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**No Such Thing as Race:
Exploring the Past and Future of
Affirmative Action after *Schuette***

**IHELG Monograph
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NO SUCH THING AS RACE: EXPLORING THE PAST AND FUTURE OF AFFIRMATIVE ACTION AFTER *SCHUETTE*

Mary Ziegler*

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Abstract

On the surface, *Schuette v. Coalition for Affirmative Action* leaves the constitutional law of affirmative action undisturbed. Michigan had amended its state constitution to prevent the use of racial preferences by any university system or school district. Rejecting a fourteenth-amendment challenge, the Court upheld Michigan's law. The *Schuette* plurality went to considerable lengths to explain that *Schuette* in no way touched on the constitutionality or merits of race-based admissions. Just the same, understood in historical context, the *Schuette* majority lays bare profound new dangers confronting proponents of affirmative action. In addition to praising colorblindness, the Court cast doubt on the very definition of race.

This Article historicizes *Schuette*, revealing it to be a turning point in the law and politics of affirmative action. In the past, activists consistently used race to describe the color of one's skin, but before *Schuette*, the meaning of race itself had not played a central part in challenges to the constitutional legitimacy of affirmative action. As *Schuette* shows, anti-affirmative action amici and activists have developed a new argument: a claim that if race is a social construct, race-conscious remedies are arbitrary, unfair, and likely to reinforce existing stereotypes.

As the new anti-affirmative action activism makes plain, the question is how courts can address racial discrimination when racial identities themselves are fluid and complex. The Article looks to employment discrimination law—and to “regarded as” liability—as a framework for judges seeking to address the reality of race discrimination without reifying racial categories. Under the Americans with Disabilities Act (ADA) and the Americans with Disability Act Amendments Act of 2009 (ADAAA), a worker may in certain cases seek relief when she is regarded as disabled—regardless of whether she actually belongs to a protected class. The Article argues that regarded-as reasoning has considerable potential in the context of postsecondary admissions. In complying with existing fourteenth-amendment jurisprudence, admissions officers already rely on proxies for applicants' race. Doing so checks self-serving behavior and better captures the fluidity of race in modern America.

No Such Thing as Race:

Exploring the Past and Future of Affirmative Action After *Schuette*

On the surface, *Schuette v. Coalition for Affirmative Action* (2014) leaves the constitutional law of affirmative action undisturbed.¹ Michigan had amended its state constitution to prevent the use of racial preferences by any university system or school district.² Rejecting a fourteenth-amendment challenge, the Court upheld Michigan's law.³ The plurality went to considerable lengths to explain that *Schuette* in no way touched on the constitutionality or merits of race-based admissions.⁴ Just the same, understood in historical context, *Schuette* lays bare profound new dangers confronting proponents of affirmative action. In addition to praising colorblindness, the Court cast doubt on the very definition of race. "In a society in which [racial] lines are becoming blurred," *Schuette* explains, "the attempt to define race-based categories raises serious questions of its own."⁵

This Article historicizes *Schuette*, revealing it to be a turning point in the law and politics of affirmative action. Historians and critical race

¹ See *Schuette v. Coalition to Defend Affirmative Action, Integration, Immigrant Rights, and Fight for Equality by Any Means Necessary (BAMN) et al.*, 572 U.S. _ (2014), available at http://www.supremecourt.gov/opinions/13pdf/12-682_j4ek.pdf http://www.supremecourt.gov/opinions/13pdf/12-682_j4ek.pdf (last visited May 20, 2014).

² *Id.* at 8-9.

³ *Id.* at 9-17.

⁴ *Id.* at 12.

⁵ *Id.* at 12.

theorists (CRT) have long contended that race is a social construct—the product of struggles over class and political power.⁶ For these scholars, understanding race in this way exposes the institutional racism concealed by superficially neutral laws.

For decades, opponents of affirmative action dismissed these arguments out of hand. In the past, these activists consistently used race to describe the color of one’s skin, but the meaning of race itself had not played a central part in challenges to the constitutional legitimacy of affirmative action.⁷ However, *Schuette* represents the culmination of a process of movement-counter-movement dialogue and consensus. Far from denying claims that race is a construct, opponents of affirmative action now use those claims to their advantage. For anti-affirmative action amici and activists, the idea that race is a social construct now militates in favor of colorblindness.⁸ Since race is a social construct, it is argued to be devoid of

⁶ For a sample of historical work on the construction of race, see DANIEL J. SCHARFSTEIN, *THE INVISIBLE LINE: THREE AMERICAN FAMILIES AND THE JOURNEY FROM BLACK TO WHITE* (2012); PEGGY PASCOE, *WHAT COMES NATURALLY: MISCEGENATION LAW AND THE MAKING OF RACE IN AMERICA* (2009); ARIELA GROSS, *WHAT BLOOD WON’T TELL: A HISTORY OF RACE ON TRIAL IN AMERICA* (2008); ELISE LEMIRE, “MISCEGENATION:” *MAKING RACE IN AMERICA* (2002); MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH* (1997). For a sample of CRT work on the construction of race, see IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (2006); RICHARD DELGADO AND JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2012). Although CRT scholars cover a range of topics, the field shares a focus on “race, racism, and power” and “questions the foundations of the liberal order.” DELGADO AND STAFANCIC, *supra* at 3.

⁷ On the use of race as skin color in colorblindness claims, see, e.g., Ian F. Haney Lopez, “*A Nation of Minorities*”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 *STAN. L. REV.* 985, 985 (2007).

⁸ See, e.g., Brief as Amicus Curiae for the American Center for Law and Justice at *3-

meaning. Any use of race, in this account, becomes an unfair and incoherent allocation of government benefits.⁹

Regardless of whether it has stable meaning, race shapes individual opportunities and experiences.¹⁰ When voluntarily assumed, racial identities can be powerful expressions of self.¹¹ As the new anti-affirmative action activism makes plain, the question is how courts can address racial discrimination when racial identities themselves are fluid and complex. The Article looks to employment discrimination law—and to “regarded as” theories of liability—as a framework for judges seeking to address the reality of race discrimination without reifying racial categories.¹² Under the

7, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345); Brief as Amici Curiae for Judicial Watch Inc. at 2-6, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345).

⁹ See *supra* note 8 and text accompanying.

¹⁰ For a sample of the scholarship on racial identity formation, see Charmaine L. Wijeyesinghe and Bailey W. Jackson III, *Introduction*, in *NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT: INTEGRATING EMERGING FRAMEWORKS* 1-11 (Charmaine L. Wijeyesinghe ed., 2012); *RACIAL IDENTITY THEORY: APPLICATION TO INDIVIDUAL, GROUP, AND ORGANIZATIONAL INTERVENTIONS* xii-1 (Chalmer E. Thompson and Robert T. Carter eds., 2012).

¹¹ See, e.g., Camille Gear Rich, *Affirmative Action in the Era of Elective Race: Racial Commodification and the Promise of the New Functionalism*, 102 *GEO. L. J.* 179, 181 (2013) (tracing the shift in modern America “to a model that places primary emphasis on ‘elective race’ or voluntary, racial self-identification decisions”); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 61 (1994) (“race, because it is closely tied to communities, provides an essential component of identity”).

¹² Other scholars have proposed the use of regarded-as theories in the context of Title VII race discrimination. See, e.g., Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being Regarded as “Black,” and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 *WIS. L. REV.* 1283; Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 *N.Y.U. L. REV.* 1134 (2004) (criticizing current Title VII doctrine for failing to recognize claims based on racial identity performance in the workplace). This Article breaks new ground by exploring how regarded-as theories matter in a radically different racial politics—one defined by changing arguments against affirmative action and by the *Schuette* decision

Americans with Disabilities Act (ADA) and the Americans with Disability Act Amendments Act of 2009 (ADAAA), a worker may in certain cases seek relief when she is regarded as disabled—regardless of whether she belongs to a protected class.¹³ Under such a “regarded-as” theory, what matters is not that an individual belongs to a particular biological or cultural category but rather that the individual experiences the stereotypes associated with it. Regarded-as theories will allow courts to avoid placing individuals in one racial category or another. Instead, by turning to a developed body of law, courts can recognize the reality of discrimination without reinforcing the fiction of race.

The Article proceeds in four parts. Part I traces the origins of the movement-counter movement dialogue from which *Schuetz* emerged. This Section lays out three influential phases in the history of opposition to affirmative action. This story begins with the fight led by Jewish organizations and unions to define legitimate affirmative action. While denouncing race-based quotas, these activists urged the government to introduce education and training programs designed to level the playing field.

itself. The Article also offers the first look at how these theories respond to powerful new arguments against an antisubordination vision of the Constitution.

¹³ See 42 U.S.C. § 12102(3)(A)(2012). “The ADAAA [...] protect[s] any individual who is treated adversely because of an actual or perceived impairment without regard to the existence of any functional limitation.” Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 *WASH. & LEE L. REV.* 2027, 2062 (2013).

In the 1970s, as Part I shows, with a revival of white ethnic identity, opposition to affirmative action took a dramatic turn. As the Supreme Court's decision in *Bakke v. Regents of California*¹⁴ makes clear, opponents of affirmative action began challenging the definition of a racial majority rather than the justice of antistatutory approaches to race. Identifying themselves as victims of discrimination, a variety of white ethnics urged the Court to extend constitutional protection to them. The colorblindness arguments now so familiar to scholars of affirmative action came to the fore later, when the recently mobilized New Right attacked the core premise of antistatutory reasoning.

As Part I demonstrates, the ascendancy of colorblindness rhetoric in the 1990s and 2000s concealed a more complex story about efforts to respond to the diversity rationale developed prior to and endorsed by the Supreme Court in *Grutter v. Bollinger*.¹⁵ Some activists echoed earlier arguments about the unfairness of race-specific policies. Gradually, however, opponents of affirmative action began presenting the very idea of diversity as incoherent. Borrowing from claims about race made by historians and critical race theorists, affirmative-action opponents maintained that the categories universities used to achieve diversity were arbitrary and unjust.

¹⁴ See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁵ See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Drawing on this historical narrative, Part II reconsiders the meaning and consequences of *Schuetze*. Justice Kennedy's denials aside, the decision reveals an unprecedented threat to *Bakke*, *Grutter*, and their progeny. The fate of affirmative action in the courts will depend more than ever before on whether progressives can reconcile support for an antisubordination vision of the Constitution with the belief that race is a social construct.

Part III develops a legal framework to address new anti-affirmative action arguments about the social construction of race. Looking to ADA case law and Title VII individual disparate treatment cases, the Article proposes that affirmative-action law should recognize that individuals may suffer serious—and adverse—consequences when they are regarded as members of a particular race. As regarded-as reasoning shows, relevant decision-makers rely not only skin color but also on a variety of proxies—including class, education, place of residence, dress, voice, and name—in judging an individual's racial identity.

Part III also confronts potential problems with applying regarded-as reasoning in the context of university admissions. When students categorize themselves by race, admissions officers explicitly ask about racial identity, and minority status often strengthens applicants' candidacy. An examination of the Guidance on the Voluntary Use of Race in Postsecondary Admissions issued by the Departments of Education and

Justice reveals that admissions officers likely already rely on regarded-as reasoning. The use of proxies allows universities to comply with the Supreme Court's race-discrimination mandates while limiting self-serving behavior. At the same time, regarded-as reasoning better captures the fluidity of racial identity. Part IV offers a brief conclusion.

I. The History of the Anti-Affirmative Action Movement, 1961 to the Present

Opposition to affirmative action emerged almost as soon as the first race-conscious remedial programs took shape. However, the movement against affirmative action changed substantially over time. The strategies shaping *Schuette* arose in the aftermath of an unpredictable and decades-long struggle about the meaning of discrimination and race. Placing *Schuette* in historical context exposes the stakes of new tactics used in the fight against affirmative action.

In the mid-1960s, Jewish organizations and the labor movement mobilized to oppose what they described as race-based quotas. Many of these advocates, however, claimed to speak for "true" affirmative action—measures to recruit, train, and fairly measure the abilities of minority candidates. These early struggles addressed the meaning of affirmative action as much as they did the legitimacy of state-sponsored efforts to combat racial subordination. In the mid-1970s, the movement began to change, as a white ethnic revival spread across the United States. A variety

of Jews, Italian-, Greek-, and Polish-Americans defined themselves as minorities deserving of state solicitude. This new argument again assumed the legitimacy of the basic principle underlying affirmative action.

By the early 1980s, both of these factions began to lose influence, as the Democratic Party reinforced its support for affirmative action, and the Republic Party firmed up its opposition to race-conscious policies. As the political parties realigned, conservatives came to define the anti-affirmative action agenda, linking constitutional values of colorblindness to a faith in small government and suspicion of entitlement programs. Together the Reagan Administration and the New Right created a new anti-affirmative action agenda that was inextricably tied to the substantive goals of the grassroots conservative movement.

Change defined the story of the affirmative action movement—shifting arguments, members, and goals. When we understand the fluidity of the movement, we can see more clearly that *Schuette* represents a new chapter in the affirmative action struggle.

The Birth of a Movement, 1961-1969

The term “affirmative action” itself came into the American vocabulary in 1961, when President John F. Kennedy issued an executive order requiring federal employers to take “affirmative action” in combating

racial discrimination.¹⁶ Two years later, the executive order was extended to cover federally financed construction projects.¹⁷ Kennedy himself denied that affirmative action involved or required quotas, but other influential Democrats, including the leaders of the Equal Employment Opportunity Commission (EEOC) and the United States Commission on Civil Rights, came to believe that quotas were necessary to make a dent in the legacy of slavery and Jim Crow.¹⁸ By 1965, the EEOC required employers to submit forms breaking down their work force by sex and race.¹⁹ Within three years, states could receive block grants in order to identify disparate employment patterns; employers could face a variety of sanctions.²⁰ In the meantime, a debate about the importance of quotas and about the meaning of affirmative action had begun in the academy and in American politics.

The early anti-affirmative-action movement was complex and drew heavily from the ranks of the New Deal coalition and the American left. Since the mid-1960s, members of skilled-trades and construction unions had tended to oppose any form of remedial program for racial minorities, worrying about the loss of control over hiring and promotion.²¹ Industrial

¹⁶ Executive Order 10925, 3 C.F.R. 86 (Supp. 1961), 6 R.R.L.R. 9 (1961).

¹⁷ See DENNIS DESLIPPE, *PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION* 19 (2012).

¹⁸ *See id.*

¹⁹ *See id.* at 23-24.

²⁰ *See id.* at 24.

²¹ *See id.* at 36-38.

unions, like the AFL-CIO, favored affirmative action until such programs posed a challenge to seniority-based preferences in employment.²²

Although the Jewish community would remain divided about affirmative action throughout the 1970s, organizations like the American Jewish Committee (AJC) and the American Jewish Congress (the Congress) also led the first efforts to articulate a vision of a colorblind Constitution. The AJC was formed in 1906 by Jewish community leaders concerned about pogroms in Russia.²³ In its early years, the AJC focused on protecting the civil liberties and religious freedoms of Jews.²⁴ By the 1950s, the AJC had expanded its mandate, arguing that all forms of discrimination based on race or ethnicity reinforced the bias experienced by Jews and other minority groups.²⁵ The AJC specialized in sociological research documenting the psychological harms worked by discrimination.²⁶ Indeed, this research figured centrally in the litigation of *Brown v. Board of Education*.²⁷

²² *See id.*

²³ On the founding of the AJC, *see, e.g.*, DAVID BIALE, *POWER AND POWERLESSNESS IN JEWISH HISTORY* 125 (1986). For contemporary discussion of the group's early years, *see Jewish Committee Meets—National Body to Protect Civil Rights*, **N.Y. TIMES**, Nov. 7, 1907, at 16.

²⁴ On the early activities of the AJC, *see, e.g.*, *\$1,000,000 Sought for Jews in Russia*, **N.Y. TIMES**, Feb. 04, 1929, at 10; *Jews Here Reply to Hitler's Charge*, **N.Y. TIMES**, Oct. 21, 1935, at 15.

²⁵ For contemporary discussion of such initiatives, *see, e.g.*, *Two Groups Open Drive Against Bias*, **N.Y. TIMES**, Nov. 30, 1952, at 65; *Survey Finds U.S. Hurt By Till Case; American Jewish Group Cites Reaction Abroad*, **N.Y. TIMES**, Oct. 22, 1955, at 40; *40 Years Marked by Jewish Group*, **N.Y. TIMES**, Apr. 7, 1957, at 120; *Civil Rights Gains Hailed*, **N.Y. TIMES**, Dec. 8, 1957, at 132.

²⁶ *See, e.g.*, STUART SVONKIN, *JEWES AGAINST PREJUDICE: AMERICAN JEWS AND THE FIGHT FOR CIVIL LIBERTIES* 66-68 (1997).

²⁷ *See id.* at 67.

By the late 1960s, however, the AJC had come out against “quotas.”

In 1969, for example, the AJC issued a statement favoring what it called

“true affirmative action” while opposing quotas.²⁸ The statement explained:

[W]e cannot ignore the growing concern on the part of many Jews and members of other ethnic groups that the burden of needed social changes may especially fall on them and limit their opportunities for advancement. Care must be taken in advancing compensatory and preferential treatment for disadvantaged minorities that our sense of outrage for what they have endured does not cause us to lose sight of our sense of the needs and aspirations of other groups.²⁹

If, as the AJC reasoned, quotas were a zero-sum game, other disadvantaged ethnic groups would necessarily pay the price for the inclusion of racial minorities.³⁰ Between 1969 and 1972, the AJC and other organizations refined their arguments. “Individual rights,” the New York Chapter of the AJC asserted in a 1971 statement on affirmative action, “which are a cornerstone of our Constitution, must be preserved and protected.”³¹ AJC President Philip Hoffman advanced a similar view when

²⁸ See American Jewish Committee, Statement on Compensatory and Preferential Treatment in Education and Employment, Nov. 11, 1969, *in* The American Jewish Committee Papers, American Jewish Committee Library, New York, New York.

²⁹ The American Jewish Committee, Statement on Affirmative Action, Dec. 3, 1972, *in* The American Jewish Committee Papers, American Jewish Committee Library, New York, New York.

³⁰ *See id.*

³¹ American Jewish Committee of New York, Statement on Affirmative Action (May 11, 1972), *in* The American Jewish Committee Papers, American Jewish Committee Library, New York, New York.

writing to presidential candidates Richard Nixon and George McGovern.³²

AJC Vice President Bertram H. Gold summarized this vision, stating that “the American system, which is an open society, is based on individual rights, not group rights. We are opposed to quotas because quotas are the negation of judging a man on his worth alone.”³³

In the late 1960s and early 1970s, Jewish groups like the AJC and the American Jewish Congress remained divided about what kinds of affirmative action were defensible. Founded in 1918, the Congress formed to be a democratic, representative group for Jewish leaders across the nation.³⁴ In the 1940s, the organization took a leading role in protesting Nazism in Germany, serving as a liaison between the United States Government and European Jews seeking refuge in the United States.³⁵ In the 1950s, the Congress also took part in the civil-rights movement, and one of its leaders played a vital role in planning Martin Luther King’s 1963 March on Washington.³⁶

³² See *Facts Behind the News*, Aug. 25, 1972, at 1, in The American Jewish Committee Papers, American Jewish Committee Library, New York, New York.

³³ American Jewish Committee, Press Release, Aug. 16, 1972, in The American Jewish Committee Papers, American Jewish Committee Library, New York, New York.

³⁴ On the early years of the Congress, see, e.g., *Jewish Congress to Meet*, **N.Y. TIMES**, Jul. 29, 1919, at 9; *Jews Seek Hearing at Peace Table*, **N.Y. TIMES**, Dec. 17, 1918, at 11; *American Jewish Congress to Meet*, **N.Y. TIMES**, Dec. 8, 1918, at 2.

³⁵ See, e.g., *Jews Pay Tribute to Hitler Victims*, **N.Y. TIMES**, Aug. 20, 1943, at 1; *Wise Asks Roosevelt Aid*, **N.Y. TIMES**, Jul. 23, 1943, at 11; *Embargo on Exports to Germany Urged*, **N.Y. TIMES**, Mar. 4, 1940, at 6; *Rescue At Once Demanded for America’s Jews Here*, **N.Y. TIMES**, Aug. 31, 1943, at 1.

³⁶ See, e.g., Irving Spiegel, *Jewish Unit To Meet on Civil Liberties*, **N.Y. TIMES**, May 27, 1950, at 11; *Failure to Attack Bias Is Denounced*, **N.Y. TIMES**, May 19, 1952, at 20; E.W. Kenworthy, *200,000 March in Washington in Orderly Washington Rally*, **N.Y.**

However, like the AJC, the Congress viewed the issue of affirmative action with considerable ambivalence. For example, in May 1969, when the Congress debated the subject, members disagreed about whether “‘benign’ quotas” deserved support. One member, a professor at Rutgers, maintained that quotas were necessary to increase the access of racial minorities to quality education.³⁷ While maintaining that quotas were “deleterious to [a] democratic system,” others offered alternative methods of helping minorities, including “a shift to consideration of the factors of financial and economic need.”³⁸

Later, at a 1972 meeting of its executive committee, some members of the Congress favored the use of numerical goals “during a transitional period until equality [could] be achieved.”³⁹ Other Congress members acknowledged that, while “[t]here [was] little argument that blacks had been discriminated against by society,” any form of special treatment for minorities would be unfair and would “severely retard, if not impede altogether, a full scale assault on the problems of all the poor and unemployed, which are the real issues and demand major attention.”⁴⁰ The

TIMES, Aug. 29, 1963, at 1.

³⁷ See Minutes of the American Jewish Congress Executive Committee (May 12, 1969), in *The American Jewish Congress Papers*, Box 34, American Jewish Library, New York, New York.

³⁸ *Id.* at 5-6.

³⁹ Executive Committee Meeting Minutes, American Jewish Congress, Mar. 16, 1972, in *The American Jewish Congress Papers*, Box 6, American Jewish Historical Society, New York, New York.

⁴⁰ *Id.* at 2.

organization could not agree even on a compromise resolution stating opposition to any government program that “require[d], permit[ted], or [made] predictable any discrimination against any ethnic, racial, or religious group or groups,” deciding to table it by a vote of 13-11.⁴¹

The AJC was similarly divided throughout the early 1970s. Some chapters, including the one based at its New York headquarters, seriously considered endorsing the use of goals and timetables, and even opponents of quotas worried that seemingly neutral tests used to measure individual merit unduly favored those in the white majority, constituting “a denial of the very merit principle we purport to support.”⁴²

Generally, however, a majority in the Congress and the AJC opposed quotas while endorsing recruiting and training programs as “true” and just affirmative action. These arguments echoed the views expressed in Gunnar Myrdal’s monumental *The American Dilemma: The Negro Problem and Modern Democracy*.⁴³ Published in 1944, Myrdal’s book argued that Americans were torn between their ideals and the realities of racism, segregation, and discrimination.⁴⁴ Myrdal identified American commitments to democracy and egalitarianism as important weapons

⁴¹ *Id.* at 14.

⁴² *See* Deslippe, *supra* note 17 at 86.

⁴³ Gunnar Myrdal, *THE AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (1944).

⁴⁴ *Id.* at 75, 1021.

against Jim Crow.⁴⁵ He suggested that if Americans lived up to their own ideals, de jure segregation could not last long.⁴⁶

Myrdal's influential ideas reflected one strand of argument offered by the NAACP in *Brown*.⁴⁷ His arguments also helped to cement a liberal alliance committed to the achievement of civil rights reforms.⁴⁸ By the 1960s, however, liberal consensus about Myrdal's arguments had collapsed.⁴⁹ Movement activists and commentators argued that Myrdal had been naive about the pervasiveness of racism in American society.⁵⁰ Rather than being a matter of individual attitudes, racism shaped important institutions and laws.⁵¹

For the AJC and ADL, by contrast, prescriptions like those set forth by Myrdal still rang true. The AJC believed that neutrality was constitutionally necessary and politically possible, and the organization

⁴⁵ See *id.* at 1021.

⁴⁶ See *id.*

⁴⁷ As Christopher Schmidt has shown, however, reasoning similar to Myrdal's was not the only kind of argument used by the NAACP in *Brown*, and the Court was not obviously deciding the case only on the basis of Myrdal-style arguments. See Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 *CORNELL L. REV.* 203, 207 (2008).

⁴⁸ See, e.g., WALTER JACKSON, *GUNNAR MYRDAL AND AMERICA'S CONSCIENCE: SOCIAL ENGINEERING AND RACIAL LIBERATION, 1938-1987* 261 (1994) ("*An American Dilemma* was the key book in shaping a new liberal consensus on racial issues").

⁴⁹ See, e.g., JAMES T. PATTERSON, *GREAT EXPECTATIONS: THE UNITED STATES, 1945-1974* 22 (1997); DAVID CARROLL COCHRAN, *THE COLOR OF FREEDOM: RACE AND CONTEMPORARY LIBERALISM* 28 (1999); CHRISTOPHER SHANNON, *A WORLD MADE SAFE FOR DIFFERENCES: COLD WAR INTELLECTUALS AND THE POLITICS OF RACE* 48 (2005).

⁵⁰ See, e.g., Lopez, *supra* note 7 at 999-1000.

⁵¹ See, e.g., *id.*; For arguments of this kind from the period, see generally ROBERT L. ALLEN, *BLACK AWAKENING IN CAPITALIST AMERICA* (1970); ROBERT BLAUNER, *RACIAL OPPRESSION IN AMERICA* (1972); WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO* 1550 (1968); STOKELY CARMICHAEL AND CHARLES V. HAMILTON, *BLACK POWER: THE POLITICS OF LIBERATION IN AMERICA* 4 (1967).

argued that relying on individual merit would dismantle, rather than reinforce, existing racial hierarchies. At the same time, the organization favored some race-conscious remedial programs—if only those designed to prepare candidates rather than those geared toward hiring or admission decisions. The AJC also acknowledged that some tests used to measure individual merit, if not the idea of individual merit, rewarded membership in a dominant group rather than actual talent.

These apparent contradictions made sense as part of the AJC’s commitment to “true” affirmative action. The organization wanted to identify race-conscious remedial programs that would not be inconsistent with ideals of neutrality, individual merit, and equal opportunity. The quest to defend “true” affirmative action revealed the ambivalence of early affirmative-action opponents about antiracism values or remedial programs. The movement resisted arguments that racism had infected seemingly neutral institutions and laws. In the early 1970s, however, the movement still embraced the basic idea of affirmative action as necessary and just.

Similar arguments animated the litigation of *DeFunis v. Odegaard*, the first Supreme Court case on affirmative action in higher education.⁵² Marco DeFunis, Jr., a Jewish man from Seattle, challenged the University

⁵² See 416 U.S. 312 (1974).

of Washington Law School affirmative-action policy after being denied admission to the class of 1971.⁵³ The media portrayed the affirmative-action battle as part of the collapse of a powerful civil-rights coalition, a war between blacks and Jews, between visions of the Constitution based on ending group subordination or alternatively on allowing individuals to prove their own merit. For example, African-American columnist William Raspberry argued in 1972: “The fight against affirmative action programs designed to help blacks and other minorities into the American mainstream is being led by Jews [...] And it may be that attempts at making the campuses more representative of the country are seen by Jews as attacks on their special preserve.”⁵⁴

The Court ultimately held that *DeFunis* was moot, since, pursuant to an order from the trial court, he had been attending the University of Washington Law School since 1971 and was soon scheduled to graduate.⁵⁵ Speaking on behalf of DeFunis’s allies, the AJC maintained that affirmative action was appropriate and constitutional so long as quotas were not involved.⁵⁶ As Elmer Winter, the leader of the AJC, explained, “the primary goal, in our view, is the establishment of affirmative actions and processes

⁵³ See, e.g., Nina Totenberg, *Discriminating to End Discrimination*, **N.Y. TIMES**, Apr. 14, 1974, at 207.

⁵⁴ *Id.*

⁵⁵ See *DeFunis*, 416 U.S. at 318-19.

⁵⁶ See, e.g., American Jewish Committee, Press Release (Apr. 24, 1974), in *The American Jewish Committee Papers, Affirmative Action*, American Jewish Committee Library, New York, New York.

that provide disadvantaged minorities a realistic opportunity in education and employment while avoiding the dangers of reverse discrimination.”⁵⁷

Bakke and the White Ethnic Revival

Between the decisions of *DeFunis* and *Regents of the University of California v. Bakke*, the anti-affirmative action movement changed substantially. White ethnics mobilized, contending that they suffered as serious a social disadvantage as did the people of color for whom affirmative action programs had conventionally been designed.⁵⁸ In major newspapers, white male academics attacked University hiring policies that favored women and people of color.⁵⁹ For the first time, Title VII discrimination suits brought by white males before the EEOC reached into the 100s.⁶⁰ These activists no longer claimed to understand the true meaning of fair affirmative action. Instead, activists defined themselves—as Italians,

⁵⁷ *Id.*

⁵⁸ For examples of claims of this kind, see, e.g., Richard Cappozola, *Bias Against Italians*, **N.Y. TIMES**, Apr. 5, 1969, at 26; Craig Whitney, *Italians Picket FBI Office Here, Charge Bias*, **N.Y. TIMES**, May 2, 1970, at 35; Francis X. Clines, *20 Other Italian Groups Meet With State Rights Chief in Complaints of Bias*, **N.Y. TIMES**, Jun. 26, 1971, at 15; Jonathan Randal, *U.S. Challenged By Polish Leader*, **N.Y. TIMES**, May 2, 1968, at 13; Michael Novak, *Black and White in Catholic Eyes*, **N.Y. TIMES**, Nov. 16, 1975, at 273; Walter Waggoner, *A White NAACP Set Up in Newark*, **N.Y. TIMES**, Jun. 28, 1974, at 35.

⁵⁹ See, e.g., Iver Peterson, *College Scored on Hiring Women*, **N.Y. TIMES**, Nov. 30, 1972, at 44; Tom Wicker, *A Misplaced Anger*, **N.Y. TIMES**, Jun. 30, 1974, at 187; Tom Wicker, *No Retreat Needed*, **N.Y. TIMES**, Jan. 4, 1972, at 32.

⁶⁰ See, e.g., *U.S. to Check on Complaints of Reverse Discrimination*, **N.Y. TIMES**, Nov. 23, 1972, at 23.

Poles, Greeks, or Jews—as belonging to a true minority that deserved “special treatment.”⁶¹

Ian Haney Lopez has carefully examined arguments about race as ethnicity.⁶² He focuses on the importance of studies by sociologists Nathan Glazer and Daniel Patrick Moynihan.⁶³ Glazer and Moynihan described America not as a racially stratified society but rather as a pluralistic place in which culturally distinct ethnic groups competed and collaborated with one another.⁶⁴ Lopez is right to acknowledge the influence of this idea, and he compellingly traces its impact on later thinking about race and the Constitution.

White ethnic identity was complex, however, and it arose because of a number of interrelated social and economic factors. What historian Matthew Frye Jacobson has called the “white ethnic revival” marked race relations in the 1960s and 1970s.⁶⁵ The revival manifested itself in a new national passion for genealogy and ethnic pride, in art, television programming, and movies celebrating ethnic differences, in public consumption of products celebrating ethnic pride, and in a new sense of

⁶¹ See, e.g., Cappozola, *supra* note 58 at 26; Randal, *supra* note 58 at 13; Waggoner, *supra* note 58 at 35.

⁶² See Lopez, *supra* note 7 at 985-1010.

⁶³ See *id.*

⁶⁴ See, e.g., *id.*

⁶⁵ See MATTHEW FRYE JACOBSON, *ROOTS TOO: WHITE ETHNIC REVIVAL IN POST-CIVIL RIGHTS AMERICA* 7-9 (2006); see also JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* 118 (1987); STEVEN LUCONI, *FROM PAESANI TO WHITE ETHNICS: THE ITALIAN AMERICAN EXPERIENCE IN PHILADELPHIA* 9 (2001); JOHN SKRETNY, *THE MINORITY RIGHTS REVOLUTION* 278 (2002).

grievance among white ethnics.⁶⁶ Between 1967 and 1970, a variety of new ethnic organizations formed, including the American Committee for Democracy and Freedom in Greece (1967), the National Association for Irish Justice (1970), the Serbian National Committee (1968), and the Latvian Foundation (1970).⁶⁷ In the period, moreover, ethnic consciousness dramatically increased. For example, a study commissioned by the United States Census in the early 1970s found that a million more people identified as Polish-American than had a few years before.⁶⁸

The white ethnic revival partly reflected intense nationalist sentiment provoked by Soviet intervention in Eastern and Central Europe, the “Troubles” in Ireland, and the Israeli Wars of 1967 and 1970.⁶⁹ The revival borrowed from the rhetoric and the symbolism of the civil-rights movement. As civil-rights activists invoked “Black pride,” white ethnics wore tam-o-shanter hats or waved Italian or Irish flags.⁷⁰

White ethnics also claimed to have been victimized by past discrimination on the part of a broader Anglo-Saxon Protestant majority.

⁶⁶ See, e.g., JACOBSON, *supra* note 65 at 3-10.

⁶⁷ See, e.g., *id.* at 28. For a sample of coverage of the work done by these organizations, see *For Greek Democracy*, **N.Y. TIMES**, Jun. 3, 1971, at 38 (on the American Committee for Democracy and Freedom in Greece); *Irish Group Pickets B.O.A.C.*, **N.Y. TIMES**, Jul. 4, 1970, at 13; *Irish Appeal Seeks Funds to Rebuild Belfast Street*, **N.Y. TIMES**, Jan. 26, 1970, at 20.

⁶⁸ See Jacobson, *supra* note 65 at 28.

⁶⁹ *Id.* at 26.

⁷⁰ See, e.g., John Kifner, *6,000 In Boston Protest Busing*, **N.Y. TIMES**, Dec. 16, 1974, at 19. The anti-busing movement at times used a kind of hybrid flag, combining the American flag with elements of the Italian and Irish flags. See, e.g., John Kifner, *Two Rallies at Odds in Boston*, **N.Y. TIMES**, May 19, 1975, at 19.

For example, the Center for Urban Ethnic Affairs, founded in New Jersey in 1978, was designed to “combat discrimination against ‘white ethnics’ at middle- and upper-management jobs.”⁷¹ The organization’s director explained to the *New York Times*: “We want no slowdown in the advancement of blacks and browns, but we don’t want their advancement at the expense of white ethnics.”⁷²

Such claims made some headway. In 1971, the Department of Health, Education, and Welfare (HEW) offered some assistance to white ethnics but stopped short of instituting the timetables or hiring goals available to people of color.⁷³ White ethnic grievance also played out in the courts. For example, Phillip DeLeo, a rejected applicant to the University of Colorado Law School, argued in court that affirmative action programs should give equal consideration to African-American and Italian-American minority members.⁷⁴

By the mid-1970s, a wide array of white ethnic organizations had come out against affirmative action. These activists demanded a new legal and social definition of a disadvantaged minority. For these activists, “minorities” included any distinct group that had experienced past

⁷¹ Waggoner, *supra* note 58 at 35.

⁷² *Id.*

⁷³ See, e.g., Deslippe, *supra* note 17 at 92.

⁷⁴ See *University of Colorado v. DiLeo*, 540 P.2d 486, 492-93 (Colo. 1978). The *DiLeo* Court ultimately held that the applicant lacked standing to challenge the constitutionality of the university’s affirmative-action policy, since he lacked the qualifications to have been admitted had no such program existed. *Id.* at 489-90.

discrimination and continued to suffer from its legacy. For example, in 1977, the *Jewish Advocate*, a magazine in the New England area, complained that existing affirmative action programs “exclude[ed] the Jewish community and other white minority groups in this country.”⁷⁵ Other white ethnic groups and conservative activists took up similar claims. As right-wing activist Pat Buchanan argued in 1977, “[T]he fact is that Eastern European and Mediterranean ethnic groups really aren’t much further up the executive ladder than non-whites.”⁷⁶

When *Bakke* came before the Court, white ethnics in the anti-affirmative action movement focused on similar efforts to contest the definition of minority status. *Bakke* involved a challenge to the affirmative action program in place at the University of California-Davis Medical School.⁷⁷ Davis had a policy of admitting “special applicants” under provisions either for members of “minority groups” (such as African-Americans) or for those who were “economically and/or educationally disadvantaged.”⁷⁸ While many Caucasians had applied under this second provision, none had been successful.⁷⁹ The Medical School rejected the application of Alan Bakke, an American of Norwegian descent, and he

⁷⁵ See, e.g., Patrick Buchanan, *Reverse Discrimination Advocates Must Go*, **HUM. EVENTS**, Nov. 15, 1975, at 9.

⁷⁶ *Id.*

⁷⁷ See *Bakke*, 438 U.S. at 474.

⁷⁸ *Id.* at 474.

⁷⁹ See *id.* at 476.

sued, arguing that Davis's affirmative-action program violated the Equal Protection Clause of the Constitution.⁸⁰

Amicus briefs in *Bakke* often stressed that affirmative-action programs should protect white ethnic minorities as well as non-white ones. For example, an amicus brief submitted on behalf of the AJC and other white ethnic groups explained:

Nor can all whites by any stretch of the imagination properly be considered "advantaged." Rarely, if ever, for instance, have whites from poverty-stricken Appalachia been singled out as a group for preferential educational treatment. Nor has favoritism been bestowed on members of other ethnic groups which can credibly claim to have been subject to generalized societal discrimination—Italians, Poles, Greeks, Slavs—as the result of which some people bear the economic and cultural scars of prejudice.⁸¹

The Young Americans for Freedom (YAF), an anti-communist, socially conservative group, raised a similar challenge to the definition of a "minority" deserving of affirmative action under the Fourteenth Amendment. "Jews, Poles, Italians, Japanese, [and] Chinese are all part of the majority now," the YAF contended.⁸² "These dissimilar groups have each endured past discrimination. Who but the most sheltered could avoid

⁸⁰ See *id.* at 476-77.

⁸¹ Brief as Amici Curiae for the American Jewish Committee at *41, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 7811).

⁸² Brief as Amicus Curiae for the Young Americans for Freedom at *10, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 7811).

hearing words such as Kike, Dago, Wop, Polack, Chink, Shanty Irish, and Jap? Yet what special protection or special treatment is accorded these groups who have in the past and still suffer the effects of overt discrimination?”⁸³

Anti-affirmative action understandings of “minority” status informed the arguments about diversity and about other proposed justifications for affirmative action offered in Justice Powell’s opinion in *Bakke*. The University had argued that Alan Bakke’s equal-protection argument lacked merit because whites had not suffered the history of discrimination and subordination that defined traditionally recognized minorities.⁸⁴ In rejecting this claim, Powell took up anti-affirmative claims about the difficulty of defining “minority” status.⁸⁵ “The United States,” Powell explained, “has become a nation of minorities. Each had to struggle and some struggle still to overcome not the prejudices of a monolithic majority but of a ‘majority’ composed of various minority groups.”⁸⁶

In Powell’s view, minority status reflected a history of past discrimination rather than a particular, entrenched, deeply rooted racial hierarchy. White ethnics could “lay claim to a history of past

⁸³ *Id.*

⁸⁴ *See Bakke*, 438 U.S. at 288.

⁸⁵ *See id.*

⁸⁶ *Id.* at 294.

discrimination” as much as could people of color.⁸⁷ And if everyone who had experienced past discrimination could benefit from special preferences, a new “minority of white Anglo-Saxon Protestants” would be created and made vulnerable to discrimination.⁸⁸

Courts could not competently determine which groups had suffered more prejudice, Powell asserted.⁸⁹ Prejudice itself would be ever-changing and that much harder to measure. “The kind of variable sociological and political analysis needed to produce [...] rankings [of prejudice],” Powell concluded, “simply does not lie within judicial competence.”⁹⁰ *Bakke* fractured the Court. Two separate four-justice factions joined different parts of Powell’s opinion, holding that while diversity was a compelling state interest and some affirmative action programs passed constitutional muster, the UC Davis policy went too far.⁹¹

Given the deep divide on the Court, the reach of *Bakke* remained unclear until the decision of *Grutter* decades later. Just the same, the opinion represented an important step for opponents of affirmative action. Powell’s view of Alan Bakke reflected his agreement with the definition of “minority” status proposed by these activists. Bakke bore “no responsibility for whatever harm the beneficiaries of special admission programs are

⁸⁷ *Id.* at 296.

⁸⁸ *Id.*

⁸⁹ *See id.* at 297.

⁹⁰ *Id.*

⁹¹ *Id.* at 271-272.

thought to have suffered.”⁹² Indeed, Bakke himself could soon be (or already was) a member of a victimized minority. Remedial justifications for affirmative action did not make sense when one believed that minority status was ever-changing and that people of color had no special claim to it.

Reverse Discrimination: Opposition to Affirmative Action on the Right

Between 1961 and 1980, opponents of affirmative action often did not take issue with the basic premise that the State should work to address racial subordination by offering special, race-conscious assistance to the disadvantaged. Instead, opponents of affirmative action took issue with what “true” affirmative action entailed or who belonged to “true minorities.” By the early 1980s, however, the challenge posed by the movement against affirmative action had deepened. The anti-affirmative action movement of the 1980s firmly established itself as part of the political right, and different claims against affirmative action took center stage. Instead of challenging the definition of “minority” status, opponents began stressing that affirmative action itself represented a pernicious form “reverse discrimination” against whites. For the first time, opponents of affirmative action denied the existence of racial subordination and argued that racism no longer made a difference to American society. In a post-

⁹² *Id.*

racial society, affirmative action became both unnecessary and discriminatory.

As the YAF involvement in *Bakke* would suggest, conservatives had opposed affirmative action for the better part of a decade. Since the early 1970s, neoconservative commentators, such as Irving Kristol and Norman Podhoretz, had endorsed a vision of colorblind constitutionalism.⁹³ Perhaps the most prominent conservative spokesman for colorblindness was Thomas Sowell, an African-American economist who pioneered arguments that affirmative action actually harmed the disadvantaged minorities it was intended to aid.⁹⁴ Just the same, before the late 1970s, “[c]olorblind liberals were at the helm of anti-affirmative action efforts.”⁹⁵

By the end of the decade, however, the involvement of the New Right in opposing affirmative action became more systematic, organized, and intense. Leaders of the New Right asserted claimed to have risen from the ashes of the Watergate scandal and from “impatience with the shambles of the Nixon-Ford Administration.”⁹⁶ One of the orchestrators of this movement was Paul Weyrich, a co-founder of the Heritage Foundation, a

⁹³ See, e.g., DESLIPPE, *supra* note 17 at 72-77. The YAF also publicized several arguments against affirmative action in the mid-to-late 1970s. See, e.g., *Racial Discrimination and the Law*, **NEW GUARD**, Jan. 1978, at 6-8; Clifford White, *The New Racism*, **NEW GUARD**, Dec. 1976, at 18-19.

⁹⁴ See, e.g., DESLIPPE, *supra* note 17 at 72-77.

⁹⁵ *Id.* at 78.

⁹⁶ See Mary Ziegler, *The Possibility of Compromise: Anti-Abortion Moderates After Roe v. Wade*, 87 **CHI.-KENT L. REV.** 571, 588 & n. 102 (2012) (quoting Barry Sussman, “New Right” in American Politics May Be Just an Expression of Discontent, **WASH. POST**, Mar. 5, 1978, at C3).

conservative think-tank, and the Committee for the Survival of a Free Congress (CSFC), a group dedicated to electing social conservatives to Congress.⁹⁷ Weyrich saw his mission as the creation of a grassroots, politically pragmatic Right, a complement to the intellectuals who had dominated conservatism. He explained to the press in November 1977: “Conservatives have been led by an intellectual movement but not a practical movement until now [...] We [now] talk about issues people care about, like gun control, abortion, taxes, and crime.”⁹⁸ Weyrich’s organizations provided valuable training and money to fledgling New Right causes: by 1978, the CSFC and other conservative political action committees, including the National Conservative Political Action Committee (NCPAC), had raised more than \$3.5 million for conservative candidates.⁹⁹ While Weyrich provided political strategy for these groups, Richard Viguerie and his direct-mail organization offered lobbying and fundraising services.¹⁰⁰

⁹⁷ On Weyrich’s role in the Heritage Foundation and the CSFC, *see, e.g.*, GREGORY SCHNEIDER, *THE CONSERVATIVE CENTURY: FROM REACTION TO REVOLUTION* 125 (2009).

⁹⁸ *The Conservatives’ Drive for a Stronger Voice*, **U.S. NEWS AND WORLD REPORT**, Jul. 11, 1977, at 47.

⁹⁹ *See, e.g.*, Chip Berlet, *The New Political Right in the United States: Reaction, Rollback, and Resentment*, in *CONFRONTING THE NEW CONSERVATISM: THE RISE OF THE RIGHT IN AMERICA* 83 (Michael Thompson ed. 2007); DANIEL K. WILLIAMS, *GOD’S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT* 169 (2d ed. 2012); ALAN CRAWFORD, *THUNDER ON THE RIGHT: THE NEW RIGHT AND THE POLITICS OF RESENTMENT* 70 (1980).

¹⁰⁰ On Viguerie’s direct-mail services, *see, e.g.*, SARA DIAMOND, *SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT* 58 (1989); DAVID M. RICCI, *THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND*

The New Right became interested in affirmative action as a wedge issue partly because of its connection to busing and desegregation.

Following the decision of *Green v. County School Board of New Kent County*¹⁰¹ in 1968, the Supreme Court and lower courts embraced busing as a tool used to desegregate schools.¹⁰² In 1971, the Nixon Administration almost immediately made busing a political issue, forbidding use of federal funds for the purpose.¹⁰³

By the mid-1970s, the anti-busing movement had grown nationally. One related organization, the National Action Group, sponsored a constitutional amendment that would end “forced busing.”¹⁰⁴ The movement remained the most visible in Boston, where racial violence exploded in 1974.¹⁰⁵ In the next five years, busing-related fire bombings took place in East and South Boston.¹⁰⁶ During a football game, two white

THE RISE OF THE NEW RIGHT 167 (1993).

¹⁰¹ See 391 U.S. 430 (1968).

¹⁰² On the use of busing as a remedy in desegregation cases decided between *Green* and *Milliken v. Bradley*, 418 U.S. 717 (1974), see, e.g., RICHARD PRIDE AND DAVID WOODWARD, *THE BURDENS OF BUSING: THE POLITICS OF DESEGREGATION IN NASHVILLE, TENNESSEE* 244 (1995); CHRISTINE ROSELL, *SCHOOL DESEGREGATION IN THE 21ST CENTURY* (2006).

¹⁰³ See, e.g., RONALD FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS, AND ETHNICITY IN THE 1960S AND 1970S* 61-62 (1991).

¹⁰⁴ *Busing Protestors Reach Hills Midway on a March to Capital*, **N.Y. TIMES**, Apr. 2, 1972, at 23.

¹⁰⁵ See generally FORMISANO, *supra* note 103; see also generally SUSAN E. EATON, *THE OTHER BOSTON BUSING STORY: WHAT’S WON AND LOST ACROSS THE BOUNDARY LINE* (2001); STEVEN J. L. TAYLOR, *DESEGREGATION IN BOSTON AND BUFFALO: THE INFLUENCE OF LOCAL LEADERS* (1998).

¹⁰⁶ See, e.g., Edward Schumacher, *School Violence in Boston Reflects Deep-Seated Racial Animosity*, **N.Y. TIMES**, Oct. 22, 1979, at A16.

students shot and paralyzed a black classmate.¹⁰⁷ Major anti-busing protests spread to cities like Chicago and Nashville.¹⁰⁸

Racial prejudice certainly animated a good deal of anti-busing activism. The movement's arguments were broader, however. In Boston and Chicago, for example, protesters stressed their resentment of "judicial tyranny"¹⁰⁹ and of an ever larger and more interventionist federal government that used "white children [...] as pawns."¹¹⁰ Many members of the anti-busing movement often included poor or working class mothers who, as the *New York Times* put it in 1979, felt "that they [had] no control over their future and the future of their neighborhoods and families."¹¹¹

For the New Right, the connection between busing and affirmative action was obvious. Both involved the meddling of liberal bureaucrats who did not believe in the free market, who supported judicial activism, who did not respect parental rights, and who unnecessarily victimized white children.¹¹² "Conservatives cannot become the dominant political force in America," Viguerie argued, "until we stress the issues of concern to ethnic

¹⁰⁷ *See id.*

¹⁰⁸ On protests in Chicago, *see, e.g.*, Douglas Kneeland, *Both Sides in Busing Fight Charge Chicago Mayor Lacks Leadership*, **N.Y. TIMES**, Sep. 19, 1977, at 16. On the Nashville protests, *see generally* Pride and Woodward, *supra* note 103.

¹⁰⁹ John Kifner, *6000 in Boston Protest Busing*, **N.Y. TIMES**, Dec. 16, 1974, at 19.

¹¹⁰ Kneeland, *supra* note 108 at 16.

¹¹¹ Schumacher, *supra* note 106 at A16; *see also* FORMISANO, *supra* note 103 at 172-73 (arguing that the anti-busing movement "drew upon a widespread sense of injustice, unfairness, and deprivation of rights").

¹¹² For articulations of this perspective, *see, e.g.*, FORMISANO, *supra* note 103 at 188; JEROME HIMMELSTEIN, *TO THE RIGHT: THE TRANSFORMATION OF AMERICAN CONSERVATISM* 83 (1993).

and blue-collar Democrats, born-again Christians, and pro-life Catholics and Jews. Some of these are abortion, busing, pornography, traditional Biblical values, and quotas.”¹¹³

The New Right had political incentive to tie affirmative action to a larger conservative agenda. Significantly, in the mid-1970s, changes to party politics created a perfect opportunity for opponents of affirmative action to make their cause a core part of the New Right platform. In order to be effective, opponents of affirmative action had to work with allies in the Republican Party. At the same time, the Democratic Party firmed up its support for affirmative action, denying influence to groups such as the AJC that opposed some affirmative-action programs.

In the early 1970s, it was far from clear that the Democratic Party would take this position. In 1975, the House of Representatives voted on proposed legislation sponsored by Representatives Henry Waxman (D-CA) and James Scheuer (D-NY), stating: “No person shall, on basis of the race, color, national origin, or sex, be excluded from or admitted to participation in, [...] or be subjected to discrimination under any program.”¹¹⁴ Between 1974 and 1980, however, the positions of the Republican and Democratic Parties diverged. “Whereas the 1980 Democratic platform asserted that ‘[a]n effective affirmative action program is an essential component of our

¹¹³ HIMMELSTEIN, *supra* note 112 at 83.

¹¹⁴ DESLIPPE, *supra* note 17 at 188-89.

commitment to expanding civil rights protections,' the Republican platform argued that 'equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others, thereby rendering such regulations and decisions inherently discriminatory.'"¹¹⁵

By 1980, the New Right had also established a new central objection to affirmative action. Organizations like the AJC primarily contested the meaning of true affirmative action. The AJC and ADL had conceded that racial minorities deserved special assistance, nonetheless insisting that judging people exclusively by individual merit was both constitutionally necessary and effective in reducing the impact of past discrimination. During the *Bakke* litigation, white ethnic groups primarily challenged the definition of a deserving minority.

By 1980, the New Right had rejected the need for any remedial program for any minority group. Instead, New Right activists argued that affirmative action programs themselves represented racist discrimination against whites. In this account, affirmative action was no longer necessary because "discrimination [had] been effectively abolished in this country."¹¹⁶ At the same time, the New Right contended that the free market would address any remaining discrimination. By contrast, the wrongful

¹¹⁵ Neal Devins, *Affirmative Action After Reagan*, 68 **TEX. L. REV.** 353, 354 (1989).

¹¹⁶ George Gilder, *The Myths of Racial and Sexual Discrimination*, **NAT. REV.** Nov. 14, 1980, at 1381.

“presumption” of affirmative action was “that the market will not, for the foreseeable future, operate fairly, and that racial equality requires the brokerage of progressive-minded bureaucrats.”¹¹⁷

If racial discrimination was no longer a major issue, remedial programs for blacks represented racial discrimination against whites. As the *National Review* argued in 1986: “Affirmative action, as it currently being used, is quite simply wrong—wrong because it is anti-white. It seeks to wipe out the effects of past discrimination through discrimination. A white male American would be justified in judging that the Supreme Court, in upholding reverse discrimination, has nullified the social contract.”¹¹⁸

Between 1980 and 1987, the New Right worked to convince the Reagan Administration to oppose affirmative action. Reagan had a long track record of opposing race-conscious remedies, and after his election, Edwin Meese III, one of Reagan’s chief advisors, encountered opposition to efforts to undo federal support for affirmative action. In May 1981, for example, one of Meese’s allies complained that “careerist ideologues in the Civil Rights Division [of the Justice Department]” had endorsed busing and pushed “through decisions adverse to Reagan policies.”¹¹⁹

¹¹⁷ *The Real Commitment*, **NAT. REV.**, Nov. 23, 1981. For an earlier version of this argument, see, e.g., Walter Williams, *Racial Discrimination and the Law*, **NEW GUARD**, Jan. 1978.

¹¹⁸ *Does America Hate Whites?*, **NAT. REV.**, Aug. 1986, at 15.

¹¹⁹ Ed Harper to Edwin Meese III and Jim Baker (May 5, 1981), in The Edwin Meese III Files, OA 9447, Ronald Reagan Presidential Library, Simi Valley, California.

Disagreement within the Administration became news when Reagan made a statement to the press about *Weber v. Kaiser Aluminum*, a 1979 Title VII case in which the Court held that a white factory worker was not entitled to enroll in a training program for black workers set up under voluntary union-management agreement.¹²⁰ When first asked about the case, Reagan had stated that he would approve of such programs so long as they were voluntary.¹²¹ Meese and other opponents of affirmative action quickly acted to correct Reagan's gaffe, and the White House issued a statement stating Reagan's belief that the case had been "wrongly decided."¹²²

The press conference made clear that civil-rights issues were a public-relations problem for the Administration. One aide explained in a March 1982 memo that "[w]e very badly need a comprehensive statement on what this Administration's policies are toward racial minorities, especially blacks and Hispanics."¹²³ The memo explained that by opposing "quotas," the Administration had triggered complaints that "[t]he Administration (and primarily the Justice Department) [had] gutt[ed] long-

¹²⁰ See 443 U.S. 193 (1979).

¹²¹ See John Herbers, *Reagan's Changes on Rights Are Starting to Have Impact*, **N.Y. TIMES**, Jan. 24, 1982, at 11; see also Robert Pear, *President Opposes Quotas in Affirmative Action*, **N.Y. TIMES**, Jan. 4, 1982, at A1

¹²² Herbers, *supra* note 121 at 11.

¹²³ Ed Harper to Edwin Meese III (Mar. 15, 1982), in *The Edwin Meese III Files*, OA 9447, Ronald Reagan Presidential Library, Simi Valley, California.

established policies on affirmative action.”¹²⁴ It would be increasingly important to popularize arguments against quotas. Future statements “need not surrender on certain key principles [...] (e.g., opposition to quotas), but [...] must undertake to explain why our policies, rightly understood, are designed to protect civil rights and expand equal opportunity.”¹²⁵

In the short term, Meese and his allies seemed to have their way without popularizing colorblindness claims. Between 1982 and 1983, the Reagan Justice Department submitted amicus briefs arguing that affirmative-action hiring programs in Memphis and Detroit were impermissibly discriminatory, and Reagan made three new appointments to the United States Commission on Civil Rights, undercutting opposition to his policies.¹²⁶

After the 1984 election, however, new internal conflict emerged. In August 1985, Meese, the new Attorney General, went to work behind the scenes pushing Reagan to endorse a new executive order ending racial set-asides in hiring.¹²⁷ That fall, Meese called a meeting to organize support for a full-scale retreat from federal involvement in affirmative action.¹²⁸ During

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See, e.g., *Just How Fair Is Affirmative Action*, **N.Y. TIMES**, Dec. 11, 1983, at 44. For the holding in the Memphis case, see *Firefighters Local Union v. Stotts*, 467 U.S. 561 (1984) (invalidating a consent-decree requiring minority hiring on the part of the Memphis Police Department).

¹²⁷ See, e.g., *Two Key Aides Plotted to End Quotas*, **CHI. TRIB.**, Aug. 16, 1985, at 1.

¹²⁸ See, e.g., *Civil Rights Leaders Accused of Discrimination*, **L.A. TIMES**, Nov. 1, 1985, at 14.

a heated exchange, Bill Brock, the Secretary of Labor in the Reagan Administration, led a faction that favored leaving existing employment-related affirmative action programs in place, arguing that these initiatives worked well and were necessary to demonstrate the Administration's concern about civil rights.¹²⁹ When those at the meeting could not reach a consensus, those present produced an "option paper," outlining radically different options about how to deal with affirmative action in hiring.¹³⁰

In trying to popularize his positions on affirmative action, Meese took his case to the media. The claims he forged linked anxieties about "reverse discrimination" and anti-white bias to constitutional arguments about the importance of original intent and anti-classification values.¹³¹ He linked affirmative action to de jure segregation, suggesting that "a new version of separate but equal [was] being pushed upon us."¹³² Meese primarily stressed that the 13th, 14th, and 15th Amendments made the Constitution "officially colorblind."¹³³ As he stated in a widely reported speech, "The fact that discrimination occurred in the past provides no justification for engaging in discriminatory conduct."¹³⁴ By February 1986, Reagan took a clearer position, siding with Meese and calling for a

¹²⁹ *See, e.g., id.*

¹³⁰ *See, e.g., id.*

¹³¹ *See, e.g., Philip Shenon, Meese Sees Racism in Hiring Goals, N.Y. TIMES, Sep. 18, 1985, at A16.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

“colorblind society” where “nothing is to be done to or for anyone because of race.”¹³⁵

As Reva Siegel has shown, legal scholars, sociologists, and members of the Supreme Court had spotlighted anticlassification arguments since the decision of *Brown*.¹³⁶ Meese and Reagan fused these arguments with popular anxieties about anti-white “discrimination” articulated by the New Right. The Administration had developed claims against affirmative action that brought together the New Right’s arguments about reverse discrimination, judicial activism, and original intent.

Between 1989 and 1994, Justice Antonin Scalia and Clarence Thomas (nominated by Presidents Reagan and Bush, respectively) emerged as strong defenders of this particular vision of colorblindness.¹³⁷ In 1989, in *City of Richmond v. J. A. Croson Co.*, the Court struck down the Minority Business Utilization Plan adopted by the city of Richmond. The Plan required at least 30% of prime subcontracts to be given to minority-owned business entities.¹³⁸ Writing in concurrence, Scalia echoed Meese’s claims that “‘benign’ racial quotas have individual victims.”¹³⁹ Scalia conceded that, in American society, blacks had, in the past, “suffered discrimination

¹³⁵ *Id.*

¹³⁶ See, e.g., generally Reva B. Siegel, *Equality Talk: Anticlassification and Antisubordination Values in Struggles Over Brown*, 117 *HARV. L. REV.* 1470 (2004).

¹³⁷ See, e.g., Jamal Greene, *Fourteenth Amendment Originalism*, 71 *MARYLAND L. REV.* 978, 988 (2012).

¹³⁸ See 488 U.S. at 469.

¹³⁹ *Id.* at 527 (Scalia, *J.*, concurring).

immeasurably greater than any other group.”¹⁴⁰ Nonetheless, racism and racial classifications no longer made enough of a difference to justify discrimination against whites. As Scalia explained: “Racial preferences appear to ‘even the score’ (in some small degree) only if one embraces the proposition that our society is appropriately divided into races, making it right that an injustice rendered against a black man should be compensated for by discriminating against a white.”¹⁴¹ Because racial prejudice against blacks was no longer institutionalized or widespread, Scalia suggested, colorblindness was fair to everyone, while race-conscious remedies represented discrimination against whites.¹⁴²

Scalia made this point clearer in *Adarand v. Peña*, a 1995 case involving federal statutory and regulatory incentives for contractors to award subcontracts to “socially and economically disadvantaged individuals.”¹⁴³ Confirming that strict scrutiny applied to all racial classifications, *Adarand* struck down the federal racial preferences at issue.¹⁴⁴ Scalia’s concurring opinion again endorsed a vision of colorblindness.¹⁴⁵ In the absence of a contemporary racial hierarchy, Scalia argued, race-conscious remedies “reinforce[d] and preserve[d] for future

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 528.

¹⁴² *See id.*

¹⁴³ 515 U.S. at 204-208.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.* at 238-40 (Scalia, *J.*, concurring).

mischief the way of thinking that introduced race slavery, race privilege, and race hatred.”¹⁴⁶

Similar arguments for colorblindness dominated anti-affirmative action activism throughout the 1990s. In this period, veterans from the Reagan and George H.W. Bush Administrations formed highly organized, conservative, and professional organizations opposed to affirmative action. Organizations of this kind included the Center for Equal Opportunity (the Center), the Center for Individual Rights (CIR), and Judicial Watch, Inc. (JWI).

The Center was founded in 1995 by Linda Chavez, the former head of the United States Commission on Civil Rights, and Roger Clegg, a former Assistant Attorney General who served in the Reagan and George H.W. Bush Administrations.¹⁴⁷ The Center set out to be a conservative think tank focused exclusively on racial issues, and its work reflected the influence of arguments against affirmative action forged in the Reagan Administration.¹⁴⁸ In 1995, Chavez stressed original-intent claims, reasoning: “The Constitution forbids discrimination on the basis of race.

¹⁴⁶ *Id.* at 239. For discussion of Thomas’s views on affirmative action, see generally Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Clarence Thomas Makes the Case for Affirmative Action*, 47 *ARIZ. L. REV.* 113 (2005).

¹⁴⁷ On the founding of the Center, see, e.g., Marco Della Cava, *Chavez: All Should Fit Same Standard*, *U.S.A. TODAY*, May 1, 1995, at 61; see also *Belief in Meritocracy on Equal Opportunity*, *L.A. TIMES*, Apr. 30, 1995, at 1; William Goldschlag, *Affirmative Action Under Fire*, *N.Y. DAILY NEWS*, Jun. 18, 1995, at 20.

¹⁴⁸ See, e.g., *Belief in Meritocracy*, *supra* note 147 at 1.

That includes reverse discrimination.”¹⁴⁹ Clegg described himself as a victim of past reverse discrimination, and he stressed that it was “wrong to discriminate against people because of their skin color and their ancestors’ country of origin.”¹⁵⁰

While the Center studied and criticized affirmative-action programs, the CIR was a single-issue, public-interest litigation group founded in 1988 by conservative attorneys Michael McDonald and Michael Greve.¹⁵¹ As early as 1995, the CIR brought a constitutional challenge to the affirmative-action policy used by the University of Texas, and by the late 1990s, the group led a full-scale attack on affirmative action in higher education.¹⁵² McDonald, a former professor at the George Washington University School of Law, particularly objected to claims that racial diversity was important to higher education.¹⁵³ True diversity, he argued, came from one’s beliefs and experiences. By contrast, “[m]ulticulturalism [was] just people who look different but think the same.”¹⁵⁴

A final group, JWI, was founded in 1994 by conservative attorney Larry Klayman.¹⁵⁵ The group first attracted attention by virtue of its legal

¹⁴⁹ John M. Biers, *Conservative Shock Troops Take on Racial Preference*, **CHRISTIAN SCI. MON.**, Dec. 3, 1997, at 3.

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

¹⁵² *See, e.g., Group Threatens Colleges Over Affirmative Action*, **RICH. TIMES DISPATCH**, Jan. 27, 1989, at A14.

¹⁵³ *See Biers, supra* note 149 at 3.

¹⁵⁴ *Id.*

¹⁵⁵ On the founding of the JWI, *see, e.g., Lieberman Jeered*, **WASH. TIMES**, May 15,

attacks on the Clinton Administration in the 1990s.¹⁵⁶ By the end of the decade, conservative attorney Clint Bolick took a leading role in the JWI.¹⁵⁷ Another former Reagan Administration official, Bolick became a passionate opponent of affirmative action during his time interning at Senator Orrin Hatch's (R-UT) office.¹⁵⁸ During the litigation of *Bakke*, Bolick became convinced that Bakke was "a modern day Rosa Parks."¹⁵⁹

Starting in the mid-1990s, the newly professionalized anti-affirmative action movement made its public debut. Perhaps its best known efforts in this period involved campaigns for anti-affirmative action initiatives in states like California.¹⁶⁰ In 1996, Ward Connerly, an African-American member of the University of California Board of Regents, led the California campaign for Proposition 209, a measure prohibiting "discrimination" or "preference" on the basis of race.¹⁶¹ Connerly worked

2003, at A5.

¹⁵⁶ For discussion of these attacks, *see, e.g.*, Toni Locy, *Conservative Group Seeks Access To White House*, **WASH. POST**, Feb. 4, 1997, at A4; *Clinton Defense Fund Hit With a Federal Suit*, **CLEVELAND PLAIN DEALER**, Aug. 5, 1994, at 6A; *Group Sues for Access to Clinton Legal Fund*, **WASH. POST**, Aug. 5, 1994, at A18.

¹⁵⁷ *See* Biers, *supra* note 149 at 3.

¹⁵⁸ *See id.*

¹⁵⁹ *Id.*

¹⁶⁰ For discussion of these initiatives, *see, e.g.*, Dan Frosch, *Vote Results Are Mixed on a Ban on Racial Preference*, **N.Y. TIMES**, Nov. 8, 2008, at A19; Leslie Fulbright, *Connerly Gearing Up for a Wider Crusade*, **SAN. FRAN. CHRON.**, Dec. 14, 2006, at A1; Jodi Cohen, *Ground Zero of Affirmative Action*, **CHI. TRIB.**, Oct. 19, 2006, at 4.

¹⁶¹ On the success of Proposition 209, *see, e.g.*, Robert Pear, *In California, Opponents of Affirmative Action See a New Day*, **N.Y. TIMES**, Nov. 7, 1996, at B7; B. Drummond Ayres, *Affirmative Action Measure Nears a High-Profile Finish*, **N.Y. TIMES**, Nov. 4, 1996, at B7.

to launch similar campaigns in Colorado, Florida, Oregon, and Washington.¹⁶²

By the end of the decade, the movement turned to the courts in advancing an attack on affirmative action in higher education. The CIR and JWI held a news conference in which they questioned the constitutionality of the admissions policies in place at many universities.¹⁶³ The Center developed research designed to show that affirmative-action programs resembled hard hiring quotas or failed to achieve a significant amount of racial diversity.¹⁶⁴ The CIR, in turn, initiated lawsuits and created a handbook for applicants interested in suing universities that had adopted affirmative action programs.¹⁶⁵

Between 1999 and 2003, Judicial Watch, the CIR, and the Center stressed arguments for a colorblind Constitution formulated by conservatives in the late 1970s and 1980s.¹⁶⁶ However, *Grutter v. Bollinger* marked a turning point for opponents of race-conscious policies. *Grutter* came at the end of earlier struggles to challenge the legitimacy of affirmative action in court. The case involved a challenge to an affirmative

¹⁶² See, e.g., Frosch, *supra* note 160 at A19.

¹⁶³ See, e.g., *Group Threatens*, *supra* note 152 at A14.

¹⁶⁴ See, e.g., *The Downgrading of Diversity*, **BOS. GLOBE**, Feb. 28, 1999, at C6.

¹⁶⁵ See, e.g., *id.*

¹⁶⁶ For examples of colorblindness claims of this kind made in the period, see, e.g., Lance Gay and Bill Straub, *GOP Wants to Ban Racial Preferences*, **CINN. POST**, May 14, 1996, at 11A; William Goldschlag, *High Court Limits Affirmative Action*, **N.Y. DAILY NEWS**, Jun. 13, 1995, at 6; Ramon McLeod, *New Rules for Marking Racial Identity*, **SAN FRAN. CHRON.**, Dec. 6, 1997, at 11A; Roger Clegg, *Goodbye Preferences*, **WASH. TIMES**, Jun. 12, 1997, at A17.

action program at the University of Michigan Law School.¹⁶⁷ The law school's admissions policy required consideration of a variety of factors, including an applicant's test scores, grade point average, and "soft factors," such as the quality of an applicant's essay.¹⁶⁸ The policy further made apparent that diversity was accorded "substantial weight" in the admissions process.¹⁶⁹ While recognizing a broad range of diversity contributions, the policy reaffirmed the University's commitment to "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against."¹⁷⁰

Barbara Grutter, a white applicant, was denied admission to the law school and sued, alleging that the University had relied predominantly on race in rejecting her candidacy.¹⁷¹ *Grutter* forced the Court to revisit the diversity rationale for affirmative action articulated by Justice Powell in *Bakke*. Significantly, lower court opinions in the case shaped the strategies used by opponents of affirmative action. The United States Court of Appeals for the Sixth Circuit had relied heavily on *Bakke* in upholding the challenged admissions policy, concluding, among other things, that diversity was a compelling state interest.¹⁷²

¹⁶⁷ *Grutter*, 539 U.S. at 314.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 316.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 316-317.

¹⁷² *See* 288 F.3d 732, 746, 749 (6th Cir. 2002).

Opponents of affirmative action had to respond to this new focus on diversity. Already, however, affirmative action opponents began questioning the coherence and accuracy of the State's concept of race. A brief submitted by anti-affirmative action scholars contended that ideas of diversity were "based on racial stereotypes" and made it "permissible to use race as a proxy for experience, outlook, or ideas."¹⁷³

The CIR similarly contended that diversity reasoning assumed that members of a certain group were "particularly likely to have experiences or perspectives important to the Law School's mission merely because of their membership in a particular racial or ethnic group."¹⁷⁴ Amici suggested that the diversity rationale made little sense, since racial identity did not reflect a signature experience or perspective. An amicus brief submitted by Ward Connerly took this argument even further, explaining: "Diversity based on race is meaningless given that Americans are increasingly multiracial and no one student can fairly be said to be representative of their race."¹⁷⁵

As we have seen, previous claims about colorblindness had presented race as a matter of skin color. The *Grutter* briefs, by contrast, portrayed race as a generalization that failed to capture the beliefs of

¹⁷³ Brief as Amici Curiae for Professor Larry Alexander et al. at *2, 12-13, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

¹⁷⁴ Brief for the Petitioner at *16, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

¹⁷⁵ Brief as Amicus Curiae for Ward Connerly at *15, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241).

individuals belonging to the group at issue. Connerly's brief went further, suggesting that with the increase in the number of Americans identifying as multiracial, race itself might be a myth.

Grutter ultimately upheld the challenged policy, reasoning that the Equal Protection Clause did not prohibit narrowly tailored admission policies designed to achieve a compelling interest in diversity.¹⁷⁶ After *Grutter* upheld Michigan's program, the anti-affirmative action movement continued its gradual retreat from the colorblindness arguments of the Reagan era. One new claim made in this period involved the supposed mismatch between the minority beneficiaries of affirmative action programs and the universities to which they were admitted.¹⁷⁷ As John O'Sullivan wrote in the *National Review*, affirmative action programs "systematically mismatch minority talent to academic opportunities, placing the top 10% of designated minorities into competition with the top 1% of white and Asian students."¹⁷⁸ In this way, O'Sullivan contended that the beneficiaries of affirmative action were actually worse off than they would have been in programs to which they were better suited.¹⁷⁹ Similarly, in the Supreme Court, anti-affirmative action amici less often stressed anti-classification

¹⁷⁶ *Grutter*, 539 U.S. at 335-343.

¹⁷⁷ For versions of the mismatch argument, see, e.g., RICHARD SANDER AND STUART TAYLOR, *MISMATCH: AFFIRMATIVE ACTION AT WAR WITH ITSELF* (2012); John O'Sullivan, *Affirmative Action Forever*, **NAT. REV.**, Jul. 28, 2003, at 14.

¹⁷⁸ O'Sullivan, *supra* note 177 at 14.

¹⁷⁹ *See id.*

arguments, instead emphasizing that particular race-conscious programs were not narrowly tailored enough to satisfy strict scrutiny.¹⁸⁰

This shift was evident in 2006, in *Parents Involved in Community Schools v. Seattle*. The case involved voluntary integration plans adopted by school districts in Seattle and Louisville. In the Seattle plan, race served as a tiebreaker when desirable schools were oversubscribed.¹⁸¹ Louisville's plan also allowed students to attend a preferred school until a particular institution "reached the extremes of the racial guidelines," at which point the school district would assign students to different schools partly to achieve a more desirable racial balance.¹⁸²

In a plurality opinion, the *Parents Involved* Court struck down both voluntary integration plans.¹⁸³ At first, the opinion seems to be a strong endorsement of the colorblind Constitution. Justice Roberts provided a clear articulation of the conventional colorblind view.¹⁸⁴ As he explained, *Brown* recognized and mandated that the Court follow a colorblind approach.¹⁸⁵ "The position of the parties in *Brown* could not have been clearer," Roberts

¹⁸⁰ See, e.g., Brief as Amicus Curiae for the Center for Individual Rights at *5-6, *Parents Involved in Community Schools v. Seattle*, 551 U.S. 701 (2006) (stressing that the challenged integration plan was not narrowly tailored); Brief as Amici Curiae for the Mountain States Legal Foundation et al. at 3-12, *Parents Involved in Community Schools v. Seattle*, 551 U.S. 701 (2006) (same); Brief as Amicus Curiae for the Pacific Legal Foundation at *20-30, *Parents Involved in Community Schools v. Seattle*, 551 U.S. 701 (2006) (same).

¹⁸¹ See *Parents Involved*, 551 U.S. at 711-712.

¹⁸² *Id.* at 716.

¹⁸³ See *id.* at 747-48.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

wrote.¹⁸⁶ “The Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their race.”¹⁸⁷ Significantly, in Roberts’ view, “it was that position that prevailed in this Court.”¹⁸⁸

However, Justice Kennedy, the likely swing vote in future affirmative action cases, distanced himself from the idea of a colorblind Constitution: “[A]s an aspiration, [constitutional colorblindness] must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle.”¹⁸⁹ Kennedy laid the foundation for future opinions holding legitimate “the interest the government has in ensuring all people have equal opportunity regardless of their race.”¹⁹⁰

Kennedy again zeroed in on the fit between the School Districts’ ends and means. In Kennedy’s view, racial-conscious remedies could “be considered legitimate only if they are a matter of last resort to achieve a compelling interest.”¹⁹¹

In the Court, Kennedy’s opinion laid a road map for opponents of affirmative action: activists could focus on schools’ failure to exhaust racially neutral strategies or to prove that less race-conscious methods could

¹⁸⁶ *Id.* at 705.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 788 (Kennedy, *J.*, concurring).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 790.

achieve a desired goal. In practice, this tactic could prove quite effective: schools would have to test and reject a long list of racially neutral strategies, and districts would face the difficult task of proving that a hypothetical alternative would not achieve a similar rate of integration.

Politically, however, Kennedy's approach appears less promising for opponents of affirmative action. Narrow tailoring appears to be a technical question, whereas the idea of a colorblind Constitution is easy to convey and potentially resonant.¹⁹² If Kennedy's approach shapes the Court's future affirmative-action opinions, opponents of race-conscious programs had develop a politically powerful alternative to colorblindness claims.

Two of the Court's recent racial decisions, *Fisher v. University of Texas at Austin* and *Schuette*, showcase the alternatives developed by anti-affirmative action activists. Rather than arguing for an abstract principle of colorblindness, these advocates question the workability of affirmative action. Borrowing from arguments made by historians and critical race theorists, opponents of affirmative action now suggest that the courts know nothing about what race means.

II. Historicizing *Schuette*

¹⁹² See, e.g., Koteles Alexander, *Brute Political Force Disguised as a Colorblind Constitutional Principle*, 39 **HOW. L. J.** 367, 376 (1995) ("In a vacuum, a colorblind Constitution is precisely what many would want in any governing document, particularly with respect to the Equal Protection Clause").

If read in historical context, *Schuette* marks an opening salvo in a new attack on affirmative action. For some time, both inside and outside the Court, originalist arguments have been strikingly absent from advocacy against affirmative action.¹⁹³ Instead, opponents of race-conscious remedial policies have tended to use *Brown* as a foundational text, relying on the 1954 opinion to pinpoint what counts as discrimination under the Fourteenth Amendment.¹⁹⁴ More recently, academics and movement organizations have experimented with a new tactic—one borrowed from historians and CRT theorists who have questioned the meaning of race.

These strategies debuted in the litigation of *Fisher v. University of Texas at Austin*, a 2013 case involving an affirmative-action program at the University of Texas-Austin. At that time, Texas relied on a two-tiered program of affirmative action—the product of years of litigation and experimentation.¹⁹⁵ Earlier, in 1996, in *Hopwood v. Texas*, the Fifth Circuit Court of Appeals had struck down a previously applicable, race-conscious

¹⁹³ See, e.g., Greene, *supra* note 137 at 988 (explaining that neither Justice Scalia nor Justice Thomas has justified a colorblind interpretation of the Constitution by reference to the original intent of the Fourteenth Amendment); Schmidt, *supra* note 47 at 206 (“Colorblind principles have little basis in the original meaning of the Fourteenth Amendment”); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 *MICH. L. REV.* 213, 235 n.95 (1991).

¹⁹⁴ See, e.g., Schmidt, *supra* note 47 at 208. For more on the framing of colorblindness claims, see Rachel Moran, *Rethinking Race, Equality, and Liberty: The Unfulfilled Promise of Parents Involved*, 69 *OHIO ST. L.J.* 1321, 1326-43 (2008); Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 *STAN. L. REV.* 1 (1991); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 *U. CHI. L. REV.* 935 (1989).

¹⁹⁵ See *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2416-2417 (2013).

admissions plan at the University of Texas at Austin.¹⁹⁶ The program divided students into three groups: presumptive admits, those in the discretionary zone, and presumptive rejects.¹⁹⁷ A special admissions subcommittee dealt with minority candidates who fell in the discretionary zone and referred promising minority candidates to the full admissions committee.¹⁹⁸ After the *Hopwood* Court struck down this admissions program, the Texas State Legislature passed the Top Ten Percent Law, requiring schools to admit the top ten percent of students from every high school in the state.¹⁹⁹ Given the high rate of residential segregation in Texas, the plan tended to increase the admission of Hispanic and African-American applicants.²⁰⁰

After the decision of *Grutter* in 2003, the University also implemented a program that allowed for consideration of race or ethnicity as a factor relevant to the admissions process.²⁰¹ Following a study on the subject, the University concluded that race or ethnicity could factor into a “personal achievement score,” a measurement of whether an applicant had

¹⁹⁶ See *Hopwood v. Texas*, 78 F.3d 932, 935-38 (5th Cr. 1996).

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*

¹⁹⁹ Tex. Educ. Code § 51.803 (1997). For further discussion, see *Fisher v. University of Texas at Austin*, 631 F.3d at 213, 224 (5th Cir. 2011).

²⁰⁰ *Id.* at 224. Under the plan, as the Fifth Circuit reported, African-American enrollment increased from 2.7% to 3.0% , and Hispanic enrollment increased from 12.6% to 13.2%. *Id.*

²⁰¹ See *id.* at 227-28.

confronted “special circumstances” or obstacles such as growing up in poverty or a single-parent home.²⁰²

In a majority written by Justice Kennedy, the *Fisher* Court reversed and remanded a lower court opinion, reasoning that the Court of Appeals had not properly applied strict scrutiny in evaluating the Texas admissions policy.²⁰³ *Fisher* did not transform the law of affirmative action, but the case did mark the appearance of important new arguments against race-conscious remedies. Some opponents of affirmative action made familiar claims, contending that the University’s policy would fail true strict scrutiny because it failed to increase minority enrollment dramatically, because it was overinclusive, and because there was no strong basis in the evidence that the program was necessary to increase minority enrollment or access.²⁰⁴ Two important amicus briefs, submitted by the socially conservative American Center for Law and Justice (ACLJ) and Judicial Watch, Inc. (JWI), turned to a different line of argument. These briefs asserted that even if diversity counted as a compelling governmental interest, “racial

²⁰² *Id.*

²⁰³ See *Fisher*, 133 S. Ct. at 2421-2422.

²⁰⁴ See, e.g., Brief for the Petitioner, *Fisher v. University of Texas at Austin*, *24-47, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345); Brief as Amicus Curiae for the Cato Institute, *5-17, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345); Brief as Amicus Curiae for the Center for Individual Rights, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345); Brief of Scholars and Economists, *7-14, *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2011) (No. 11-345).

categories [were] arbitrary and incoherent.”²⁰⁵ Racial classifications, as amici claimed, “[were], for the most part, sociopolitical, rather than biological, in nature.”²⁰⁶

Judicial Watch, Inc. extensively quoted a statement made by the American Anthropological Association that “race evolved as a worldview, a group of prejudgments that distorts ideas about human differences and group behavior.”²⁰⁷ If racial categories had no scientific validity, and if race was a sociopolitical construct, then race-based preferences had to be inherently incoherent and wrong. As the JWI contended in *Fisher*: “Although science has rejected race long ago, law and public policy, and in particular the University’s admission policy, have yet to catch up. It is time they did so.”²⁰⁸

For the JWI, the idea of race as a social construct first meant that racial categories are “inherently ambiguous.”²⁰⁹ Racial definitions could be cultural, personal, or genetic, the brief argues, and individual racial groups are maddeningly hard to define. Would an applicant from Azerbaijan be white or Asian? Who would decide the racial identity of mixed-race applicants? In asking these questions, the JWI sought to establish that race-

²⁰⁵ Brief as Amicus Curiae for the American Center for Law and Justice, *supra* note 8 at 3-6.

²⁰⁶ *Id.* at 5.

²⁰⁷ Brief as Amici Curiae for Judicial Watch Inc., *supra* note 8 at 2-6.

²⁰⁸ *Id.* at 9.

²⁰⁹ *Id.* at 2.

based preferences could not withstand strict scrutiny because race itself “cannot withstand a moment’s scrutiny.”²¹⁰ The ACLJ echoed these claims, arguing that race-conscious affirmative action is “ultimately incoherent, as racial categories are both incoherent and porous.”²¹¹

In *Schuetz*, several amicus briefs updated these arguments.²¹² A brief by UCLA professor and noted affirmative-action critic Richard Sander spotlighted changing understandings of race in modern America. As group identities multiplied and shifted, Sander argued that “the connection between these racial categories and underlying types of disadvantage favored, or diversity pursued, [became] more attenuated.”²¹³ Sander focused on the impact of “a large and growing multi-race population.”²¹⁴ “By what rules is racial membership assigned?” Sander argued. “How does one prevent opportunistic behavior by self-classifying applicants?”²¹⁵

The new anti-affirmative-action argument questioned both the workability and fairness of racial-preference programs. If some Americans do not belong to any racial category, or fit within more than one, then

²¹⁰ *Id.* at 21.

²¹¹ Brief as Amicus Curiae for the American Center for Law and Justice, *supra* note 8 at 3.

²¹² See, e.g., Brief of Richard Sander as Amicus Curiae at *7-8, *Schuetz v. Coalition to Defend Affirmative Action, Integration, Immigrant Rights, and Fight for Equality by Any Means Necessary (BAMN) et al.*, 572 U.S. _ (2014) (No. 12-682); Brief Amici Curiae of Carl Cohen et al., *40, *Schuetz v. Coalition to Defend Affirmative Action, Integration, Immigrant Rights, and Fight for Equality by Any Means Necessary (BAMN) et al.*, 572 U.S. _ (2014) (No. 12-682).

²¹³ Brief of Richard Sander as Amicus Curiae, *supra* note 212 at *7.

²¹⁴ *Id.*

²¹⁵ *Id.*

someone will have to decide which individuals qualify for assistance. If individuals can select their own racial identity, as Sander suggested, there seems to be no natural check on self-interested behavior. If courts have to determine racial identity, the argument goes, then affirmative-action programs will enlist courts in a process that will reinforce—and rely upon—largely empty racial categories.

Schuette's Definition of Race

Racial-construct arguments played an important, if subtle part, in the disposition of *Schuette*. The case involved a challenge to Article 1, § 26 of the Michigan Constitution, which prohibited any university or school district from “discriminat[ing], or grant[ing] preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin.”²¹⁶ Joined by the Coalition to Defend Affirmative Action, Integration, and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), a group of students, faculty, and prospective applicants argued that Section 26 ran afoul of the political-process doctrine articulated by the Supreme Court in a line of cases decided in 1969 and 1982.²¹⁷ The first such case, *Hunter v. Erickson*, addressed a city charter amendment in Akron, Ohio.²¹⁸ The city had introduced a fair-housing law prohibiting racial discrimination, but voters amended the charter, requiring a

²¹⁶ See Mich. Const. Art. 1, § 26.

²¹⁷ See *Schuette*, *supra* note 1 at 3.

²¹⁸ See 393 U.S. 385 (1969).

referendum before a fair-housing law could be introduced.²¹⁹ Because the charter amendment singled out fair-housing laws, *Hunter* found that the amendment “place[d] special burdens on minorities in the government process,” thereby violating of the Constitution’s protections against racial discrimination.²²⁰

In 1982, the Court elaborated on the political-process doctrine in *Washington v. Seattle School District*.²²¹ There, the Court dealt with a local school board decision to introduce busing. Voters statewide responded with an initiative banning busing. For the Court, the initiative raised the same constitutional concerns as the amendment addressed in *Hunter*: it “removed the authority to address a racial problem—and only a racial problem—from the existing decision-making body, in such a way as to burden minority interests.”²²²

BAMN and the Sixth Circuit Court of Appeals read *Hunter* and *Seattle* to stand for a broader proposition: if a policy “inured primarily to the benefit of a minority,” then any state action that “place[s] effective decision-making authority” over that policy “at a different level of government” required strict scrutiny.²²³ In a plurality opinion for the Court, Justice Kennedy concluded that this broader reading of *Hunter* and *Seattle*

²¹⁹ *See id.* at 390-391.

²²⁰ *Id.* at 391.

²²¹ *See* 458 U.S. 457 (1982).

²²² *Id.* at 470, 474.

²²³ *Schuetz*, *supra* note 1 at 10.

relied on an untenable and unfair definition of race.²²⁴ Kennedy explained that to know whether a law inured primarily to the benefit of a minority, the courts would have to make sense of who was—and was not—a member of that minority.²²⁵ “Were the courts to embark on this venture,” Kennedy explained, “not only would it be undertaken with no clear legal standards or accepted sources to guide judicial decision, but it would result in—or at least impose a high risk of—inquiries and categories dependent on demeaning stereotypes.”²²⁶

Kennedy also echoed amici’s anxieties about the self-seeking behavior made possible by fluid racial categories. The plurality explained that adopting a broad interpretation of *Seattle/Hunter* would create “incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or disadvantage.”²²⁷ The plurality could imagine a kind of opportunism with few limits: groups could claim a racial disadvantage to manipulate “[t]ax policy, housing subsidies, wage regulations, and even the naming of public schools.”²²⁸

Concerns about racial construction and racial opportunism also shaped Justice Scalia’s concurrence. While the plurality preserved a narrow reading of *Hunter* and *Seattle*, Scalia called for them to be overruled, and he

²²⁴ *See id.* at 10-18.

²²⁵ *See id.* at 12.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 13.

did so partly by relying on the problems created by courts deciding what race means.²²⁹ Scalia's concurrence foregrounds "the dirty business of dividing the Nation into 'racial blocs.'"²³⁰

For Scalia, racial definition presents two independent problems. First, courts would have to identify an individual's race correctly—an exercise, Scalia writes, that is "as difficult as it is unappealing."²³¹ Like the plurality, Scalia put mixed-race individuals center stage. "Does a half-Latino, half American-Indian," Scalia asks, "have Latino interests, American-Indian interests, both, half of both?"²³² Second, racial identification would rely on disturbing—and for Scalia, unconstitutional—assumptions that race means something. To understand whether a policy advances a minority interest, a court would have to believe that minority members, whoever they are, have something in common. For Scalia, "such stereotyping is at odds with equal protection mandates."²³³

Together with Scalia's concurrence, the *Schuette* plurality departs from earlier attacks on affirmative action. The debate on a colorblind Constitution turns mostly on questions of principle and philosophy. Do equality mandates require formally equal—or identical—treatment? Or does equality sometimes require different treatment to address past

²²⁹ *See id.* at 8-10 (Scalia, J., concurring).

²³⁰ *Id.* at 9.

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

subordination? *Schuette* operates at a different level. *Schuette* reasons that regardless of how one defines racial inequality, affirmative action would require the courts to label individuals by race and to know what race means. Drawing courts into the process of racial categorization would reinforce racial categories, strengthen racial stereotyping, encourage self-seeking behavior, and offer no guarantee that affirmative action would help those actually suffering the effects of past subordination.

III. *Race Beyond Schuette: The Promise of Regarded-As Reasoning*

The problem, of course, is that racial thinking shapes individual experience and outcomes, regardless of the biological validity of racial categories. Individual background, in turn, can determine others' perceptions of race. Using data from the National Longitudinal Survey of Youth (NLSY), a recent study conducted by Professors Aliya Saperstein and Andrew Penner found that changes in individual economic circumstances changed how interviewers defined a person's race: interviewers more often identified a subject as a minority when she was unemployed, facing criminal charges, or otherwise struggling.²³⁴ In another study, Saperstein and her colleagues explored how funeral directors categorized those who had passed away.²³⁵ Again, economic and other life

²³⁴ See Aliya Saperstein and Andrew Penner, *How Social Status Shapes Race*, 105 **PROCEEDINGS OF THE NAT. AC. OF SCI.** 19628, 19628-30 (2008).

²³⁵ See Aliya Saperstein, Andrew Penner, and Andrew Noymer, *Cause of Death Affects Racial Classification on Death Certificates*, 6 **PLOS** e15812, e15812 (2011).

circumstances determined the outcome: people who had been murdered were categorized as African-American, even when loved ones had identified the deceased as belonging to another race.²³⁶ As these studies make apparent, economic and social stereotypes still mark our perceptions of one another. Proxies for race, including class, criminal history, and place of residence, all help to determine how an individual is categorized.

These stereotypes also make a significant difference in individuals' lives. Research by Marianne Bertrand and Sendhil Mullainathan found a 50% gap in callbacks for those with stereotypically "black" names on their resumes compared to those with typically white names.²³⁷ This effect applied regardless of the "real" race of an applicant—an individual's name brought to mind race and all it represented for many prospective employers.²³⁸ Professor Douglas Massey and Garvey Lundy found a similar effect when measuring the ability of fictitious prospective tenants to get through to a rental agent.²³⁹ Study subjects spoke on the phone using either White Middle Class English, Black English Vernacular, or Black Accented

²³⁶ *See id.*

²³⁷ *See* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination* (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2003), available at <http://www.nber.org/papers/w9873> (last visited May 13, 2014).

²³⁸ *See id.* at 1-3, 10.

²³⁹ *See* Douglas S. Massey & Garvey Lundy, *Use of Black English and Racial Discrimination in Urban Housing Markets: New Methods and Findings*, 36 **URB. AFF. REV.** 452, 452 (2001).

English.²⁴⁰ Race, sex, and class—determined by voice alone—helped to dictate an individual’s access to a landlord and to a rental unit.²⁴¹ For example, the study found that 87% of white males were able to get through to a rental agent, compared with only 63% of females speaking in black vernacular.²⁴²

Schuette’s skepticism about racial definitions offers no guidance for how to deal with the difference made by perceptions of race, however inaccurate. The plurality’s concerns about racial definition also seem to prove too much. The plurality, and the concurring judges who espouse some form of colorblindness, express a continued interest in policing laws that categorize on the basis of race.²⁴³ Just the same, if racial categories are totally incoherent, and individuals (particularly mixed-race ones) have no “real” race, then the colorblindness paradigm will need reworking. As scholars often recognize, the courts often use “color” and “race” synonymously, treating both as biological labels rather than as social constructs.²⁴⁴ For example, under the *McDonnell Douglas* burden-shifting framework, the courts use skin color or other salient physical features as

²⁴⁰ See *id.* at 460-461, 465.

²⁴¹ See *id.*

²⁴² See *id.*

²⁴³ See *Schuette*, *supra* note 1 at 9, 12.

²⁴⁴ See, e.g., Roy L. Brooks, *Race As An Under-Inclusive and Over-Inclusive Concept*, 1 **AFR.-AM. L. & POL’Y REP.** 9, 12-27 (1994); Rich, *supra* note 11 at 1140; Onwuachi-Willig and Barnes, *supra* note 12 at 1293-1294.

shorthand for membership in a particular group.²⁴⁵ To know if someone has suffered racial discrimination, the final prong of *McDonnell-Douglas* often requires courts to decide whether an individual was treated differently than similarly situated employees.²⁴⁶ If that employee was replaced by someone of the same race—defined by the person’s physical traits—then discrimination becomes much harder to prove.²⁴⁷ Even in fourteenth-amendment cases, to make sense of the idea that someone suffered discrimination “because of race” logically requires a court to know what race that person was or was perceived to be.

How, then, should courts address the dangers of racial categorization foregrounded in *Schuetz* and emphasized by affirmative action opponents without ignoring the reality of racial stereotyping in modern America? The Article suggests that courts should look at an established body of law addressing whether a worker is “regarded as” belonging to a disfavored group. Most developed in the context of the Americans with Disabilities Act, “regarded as” cases get at the root of the problem with racial stereotyping. If personal circumstances determine how one’s race is defined, and if racial stereotypes can dictate certain individual outcomes, then what matters to the law of affirmative action should be how relevant decision makers perceive race to be.

²⁴⁵ See, e.g., Onwuachi-Willig and Barnes, *supra* note 12 at 1293-1294.

²⁴⁶ See, e.g., *id.*

²⁴⁷ See, e.g., *id.*

Using “regarded as” cases as a starting point also helps to address some of the problems raised by *Schuette*. Together with a handful of cases decided under Title VII, this body of law could provide badly needed guidance for courts forced to determine whether or not an individual was judged because of race. Without adjudicating that person’s identity or reaffirming racial categories, courts could return to a relatively familiar question involving how that person was perceived. As importantly, as Angela Onwuachi-Willig and Mario Barnes have argued, “regarded as” cases recognize the harm individuals experience because of negative and often inaccurate stereotypes.²⁴⁸

But how would regarded-as reasoning apply in the dramatically different context of postsecondary admissions? Whereas race can make it harder for workers to get or keep a job, university affirmative action programs treat race as a plus, and applicants often identify themselves, thereby increasing the chances of self-serving behavior. Moreover, the kind of evidence central to employment cases seems inapplicable in the context of admissions, where officers often rely on the content of a written application.

However, as the official guidance issued by the Departments of Education and Justice suggests, admissions officers likely already rely on

²⁴⁸ See *id.* at 1289; see also Michele Goodwin, *Race As Proxy: An Introduction*, 53 **DEPAUL L. REV.** 931, 932 (2004).

regarded-as reasoning. Because the Court's recent affirmative-action decisions allow for race-conscious remedies only as a measure of last resort,²⁴⁹ admissions officers seem to fall back on proxies thought to identify minorities. Regarded-as reasoning allows admissions officers to comply with the Court's mandate.

By explicitly recognizing the way in which racial identification often operates, the Court can address the problem affirmative-action opponents raised in *Schuette*. Focusing on a person's perceived race—rather than on skin color or any other pseudo-biological category—would create a jurisprudence that better reflects the fluidity and context-dependence with which outsiders—and sometimes individuals themselves—perceive racial identity. Far from ignoring the dangers of racial classification, regarded-as case reasoning would take them head on.

The Regarded-As Standard Under the ADA, the ADAAA, and Title VII

In 1990, with the passage of the ADA, Congress seemed intent on including those perceived as disabled within the protections of the law.²⁵⁰ A

House Report stated:

In the employment context, if a person is disqualified on the basis of an actual or perceived physical or mental condition, and the

²⁴⁹ See, e.g., *Fisher*, 132 S. Ct. at 2419; *Parents Involved*, 551 U.S. at 789.

²⁵⁰ See, e.g., Stephen Befort, *Let's Try This Again: The ADA Amendments Act of 2008 Attempts to Reinvigorate The "Regarded As" Prong of the Statutory Definition of Disability*, 2010 UTAH L. REV. 993, 997-998; Chai R. Feldblum, *Definition of Disability under Federal Anti-discrimination Law: What Happened? Why? And What Can We Do About It?*, 21 BERKELEY J. EMP. & LAB L. 91, 94 (2000).

employer can articulate no legitimate job-related reason for the rejection, a perceived concern about employing persons with disabilities would be inferred and the plaintiff could qualify for coverage under the “regarded as” test.²⁵¹

Following the passage of the ADA, the EEOC’s Interpretive Guidance similarly covered those regarded as disabled:

An individual rejected from a job because of the ‘myths, fears and stereotypes’ associated with disabilities would be covered under this part of the definition of disability, [...] whether or not the individual’s actual physical or mental condition would be considered a disability under the first or second part of this definition.²⁵²

According to the Interpretive Guidance, an individual proceeding under this theory would have to show that an employer believed that a worker was disabled because of “‘myths, fears, or stereotypes.’”²⁵³ After the courts restricted relief for those perceived as disabled, the Americans with Disabilities Act Amendments Act (ADAAA) clarified the definition of disability.²⁵⁴ Under the ADAAA, a person meets the regarded-as prong “if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”²⁵⁵

²⁵¹ H.R. Rep. No. 101-485, pt. 3, at 30-31 (1990).

²⁵² 29 C.F.R. pt. 1630 app. § 1630.2(l).

²⁵³ *Id.*

²⁵⁴ *See, e.g.,* Befort, *supra* note 251 at 1016-1017.

²⁵⁵ 42 U.S.C.A. § 12102(3).

A handful of cases have developed a doctrinal framework for the ADAAA's regarded-as prong. In *Hilton v. Wright*, a former state prisoner suffering from Hepatitis C Virus brought suit with several other inmates allegedly denied antiviral treatments because of past alcoholism or drug abuse.²⁵⁶ Hilton argued that the Department of Correctional Services (DOCS) discriminated against him and others similarly situated because they were regarded as disabled.²⁵⁷

In addressing Hilton's claim, the Second Circuit elaborated on the standard for a regarded-as suit under the ADAAA.²⁵⁸ At least at the summary judgment stage, Hilton would have to bring forth evidence only that DOCS regarded him as having a physical or mental impairment, regardless of how severe they believed that impairment to be.²⁵⁹

Several courts have also fleshed out what might count as evidence that an employer regarded an individual as disabled. In *Gil v. Vortex, L.L.C.*, the court rejected defendant's motion to dismiss employee's disability-discrimination claim.²⁶⁰ The court found evidence that the employer regarded plaintiff as disabled when the employer required plaintiff to submit additional medical documentation, expressed concern

²⁵⁶ See 673 F.3d 120, 124-126 (2d Cir. 2012).

²⁵⁷ See *id.* at 129.

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ *Gil v. Vortex, Limited Liability Company*, 697 F. Supp. 2d 234, 244 (D. Mass. 2010).

about the plaintiff's disability when talking to colleagues, and required plaintiff to submit to tests not applicable to any other employee.²⁶¹ In addition to differential treatment, courts look at employer's comments as evidence that a worker was regarded as disabled.²⁶² Consider, for example, *Darcy v. New York*, in which plaintiff police officer brought a disability-discrimination claim based on his superiors' belief that he was an alcoholic.²⁶³ In rejecting defendant's motion for summary judgment, the court relied on evidence that an employer had called plaintiff an alcoholic, knew he associated with supposed alcoholics, and transferred him to a less desirable position five months later.²⁶⁴ Consistently, when deciding cases under the ADAAA, courts have not required proof that an individual actually had an impairment. In other words, courts do not have determine either how serious an employer believed a disability to be—or whether a worker suffered from a disability at all.

To a limited extent, the courts have imported the regarded-as standard into race-discrimination cases. The EEOC has consistently maintained that misperception should not be a defense to either race or

²⁶¹ See *id.* at 240-241.

²⁶² See *id.*

²⁶³ See *Darcy v. City of New York*, 2011 WL 841375, at *1 (E.D.N.Y. Mar. 8, 2011).

²⁶⁴ See *id.* at *3-5.

national origin discrimination.²⁶⁵ The EEOC Compliance Manual prohibits race discrimination, including:

discrimination against an individual based on a belief that the individual is a member of a particular racial group, regardless of how the individual identifies himself. Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.²⁶⁶

While some federal circuit courts treat misperception as a defense,²⁶⁷ others follow the EEOC in concluding that those regarded as minorities suffer real harm. Consider the Fifth Circuit's recent decision in *EEOC v. WC & M Enterprises*.²⁶⁸ Mohammed Rafiq, a practicing Muslim from India, found his workplace dramatically different in the aftermath of September 11, 2001.²⁶⁹ In addition to making comments on Rafiq's religion, his coworkers repeatedly called him "an Arab" and a "Taliban."²⁷⁰ Rafiq suffered because co-workers regarded him as Arab, treating religion as a proxy for national origin and ethnicity.

²⁶⁵ On the EEOC's position on the issue *see, e.g.*, EEOC Compl. Man. § 13-II(B) (2002); Employment Discrimination Based on Religion, Ethnicity, or Country of Origin, available at http://www.eeoc.gov/laws/types/fs-relig_ethnic.cfm (last visited Jun. 27, 2014).

²⁶⁶ EEOC Compl. Man. § 15-II (2006).

²⁶⁷ For a study of the rise and spread of the misperception defense, *see, e.g.*, D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 **U. MICH. L. REFORM** 87, 101-109 (2013).

²⁶⁸ 496 F.3d 393 (5th Cir. 2007).

²⁶⁹ *Id.* at 396-397.

²⁷⁰ *Id.*

Rafiq filed a charge of discrimination with the EEOC, which later brought a hostile work environment claim on Rafiq's behalf.²⁷¹ The district court had rejected Rafiq's national-origin discrimination claim, reasoning that no one had targeted Rafiq for being from India.²⁷² Relying on the EEOC's Guidance, the Fifth Circuit disagreed, suggesting that the hostility a worker faces is just as substantial in cases of misperception.²⁷³ As the Court explained: "[A] party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim's actual country of origin."²⁷⁴

In *Jones v. UPS Ground Freight*, the Eleventh Circuit similarly recognized the harm of racial misperception.²⁷⁵ Jones, who identified as African-American, began training for a road driver position.²⁷⁶ Jones' race-discrimination argument relied partly on statements made by his co-worker, Kenneth Terrell, during a week-long training session.²⁷⁷ At that time, Terrell told Jones: "I know how to train you Indians."²⁷⁸ When Jones responded that he was not Indian, Terrell replied: "I don't care what race

²⁷¹ *Id.* at 397.

²⁷² *See id.*

²⁷³ *See id.* at 401.

²⁷⁴ *Id.*

²⁷⁵ 683 F. 3d 1283 (11th Cir. 2012).

²⁷⁶ *Id.* at 1288.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

you are, I trained your kind before.”²⁷⁹ Terrell went on to call Jones an Indian several more times over the course of the conversation.²⁸⁰

In evaluating Jones’ hostile work environment claim, the Eleventh Circuit considered how much weight to attach to Terrell’s statements, particularly since he had misidentified Jones.²⁸¹ While recognizing that Jones was “neither Native American nor Indian,” the Court insisted that “a harasser’s use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment.”²⁸² Whatever stereotypes Terrell applied to Indians may well have affected Jones, regardless of how he categorized himself. “The fact that [a co-worker] ignorantly used the wrong derogatory ethnic remark toward the plaintiff,” the court reasoned, “is inconsequential.”²⁸³

The Ninth Circuit stated the rationale for rejecting a racial-misperception defense in *Amos v. City of Page Arizona*.²⁸⁴ There, Burton Amos got in a car accident, crossing the center line and colliding with another vehicle.²⁸⁵ Informed that Amos had exited his vehicle and likely suffered from serious injuries, the police conducted a brief search before

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *See id.* at 1299.

²⁸² *Id.*

²⁸³ *Id.* (*LaRocca v. Precision Motorcars, Inc.*, 45 F.Supp.2d 762, 770 (D.Neb.1999)).

²⁸⁴ *See Estate of Amos ex rel. Amos v. City of Page, Ariz.*, 257 F.3d 1086, 1094 (9th Cir.2001).

²⁸⁵ *See id.* at 1089-1090.

their flashlight batteries died.²⁸⁶ The police did not look for Amos again until more than a month later.²⁸⁷ Tourists would ultimately find Burton's remains one year later.²⁸⁸ Representatives from Burton's estate learned that law enforcement routinely waited to conduct searches nearby, since the area where Burton vanished bordered the Navajo Indian Reservation.²⁸⁹ Burton was white, but his perceived race seems to have dictated the officers' actions.²⁹⁰ Believing that Native Americans involved in car accidents often fled the scene, reached the reservation, and called in the next day, officers might have cut short the search for Burton based on a mistaken belief about his ethnicity.²⁹¹ Burton's estate filed suit under Section 1983, arguing that law enforcement violated the Equal Protection Clause by selectively withholding protective services based on his perceived ethnicity.²⁹²

The City argued that Amos's Estate had no standing to bring a claim because Amos was white—and did not belong to the class of persons that the City had stereotyped or mistreated.²⁹³ The lower court had adopted this reasoning in dismissing the Estate's equal-protection claim, reasoning that antidiscrimination protections help to rectify the effects of past

²⁸⁶ *See id.*

²⁸⁷ *See id.*

²⁸⁸ *See id.*

²⁸⁹ *See id.* at 1090.

²⁹⁰ *See id.*

²⁹¹ *See id.*

²⁹² *See id.*

²⁹³ *See id.* at 1093-1094.

subordination that Amos, a white man, likely never experienced.²⁹⁴ The Ninth Circuit reversed and remanded, relying on the harms Amos suffered because of his perceived identity.²⁹⁵ First, the court recognized that the consequences for Amos did not change because he was white, and the injury he suffered was no less real.²⁹⁶ Stereotyping, the court recognized, was just as malevolent when an actor chose the “wrong” victim.²⁹⁷

Taken together, *Amos*, *Jones*, and *WC & M Enterprises* reveal that regarded-as discrimination cuts across racial lines, affecting those who identify as minorities and those who do not. These cases show how racial proxies and stereotypes influence how individuals perceive, judge, and treat one another. These cases bolster the case for separating the stereotypes associated with race from skin color. Regardless of how a person categorizes herself, the judgments and generalizations associated with perceived race can do far-reaching harm.

But how can the courts translate regarded-as reasoning in the context of postsecondary admissions? Exploring admissions officers’ efforts to comply with the Supreme Court’s affirmative-action jurisprudence illuminates one potentially constructive answer to this question.

Race, Regarded-As Reasoning, and Affirmative Action

²⁹⁴ *Id.*

²⁹⁵ *See id.* at 1094.

²⁹⁶ *See id.*

²⁹⁷ *See id.*

Almost inevitably, the courts will soon address the question just under the surface of *Schuette*: whether the race-conscious remedies discussed in *Grutter v. Bollinger* and *Parents Involved v. Seattle* can ever pass constitutional muster in a world in which racial identity is socially constructed and ever-changing. How can the courts justify any antidisubordination measure designed to protect the members of a particular race when it is impossible to offer a principled definition of race itself?

Drawing on the ADAAA, courts should view affirmative action as justified and coherent when an individual is regarded as belonging to a particular race. As under the ADAAA, the question should not be whether that person actually has a particular racial background or even whether a decision maker views that racial background negatively. Instead, the analysis should turn on simple perception of race.

However, using regarded-as reasoning in the context of postsecondary admissions raises unique challenges. In the employment context, as Bertrand and Mullainathan have shown, perceived racial identity can count as a strike against a potential hire or worker.²⁹⁸ By contrast, in postsecondary education, many admission officers view minority status favorably. In studying admissions practices at seventy-five of the nation's most competitive universities, scholar Rachel Rubin found that most

²⁹⁸ See Bertrand and Mullainathan, *supra* note 238 at 1-3, 10.

admissions officers heavily weighed an applicant's "fit" with the university in question.²⁹⁹ When asked to define fit, officers attached the most importance to an applicant's membership in an under-represented minority.³⁰⁰ Rubin's conclusions reinforce the findings of earlier studies, explaining that members of under-represented minorities (along with legacy students and those with SAT scores higher than 1500) receive the greatest preference.³⁰¹

Moreover, in the university setting, because applicants often identify themselves by race, the odds of opportunistic behavior are higher.³⁰² In the workplace, employers cannot select workers by race or even ask about the identity of a potential hire.³⁰³ Because students have more control over the process of racial categorization, the risk of self-serving behavior is naturally higher.

²⁹⁹ See Rachel Rubin, *Who Gets In and Why? An Examination of Admissions into America's Most Selective Colleges and Universities*, 2 *INT. ED. RES.* 1, 1-2, 10 (2014).

³⁰⁰ *Id.*

³⁰¹ See T. J. Espenshade, C. Y. Chung, and J. L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 *SOC. SCI. Q.* 1422, 1422-1466 (2004); see also T. J. Espenshade and C. Y. Chung, *The Opportunity Costs of Admissions Preferences at Elite Universities*, 86 *SOC. SCI. Q.* 293, 293-305 (2005).

³⁰² As of 2011, the Common Application used by Harvard, Yale, and over 600 other universities and colleges have asked about race as part of a section on "Demographics." See, e.g., *Mixed Race Students Wonder How Many Boxes to Check*, *N. Y. TIMES*, Jun. 13, 2011, available at <http://www.nytimes.com/2011/06/14/us/14students.html> (last visited Jun. 26, 2014). The same year, the number of racial categories available to select increased dramatically, as the Department of Education ordered universities to comply with a federal edict to collect more information on race and ethnicity. See, e.g., Susan Saulny and Jacques Steinberg, *On College Forms, a Question of Race, or Races, Can Perplex*, *N. Y. TIMES*, Jun. 13, 2011, available at <http://www.nytimes.com/2011/06/14/us/14admissions.html?pagewanted=all> (last visited Jun. 17, 2014).

³⁰³ See, e.g., EEOC, *Questions about Race and Color Discrimination in Employment*, available at http://www.eeoc.gov/policy/docs/qanda_race_color.html (Jun. 15, 2014).

Finally, the evidentiary strategies used in ADAAA and race discrimination case seem to be a poor fit in the context of university admissions. In employment cases, courts rely on off-color comments, adverse employment actions, and comparator evidence to smoke out regarded-as discrimination.³⁰⁴ Given the confidentiality surrounding university admissions and the different ways in which applicants categorize themselves by race, this kind of evidence seems unlikely to surface.

However, the United States Departments of Education and Justice's Guidance on the Voluntary Use of Race in Postsecondary Admissions [*hereinafter*, The Guidance] suggests that universities have already adopted regarded-as reasoning.³⁰⁵ Under *Grutter*, *Parents Involved*, and their progeny, as the Guidance suggests, universities must first justify why diversity counts as a compelling state interest.³⁰⁶

Centrally, however, the Guidance addresses how to create a diverse student body without recourse to racial categorization. The Guidance

³⁰⁴ United States Department of Education and United States Department of Justice, Guidance on the Voluntary Use of Race in Postsecondary Admissions (2011), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html> (last visited Jun. 15, 2014). Following the decision of *Fisher*, the Departments of Education and Justice issued a letter concluding that the 2011 Guidance would remain in effect. *See, e.g.*, United States Department of Education and United States Department of Justice, Questions and Answers (2013), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-qa-201309.html> (last visited Jun. 12, 2014); United States Department of Education and United States Department of Justice, Joint Dear Colleague Letter, *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201309> (last visited Jun. 14, 2014).

³⁰⁵ United States Department of Education and United States Department of Justice, Guidance on the Voluntary Use of Race in Postsecondary Admissions, *supra* note 308.

³⁰⁶ *Id.*

encourages admissions officers to turn first to race-neutral alternatives to achieve obviously race-conscious outcomes. “In selecting among race-neutral approaches,” the Guidance explains, “you may take into account the racial impact of various choices.”³⁰⁷ The Guidance next explores how admissions officers identify might minority applicants without turning to racial categories. Rather than explicitly asking about race, as the Guidance states, universities may rely on proxies, including “socioeconomic status,” “the educational level attained by parents,” “first-generation college status,” “marked residential instability,” or “enrollment in a low-performing school or district.”³⁰⁸ While officially race-neutral, these criteria allow officers to identify applicants they regard as minorities. The Guidance treats these proxies as strategies that “would assist in drawing students from different racial backgrounds to the institution.”³⁰⁹

Most obviously, regarded-as reasoning allows universities invested in racial diversity to proceed in spite of the Court’s decisions in *Grutter*, *Parents Involved*, and *Fisher*. Most recently, in *Fisher*, Justice Kennedy’s majority opinion reminded universities that to satisfy strict scrutiny, “[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.”³¹⁰ Using

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Fisher*, 133 S. Ct. at 2414.

race-neutral proxies appears to allow admissions officers to achieve a desired result without resorting to racial categorization.

In defining race, the courts should look to how admissions officers identify students. By acknowledging and analyzing the way in which admissions officers deal with students' race, the Court can better capture the reality of racial identity, both as college applicants experience it and admissions officers perceive it. As Saperstein and Penner have shown, outsiders' perception of another's racial identity—and even an individual's understanding of herself—varies depending on the surrounding circumstances.³¹¹ And as Bertrand and Mullainathan indicate, the stereotypes and judgments surrounding race do damage regardless of a person's "true" identity.³¹²

Furthermore, if the Court relies on an evidence of a person's perceived race, the risk of opportunism might decrease, since there is anecdotal evidence that admissions officers use regarded-as reasoning to detect and resist self-serving behavior. Rather than taking an applicant's self-categorization at face value, admissions officers at Rice University "try to reconcile whatever boxes an applicant may have checked with the rest of the application."³¹³ Some admissions officers at Rice used a specific essay

³¹¹ See, e.g., Saperstein and Penner, *supra* note 235 at 19628-30; Saperstein and Penner, *supra* note 236 at e15812.

³¹² See, e.g., Bertrand and Mullainathan, *supra* note 238 at 1-3, 10.

³¹³ Saulny and Steinberg, *supra* note 303.

question about “unique cultural heritage or experiences” to filter out applicants who were insincere about a particular racial identity.³¹⁴ Another former admissions officer interviewed by the *Huffington Post* explained that her colleagues had used proxies when students refused to answer questions about race, believing that officers discriminated against Asian or Caucasian applicants.³¹⁵ In particular, she described how officers used a student’s name, parents’ name, or school of origin to determine racial identity.³¹⁶ As this anecdotal evidence suggests, courts focusing on an individual’s perceived identity might more effectively check the kind of self-serving behavior *Schuette* foregrounds.

Nonetheless, in the university setting, regarded-as reasoning represents a far from perfect solution. Critics of *Grutter* and its progeny have long insisted that the Court’s approach to diversity encourages universities to conceal their true objectives.³¹⁷ First, diversity jurisprudence encourages decision-makers to play down the remedial interest in

³¹⁴ *Id.*

³¹⁵ See Steffe Drucker and Josh Kalamotousakis, *College Applications Can Be Complicated for Mixed-Race Teens*, **HUFFINGTON POST**, Dec. 1, 2012, available at http://www.huffingtonpost.com/2012/12/01/mixed-race-teens-and-coll_n_2224256.html (last visited Jun. 20, 2014).

³¹⁶ *See id.*

³¹⁷ For complaints about the lack of candor produced by the Supreme Court’s affirmative-action decisions, see, e.g., Vikram Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases? Fisher v. University of Texas Gives the Supreme Court Another Chance to Say Yes*, 65 **VAN. L. REV. EN BANC** 77, 91 (2012) (“The troubling lack of intellectual forthrightness in the Court’s opinions [...] in some ways mirrors the ways “plus plans” and percentage schemes lack the candor of old-fashioned set-asides”); Colin S. Diver, *From Equality to Diversity: The Detour From Brown to Grutter*, 2004 **U. ILL. L. REV.** 691, 718 (“[T]he Court in *Grutter* and *Gratz* has adopted a rule that penalizes candor”).

addressing the effects of past race discrimination that likely motivates many admissions officers.³¹⁸ By prohibiting quotas and other quantitative approaches to affirmative action, the Court encourages officers to obscure how much race matters to admissions decisions.³¹⁹ By focusing on how admissions officers evaluate students' racial identity, the Court can acknowledge the social construction of race while recognizing the ways in which perceived race impacts individual outcomes. However, at least in the affirmative action context, regarded-as approaches to race seem to ratify admissions officers' efforts to achieve a race-specific outcome without admitting their true intentions. To the extent that a regarded-as approach represents an effort to comply with *Grutter* and its progeny, it may once again allow officers and courts to deny the extent to which racial categorization still drives admissions decisions.

Regarded-as approaches may also be over- or under-inclusive, given a university's genuine interest in diversity. First, by focusing on variables like socioeconomic class, such an approach may fail to capture the disadvantaged minority students that affirmative action programs would ideally assist.³²⁰ As importantly, by failing to address all self-serving

³¹⁸ See, e.g., Amar, *supra* note 319 at 93; Diver, *supra* note 319 at 718.

³¹⁹ See, e.g., Diver, *supra* note 319 at 718.

³²⁰ For example, critics of the Texas Top Ten Percent Law addressed in *Fisher*—one type of proxy program—point out that it is less effective than traditional affirmative action and may in fact increase admissions of Caucasian students. See, e.g., Marta Tienda et al., *Affirmative Action and the Texas Top Ten Percent Admission Law: Balancing Equity and*

behavior, regarded-as approaches may give an unfair advantage to students more successfully able to simulate a favored racial identity. From the standpoint of individual students, regarded-as approaches ignore how a student's sense of identity. Regardless of whether not it is constructed, racial identity can play a crucial role in how an individual sees herself and her place in the community.³²¹ By relying so heavily on what outsiders think, regarded-as approaches do not do justice to students' understandings of themselves.

Just the same, regarded-as reasoning provides the best path for courts faced with a Hobson's choice: categorizing individuals by race or rejecting all antidisubordination remedies that touch on racial differences. Recognizing the impact of perceived racial differences allows courts to rationalize affirmative action policies without assuming the validity of racial categories. Should courts ever have to adjudicate race, in the context of affirmative action or otherwise, an existing (albeit developing) legal framework exists to provide guidance.

Regarded-as reasoning may also work effectively to allow universities to address past subordination without running up against

Access to Higher Education, SOC. CONTEMPORAINES (forthcoming 2014), available at http://theop.princeton.edu/reports/wp/AffirmativeAction_TopTen.pdf (last visited Jun. 15, 2014).

³²¹ "If race is closely linked to communities, and communities are similarly tied to identities, then race and identity are themselves connected," writes Ian F. Haney Lopez. "Race matters because communities link our faces to our souls." Ian F. Haney Lopez, *The Social Construction of Race: Observations on Illusion, Fabrication, and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 57 (1994).

constitutional prohibitions on racial classifications. Recent work published by the *Harvard Journal of Law and Policy* studied the impact of a proxy program developed at the University of Colorado Boulder.³²² Prior to 2009, the University used socioeconomic class instead of race in admissions decisions.³²³ By 2010, the University had turned to a race-plus-class model.³²⁴ A 2009 study found that officers admitted 9% more underrepresented minorities under the race-blind policy.³²⁵ In evaluating the race-plus-class approach, a 2010 study concluded that it had resulted in a 13 percent increase in acceptance rates for the poorest students, a 17 percent increase for underrepresented minority students, and a 32 percent increase in the lowest-income, minority students.³²⁶ At least some well-tailored proxy programs may make a significant difference to minority enrollment.

In spite of its drawbacks, regarded-as reasoning offers a promising solution for the dilemma outlined by affirmative-action opponents in *Schuette* and *Fisher*. By defining racial identity according to others' perception, regarded-as reasoning reduces any threat of opportunism or self-serving behavior. It captures the fact that racial proxies and all the stereotypes they represent matter more than color or biological race. In this

³²² Matthew N. Gaertner and Melissa Hart, *Considering Class: College Access and Diversity*, 7 *J.L. & POL'Y REV.* 367, 387-390 (2013).

³²³ *Id.*

³²⁴ *See id.* at 390-395.

³²⁵ *Id.*

³²⁶ *Id.* at 396-399.

way, the challenge raised by anti-affirmative action advocates may create an unexpected new opportunity. From equal-protection to Title VII jurisprudence, commentators have long faulted the courts for adopting a biological understanding of race that is inaccurate and misleading. Forcing cause lawyers and the courts to say what race means might finally provide a way forward.

IV. Conclusion

It is tempting to view colorblind constitutionalism through the lens of contemporary politics. Opposition to affirmative action has become a signature position of the political Right, synonymous with faith in the free market, emphasis on the harms created by racial classifications, and concern about discrimination against whites. The history of opposition to affirmative action shows, however, that the politics of colorblindness have been contested and complex. The players and terms of the anti-affirmative action debate have changed considerably over time, and the form of “reactionary” colorblindness familiar to us from the dissents of Justices Thomas and Scalia developed only recently.

Viewed in historical context, the stakes of *Schuette* become clearer. More than ever before, a plurality on the Supreme Court has come to grapple with what race means. However, the Court’s growing awareness of the social construction of race has created new challenges for supporters of

an antistatist vision of the Constitution. Opponents of affirmative action have marshalled new arguments, borrowing from the claims long advanced by historians and CRT theorists. These activists argue that if race is artificial, race-conscious admissions programs are unfair, arbitrary, and easy to manipulate.

Nevertheless, *Schutte* may represent an unexpected opportunity. Those on opposing sides of the affirmative-action issue have come to an uneasy consensus that racial identities are fluid, contested, and socially determined. Perhaps for the first time, in using regarded-as reasoning, discrimination jurisprudence will come to grips with what race means in modern America.