. If race is individuating, then considering it is consistent with the Equal Protection Clause’s command that states treat persons as individuals. As such, one cannot argue, as conservative Justices have, that although race matters, consciously considering it is unconstitutional. On the contrary, it is because race matters that consciously considering it is constitutional. It is because race matters that race is individuating—making its consideration consistent with the Equal Protection Clause’s mandate that “[g]overnment must treat citizens as individuals”¹⁵⁷

Because race is individuating, Justices cannot justify their claim that affirmative action is unconstitutional with the argument that race denies individuality. Their claims must be justified by something else. The second most frequent justification—second only to the claim that race is deindividuating—is a utilitarian argument about the harms of affirmative action outweighing the benefits. However, that argument does not speak to the constitutionality of affirmative action programs; it only goes to their wisdom. Moreover, reasonable people have disagreed, and will continue to disagree, about the wisdom of affirmative action—about whether the costs of affirmative action outweigh the benefits.¹⁵⁸ If some reasonable people decide that an affirmative action program is a mechanism they want to use to attempt to make race matter less in future iterations of American society, and if they manifest this decision by electing to university boards or state legislatures persons who want to implement affirmative action programs, then the unelected Justices that sit on the Court act illegitimately by preventing the expression of their will. For the Justices to do anything but step aside and permit state actors to experiment with means of undoing the

157. See *supra* notes 1 and 2.

158. Compare *Regents of Univ. of California v. Bakke*, 438 U.S. 265, at 396 (1978) (Marshall, J., concurring in part, dissenting in part) (“Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society’s discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.”), with *Schuetz v. BAMN*, 134 S.Ct. at 1638–39 (2014) (Roberts, C.J., concurring) (“[I]t is not ‘out of touch with reality’ to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely [the negative associations that are attached to racial identities], and, if so, that the preferences do more harm than good. To disagree with the dissent’s views on the costs and benefits of racial preferences is not to ‘wish away, rather than confront’ racial inequality.”).

devastating racial inequality in this country is to substitute their will for the will of the people, dissembling their will as a constitutional mandate.¹⁵⁹

IV. CONCLUSION

So: *Grutter* got it right. It recognized that race can be individuating. Further, it established the constitutionality of a landscape within which academic institutions can consider race. This is vital because to know race is to know the engine—the constitutive force—behind the individual who presents himself on paper. The diversity rationale sanctioned in *Grutter* is a means to achieving that end.

Of course, the diversity rationale might be the most disturbing part of *Grutter*. The reign of the diversity rationale came on the heels of the death of the “remedying past societal discrimination” rationale.¹⁶⁰ Accordingly, it is fair to say that advocates for race-conscious programs have been forced to argue in the language of “diversity” because the jurisprudence will not allow them to argue successfully in the language of “remedying past societal discrimination.” But, while the end is the same (more racial minorities gain access to schools that otherwise would be inaccessible), the means to the end are troubling. Why is “diversity” more attractive as a compelling interest than “remedying past societal discrimination”?¹⁶¹ The answer may be that those who are imagined to benefit from programs designed to remedy past societal discrimination are only the minority groups that were victims of discrimination; however, those who are imagined to benefit from programs designed to increase diversity include non-minorities.¹⁶² To be clear, the programs are the same. But when “diversity” is the justification for the program, it allows us to imagine that

159. In *Scheutte*, Justice Sotomayor, writing in dissent, devotes a lot of ink to arguing that affirmative action programs are wise social policies. See *Schuette*, 134 S.Ct. at 1683 (Sotomayor, J., dissenting) (defending of the wisdom of affirmative action policies and noting that she “do[es] not mean to suggest that the virtues of adopting race-sensitive admissions policies should inform the legal question before the Court.”). This is precisely the argument that this Article makes here. The virtues of adopting race-sensitive admissions policies should not inform the legal question of whether they run afoul of the Equal Protection Clause. Once the individuating nature of race has been established, Justices can only argue that they are unconstitutional by making arguments about their virtues. Yet, “the virtues of adopting race-sensitive admission policies should not inform the legal question.” *Id.*

160. See *Crosen.*, 488 U.S. at 496–97 (1988) (looking to precedent and finding that the Court’s jurisprudence had rejected the proposition that “remedying past discrimination” is a compelling governmental interest).

161. *Id.* at 469.

162. See Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (explaining that steps towards racial equality for black people will only be taken when these steps also benefit white people).

even white people benefit. Non-white people *and* white people acquire cross-racial understanding.¹⁶³ Non-white people *and* white people are disabused of racial stereotypes.¹⁶⁴ Non-white people *and* white people are better prepared to enter a multicultural workforce.¹⁶⁵ There may be some losers with diversity, such as those denied admission under a race-conscious admissions program or those who may have been admitted if the university had a race-blind program. But, most importantly, *white people*—those white people who are present in the classroom with the racial minorities—are winners, too.

While it is likely true that individuals of all racial ascriptions and identifications benefit from racially diverse environments, it is concerning that when the interest was framed in terms focusing only on benefits *minorities* would receive from affirmative action—when it was articulated in the language of “remedying past societal discrimination”—a majority of the Court refused to find this interest compelling. A majority of the Court refused to recognize how compelling it was for the state to rectify the enduring effects of the mistreatment, disenfranchisement, and the denial of citizenship experienced by racial minorities in the United States.

At present, efforts to repair the damage caused by this country’s history of racism and exclusion can only be justified by not making reference to this country’s history of racism and exclusion. There is something deeply unsettling about that. More satisfying would be a jurisprudence that allows us to speak frankly about our dreadful history and how that history continues to have repercussions. Much more satisfying would be a jurisprudence that allows us to say, emphatically and often, that our *present* is dreadful in many ways. We exist in a nation in which non-white people are poorer, sicker, more frequently incarcerated, die earlier, and more likely to die violent deaths. Given the intuitive injustice of those facts, we ought to develop a jurisprudence that not only unties the hands of any state actor who wants to remedy them, but actively encourages them to use their hands to build a different, more just society.

163. See Robert Garda, *The White Interest in School Integration*, 63 FLA. L. REV. 599, 617–18 (2011) (citing Justice Powell in *Bakke* who claimed that white students would not learn as much if they were not exposed to other races and observing that Supreme Court decisions dealing with affirmative action plans do not discuss the cultural benefits minorities would have by being around white students, therefore showing a focus on nonminority benefit).

164. *Id.* at 623.

165. *Id.* at 622.