# REMEDYING RACE-BASED DECISION-MAKING: RECLAIMING THE REMEDIAL FOCUS OF AFFIRMATIVE ACTION AFTER *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN*

*John V. Wintermute**

"Individuals who have been wronged by unlawful discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race."[1]

## I. INTRODUCTION

In the aftermath of *Fisher v. University of Texas at Austin*,[2] in which the Supreme Court "added a wrinkle" to a college or university's ability to craft a race-conscious admissions policy,[3] American schools have been left with a tentative legal underpinning for their affirmative action programs.[4] In light of the uncertainty created by *Fisher*, this Comment seeks to inject some perspective into the debate and to provide colleges and universities with another potential foundation upon which to pursue a race-conscious admissions policy. Specifically, this Comment argues: (1) that the Supreme Court's articulation of racial discrimination as "race-based decision-making" encompasses many forms of unequal treatment likely experienced by a Black college applicant during his or her educational career; and (2) that the Court's race-conscious remedy jurisprudence permits a school to account for the presence of the resultant discriminatory effects in its applicant pool.

President Lyndon B. Johnson, in a 1965 address at Howard

* J.D. Candidate, 2014, Seton Hall University School of Law; B.S., 2011, The College of New Jersey. I would like to thank Professor Rachel Godsil for her invaluable insight and guidance throughout the writing process.

[1] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

[2] 133 S. Ct. 2411 (2013).

[3] Joy Resmovits, Fisher v. University of Texas At Austin *Ruling Leaves Universities In Limbo*, HUFFPOST POLITICS (June 24, 2013), http://www.huffingtonpost.com/2013/06/24/fisher-v-university-of-texas-at-austin-ruling_n_3434687.html (quoting a statement by the NAACP Legal Defense Fund).

[4] *Id.*

University, delivered his stance on the moral imperative of affirmative action: "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."[5] This broad, societal view of race-consciousness, though justifiably informed by our country's egregious history of race relations, seems to advocate for something akin to designating "a creditor or debtor race"—the skeptical language employed by Associate Justice Antonin Scalia in his opposition to a minority set-aside program for government contracts.[6] The philosophical tension underlying these positions is readily apparent, and is manifest in the fierce public debate surrounding race-conscious remedies. Both statements, however, appear to presume that discrimination is a thing of the past, and thus misunderstand the proper scope of race-based remedial action in the twenty-first century. Although America's state-enforced systems of slavery, segregation, and Jim Crow have undoubtedly created extensive racial injustices that still persist today, it is *contemporary* racial discrimination that race-conscious remedies are best equipped to address.

Properly devised race-conscious policies, aimed at remedying the effects of identified discrimination, are far less ideological than Justice Scalia might suggest. Race-conscious policies, accurately understood, are practical mechanisms by which competent governmental entities can identify contemporary instances of unlawful discrimination, and undertake affirmative measures to ensure that the effects of such practices are not publicly subsidized and perpetuated.[7] Indeed, the Supreme Court has unambiguously allowed public entities, in appropriate circumstances, to identify effects of current racial discrimination and to undertake policies that will alleviate or account for them.[8] Rather than utilizing racial preference as an embarrassingly futile attempt to apologize for past

[5] President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965).

[6] *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

[7] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.").

[8] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.").

societal discrimination, constitutionally permissible race-conscious measures are carefully crafted to actually *remedy* identified discrimination.

In the higher education context, colleges and universities have a compelling interest in preventing racial discrimination from tainting their applicant pools by artificially depressing the standard measures of Black candidates for admission. In order to remedy these effects, admissions officers can and should conduct admissions procedures with an informed understanding of the ways in which racial discrimination often shapes the educational playing field, and utilize a holistic, race-conscious review of an applicant in order to admit candidates in accordance with this reality. In this way, schools are not "'mak[ing] up' for past racial discrimination";[9] rather, they are accounting for the effects of current discrimination in their pools of applicants.

Although the need for a race-conscious remedy remains strong, the need for a remedially-focused argument largely dissipated with the Court's decision in *Grutter v. Bollinger*.[10] In *Grutter*, the majority sanctioned the University of Michigan's holistic use of race, and found a compelling governmental interest in educational diversity.[11] The *Grutter* Court's focus on diversity was not new; *Regents of University of California v. Bakke* had already accepted the premise of the diversity interest back in 1978, while rejecting the University of California's other asserted interests, including "countering the effects of societal discrimination."[12] Over time, it apparently became clear to schools that the diversity interest was the easiest road to travel, enough so that the University of Michigan did not even assert a compelling interest aside from diversity.[13]

With its decision in *Fisher*, however, a case involving a constitutional challenge to the University of Texas's ("UT") race-conscious admissions policy, the Supreme Court has created uncertainty over the continued permissibility of affirmative action in pursuit of educational diversity.[14] And because UT chose not to assert

---

[9] *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

[10] 539 U.S. 306 (2003).

[11] *Id.* at 343.

[12] *Bakke*, 438 U.S. at 306–15.

[13] *Grutter*, 539 U.S. at 327–28.

[14] This Comment does not evaluate the merits of the diversity interest, nor does it analyze the Supreme Court's holding in the *Fisher* case. The background of *Fisher* is discussed below, *infra* Part IV, but is used only to provide a context in which to

an interest in remedying the effects of identified discrimination, one of the most firmly established justifications for the consideration of race,[15] the school's entire policy hinges on the diversity interest. Although UT is not alone in its neglect of the remedial underpinnings of race-conscious admissions, moving forward it is imperative that colleges and universities recognize the strength of the governmental interest in remedying the effects of identified discrimination. Remedying identified discrimination is not only a compelling interest that can support the government's modest use of race as an admission criterion, it also serves as a reminder that racial minorities often still face race-based, unequal treatment in education, employment, criminal justice, and numerous other areas.

In the last fifty years, rates of explicit racial prejudice have declined sharply.[16] As a general rule, it is no longer considered socially acceptable to harbor conscious animus toward Blacks and other minorities.[17] Despite the triumph of egalitarianism in public opinion polls, significant racial disparities still permeate nearly every aspect of Americans' economic, social, and political lives.[18] These overwhelming inequalities are undoubtedly linked to the United States' history of slavery and state-enforced racial hierarchies, but progress toward parity is equally hampered by contemporary forms of discrimination and racial bias. Inherent biases and racial anxieties repeatedly lead to imbalanced racial outcomes—Blacks are less likely to be given an interview based on their resume,[19] more likely to be sentenced to death in capital trials,[20] and more likely to receive

demonstrate the potential of the remedial interest.

[15] *See Grutter*, 539 U.S. 306, 328 ("[W]e have never held that the *only* governmental use of race that can survive strict scrutiny is remedying past discrimination.") (emphasis added).

[16] *See, e.g.*, *Race Relations*, GALLUP.COM, http://www.gallup.com/poll/1687/race-relations.aspx#1 (last visited Jan. 21, 2013) (comparing the approval rates of interracial marriage over time: 4% in 1958 and 86% in 2011).

[17] *See* BERNARD E. WHITLEY, JR. & MARY E. KITE, THE PSYCHOLOGY OF PREJUDICE AND DISCRIMINATION 372 (Jane Potter et al., eds., 2d ed. 2010) (showing that 92% of poll participants approve of prejudice against racists).

[18] *See generally*, *Lassiter Racial Disparity Statistics*, LAW.UKY.EDU, http://www.law.uky.edu/files/docs/misc/LassiterRacialDisparityStatistics.pdf (last visited Feb. 27, 2014).

[19] Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment On Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004).

[20] David C. Baldus & James W. L. Cole, STATISTICAL PROOF OF DISCRIMINATION (1980).

inadequate medical treatment for serious diseases.[21] Although the effects of implicit biases would be difficult to prove in a given situation, the consistency with which Black men and women receive different treatment suggests that those decisions are sometimes influenced by race. In other words, if they were White instead of Black, they likely would not have been turned down for an interview, sentenced to death, or given inadequate medical care.

In the educational context specifically, Black students in kindergarten through twelfth grade ("K-12") routinely face common forms of disparate treatment, perpetrated by teachers, guidance counselors, and other state actors.[22] Although this discrimination is not usually rooted in malice or a desire to cause harm, it is intentional, as defined by the Supreme Court—Black students are often treated quite differently as a durect result of their race.[23] In each situation where a teacher is motivated by race to give artificially positive feedback to the poorly written work of a Black student,[24] or fails to warn him or her about a difficult course of study,[25] perhaps out of a desire not to appear prejudiced, that student has suffered unconstitutional racial discrimination. The scientifically demonstrated prevalence of such "race-based decisionmaking"[26] provides a "strong basis in evidence"[27] of constitutional violations. The robust evidence of racial discrimination in K-12 schools, combined with its inevitable effects on the standard measures used by colleges in evaluating incoming candidates, makes necessary the modest consideration of race in university admissions. The understandable desire to account for these discriminatory effects, and to avoid reinforcing them, gives rise to a college or university's compelling interest in the narrowly-tailored use of race.[28]

---

[21] Janice A. Sabin et al., *Physician Implicit Attitudes and Stereotypes about Race and Quality of Medical Care*, 46 MED. CARE 678 (2008).

[22] *See, e.g.*, Jennifer Randall Crosby & Benoit Monin, *Failure to Warn: How Student Race Affects Warnings of Potential Academic Difficulty*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 663 (2007); Kent D. Harber, *Feedback to Minorities: Evidence of a Positive Bias*, 74 J. PERSONALITY & SOC. PSYCHOL. 622 (1998).

[23] *See* Ricci v. DeStefano, 557 U.S. 557, 580 (2009) (finding intentional discrimination based on action taken "solely because the [plaintiffs] were white").

[24] Harber, *supra* note 22, at 622.

[25] Crosby & Monin, *supra* note 22, at 663.

[26] *Ricci*, 557 U.S. at 579.

[27] *See id.* at 582–85.

[28] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989) (permitting affirmative measures by an entity seeking to avoid becoming a "passive participant in a system of racial exclusion").

Part II of this Comment addresses the necessary first step in justifying the use of a race-conscious remedy—a finding that intentional discrimination has occurred. Part II discusses the Supreme Court's present view of discriminatory intent, and demonstrates that any instance of "race-based decisionmaking" constitutes an instance of intentional discrimination. It uses *Ricci v. DeStefano*[29] to delineate the precise scope of the Supreme Court's current understanding of discriminatory intent and to explain that no malice or intent to harm is required for a constitutional violation. Part II then discusses the persisting evidentiary obstacles to a showing of discriminatory intent, but explains that many of these problems are inapplicable to race-conscious remedy doctrine. Lastly, Part II introduces various psychological studies that document some types of race-based decision-making that constitute intentional discrimination.

Part III of this Comment analyzes the text and the tenets of the Supreme Court's limits upon race-conscious governmental policies. Specifically, it discusses the Court's treatment of race-conscious admissions and examines the reasons behind the contemporary reliance on a diversity justification for such programs. More broadly, it explores the Court's imprecise guidelines for affirmative state action aimed at addressing the effects of discrimination. Part III then explains that the Court's jurisprudence in this area can best be understood as a desire to frame remedial justifications in a present context. That is, by requiring identified discrimination and a showing that race-conscious measures are necessary to alleviate or account for its effects, the Court has tried to ensure that state actors are not using racial distinctions to remedy ideological wrongs from the past, but only to account for legitimate racial differences and disadvantages caused as a result of unlawful discrimination. The end of Part III synthesizes the Supreme Court's limitations on race-conscious remedies into a practical definition and outlines the necessary steps in crafting a race-conscious policy that comports with the language and the spirit of the Court's Equal Protection jurisprudence.

Part IV of this Comment introduces the circumstances surrounding the *Fisher* controversy, highlights its importance for the future of race-conscious admissions, and notes its lack of focus on remedial justifications for UT's race-conscious admissions program.

[29] 557 U.S. 557 (2009).

Part V then presents a hypothetical argument within the factual context of *Fisher*, using the constitutional framework and the principles derived from Parts II and III; in so doing it demonstrates that all public colleges and universities have a compelling interest in remedying identified discrimination and its effects. Part VI concludes, and reiterates the need to develop an informed response to the unique, race-based barriers faced by minority students.

## II. INTENTIONAL DISCRIMINATION AS RACE-BASED DECISION-MAKING

As a prerequisite to any race-conscious remedy, the governmental entity enacting the measure must have a "strong basis in evidence" that statutory or constitutional violations have occurred,[30] and the Court's decision in *Washington v. Davis* made clear that discriminatory purpose—discriminatory intent—is the "touchstone" of Equal Protection analysis.[31] Although there are certain statutory contexts where discriminatory intent is not a mandatory component of a violation,[32] a person's Equal Protection rights are not violated without a showing that the wrongdoer acted with discriminatory purpose.[33] In order to implement a race-conscious remedy, therefore, it is first necessary to accurately define "discriminatory intent" and determine whether this intentional discrimination can indeed be shown in a given context. These inquiries require an examination of the Supreme Court's approach in cases involving both explicit racial classifications and actions alleged to have racial motivations.

Over the last thirty years, the Court's treatment of racial classifications and race-motivated actions has been anything but static.[34] One of the most recent twists in the road was *Ricci*, in which the Court severely limited the ability of employers to pursue compliance with Title VII's disparate-impact provisions.[35] *Ricci* was a

[30] Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 279 (1986).

[31] Washington v. Davis, 426 U.S. 229, 242 (1986).

[32] *See Ricci*, 557 U.S. at 577 ("Title VII prohibits both intentional discrimination . . . as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities . . . .").

[33] *Washington*, 426 U.S. at 245.

[34] *Compare* Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (noting that Congress must be afforded "appropriate deference" when it uses racial criteria to pursue equal protection goals) *and* Metro Broad., Inc. v. FCC, 497 U.S. 547, 564 (1990) (noting that "benign race-conscious measures" are only subjected to intermediate scrutiny), *with* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny.").

[35] *Ricci*, 557 U.S. at 585.

casualty of the Court's increasing hostility toward explicit racial decision-making and is generally viewed by proponents of race-consciousness as a discouraging development in labor law.[36] But in the course of its decision, the Court also held that the White plaintiffs had suffered disparate treatment[37]—a finding that necessarily includes a discriminatory intent component, and therefore carries implications far beyond the scope of Title VII and actually provides promise for civil rights plaintiffs generally. With its quick disposition of the disparate-treatment claim, the Court has solidified its position on the true meaning of discriminatory intent—by making clear that intentional discrimination occurs whenever a decision is motivated by race, regardless of the presence or absence of malice.[38]

The race-based decision-making formulation of discriminatory intent possesses significance for a variety of doctrinal areas, but its implications for race-conscious remedies provide the most promise. A wide scope of non-malicious, racially-driven behavior is largely indistinguishable from *Ricci*'s "race-based decisionmaking" standard, and thus amounts to intentional discrimination in any instance where it could be proven. Although these less conspicuous racial motivations may be difficult to identify in individual situations, race-conscious remedies need not identify specific instances of discrimination, so long as a "strong basis in evidence" can be established,[39] and therefore, proponents of race-conscious remedies stand to gain significantly from the Court's broadened view of intentional discrimination.

### *A.* Ricci *and the "Race-Based Decisionmaking" Standard*

In *Ricci*, the Supreme Court declared that race-based action, taken in an effort to avoid disparate-impact liability under Title VII, is itself "impermissible under Title VII unless the employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute."[40] The initial claim was filed by a group comprised primarily of White candidates for officer positions within the fire department

[36] *See, e.g.*, Michael Subit, *A Plaintiffs' Employment Lawyer's Perspective on* Ricci v. DeStefano, 25 ABA J. LAB. & EMP. L. 199 (2010).

[37] *Ricci*, 557 U.S. at 579.

[38] *Id.* at 579–80.

[39] Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277 (1986).

[40] *Ricci*, 557 U.S. at 563.

of New Haven, Connecticut (the "City").[41] The suit alleged that the City had violated the disparate-treatment section of Title VII when it threw out the results of a job-related examination, which would have provided the basis for certain promotions, but which produced results that were heavily skewed along racial lines.[42] Faced with the threat of a disparate-impact Title VII lawsuit if it certified the results and the threat of a disparate-treatment lawsuit if it refused, the City eventually sided with the opponents of the test and threw out the results.[43]

The Court began its analysis with the premise that the "City's actions would violate the disparate-treatment prohibition of Title VII absent some valid defense."[44] Writing for the majority, Justice Kennedy proceeded to evaluate the City's affirmative defense of avoiding disparate-impact liability under the newly proscribed "strong-basis-in-evidence" standard.[45] Finding that the City had produced legally insufficient evidence of potential disparate-impact liability, the Court held that the standard was not met, and therefore that the City had no valid defense for the allegations of disparate-treatment.[46] The Court remanded for an entry of summary judgment for the plaintiffs on their Title VII claim, avoiding the need to discuss any underlying constitutional issues raised by the case.[47]

When the Court issued *Ricci* in 2009, it was technically a pro-employee Title VII ruling, but it was met with criticism and pessimism from plaintiffs' employment attorneys and pro-Title VII commentators.[48] Much of the critical analysis rightfully focused upon the implications for disparate-impact litigation and for the ability of employers to take race-conscious measures in pursuit of racial parity.[49] A number of commentators, however, have focused their attention upon the possible repercussions of *Ricci* in the area of disparate-

[41] *Id.* at 562–63.

[42] *Id.* at 562.

[43] *Id.*

[44] *Id.* at 579.

[45] *Id.* at 580. The "strong basis in evidence" standard was newly proscribed only in this specific context—it was imported from constitutional race-conscious remedy analysis, to which it had applied for years. *Id.*

[46] *Ricci*, 557 U.S. at 592.

[47] *Id.* at 593.

[48] *See, e.g.*, Subit, *supra* note 36, at 211 ("*Ricci* is the epitome of a pyrrhic victory for employees.").

[49] *See, e.g.*, Subit, *supra* note 36.

*treatment* litigation.[50] In determining that the *Ricci* plaintiffs had suffered disparate-treatment as a matter of law, the Court embraced a definition of discriminatory intent that might actually *benefit* those representing disadvantaged racial classes and other minority groups.

Scholars have raised the latter observation because of the swift and certain premise with which the *Ricci* Court began its analysis: that the City's act of throwing out the test results violated the disparate-treatment prohibition of Title VII—as a matter of law—absent a valid defense.[51] The premise is critical because of what a disparate-treatment claim must include—a finding that the defendant had a discriminatory intent or motive for taking the job-related action.[52] The majority found conclusively that the element of discriminatory intent was satisfied by the City's "express, race-based decisionmaking."[53] More importantly, it found irrelevant the ostensibly "well intentioned or benevolent" aim of the City—what mattered was that the decision was made "solely because the higher scoring candidates were white."[54] In other words, once it was determined that the decision was made "because of race," the inquiry was over, and the City had committed intentional discrimination.[55]

Although *Ricci* is a Title VII case, and the Supreme Court avoided addressing any constitutional issues in the decision,[56] comparisons between equal protection jurisprudence and *Ricci*'s approach to Title VII are inescapable.[57] Indeed, the majority derived its strong-basis-in-evidence standard from *Richmond v. J.A. Croson Co.*,[58] an Equal Protection Clause case involving the remedying of past

[50] *See, e.g.*, Michael J. Zimmer, Ricci*'s "Color-Blind" Standard in a Race Conscious Society: A Case of Unintended Consequences?*, 2010 B.Y.U. L. REV. 1257; Kerri Lynn Stone, Ricci *Glitch? The Unexpected Appearance of Transferred Intent in Title VII*, 55 LOY. L. REV. 751 (2009).

[51] *Ricci*, 557 U.S. at 579.

[52] *Id.* at 577 (citing Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986 (1988)).

[53] *See id.* at 579–80.

[54] *Id.* at 580. This phrase might seem a little odd, given the complex and lengthy decision-making process leading to the action at issue. After all, is it really "solely because the higher scoring candidates were white," or does it have more to do with the race of the *lower* scoring candidates? A more helpful way of viewing this statement, especially within the context of the argument to follow, might be: "but for" the employees' race, they would not have suffered the adverse job action.

[55] *Id.*

[56] *Id.* at 593.

[57] *Ricci*, 557 U.S. at 582 ("Our cases discussing constitutional principles can provide helpful guidance in this statutory context.").

[58] 488 U.S. 469 (1989).

discrimination through race-conscious measures.[59] Further, the requirement of discriminatory intent appears in both the statutory and constitutional contexts, and *Ricci*'s definition of intentional discrimination is consistent with the Court's approach in the constitutional arena. *Ricci*, therefore, carries implications for doctrinal areas outside of Title VII, and provides a broadly applicable clarification of the Court's outlook on discriminatory intent.

### *B. Constitutional Implications: "Intent to Harm" vs. "Race-Based Decisionmaking"*

In 1979, the Supreme Court faced a gender discrimination challenge to a statutory hiring preference for veterans.[60] The resulting decision, *Personnel Administrator of Massachusetts v. Feeney*, rejected the plaintiffs' contention that the policy intentionally discriminated against women,[61] and has been viewed as defining intentional discrimination as something approaching malice, or "intent to harm."[62] Commentators have observed a quasi-bifurcation of discriminatory intent doctrine by the Court in recent years, noting a stark contrast in approach between discrimination claims that involve an explicit racial classification and those that do not.[63] In reality, the vastly different treatment of the two types of challenged actions stems from procedural issues, rather than divergent definitions of what discriminatory intent actually means. For this reason, the Court's view of the substantive component of discriminatory intent is far less restrictive than many scholars believe. The illusory nature of the "intent to harm" standard is plainly demonstrated by the disposition in *Ricci*. *Ricci*'s expressed paradigm of "race-based decisionmaking" is more consistent with the Court's recent jurisprudence and should be considered the prevailing benchmark against which claims of intentional discrimination must be measured.

#### 1. *Personnel Administrator of Massachusetts v. Feeney*

*Feeney* involved a challenge to a Massachusetts civil service hiring

[59] *See Ricci*, 557 U.S. at 582.

[60] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 259 (1979).

[61] *Id.* at 280.

[62] *See, e.g.*, Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1833–37 (2012).

[63] *Id.* at 1831–33.

policy that granted almost absolute preference to veterans.[64] The Court confronted the question of whether the hiring preference discriminated against women, because more than 98 percent of veterans at that time were men.[65] Arguing that the gender consequences of the law could not have been truly "unintended," the plaintiffs asserted that the policy intentionally discriminated on the basis of gender, in violation of the Equal Protection Clause.[66] The majority opinion, written by Justice Stewart, found that the plaintiff had failed to show that the policy had the purpose of discriminating against women.[67]

As understood by Justice Stewart, discriminatory intent involves more than a mere volitional act, or an act with knowledge of the consequences.[68] Discriminatory intent requires that the decision-maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[69] Some commentators have understood this standard, logically enough, to require something akin to malice—that an actor must seek to harm a protected class through its actions.[70]

The "intent to harm" standard, coupled with the increasing difficulty of proving actual intent through contextual evidence, served to eliminate many potential equal protection claims, and discouraged proponents of strong civil rights enforcement.[71] Although *Feeney* clearly signifies a purpose-driven analysis for intentional discrimination claims, it has become subsequently and equally clear that a "purpose" need not be malicious in nature. *Feeney*, often understood as establishing an "intent to harm" standard, simply established the requirement that the harm suffered must result from a decision with a racial or gendered purpose. This reading of *Feeney* is more consistent with the Court's subsequent treatment of race-based action, and is made unmistakable by the result in *Ricci*.

---

[64] *Feeney*, 442 U.S. at 259.
[65] *Id.* at 270.
[66] *Id.* at 278.
[67] *Id.* at 281.
[68] *Id.* at 279 (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977)).
[69] *Id.*
[70] Haney-Lopez, *supra* note 62, at 1833–37.
[71] *Id.*

2. "Race-Based Decisionmaking"

As evident in *Ricci*, the proper standard for evaluating claims of intentional discrimination is "race-based decisionmaking."[72] Intentional discrimination occurs whenever someone is treated "'less favorably than others because of' a protected trait."[73] The only question to be answered in determining if a particular action was racially discriminatory, therefore, is whether the decision was made because of race.[74] Although this malice-irrelevant standard of intent seems inconsistent with certain language in *Feeney*, which suggests that a challenged action must be taken "at least in part 'because of' . . . its adverse effects upon an identifiable group,"[75] *Ricci* simply clarifies that *Feeney*'s distinction lies between actions taken "because of" and "in spite of" a protected trait and that a desire to cause harm is not truly a necessary component of intentional discrimination.[76]

At an instinctive level, it does not seem possible that the Court found an implied "intent to harm" within the context of *Ricci*. Whether the City's motivations were based upon a desire to avoid disparate-impact litigation, or out of a more egalitarian desire to achieve racial parity within the fire department, the Court found no evidence of malice toward the White firefighters.[77] It cannot be reasonably said that the City discarded the test results out of a desire to cause harm to White firefighters—although the action was taken "because of" their race, it was also surely taken "in spite of" the harm caused to them.[78] As made clear by the Court, however, "well intentioned or benign" underpinnings will not save a racially-driven action—even the most benevolent and non-malicious decisions will constitute intentional discrimination, so long as they were motivated by race.[79]

This reading of *Ricci* is also consistent with a 2003 gender discrimination case, *Bray v. Alexandria Women's Health Clinic*.[80] In *Bray*, the Supreme Court rejected a plaintiff's claim that anti-abortion

[72] Ricci v. DeStefano, 557 U.S. 557, 579 (2009).

[73] *Id.* at 577 (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 985–86 (1988).

[74] *Id.* at 579–80.

[75] Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

[76] *Ricci*, 557 U.S. at 579–80.

[77] *See id.* at 579 (finding that the City's act involved discriminatory intent regardless of how "well intentioned or benevolent it might have seemed").

[78] *See id.*

[79] *Id.*

[80] Bray v. Alexandria Women's Health Clinic, 506 U.S. 263 (2003).

protesting constituted a conspiracy to intentionally discriminate against women as a class.[81] Writing for the majority, Justice Scalia cited a lack of evidence that the protesters' demonstrations were motivated by any "purpose directed specifically at women."[82] Before reaching this conclusion, however, Justice Scalia expressed the scope of "animus" necessary for a finding of intentional discrimination:

> We do not think that the "animus" requirement can be met only by maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women. It does demand, however, at least a purpose that focuses upon women *by reason of their sex*-for example (to use an illustration of assertedly benign discrimination), the purpose of "saving" women *because they are women* from a combative, aggressive profession such as the practice of law.[83]

Justice Scalia's hypothetical scenario presents exactly the same type of action as *Ricci*—in either case, plaintiffs would have a claim because they were treated differently *simply because of their race or sex.* Such class-based action is "objectively invidious," and therefore amounts to intentional discrimination.[84]

Further, this formulation of intent makes plain that race or gender discrimination is suffered even by individuals whom a race-based action is meant to "benefit." In Justice Scalia's scenario, women are the victims of gender discrimination even where they are supposedly "helped" by a particular decision, and even where a decision-maker may be entirely unaware that the distinction actually harms women.[85] In the racial discrimination context, this proposition is expressed through the Court's hostility toward any use of race, for any purpose.[86] In *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, Justice Thomas's concurrence reminded that "race-based governmental decisionmaking is categorically prohibited" unless it fits within the narrow constraints of strict scrutiny.[87] In doing so, he

---

[81] *Id.* at 268–74.

[82] *Id.* at 270.

[83] *Id.* at 270.

[84] *Id.*

[85] *See id.*

[86] *See, e.g.*, Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007).

[87] *Id.* at 752 (Thomas, J., concurring) (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).

noted that racial decision-making "can harm [even] favored races."[88]

*C.* Ricci*'s Significance for Race-Conscious Remedy Doctrine*

Intentional discrimination can best be understood as including both procedural and substantive components. Procedurally, the Court has placed significant evidentiary burdens on plaintiffs seeking to prove discriminatory intent—both on the amount and the type of evidence required for a finding of intent.[89] In this area, *Ricci* has little significance—few plaintiffs enjoy the luxury of a defendant that proclaims a racial purpose for its actions (except those, of course, challenging race-conscious remedies). Conversely, *Ricci* sheds important light on the substantive definition of intent; it is the Court's treatment of this element that establishes solid constitutional ground for race-conscious remedies. A race-conscious remedy must simply be supported by a "strong basis in evidence that remedial action was necessary,"[90] and need not include proof that any specific decision was the product of race-based decision-making. In other words, the usual procedural hurdles in proving discriminatory intent are largely irrelevant—and it is for this reason that race-conscious remedy doctrine derives the greatest benefits from an expanded formulation of the substantive aspect of intent.

The difference between procedural and substantive proofs of intent is well-demonstrated by *McCleskey v. Kemp*.[91] In *McCleskey*, the Court rejected a capitally-sentenced Black convict's claim that his trial was contaminated by racial considerations, and therefore unconstitutional under the Fourteenth and Eighth Amendments.[92] His claim rested principally upon a comprehensive analysis of racial disparities in death-sentencing at capital trials—called the Baldus study—which he argued gave rise to an inference that unlawful discrimination had impermissibly tainted his trial.[93] The Court

[88] *Id.* (Thomas, J., concurring) (quoting *Grutter*, 539 U.S. at 353).

[89] *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 294–97 (1987) (holding that statistical evidence of discrimination in capital sentencing generally did not give rise to an inference of discrimination in the plaintiff's case); City of Memphis v. Greene, 451 U.S. 100, 166 (1981) (rejecting as irrelevant historical discrimination used to assert a racial motivation for the challenged action); Washington v. Davis, 426 U.S. 229 (1976) (rejecting the relevancy of disparate impact and announcing discriminatory purpose as the touchstone of equal protection analysis).

[90] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

[91] 481 U.S. 279.

[92] *Id.* at 299, 313.

[93] *Id.* at 293.

rejected his claim, noting that statistical disparities could only provide proof of discrimination in limited contexts.[94] Importantly, however, the deficiency in McCleskey's allegation was not substantive, but procedural, in nature. The proffered study could not provide evidence of illicit racial considerations *in McCleskey's case itself*.[95] Throughout its analysis, the Court made clear that his trial would have been constitutionally deficient if racial considerations had actually played a role.[96] In doing so, the Court provided a contrast between substantive and procedural considerations. Though the Baldus study alone would be evidentially insufficient to prove a constitutional violation in any given case, including McCleskey's, the Court never actually rejected the substance of the alleged discrimination.[97] That is, unconstitutional racial considerations had likely played a role in many of the cases involved in the study, but because of the impossibility of isolating these incidents, any equal protection claim based solely on the Baldus study would be unsustainable.

*McCleskey* highlights the difficulty of proving intent in a specific case, and this evidentiary requirement is no less stringent after cases such as *Ricci*. Because *Ricci* involved an admission of racial motivations, the substantive component of discriminatory intent was the only portion at issue. This holds true for any challenge to an explicit racial classification, including any race-conscious remedy cases. For this reason, *Ricci* will do little to lighten the plaintiff's burden in bringing a direct claim of intentional racial discrimination based on action not facially racial or admittedly race-driven.

Though race-conscious remedies do entail their own procedural and evidentiary obstacles—which will be discussed at length—they do not require that the remedy be linked to a specific discriminatory action. With this different standard of proof, it becomes possible to demonstrate certain *types* of decisions that are unquestionably racial in nature—that have no other explanation besides race. Race-based decision-making can be identified in a variety of contexts, and this racially-driven treatment can serve as a starting point for a compelling interest based on remedying that discrimination. In the educational sphere, at least two examples of race-based decision-making demand

---

[94] *Id.*

[95] *Id.* at 297.

[96] *See id.* at 292–93 (requiring McCleskey to show evidence sufficient to "support an inference that racial considerations played a part in his sentence").

[97] *See McCleskey*, 481 U.S. at 292–99.

attention and warrant the application of a race-conscious remedy. These specific and identifiable types of constitutional violations are "failure to warn"[98] and "positive feedback bias."[99]

*D. Race-Based Decision-Making in the Educational Sphere*

The Court's expression of intentional discrimination in *Ricci* and *Bray* holds importance partially due to the contemporary understanding of the ways in which race commonly becomes the determinative factor in individual decision-making. Studies have shown that the treatment of Blacks and Whites often differs significantly in many areas of society, such as criminal justice,[100] medical care,[101] employment,[102] and education.[103] For many Black men and women, their race becomes the catalyzing factor in a decision not based in malice, but which causes harm that is no less real.[104] In the educational context, there is ample research that demonstrates the prevalence of race-based decision-making, but two studies provide the most easily cognizable instances of such racially-motivated disparate treatment—the "failure to warn" and "positive feedback bias" studies. Each of these reports presents a form of race-based decision-making within the Court's understanding of the term, and discusses the dangers of decisions that are so clearly precipitated by race.

1. "Failure to Warn"

In the "failure to warn" study, researchers presented nearly 200 academic advisors with a scenario in which they were asked to counsel a student who had proposed an exceedingly difficult course of study.[105] As predicted, the counselors were far less likely to give appropriate warnings about the plan's difficulty to Black students than to White students.[106] The significant racial disparities in the advice received means that, for at least some Black students encountering this discrimination in the real world, their race likely

[98] Crosby & Monin, *supra* note 22.
[99] Harber, *supra* note 22.
[100] *See, e.g.*, Baldus & Cole, *supra* note 20.
[101] *See, e.g.*, Sabin et al., *supra* note 21.
[102] *See, e.g.*, Bertrand & Mullainathan, *supra* note 19.
[103] *See, e.g.*, Harber, *supra* note 22; Crosby & Monin, *supra* note 22.
[104] *See, e.g.*, Harber, *supra* note 22 (suggesting that false-positive feedback given to Black students can have serious repercussions on their learning).
[105] Crosby & Monin, *supra* note 22, at 665.
[106] *Id.* at 669.

determined whether or not they were adequately prepared for, or warned against, a course of study that was likely too difficult for them. The authors of the study determined that the disparate treatment likely arose out of a desire not to appear prejudiced; warning against the course of study might signal lower expectations for Black students, and as a result, the advisors held back their honest opinion of the academic plan.[107] The study ruled out the possibility that the advisors were deliberately "setting Black students up for failure"[108]—a motive which would be the product of actual racial animus—but the lack of an invidious purpose does not remove failure-to-warn from the realm of intentional discrimination. A decision motivated by a desire to avoid appearing prejudiced is quintessentially race-based, and this sort of race-based decision-making results in the intentional discrimination of every Black student who obtains poorer advice than he or she would have otherwise received.

2. "Positive Feedback Bias"

In an earlier study, researchers recognized the existence of racially skewed feedback on poorly written student essays.[109] This form of identified racial discrimination is manifested through the positive feedback bias—a phenomenon where White teachers are less likely be critical of Black or Hispanic students' work—thus inhibiting those students' educational advancement.[110] A recent study outlines the dangers of such racial discrimination:

> Although a "positive bias" may sound benign, it could pose serious liabilities. Minority students who chronically receive positively biased feedback may be misled about where, and how ardently, to exert their efforts. These students could also be deprived of the academic challenge that promotes advancement [citation omitted]. Unduly positive feedback demoralizes all students, causing them to regard praise as a consolation for deficient ability. Positively biased feedback can also erode minority learners' trust in legitimate praise, causing them to wonder whether it reflects their personal achievements or their racial backgrounds. For all these reasons, the positive bias may undermine minority

[107] *Id.*
[108] *Id.*
[109] Harber, *supra* note 22.
[110] *Id.*

learners.[111]

The study sampled the behavior of 113 public school teachers, aggregated the rates of positive and negative comments along racial lines, and found that participants were significantly more likely to provide positive feedback to Black students, and less likely to give negative feedback.[112]

Like the failure-to-warn study, positive feedback bias can only be explained along racial lines, and thus it demonstrates that teachers often treat Black and White students differently, solely because of their race.[113] Unlike the failure-to-warn study, however, positive feedback bias is potentially rooted in actual lowered expectations of Black students.[114] Whether the unequal treatment is caused by lowered expectations, or out of a similar desire to avoid appearing prejudiced, the disparities result from race-based decision-making. For the Black students that suffer from the effects of positive feedback bias, their treatment is determined exclusively by their race, and this intentional discrimination can have serious ramifications for their ability to learn and grow as writers.

3. Applying the *Ricci* Standard

Positive feedback bias and failure-to-warn are simply two examples of the ways in which entrenched racial bias and racial anxiety can make the race of a student, or anyone else, outcome-determinative. Although a particular decision-maker is not likely to be acting out of a desire to harm Black students, the resultant disparate treatment is the product of race-based decision-making, and therefore constitutes intentional discrimination.[115] The reasons underlying the differential treatment are irrelevant, as made clear by *Ricci*.[116] By letting the race of a student affect their treatment of that student, teachers and counselors have violated the rights of at least some Black students.

Indeed, the facts of *Ricci* are highly analogous to those situations involving failure-to-warn or positive feedback bias. In each instance, the discriminating actor departs from the normal course of action,

[111] *Id.* (citations omitted).
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Ricci v. DeStefano, 557 U.S. 557, 579–80 (2009).
[116] *Id.*

simply due to the race of the individual toward whom he or she is acting. None of the actions are motivated by a desire to harm the victims of the discrimination, although in each instance, harm does follow from the differential treatment.[117] In *Ricci*, it can hardly be said that the City had any intention to cause harm to the White firefighters—indeed, the Court explicitly noted that benign or benevolent motives were irrelevant.[118] Like the White firefighters in *Ricci*, the harm caused to Black students as the result of failure-to-warn and positive feedback bias is not intentional—it is simply the inevitable by-product of race-based decision-making. Comparable race-motivated action can be identified in a number of contexts—educational or otherwise—and consistent racial disparities make apparent the reality that, for a substantial number of Black men and women, their race determines the way in which they are treated.[119]

## III. THE CONSTITUTIONAL BOUNDS OF RACE-CONSCIOUS POLICIES

### *A. Level of Scrutiny for Race-Conscious Policies*

In her plurality opinion in *Adarand Constructors, Inc. v. Pena*, Justice O'Connor outlined the difficulty of reaching a proper level of scrutiny for race-based governmental action designed to benefit historically disadvantaged groups.[120] *Bakke* was the first case to address the argument that strict scrutiny should only apply to classifications that disadvantage discreet and insular minorities, and it rejected this contention, concluding that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the

[117] The nature of the resulting harm matters only for determining the scope of the redressable injury, and not for determining whether there was intentional discrimination in the first place.

[118] *Ricci*, 557 U.S. at 579–80.

[119] It is worth noting at this point, as mentioned above, that the Court's substantive definition of discriminatory intent makes clear that there are numerous situations where the prevalence of race-based decision-making leads to constitutional violations. Although the *McCleskey* Court specified that the Baldus study could not provide evidence of a constitutional violation in McCleskey's individual case, for instance, the preceding analysis raises the point that the study does, in fact, demonstrate the potential presence of widespread constitutional violations of Black defendants in the Georgia criminal justice system. Even if the proper answer to these violations is not a race-conscious remedy, the existence of equal protection violations in such a significant number of criminal trials should raise serious concerns about racial justice in our current criminal system, and should catalyze a discussion on the possible remedies to the problem.

[120] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 218 (1995).

most exacting judicial examination."[121] *Bakke*, however, did not produce an opinion for the Court, and the level of scrutiny applied by Justice Powell did not constitute binding precedent.[122] In *Wygant v. Jackson Board of Education*, a case considering race-based considerations in teacher lay-off plans, the Court again applied strict scrutiny.[123] For a second time, however, the Court was only able to produce a plurality opinion.[124] It was not until *City of Richmond v. J.A. Croson Co.* that "the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments."[125]

In *Adarand* itself, the Court determined that this principle should be broadened so that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[126] Under strict scrutiny, racial classifications must be supported by a compelling governmental interest, and must be narrowly tailored to achieve that interest.[127] As explained by Justice O'Connor, however, strict scrutiny does not speak to the merits of a particular law, but rather is used "to differentiate between permissible and impermissible governmental use of race."[128] Indeed, *Adarand* makes clear that the fundamental purpose of strict scrutiny is to take relevant differences into account.[129]

### *B. Race-Conscious Admissions and the Emphasis on Diversity*

#### 1. *Regents of the University of California v. Bakke*

In *Bakke*, a White male brought suit against the University of California at Davis ("UC") after being twice rejected for admission to UC's medical school.[130] Bakke challenged the use of a special admissions program at the school, which reserved 16 out of 100

[121] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978).
[122] *Id.* at 269.
[123] 476 U.S. 267, 273–74 (1986).
[124] *Id.* at 269.
[125] *Adarand*, 515 U.S. at 222 (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)).
[126] *Id.* at 227.
[127] *Id.*
[128] *Id.* at 228.
[129] *Id.*
[130] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 276–77 (1978).

available seats for "disadvantaged" applicants.[131] The special admissions program was administered by an entirely separate committee, which narrowed the pool of disadvantaged applicants and submitted recommendations to the general admissions committee.[132] The general admissions committee "could reject recommended special candidates for . . . specific deficiencies" but special candidates continued to be recommended until the proscribed number of applicants were admitted.[133] Over the course of four years, sixty-three minority students gained admissions through the special program, and although many disadvantaged Whites applied, none were admitted through this program.[134] Further, there was evidence that in at least one year, only members of designated racial groups were even *considered* for special admission.[135]

In over 150 pages worth of opinions, the Supreme Court reached only two true holdings: (1) that the admissions program was unlawful and in violation of the Equal Protection Clause; and (2) that not all considerations of race in university admissions would be unconstitutional.[136] As noted above, *Bakke* was unable to produce an opinion for the Court,[137] but in announcing the judgment, Justice Powell provided some guidance for courts moving forward. In turn, Justice Powell considered the four proffered justifications for the school's admissions program:

> (i) reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.[138]

Justice Powell quickly dispensed with arguments (i) and (iii), as well as the school's argument that it possessed authority to counter the effects of societal discrimination.[139] Yet he found that the fourth goal asserted by the school, the attainment of a diverse student body,

---

[131] *Id.* at 274–75.
[132] *Id.* at 275.
[133] *Id.*
[134] *Id.* at 275–76.
[135] *Id.* at 276.
[136] *Bakke*, 438 U.S. at 271–72.
[137] *Id.* at 272.
[138] *Id.* at 306.
[139] *Id.* at 310.

was "clearly . . . a constitutionally permissible goal for an institution of higher education."[140] The diversity interest, as laid out by Justice Powell, is rooted in the academic freedom concepts embodied in the First Amendment.[141] After finding the school's diversity argument compelling, Justice Powell nonetheless concluded that the special program's use of race to set aside a specified percentage of seats in the incoming class was not "necessary to promote a substantial state interest."[142]

The language in the opinion, however, clearly expressed the possibility that a "properly devised admissions program involving the competitive consideration of race and ethnic origin" could legitimately address the school's compelling interest in diversity.[143] Indeed, Justice Powell devoted a significant passage to exploring the more holistic admissions methods of Harvard College, where "race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet does not insulate the individual from comparison with all other candidates for the available seats."[144] In this way, the admissions policy would be able to treat each applicant as an individual, rather than simply a member of a particular racial group.[145]

2. *Grutter v. Bollinger*

*Grutter* involved a challenge to the holistic, race-conscious admissions policy at the University of Michigan Law School (the "Law School").[146] Barbara Grutter, a White Michigan resident, applied to the Law School with a 3.8 GPA and a 161 LSAT score and was placed on the waiting list but ultimately denied admission to the Law School.[147] Grutter alleged that her Fourteenth Amendment rights were violated because race was used by the Law School as a "predominant" factor, effectively giving minority students a significantly greater chance of admission.[148]

During a bench trial below, the Director of Admissions for the Law School testified that "he did not direct his staff to admit a

---

[140] *Id.* at 311–12.

[141] *Id.* at 312 ("The freedom of a university to make its own judgments as to education includes the selection of its student body.").

[142] *Bakke*, 438 U.S. at 320.

[143] *Id.*

[144] *Id.* at 316–17.

[145] *Id.* at 318.

[146] *Grutter*, 539 U.S. at 311–15.

[147] *Id.* at 316.

[148] *Id.* at 317.

particular percentage or number of minority students, but rather to consider the applicant's race along with all other factors."[149] The goal, according to the Director, was to ensure the admission of "a critical mass of underrepresented minority students . . . so as to realize the educational benefits of a diverse student body."[150] "Critical mass" was further explained to equal "meaningful numbers" or "meaningful representation," so that minority students were able "to participate in the classroom and not feel isolated."[151] After the District Court declared the admissions policy unlawful, and the Sixth Circuit reversed, the Supreme Court granted certiorari to resolve the issue of "[w]hether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities."[152]

The Supreme Court affirmed the Sixth Circuit, declaring that colleges and universities "ha[ve] a compelling interest in attaining a diverse student body."[153] The Court deferred to "[t]he Law School's educational judgment that such diversity is essential to its educational mission[,]" and the claim that diversity "yield[s] educational benefits . . . ."[154] Writing for the Court, Justice O'Connor noted that such a policy of diversity "promotes 'cross-racial understanding,' helps to break down racial stereotypes, and 'enables students to better understand persons of different races,'" but importantly does not rely "on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue."[155] The Court accepted the Law School's determination "based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body."[156]

After finding that the Law School had demonstrated a

---

[149] *Id.* at 318.

[150] *Id.*

[151] *Id.*

[152] *Grutter*, 539 U.S. at 321–22.

[153] *Id.* at 328, 343–44. Importantly, the Court accepted without question that remedying past discrimination can provide an interest sufficiently compelling to pass muster under strict scrutiny. *Id.* ("[W]e have never held that the *only* governmental use of race that can survive strict scrutiny is remedying past discrimination." (emphasis added)).

[154] *Id.* at 328.

[155] *Id.* at 330, 333.

[156] *Id.* at 333.

compelling interest, the Court applied the tailoring requirements of strict scrutiny to the admissions policy.[157] "To be narrowly tailored, a race-conscious admissions program . . . must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'"[158] The Court found that "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[159]

In contrast, a race-conscious admissions policy operating as a quota system or placing minority applicants on a separate admissions track will not fulfill the narrow tailoring requirements of strict scrutiny.[160] Indeed, on the very same day *Grutter* was announced, the Court decided a companion case, *Gratz v. Bollinger*, in which the University of Michigan's race-conscious undergraduate admissions policy was found unconstitutional because it was not narrowly tailored to achieve the university's diversity interest.[161] There, the admissions office utilized a point system to admit applicants and automatically awarded twenty points to every underrepresented minority applicant, which "ha[d] the effect of making 'the factor of race . . . decisive' for virtually every minimally qualified underrepresented minority applicant."[162]

Although "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative[,]" the *Grutter* Court found that the Law School "sufficiently considered workable . . . alternatives."[163] Finally, the Court found that "the Law School's race-conscious admissions program does not unduly harm nonminority applicants."[164] Because of the Law School's "individualized inquiry into the possible diversity contributions of all applicants," the admissions program fulfilled this additional requirement of narrow tailoring.[165]

---

[157] *Id.*

[158] *Grutter*, 539 U.S. at 334 (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 315, 317 (1978)).

[159] *Id.* at 337.

[160] *Id.* (citing *Bakke*, 438 U.S. at 318).

[161] Gratz v. Bollinger, 539 U.S. 244, 275 (2003).

[162] *Id.* at 272 (citing *Bakke*, 438 U.S. at 317).

[163] *Grutter*, 539 U.S. at 339–40.

[164] *Id.* at 341.

[165] *Id.*

*C. The Compelling Interest in Remedying Identified Discrimination*

Remedying the effects of discrimination through racial classifications often arises in the hiring and contracting contexts.[166] As outlined above, race-conscious admissions programs have relied almost exclusively upon the diversity interest for justification. After Justice Powell discussed at length the merits of UC's diversity argument in *Bakke*, the *Grutter* Court considered only the educational benefits of diversity as a compelling interest supporting the use of race in admissions, because it was the only justification proffered by the Law School.[167] Ostensibly because *Grutter* sanctioned the appropriateness of the diversity interest, this eventually became the sole instrument by which colleges and universities defended their race-conscious policies. The results of this narrowed focus are evident—although the *Fisher* case originates from a state that bitterly opposed and openly defied federally mandated desegregation,[168] and from a university that was forced to racially integrate itself,[169] nowhere in UT's brief to the Supreme Court does the school attempt to justify its race-conscious policy on a basis other than diversity.[170]

When a governmental entity such as a state university does seek to remedy discriminatory effects by employing race in its admissions process, however, *Bakke* articulated two clear guideposts: (1) the State has an important interest in ameliorating or eliminating the effects of identified discrimination; and (2) remedying "societal discrimination" is too amorphous a concept of injury, and cannot support the government's use of race.[171] In striking down UC's "societal discrimination" justification, Justice Powell communicated discomfort with the concept's unchecked ability to reach agelessly into the past, and the ideological nature of a classification established to "aid[] persons perceived as relatively victimized groups."[172]

---

[166] *See, e.g.*, Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[167] *Grutter*, 539 U.S. at 328.

[168] Arnoldo De León & Robert A. Calvert, *Segregation*, TEXAS STATE HISTORICAL ASS'N, http://www.tshaonline.org/handbook/online/articles/pks01 (last visited Feb. 27, 2014).

[169] *See* Sweatt v. Painter, 339 U.S. 629 (1950).

[170] *See* Brief for Respondent, Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (U.S. Feb. 21, 2012) (No. 11-345), 2011 WL 6146835.

[171] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

[172] *Id.*

Further, Justice Powell observed that the mission of a university or college is education, and it is therefore incompetent to make broader policy decisions.[173] *Bakke*, therefore, can be more effectively viewed as establishing three primary principles for schools asserting an interest in remedying discrimination through race-conscious admissions: (1) the discrimination must be identified; (2) the effects must be tangible and current; and (3) the school must be acting within its institutional competency.

Justice Powell's limited guidance in his *Bakke* opinion establishes a helpful legal foundation for remedially focused admissions policies, but falls short of providing a standard by which these programs can be measured. Due to the contemporary focus on diversity in justifying race-conscious admissions policies, it is helpful to explore the ways in which the Supreme Court has addressed these racial distinctions in contexts outside the educational sphere. Three analogous areas provide the most useful guidance: hiring, contracting, and districting.

The Court's decision in *Wygant* reiterated *Bakke*'s view that "societal discrimination is insufficient and over expansive" as a justification for race-based distinctions.[174] Although the burden never shifts from the challengers to demonstrate the unconstitutionality of the program, it is crucial that the defendant provide evidentiary support that its race-conscious remedy was necessary.[175] A race-conscious remedy is not warranted unless there is a "strong basis in evidence" that there have been constitutional or statutory violations, and therefore a state actor must provide sufficient evidence to justify such a conclusion.[176] *Wygant*, despite striking down the use of race in making lay-off decisions,[177] nonetheless reinforced the Court's clear grant of permission for the rectification of discriminatory effects through racial considerations in the appropriate contexts.[178]

*J.A. Croson Co.* was decided just three years after *Wygant*, and the Court again struck down a governmental use of race while

---

[173] *Id.* at 309 ("[A] governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination.").

[174] 476 U.S. 267, 276 (1986).

[175] *Id.* at 277–78.

[176] *Id.*

[177] *Id.* at 283.

[178] *Id.* at 280–81 ("We have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account.") (quoting Fullilove v. Klutznick, 448 U.S. 448, 484 (1980)).

reaffirming its belief that certain race-conscious measures are indeed permissible.[179] In *Croson*, the Court faced a minority set-aside program for government contractors, and negotiated a middle ground between two "stark alternatives": (1) the challenger's claim that "any race-based remedial efforts [must be limited] to eradicating the effects of [the state actor's] own prior discrimination"; and (2) the government's claim that it "enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry."[180] Thus, the Court was tasked with determining the extent to which a public entity could draw upon private discrimination as legal support for an affirmative race-conscious remedy.

Although the set-aside quota was struck down—because Richmond failed to make findings that provided a "strong basis in evidence for its conclusion that remedial action was necessary"[181]—the Court clarified the circumstances under which a public entity may employ an affirmative consideration of race in response to private discrimination.[182] The Court stated unambiguously that a state or local entity possesses the authority to "eradicate the effects of private discrimination within its own legislative jurisdiction," so long as such discrimination is identified with sufficient particularity.[183] Thus, if a public entity has become a "passive participant" in a system of racial exclusion within a particular industry or segment of society, the Court "think[s] it clear that the [entity] could take affirmative steps to dismantle such a system."[184]

The Court nevertheless found that Richmond's policy fell outside the permissible scope of race-conscious remedies, largely because of its sole reliance on race-based statistical disparities.[185] Although gross statistical disparities alone may constitute the level of proof necessary to establish a prima facie case of discriminatory effect, these statistics become meaningless when special qualifications are needed for a particular job.[186] Regardless of the Court's decision on the merits of Richmond's arguments, it made clear that

[179] 488 U.S. 469, 500, 509 (1989).
[180] *Id.* at 486.
[181] *Id.* at 500 (quoting *Wygant*, 476 U.S. at 277).
[182] *Id.* at 491–92.
[183] *Id.*
[184] *Id.*
[185] *J.A. Croson Co.*, 488 U.S. at 501.
[186] *Id.*

"[n]othing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction."[187]

The culmination of these hiring/contracting cases came in *Adarand*, in which the Court re-emphasized that strict scrutiny is not "strict in theory, but fatal in fact."[188] In establishing a uniform application of strict scrutiny to any governmental use of race, the majority made clear that the fundamental purpose of such an exacting inquiry is to "take 'relative differences' into account."[189] Strict scrutiny "says nothing about the ultimate validity of any particular law;" indeed, its entire point is to distinguish between "permissible and impermissible governmental use of race."[190]

In *Shaw v. Reno* ("*Shaw I*"), a case involving race-conscious districting in order to promote minority representation, the Court noted that it had previously recognized a compelling interest in eradicating the effects of racial discrimination.[191] *Shaw v. Hunt* ("*Shaw II*"), rising from the same set of circumstances, provided perhaps the most useful framework for evaluating racial distinctions designed to remedy the effects of past or present racial discrimination.[192]

> For that interest to rise to the level of a compelling state interest, it must satisfy two conditions: First, the discrimination must be identified discrimination. While the States and their subdivisions may take remedial action when they possess evidence of past or present discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief. A generalized assertion of past discrimination in a particular industry or region is not adequate because it provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest. Second, the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary,

---

[187] *Id.* at 509.

[188] 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

[189] *Id.* at 228

[190] *Id.* at 228, 230.

[191] Shaw v. Reno, 509 U.S. 630, 656 (1993) (citing *J.A. Croson Co.*, 488 U.S. at 491–93) ("Shaw I").

[192] Shaw v. Hunt, 517 U.S. 899, 909 (1996) ("Shaw II").

before it embarks on an affirmative-action program.[193]

*D. Establishing the Compelling Interest*

*Shaw II* provides a helpful two-step framework for evaluating race-conscious remedies, and the hiring/contracting cases supply additional principles that can further clarify the precise scope of the interest. Taken together, these cases reveal that, in order to establish a compelling interest in remedying identified discrimination, a state actor must demonstrate: (1) identifiable and particularized findings of intentional discrimination—the allegations of discrimination must not be amorphous or ideological,[194] and the alleged discrimination must rise to the level of a constitutional or statutory violation;[195] as well as (2) a strong basis in evidence for the necessity of remedial action—the scope of the injury must be quantifiable,[196] and the remedy must be responsive to the discriminatory effects.[197]

1. Identifiable and Particularized Findings of Intentional Discrimination

As the first step in demonstrating a compelling interest sufficient to support a race-conscious remedy, a public entity must sufficiently identify the predicate discrimination. Racial preferences are permissible only pursuant to "judicial, legislative, or administrative findings of constitutional or statutory violations."[198] Unless the extent of the injury and the consequent remedy are adequately defined, the rights-based remedy will be converted into a privilege for the benefit of any group perceived as relatively disadvantaged.[199]

At the core of the Supreme Court's requirement of identified discrimination is the concern that the possible remedies for societal discrimination "are ageless in their reach into the past, and timeless in their ability to affect the future."[200] By requiring "particularized findings," the Court can ensure that a race-conscious remedy is not ideological in nature, but actually attempts to alleviate

[193] *Id.*

[194] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

[195] *Id.*

[196] *Id.* at 307–08.

[197] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (holding that generalized assertions of discrimination are insufficient because it cannot otherwise be assured that the remedy addresses present and actual effects of discrimination).

[198] *Bakke*, 438 U.S. at 307 (citations omitted).

[199] *Id.* at 307–08, 310.

[200] Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 276 (1986).

constitutionally-recognized discrimination.[201] For this reason, mere generalizations or amorphous claims of discrimination fail as a predicate for race-based relief.[202] If a state actor wishes to rely on statistical comparisons, it must be accompanied by the reasonable inference that such disparities are actually reflective of alleged discrimination and not solely the result of non-discriminatory explanations.[203] Conclusory allegations of racial discrimination in a particular industry are similarly misguided because they fail to assist in defining the scope of the injury actually suffered by a minority group.[204]

Further, a race-based remedy can only arise pursuant to findings of constitutional or statutory violations,[205] and under the Equal Protection Clause, only intentional discrimination is considered unconstitutional.[206] As discussed in Part II, this intentional discrimination must be the product of "race-based decisionmaking"—it must amount to disparate treatment motivated by race.[207] The discrimination need not be fueled by a desire to cause harm, however, as long as it is racially-driven.[208]

2. Necessity of Remedial Action

To fully establish a compelling interest in remedying identified discrimination, "the institution that makes the racial distinction must have had a strong basis in evidence to conclude that remedial action was necessary."[209] Although the challengers of a racial classification retain the burden of proving the policy unconstitutional, a public entity must provide sufficient evidence in order for the trial court to factually determine whether the entity had a strong basis for concluding that the classification was warranted.[210] This burden of production assists the judicial determination that the classification is truly responsive to a remedial purpose.[211] Without this evidence, a trial court will be unable to determine whether the race-conscious

[201] *Id.* at 275–76.
[202] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).
[203] *Id.* at 501–03.
[204] *Id.* at 500, 503.
[205] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).
[206] Washington v. Davis, 426 U.S. 229, 242 (1986).
[207] Ricci v. DeStefano, 557 U.S. 557, 579 (2009).
[208] *Id.* at 579–80.
[209] Shaw v. Hunt, 517 U.S. 899, 910 (1996).
[210] Wygant v. Jackson Bd. of Ed., 476 U.S 267, 277–78 (1986).
[211] *Id.*

policy is justified, and the distinction will be struck down as unconstitutional.[212]

In demonstrating "a strong basis in evidence" that a race-conscious remedy is necessary, an actor must show that the remedy is responsive to the discrimination identified. In establishing the responsiveness of the remedy to the injury, the actor asserting the interest must define the extent of the injury demanding redress,[213] which amounts to a requirement that the discriminatory effects are quantifiable. Otherwise, a race-conscious remedy may be "timeless in [its] ability to affect the future"[214] because it will be impossible to show that the effects have dissipated or diminished over time and that the remedy is no longer justified. At its core, quantifying the alleged discriminatory effects ensures that the race-conscious remedy matches its precipitating effects and thus avoids becoming "insufficient [or] over expansive."[215]

Likewise, by ensuring that remedies address only measurable effects of identified discrimination, those remedies will not be "ageless in their reach into the past."[216] By requiring evidence that the remedy is responsive to measurable effects of identified discrimination, the Court seeks to remove the possibility that a public entity is utilizing a suspect classification that "aids persons perceived as members of relatively victimized groups,"[217] and instead attempts to retain its focus upon vindicating the legal rights of the victims of actual discrimination. A race-conscious remedy that is responsive to currently-measured effects of identified discrimination, rather than designating any particular "creditor or . . . debtor race,"[218] actually accounts for the discriminatory effects suffered by minorities today in the markets for education or labor.

## IV. *FISHER V. UNIVERSITY OF TEXAS AT AUSTIN*

### *A. Factual and Procedural Background*

Abigail Fisher and Rachel Michalewicz, White Texas residents,

---

[212] *Id.*

[213] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307–08 (1978).

[214] *Wygant*, 476 U.S. at 276.

[215] *Id.*

[216] *Id.*

[217] *Bakke*, 438 U.S. at 307.

[218] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

were denied undergraduate admission to the University of Texas at Austin for the class entering in 2008.[219] They filed suit, alleging that UT's admissions policies discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment and federal civil rights statutes.[220] The admissions program at issue involved the use of race in a manner confined to the specifications laid out in *Grutter*.[221] The challenge to the "otherwise-plain legality of the *Grutter*-like admissions program" arose from the "intimate ties and ultimate confluence" of the race-conscious admissions initiative and the Top Ten Percent Law, a "legislatively-mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class."[222]

Until 1996, students were selected for admission to UT based upon two considerations: (1) an Academic Index (AI), which computed the relative academic success of each applicant using numbers such as the applicant's high school class rank and standardized test scores; and (2) race.[223] Race was employed because school officials believed using AI alone would produce unacceptably low diversity levels, and although it was unclear how exactly race was considered, "it is undisputed that race was considered directly and was often a controlling factor in admission."[224] In 1996, however, *Hopwood v. Texas* struck down the use of race-conscious admissions at UT, holding that diversity was not a compelling government interest.[225] After the decision, UT began utilizing a Personal Achievement Index (PAI), which strived to identify and award applicants "whose merit . . . was not adequately reflected by their class rank and test scores."[226] The PAI and many other facially "race-neutral" policies implemented by UT in response to *Hopwood* still remain in effect.[227]

Also in response to *Hopwood*, and because other admissions policies were unsuccessful at achieving meaningful diversity, the Texas legislature enacted the Top Ten Percent Law—still in effect

[219] Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011).
[220] *Id.*
[221] *Id.* at 216.
[222] *Id.* at 216–17.
[223] *Id.* at 222.
[224] *Id.* at 222–23.
[225] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
[226] *Fisher*, 631 F.3d at 223.
[227] *Id.*

today—which mandated admission into any state university for a high school senior graduating in the top ten percent of his or her class.[228] Because this program targeted relatively high-performing students in low-income and often racially diverse school districts, the Top Ten Percent Law succeeded in increasing minority enrollment over a period of time.[229] The freshman class of 2004, the last one admitted before the *Grutter*-like policy was implemented, was comprised of 4.5% African-Americans, 16.9% Hispanics, and 17.9% Asian-Americans.[230]

In 2004, following the announcement in *Grutter v. Bollinger*, UT began utilizing an applicant's race as an element of his or her PAI score, which the admissions committee would review if an applicant was not admitted under the Top Ten Percent plan, and if his or her score was not high enough to be automatically admitted nor too low to be presumptively denied.[231] Race, included simply as part of UT's holistic PAI system, is never considered alone, and is not affected by the incoming class's relative racial proportions.[232] At the district court level, the judge found no problem with this holistic, *Grutter*-like approach and granted UT summary judgment.[233]

*B. Fifth Circuit Opinion*

Ultimately, the court of appeals affirmed the judgment of the district court, holding that UT undertook a "serious, good faith consideration" before resorting to race-conscious measures, and that the admissions program was faithful to the requirements of *Grutter*.[234] In comparing UT's use of race to that of the law school in *Grutter*, the Fifth Circuit noted:

> *Grutter* teaches that so long as a university considers race in a holistic and individualized manner, and not as part of a quota or fixed-point system, courts must afford a measure of deference to the university's good faith determination that certain race-conscious measures are necessary to achieve the education benefits of diversity, including attaining critical mass in minority enrollment.[235]

[228] *Id.* at 223–24.
[229] *Id.*
[230] *Id.*
[231] *Id.* at 227–28.
[232] *Fisher*, 631 F.3d at 230.
[233] *Id.* at 217.
[234] *Id.* at 246–47.
[235] *Id.* at 233.

The Fifth Circuit applied strict scrutiny within the unique context of race-conscious university admissions, with due regard to "a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body."[236] The Fifth Circuit then turned to the challengers' three arguments for invalidating UT's race-conscious admissions policy: (1) UT's plan amounted to "racial balancing"; (2) the school had failed to consider race-neutral alternatives such as the Top Ten Percent Law; and (3) minority enrollment had already surpassed critical mass.[237]

The court of appeals rejected the challengers' first argument because UT "has never established a specific number, percentage, or range of minority enrollment . . . nor does it award any fixed number of points to minority students in a way that impermissibly values race for its own sake."[238] Next, the circuit court found that the Top Ten Percent Law was not a constitutionally mandated race-neutral alternative to achieving diversity because it "comes at a high cost and is at best a blunt tool for securing the educational benefits that diversity is intended to achieve."[239] Lastly, the appellate court was unable to determine that UT had reached critical mass; although a plaintiff may produce evidence tending to show that a university is no longer pursuing the educational benefits of diversity in good faith, the court found that the various benchmarks and statistics offered by the plaintiffs were insufficient to establish such a proposition.[240]

*C. Supreme Court Decision*

In an opinion authored by Justice Kennedy, the Supreme Court vacated the Fifth Circuit's decision and remanded the case, holding that the panel did not properly apply strict scrutiny to UT's race-conscious policy.[241] Specifically, the Court found that improper deference was given to the university in analyzing the narrow tailoring requirement of the program.[242] By presuming that UT had acted in "good faith" and placing the burden on the petitioner to rebut that presumption, the Fifth Circuit had erred as a matter of

[236] *Id.* at 234.
[237] *Id.*
[238] *Fisher*, 631 F.3d at 235.
[239] *Id.* at 242.
[240] *Id.* at 245.
[241] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013).
[242] *Id.*

law.[243] As a result of the Court's, the case will be reheard by the court of appeals and may continue to carry uncertainties for the future of race-conscious admissions in higher education.

*D. Focus on Diversity*

No court, at any level, discussed a justification for UT's race-conscious admissions focused upon remedying the effects of discrimination.[244] The lack of judicial focus on the issue was not surprising, considering that the university did not even assert the interest.[245] Instead, UT opted to place all of its proverbial eggs in the diversity basket, and it now risks the invalidation of its admissions program if the Fifth Circuit decides that the asserted diversity benefits do not outweigh the countervailing concerns.

The exclusive attention to diversity in the *Fisher* case is understandable, given the Court's approach in *Bakke* and *Grutter*. In *Bakke*, the school asserted four justifications for its race-conscious admissions program, but only the diversity interest was found to be potentially compelling enough to support the use of racial distinctions.[246] Justice Powell never expressed the view that diversity would be the only acceptable justification for race-conscious admissions—indeed, his rejection of the school's "societal discrimination" argument has few implications for a properly-asserted remedial justification—but his apparent embrace of the diversity interest provided a tantalizingly simple legal foundation for schools wishing to utilize race-conscious admissions. As a consequence, the law school in *Grutter* asserted only one interest to defend its admissions program—obtaining the educational benefits of classroom diversity.[247] The law school's reliance upon the diversity interest only provided the *Grutter* Court with occasion to evaluate

[243] *Id.* The Supreme Court's approach to narrow tailoring, of course, carries implications for whatever interest is asserted by a college or university in support of a race-conscious admissions policy. To the extent that *Fisher* applies specifically to the diversity interest, however, the Court's decision makes the need for a remedial interest all the more urgent.

[244] *See id.*; Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011); Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009).

[245] *See* Brief for Respondent, Fisher v. Univ. of Tex. at Austin, No. 11-345, 2012 WL 3245488.

[246] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 310–12 (1978). Importantly, the Court did not foreclose the possibility that race-conscious admissions could be implemented as a means of remedying the effects of discrimination—it merely forbade the school from attempting to address past "societal discrimination."

[247] Grutter v. Bollinger, 539 U.S. 306, 327–28 (2003).

race-conscious admissions within this delimited context. And because *Grutter* explicitly sanctioned such policies in pursuit of classroom diversity, the scope of the debate surrounding race-conscious admissions policies has become firmly entrenched following that decision.

## V. REMEDYING RACE-BASED DECISION-MAKING: *FISHER* RECONSIDERED

As an alternative to the now-tenuous diversity argument, UT may well have asserted an interest in remedying discrimination within its state public education system, and may have argued that identifiable instances of race-based decision-making justified its holistic consideration of race in evaluating incoming candidates. UT could have argued that by utilizing race-conscious admissions, it was simply attempting to acknowledge and address the likelihood that a minority applicant had suffered a competitive disadvantage as the result of intentional discrimination in his or her educational experience. This argument has broad applicability for any school wishing to account for racially discriminatory effects within its applicant pool and can provide a blueprint for the continued use of race-conscious admissions at public colleges and universities, regardless of the fate of the diversity interest. Specifically, UT would need to demonstrate: (1) identified forms of race-based decision-making in the Texas public school system; (2) quantifiable disparities that result from such discrimination; and (3) a "strong basis in evidence" that remedial action was necessary to alleviate these racial harms.

### *A. Identified Race-Based Decision-Making*

As discussed in Part II, positive feedback bias and failure-to-warn provide two examples of race-based decision-making that rise to the level of constitutional violations for any Black students or other minority students affected. Those students received disparate treatment as the result of their race, and they are entitled to a remedy for any harm caused as the result of the discrimination. In attempting to remedy this discrimination through a race-conscious admissions process, UT would first need to establish that these race-based actions were taking place within Texas itself—through studies aimed specifically at measuring these racial phenomena and their effects solely within Texas and likely on a school-by-school or district-by-district basis. By pointing to specific types of discrimination, UT can then make reasonable estimations of the scope of the resulting

injuries, which together ensure that the use of race is not based upon amorphous and generalized allegations of "societal discrimination."

*B. Quantifiable Effects Measured through Racial Achievement Statistics*

When asserting a compelling interest in remedying identified discrimination, the current racial achievement gap in America provides a useful context. The requirement that effects be quantifiable means that a public university must define "the extent of the injury and the consequent remedy."[248] By simply using the racial achievement gap to assess the probable effects of identified discrimination, the school is already ensuring that its remedy is not "ageless in [its] reach into the past, and timeless in [its] ability to affect the future."[249] By tying the injury to currently-measured racial disparities, a public entity is placing proper emphasis on the present rather than the past and the future.

But to be sure, the racial achievement gap in America is a complex and difficult study.[250] Surely, nationwide racial disparities—without careful context—do not ineludibly connote unconstitutional discrimination. At the very least, however, the clearly identifiable forms of state-perpetrated racial discrimination support a strong inference that the gap is exacerbated by disparate treatment. And by further inhibiting the growth of Black students, thus enlarging the racial achievement gap, public K-12 schools themselves affect the applicant pools of public colleges and universities. While identified discrimination manifestly presents the risk of racialized harm, the scope of the injury needs to be sufficiently defined in order to provide adequate guidance to the entity enacting the remedy. In other words, racial disparities resulting from identified discrimination need to be reasonably separated from racial disparities caused by a host of economic, geographical, and societal concerns.

In attempting to identify the scope of injuries created by racial discrimination within K-12 schools in Texas, UT's best evidence would be intra-school racial achievement disparities.[251] The

[248] *Bakke*, 438 U.S. at 307–08.

[249] *Wygant*, 476 U.S. at 276.

[250] *See* Roland G. Fryer, Jr. & Steven D. Levitt, *Understanding the Black-White Test Score Gap in the First Two Years of School*, 86 THE REVIEW OF ECON. AND STAT. 447 (2004) (listing many possible reasons for the test score gap).

[251] Such intra-school data on racial achievement is, surprisingly, lacking. A school wishing to implement a race-conscious remedy, and wanting to measure the scope of the injury through school-specific racial grade and test score breakdowns would likely need a greater wealth of data than what is currently available.

difference between statewide and intra-school racial disparities is apparent—such micro-level analysis of racial achievement gap rules out many economic and geographic causes of the gap, and it permits a stronger inference that disparities are the result of schools providing a racially-biased learning environment. Barring the attribution of these disparities to inherent intellectual differences between races, there are few other explanations for intra-school racial inequality—such disparities would provide a reasonably strong measure of the injury from identified discrimination within K-12 schools themselves.

By examining the distinctive racial contours of each individual school district, UT can appropriately account for the competitive racial disadvantages among its applicants and sufficiently ensure that it is addressing only those racial effects that are likely caused by discriminatory treatment within Texas's school system. Limiting the analysis of racial achievement statistics to intra-school comparisons enhances the probability that a particular college's race-conscious remedy actually fits the injury suffered by local students. In supplying all of these limitations, this approach to measuring identified discriminatory effects is sufficiently particular and thus fits within the core concerns expressed by the Court.

*C. Necessity of a Race-Conscious Remedy*

Finally, an institution of higher learning is well-equipped to demonstrate a "strong basis in evidence for its conclusion that remedial action was necessary."[252] Consider a university's conclusion—based on studies showing race-based treatment in its own state and resulting racial disparities—that race-conscious admissions are a necessary response. Its conclusion would seem difficult to dispute, considering that the alternative is to force a college to become a "passive participant"[253] in an educational process that systematically depresses the grades and test scores of minority students. Forcing a college or university to assume that the test scores and grades of its applicant pool predict educational potential, independent of racially discriminatory effects, would compel the school to admit an incoming class that is tainted by the effects of discrimination. Moreover, it would exacerbate the injury to already-disadvantaged minority students and ensure that the state-created

[252] *Wygant*, 476 U.S. at 277.

[253] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

barriers to educational opportunity would continue to affect the long-term success of those individuals.

While a college or university is not competent to address the broad policy implications of identifying and remedying "societal discrimination,"[254] a carefully crafted race-conscious admissions policy considers only those discriminatory effects that arise uniquely within an educational context. Because the scope of the targeted discriminatory effects is confined to those injuries resulting in competitive disadvantages in pursuing post-secondary opportunities, a college has the authority and the institutional competency to define the extent of these effects. Racial discrimination and bias in the classroom is not a novel concept for experts in pedagogy, and such educators would seemingly be the most qualified actors to respond to the effects. A university's extensive familiarity with the precise contours of its applicant pool places it in the best position to ascertain the potential effects of identified racial discrimination, as well as any potential shifts which may indicate the lessening of discriminatory effects and the consequent need for a race-conscious remedy.

## VI. CONCLUSION

Although the Supreme Court's jurisprudence since *Bakke* has made it more difficult to assert an interest in remedying identified discrimination, it has made the interest itself no less compelling. We do not become a post-racial society merely by declaration. As acknowledged by the Court in *Adarand*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality."[255] A college or university is not entitled to afford a preference to a minority applicant simply due to his or her membership in relatively disadvantaged group. Rather, a race-conscious remedy becomes permissible because many minority applicants are likely to have suffered racial hurdles *themselves*. The inability of their primary and secondary education systems to provide a learning environment free from discrimination has hindered their ability to compete for admission with members of non-disadvantaged groups.

The need for colleges and universities to develop an informed and remedially-focused affirmative action policy is greater than ever

[254] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978).
[255] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

due to the probable implications of the *Fisher* case. By placing in jeopardy the scope of the interest in pursuing campus diversity, *Fisher* has endangered the entire permissibility of affirmative action in college admissions. Not only does remedying the effects of identified discrimination present a viable alternative compelling interest for schools wishing to maintain race-conscious admissions policies, it fulfills a much broader purpose. Simply by asserting this compelling interest, a college or university is acknowledging that our country's history of race relations is not entirely in the rearview mirror. It is refusing to permit the injudicious notion that race has ceased to present unique barriers for minority students seeking to obtain the equal opportunities of their White counterparts, or that the state is free from blame for these barriers. Above all, a modest race-based remedy for the effects of identified discrimination actually works toward removing those barriers.