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QUALITATIVE DIVERSITY: AFFIRMATIVE ACTION'S NEW REFRAME

Eang L. Ngov*

How is diversity measured? When is diversity sufficient? The Supreme Court has pressed these hard questions in affirmative action cases. With respect to college admissions, although a university campus might have a diverse student body, universities are beginning to justify the continuation of race-based affirmative action programs on the need for qualitative diversity, i.e., intraracial diversity—diversity within diversity.

In the Court's most recent affirmative action case, Fisher v. University of Texas at Austin, the university advanced two novel diversity arguments, never before employed in affirmative action cases, to justify its race-based admissions policy: there is a lack of diversity within small courses of 5–24 students, and there is a lack of diversity among the admitted minority students. The minorities admitted through the state's Top Ten Percent program, a neutral class rank program, typically consisted of those from lower socioeconomic backgrounds and who were the first in their family to attend college. The university argued that its race-based holistic admissions program was necessary to admit students who could bring viewpoints and experiences different from the students admitted through the Top Ten Percent Program. Others construed this argument as the university, in essence, wanting more privileged minorities with higher credentials.

This article explores the difficulties raised by the qualitative diversity argument and anticipates the challenges it might wreak upon the Civil Rights movement. This article cautions that a reliance on

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qualitative diversity to justify affirmative action undermines one of the bases upon which the Civil Rights movement was founded—to overcome racial stereotypes. An affirmative action program based on qualitative diversity also risks jeopardizing the legitimacy of affirmative action altogether when questions of deservedness within a race are raised and risks jeopardizing the united front needed to advance civil rights if people within a race are pitted against each other.

INTRODUCTION

The implementation of race-based admissions has been hotly contested, as admission into universities is seen as a zero-sum game in the pursuit of a coveted seat among the limited number available within an entering class. A backlash against using affirmative action for university admissions burgeoned in some states.¹

In California, Proposition 209 prohibited the use of race for admissions into its public universities.² The first year after Prop. 209, Asian American student enrollment rose substantially but African American enrollment plummeted at the University of California at Berkeley.³ Despite overall minority enrollment actually increasing, critics of Prop. 209 decried the lack of diversity at UC Berkeley.⁴ The argument centered on the lack of underrepresented minorities.⁵

In Texas, the state implemented a race-neutral program to admit students ranked in the top 10% of their high school class into the university of their choice.⁶ This program yielded one of the most diverse entering classes that the University of Texas-Austin (hereinafter, “UT Austin”), Texas’s flagship school, has ever

¹ See Eang L. Ngov, *Following Fisher: Narrowly Tailoring Affirmative Action*, 64 CATH. U. L. REV. 1, 10–12 (2014) (discussing how voter referenda and executive orders against affirmative action have prompted states to apply race-neutral measures in public employment and education).

² *A Brief History of Affirmative Action*, OFF. EQUAL OPPORTUNITY & DIVERSITY, <http://www.oeod.uci.edu/aa.html> [<https://perma.cc/F29Q-C7VZ>] (last visited Apr. 30, 2017).

³ Tung Yin, *Is “Diversity” Diverse Enough?*, ASIAN AM. L.J. 89, 99 (2014); *Challenging Race Sensitive Admission Policies*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/sats/race/summary.html> [<https://perma.cc/6BEJ-RVM6>] (last visited Apr. 30, 2017).

⁴ Yin, *supra* note 3, at 99.

⁵ *Id.*

⁶ CATHERINE L. HORN & STELLA M. FLORES, PERCENT PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES’ EXPERIENCES 16–23 (The Civil Rights Project at Harvard University ed.) (2003), <https://www.civilrightsproject.ucla.edu/research/college-access/admissions/percent-plans-in-college-admissions-a-comparative-analysis-of-three-states2019-experiences/horn-percent-plans-2003.pdf> [<https://perma.cc/WJC6-V8P6>].

experienced.⁷ At the same time, UT Austin used a race-based approach to admit students for the remaining seats.⁸ The university argued that the quality of diversity achieved through the race-neutral class rank program was deficient in that the admitted minority students were likely to be the first among their family to attend college and come from a lower socioeconomic class.⁹ The university was seeking to admit minority students, from more privileged backgrounds, who did not succeed in getting admitted through the Top Ten Percent Plan.¹⁰

This Article provides the first critique of the qualitative diversity argument. Qualitative diversity has attracted the attention of a few scholars who have written thoughtful works on intraracial diversity, but those works have been in defense of this new approach to diversity.¹¹ Because the Court's opinion in *Fisher v. University of Texas at Austin (Fisher II)* was devoid of any direct discussions of intraracial diversity when it upheld the university's race-based policy, after the case's second appearance before the Court,¹² the need for a critical perspective is all the more present. This Article hopes to fill the void in critical scholarship about qualitative diversity and presents arguments that advocate for the need to anticipate fortifying affirmative action, should it come under siege again.

In Part I, this Article sets forth how qualitative diversity serves as affirmative action's new "reframe." Because race-neutral programs have achieved diversity to comparable levels of prior race-based measures, they threaten the support for affirmative action. In response, UT Austin reframed the diversity rationale, which

⁷ Darren Meritz, *Top 10% Plan Has Improved Diversity at Top Texas Colleges*, EL PASO TIMES (Jan. 23, 2004), <http://theop.princeton.edu/publicity/theop/EIPasoTimes012304.pdf> [<https://perma.cc/N4Y3-LYLT>].

⁸ HORN & FLORES, *supra* note 6, at 17.

⁹ Transcript of Oral Argument at 43, *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411 (No. 11-345), http://supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf [<https://perma.cc/JP85-YNYF>].

¹⁰ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting); Transcript of Oral Argument, *supra* note 9.

¹¹ See generally Devon W. Carbado, *Intraracial Diversity*, 60 UCLA L. REV. 1130, 1130 (2013) (leaving open the normative question of whether qualitative diversity should be deployed, yet supporting the qualitative diversity rationale by outlining how intraracial delineations might advance the benefits of diversity); Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 463 (2012) (advancing several justifications for promoting race-conscious policies that increase minority representation overall as well as within minority groups); Elise Boddie, *Commentary on Fisher: The Importance of Diversity Within Diversity*, SCOTUSBLOG (Oct. 11, 2012, 10:50 AM), <http://www.scotusblog.com/2012/10/commentary-on-fisher-the-importance-of-diversity-within-diversity> [<https://perma.cc/B2WE-LX7S>] (discussing the importance of intraracial diversity).

¹² See *Fisher II*, 136 S. Ct. 2198, 2217 (Alito, J., dissenting) (outlining UT Austin's prior reliance on the qualitative diversity argument and pointing out that Court failed to address "the important issues in the case").

focused on diversity *between* racial groups, to a more granular level.¹³ In adopting the qualitative diversity reframe, UT Austin sought to continue racial preferences by arguing for diversity *within* each racial group.¹⁴

In Part II, this Article discusses how this “qualitative diversity” argument undermines the strides made in the affirmative action movement by stretching the diversity rationale too thinly. One criticism that opponents will lodge at the insistence to achieve qualitative diversity is that it pits “brother against brother.” The delineation between minority groups, i.e. interracial diversity, alienates particular minority racial groups that are considered overrepresented and, therefore, not valued in the pursuit of diversity. Programs focused on underrepresented minorities have polarized racial groups. The qualitative diversity argument poses a greater risk to affirmative action because it seeks intraracial diversity, diversity within a racial group. For example, some scholars have argued that affirmative action should particularly benefit legacy Blacks who are descendants of slaves over Blacks who are recent immigrants.¹⁵ Arguments over deservedness between minority groups and within racial groups will only give affirmative action critics more fodder.

Part III highlights how the qualitative diversity approach relies on stereotypes, and in doing so, undermines its rationale. Part IV discusses how the qualitative diversity argument is also prone to question by affirmative action critics because it has no logical ending point. To what level do universities plan to measure diversity? How refined a gradation will be applied?

Finally, this Article argues in Part V that the qualitative diversity argument opens the door for the Court to overrule *Grutter v. Bollinger* and *Regents of the University of California v. Bakke* and retreat from its prior recognition of diversity as a compelling interest.¹⁶ Thus, affirmative action proponents must carefully plan their next move to secure diversity without losing the entire war.

I. DIVERSITY REFRAMED

It has been sixty years since *Brown v. Board of Education*,¹⁷ yet the debate over affirmative action is as vigorous as ever. Previously, stakeholders battled over what is a sufficiently compelling purpose to allow race, even if used benignly, to

¹³ *Id.* at 2205–06 (pointing out UT Austin’s attempt to disclaim its prior emphasis on the need to achieve intraracial diversity).

¹⁴ *Id.*

¹⁵ See generally Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1229–32 (2008) (questioning “the process that lumps all blacks into a single-category approach”).

¹⁶ See, e.g., *Fisher II*, 136 S. Ct. 2198, 2215 (Thomas, J., dissenting) (“I would overrule *Grutter*.”).

¹⁷ 374 U.S. 483 (1954).

be considered in public employment and school admissions decisions.¹⁸ The Supreme Court permitted race as a consideration only in two narrow circumstances: remedial discrimination¹⁹ and diversity.²⁰ It is not enough to show past societal discrimination because the Court has insisted that an effort to remedy past societal discrimination is not compelling, but rather, racial classifications may be used only if the entity seeking to use such classifications proves to the Court that the entity itself has engaged in past discrimination.²¹

In *Grutter v. Bollinger*,²² the Court accepted diversity as a compelling interest because of the benefits to a student's education and development that would flow from having a diverse class.²³ The Court espoused the many benefits of diversity: to facilitate a "robust exchange of ideas,"²⁴ increase inclusion of underrepresented minorities,²⁵ contribute to the character of an institution,²⁶ facilitate cross racial understanding,²⁷ overcome racial stereotypes,²⁸ train students for employment,²⁹ prepare students for leadership roles,³⁰ and reduce racial isolation.³¹ Thus, diversity was framed as a benefit to the individual, class, and institution of higher education.

Responding to challenges that its raced-based admissions program is no longer necessary because its race-neutral Top Ten Percent program produced a diverse entering class, the University of Texas reframed the diversity rationale in *Fisher*. The plaintiff pointed out the effectiveness of the Top Ten Percent Plan by comparing racial compositions in the student body population before the state's prior ban on racial preferences and after the ban.³² The percentage of minorities enrolled through the Top Ten Percent Plan alone exceeded the percentage of minorities enrolled under a race-based program before the ban.³³ Consequently, the

¹⁸ For in-depth analysis of compelling interests for racial classifications, see Eang L. Ngov, *War and Peace Between Title VII's Disparate Impact Provision and the Equal Protection Clause: Battling for a Compelling Interest*, 42 LOY. U. CHI. L.J. 1 (2010).

¹⁹ See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986).

²⁰ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 309 (1978).

²¹ See *Wygant*, 476 U.S. at 276.

²² 539 U.S. 306 (2003).

²³ See *id.* at 325.

²⁴ *Id.* at 329.

²⁵ See *id.* at 316.

²⁶ See *id.*

²⁷ See *id.* at 330.

²⁸ See *id.*

²⁹ *Id.* at 303.

³⁰ See *id.* at 332.

³¹ See *id.* at 318–21.

³² See *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 645 F. Supp. 2d 587, 592–93 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013), and *aff'd*, 758 F.3d 633 (5th Cir. 2014).

³³ See *Fisher I*, 645 F. Supp. 2d at 594–95, 603 (citing to the University Proposal, which conceded that the race neutral Top Ten Percent program yielded more minority students than pre-*Hopwood* race-based program). In the last year under the combined race-

plaintiff argued that such evidence obviates the need for UT Austin to continue its race-based holistic admissions program.³⁴

Additionally, the university employed a macro level and micro level strategy to reframe the diversity rationale. At the macro level, UT Austin argued that a race-based admissions program was necessary to achieve a critical mass of qualitatively diverse students within its student body.³⁵ Diversity was reframed to encompass intraracial diversity.³⁶ At the micro level, UT Austin argued that it had not achieved critical mass in its small classes.³⁷

To the extent that the qualitative diversity approach relies on the same rationales and means of implementation as the broader diversity rationale, the qualitative diversity approach is vulnerable to the same criticisms articulated against the diversity rationale. To the extent that qualitative diversity seeks to refine the diversity inquiry, it invites new criticisms not previously relevant to the broader diversity pursuit.

II. DESERVEDNESS

Evaluating qualitative diversity invites questions of deservedness and how deservedness will be determined. The Court has entertained two measures of deservedness; each measure has implications for interracial groups as well as intraracial groups.

A. *What Does Diversity Mean?—Squeezing out Asian Americans*

A quest to find the meaning of diversity must begin with the following pronouncement by the *Grutter* Court, upholding the University of Michigan's race-based admissions policy:

The policy does, however, reaffirm the Law School's longstanding commitment to "one particular type of diversity," that is, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been *historically* discriminated against, like African-Americans, Hispanics and Native Americans, who without this

neutral holistic and Top Ten Percent programs, "[t]he 2004 entering class thus had a higher percentage of African-Americans, Asian-Americans, and Hispanics than the class that entered in 1996, when UT had last employed racial preferences." *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2218 (2016) (Alito, J., dissenting).

³⁴ See *Fisher I*, 645 F. Supp. 2d at 603.

³⁵ See *Fisher II*, 136 S. Ct. at 2219 (Alito, J., dissenting); Transcript of Oral Argument, *supra* note 9, at 43.

³⁶ See *Fisher II*, 136 S. Ct. at 2219–20 (Alito, J., dissenting).

³⁷ See *Fisher I*, 645 F. Supp. 2d at 603 (citing to the University's Proposal, which claimed "race-neutral efforts have failed to improve racial diversity within the class room"); *Fisher II*, 136 S. Ct. at 2226 (Alito, J., dissenting).

commitment might not be represented in our student body in meaningful numbers.” By enrolling a “critical mass of [underrepresented] minority students,” the Law School seeks to “ensur[e] their ability to make unique contributions to the character of the Law School.”³⁸

Through these two statements, Justice O’Connor appeared to convey two purposes for diversity: 1) a social justice concern, manifested through her reference to historical discrimination in the first statement; and 2) a focus on contributions to a school as expressed in the second statement. Within the framework of these two statements, this Part explores who may be considered for diversity. Because African Americans, Hispanics, and Native Americans have been incorporated into these goals through Justice O’Connor’s express reference to these racial groups, the question remains: What of the Asian Americans?

In one breath, it appeared that Asian Americans would be part of the diversity discussion, and yet in another, Asian Americans were excluded. Initially, the first statement seemed to suggest that Asian Americans were intended to be included as the Court referred to groups that have been *historically* discriminated. To be clear, under a compensatory rationale for affirmative action, there is an argument that African Americans should be the sole beneficiaries of affirmative action.³⁹ But Justice O’Connor’s inclusion of other groups, such as Hispanics, leads one to

³⁸ Grutter v. Bollinger, 539 U.S. 306, 316 (2003) (alteration in original) (emphasis added) (citations omitted).

³⁹ See Frank Wu, *Neither Black or White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 263 (1995). Dean Wu recognizes that “[t]he compensatory rationale makes it difficult to justify affirmative action, as it is presently practiced, for any racial group other than African Americans.” *Id.* Professor Pat Chew poses several questions relevant to deciding how an affirmative action program premised on remedial past discrimination should be implemented:

Are some types of past discrimination more extreme and hence more worthy of remedy than others? For instance, should one compare the slavery of African Americans to the deprivation of the property and lives of the Native American tribes to the riots, lynching, and internment of Asian Americans? And if so, how?

At what point should preferential treatment on the basis of past discrimination cease? Have Asian Americans and Jewish Americans, but not other minority groups reached that point?

Should everyone in a particular minority group be included or should an individual have to show a more direct link to past discrimination? For instance, should an individual have to trace his or her relationship to a Japanese American World War II internee or to a Chinese American “coolie” who was lynched?

Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 90 (1994).

believe that she had intended the diversity rationale to apply to other historically disadvantaged groups, in addition to African Americans.

That Asian Americans faced historical discrimination is not contestable.⁴⁰ At the federal level, Asian Americans were discriminated against in mass numbers. In the mid-1800s, over 6,000 Chinese laborers were imported as part of a slave trade, and 4,000 of them perished through their consignment to work in the Peruvian guano pits.⁴¹ Not long after their arrival, the oppression and discrimination continued through the Chinese Exclusion Act of 1882, which imposed a ten-year restriction on Chinese immigration into the U.S and was the “first time [that] Federal law proscribed entry of an ethnic working group on the premise that it endangered the good order of certain localities.”⁴² Subsequent laws restricted Chinese immigrants from seeking naturalization.⁴³ During World War II, after his declaration that the Pearl Harbor bombing of the U.S. would be a date that would “live in infamy,” President Franklin D. Roosevelt signed his own infamous Executive Order 9066, forcibly removing 117,000 Japanese Americans from their homes and incarcerating them in mass concentration⁴⁴ camps.⁴⁵ Two-thirds of these Japanese Americans were U.S. citizens born on U.S. soil.⁴⁶

⁴⁰ For an extensive discussion of discrimination against Asian Americans, see Chew, *supra* note 39; Wu, *supra* note 39.

⁴¹ Chew, *supra* note 39, at 9–10 n.15.

⁴² Chinese Exclusion Act, H.R. 5-804, 47th Cong. (1882), <https://www.ourdocuments.gov/doc.php?flash=true&doc=47> [<https://perma.cc/RDA3-8FL3>] (last visited May 1, 2017); *see also* Chew, *supra* note 39, at 13–15; Wu, *supra* note 39, at 232–33 (relating the social and racial tension that led to the Chinese Exclusion Act).

⁴³ Chinese Exclusion Act, H.R. 5-804, 47th Cong. (1882), <https://www.ourdocuments.gov/doc.php?flash=true&doc=47> [<https://perma.cc/RDA3-8FL3>] (last visited May 1, 2017).

⁴⁴ Although the forced relocation of Japanese Americans has been commonly referred to as an internment, the Fred T. Korematsu Institute points out that the term “internment” is inappropriate: “Internment literally refers to the confinement or impounding of enemy aliens during a war (Merriam-Webster, 2011). Although thousands of people of Japanese ancestry were incarcerated during World War II, they were not ‘enemy aliens.’ Moreover, they were not simply ‘confined’ into camps.” *Terminology*, FRED T. KOREMATSU INST., <http://www.korematsuinstitute.org/terminology-1> [<https://perma.cc/9ZCR-R49M>] (last visited Mar. 24, 2017).

⁴⁵ *Teaching with Documents: Documents and Photographs Related to Japanese Relocation During World War II*, NAT’L ARCHIVES, <https://www.archives.gov/education/lessons/japanese-relocation/> [<https://perma.cc/UAK3-NHY6>] (last visited Mar. 24, 2017) [hereinafter National Archives, *Teaching with Documents*]; *see also* Harvey Gee, *Review Essay: Asian Americans, Critical Race Theory, and the End of the Model Minority Myth*, 19 TEMP. POL. & CIV. RTS. L. REV. 149, 167–70 (2009); Chew, *supra* note 39, at 10–11 n.17 (detailing the plight of Japanese Americans); Wu, *supra* note 39, at 234–36 (discussing the social and political climate that led to the Japanese Americans’ incarceration).

⁴⁶ National Archives, *Teaching with Documents*, *supra* note 45.

At the local level, Asian Americans faced a double-edged sword of being presumed to have benefited from affirmative action, while in reality they suffered from discriminatory admissions policies.⁴⁷ For example, San Francisco's elite magnet school, Lowell High School, raised the admissions standards for Chinese American applicants to maintain a cap imposed by a consent decree.⁴⁸ Lowell accepted 30% more White students than Chinese American students, despite that half of the admitted Whites were outperformed by all of the Chinese American students on entrance exams.⁴⁹ Additionally, the University of California at Berkeley School of Law, otherwise known as Boalt Hall, discriminated against Asian Americans when it implemented in 1975 a policy that denied Japanese Americans special admissions and capped admissions of Chinese, Korean, and Filipino applicants to less than 3% of all special admits.⁵⁰ Similar policies at Brown, Harvard, Stanford, Princeton, UCLA, and UC Berkeley were challenged because fewer Asian Americans were admitted than Whites, despite the "dramatic" increase of Asian American applicants.⁵¹

When Justice Douglas considered whether admissions policies could allot seats for admissions based on past harm, he noted that "there is no Western State

⁴⁷ Wu, *supra* note 39, at 226 ("Indeed, Asian Americans frequently are imagined as the beneficiaries of special consideration, although they almost always are excluded from race-based college admissions and employment programs."); *accord* Chew, *supra* note 39, at 75.

⁴⁸ Nancy Chung Allred, *Asian Americans and Affirmative Action: From Yellow Peril to Model Minority and Back Again*, 14 *ASIAN AM. L.J.* 57, 60 (2007); Caitlin M. Liu, *Recent Development, Beyond Black and White: Chinese Americans Challenge San Francisco's Desegregation Plan*, 5 *ASIAN L.J.* 341, 343 (1998).

⁴⁹ Allred, *supra* note 48, at 60; Liu, *supra* note 48, at 343.

⁵⁰ Sharon S. Lee, *The De-Minorization of Asian Americans: A Historical Examination of the Representations of Asian Americans in Affirmative Action Admissions Policies at the University of California*, 15 *ASIAN AM. L.J.* 129, 137 (2008).

⁵¹ *Id.* at 144; Chew, *supra* note 39, at 63; Wu, *supra* note 39, at 268–69. Currently, Harvard faces a lawsuit for its allegedly discriminatory admissions policy that caps Asian American admissions. Kirk Carapezza, *Is Harvard Showing Bias Against Asian-Americans?*, NPR (May 20, 2015, 4:37 PM), <http://www.npr.org/sections/ed/2015/05/20/408240998/is-harvard-showing-bias-against-asian-americans> [https://perma.cc/ST35-TZDQ]. For similar stories, see Melissa Chen, *Why the Asian-American Lawsuit Against Harvard Is Doomed to Fail*, HUFFINGTON POST (Jul. 15, 2015, 3:08 PM), http://www.huffingtonpost.com/melissa-chen/why-the-asianamerican-law_b_7799098.html [https://perma.cc/M3A9-FB5X]; Maxim Lott, *Rejected Asian Students Sue Harvard over Admissions that Favor Other Minorities*, FOXNEWS (Nov. 18, 2014), <http://www.foxnews.com/us/2014/11/18/rejected-asian-students-sue-harvard-over-admissions-that-favor-other-minorities.html> [https://perma.cc/G7DD-6Q3F]; Charles Wheelan, *A Case for Preferential Treatment?: Accusations that Harvard Is Biased Against Asian-American Applicants Highlight Admissions Decision, Trade-Offs*, U.S. NEWS & WORLD REPS. (June 9, 2015, 4:20 PM), <http://www.usnews.com/opinion/blogs/charles-wheelan/2015/06/09/claims-of-harvard-bias-against-asian-americans-show-admissions-trade-offs> [https://perma.cc/LLF7-D62J].

which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner.”⁵² But remarkably, Asian Americans were noticeably absent from the list of racial groups specified in the Justice O’Connor’s first statement as having suffered historical discrimination.

The second statement appeared to have intended to include Asian Americans, as it referred to students who can make “unique contributions to the character” of a school.⁵³ Yet, this second statement also left Asians out of consideration for contributions to diversity benefits when Justice O’Connor inserted the word “underrepresented” before the word “minority.”⁵⁴ The inclusion of Asian Americans in the diversity discussion hinges on the modifier “underrepresented,” which prompts the question: What does underrepresented mean? The Merriam-Webster dictionary defines underrepresented as “inadequately represented”⁵⁵ and overrepresented to mean “represented excessively; *especially*: having representatives in a proportion higher than the average.”⁵⁶

In 2008, the number of Hispanics enrolled at UT Austin outnumbered the number of Asians, 1,339 Hispanics compared to 1,248 Asians.⁵⁷ Thus, there was a greater percentage of Hispanics than Asians in UT Austin’s entering class. Yet, the Fifth Circuit construed Hispanics as underrepresented and Asian Americans as overrepresented at UT Austin:

The mere fact that the gross number of Hispanic students attending UT exceeds the gross number of Asian–American students attending UT does not mean Hispanics are not an “underrepresented” minority group. Hispanic students remain underrepresented at UT when their student population as a percentage of the entire UT population is compared to Texas’ Hispanic and Latino population. According to the latest statistics from the United States Census Bureau, Texas’ population is 36 percent Hispanic or Latino. In contrast, in 2008 only 20 percent of admitted and/or enrolled UT students were Hispanic. Thus, compared to their percentage of Texas’ population as a whole, Hispanics remain underrepresented. Asian–Americans, on the other hand, are largely overrepresented compared to their percentage of Texas’ population.⁵⁸

⁵² *Defunis v. Odegaard*, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting).

⁵³ *See Grutter v. Bollinger*, 539 U.S. 306, 316 (2003).

⁵⁴ *See id.*

⁵⁵ *Underrepresented*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/underrepresented> [<https://perma.cc/8FFM-966R>] (last visited May 8, 2017).

⁵⁶ *Overrepresented*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/overrepresented> [<https://perma.cc/U7ZG-HFZJ>] (last visited Mar. 4, 2017).

⁵⁷ Office of Info. Mgmt. & Analysis, *Common Data Set 2008-2009*, U. TEX. AUSTIN, https://sps.austin.utexas.edu/sites/ut/IRRIS/CDS/IMA_PUB_CDS_2008_AY.pdf [<https://perma.cc/B77A-QKYQ>].

⁵⁸ *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009) (citations omitted).

The Fifth Circuit's formulation of overrepresentation and underrepresentation sought to mirror the state's racial population, which can be challenged as amounting to racial balancing as proscribed by the Supreme Court.⁵⁹

Incidentally, it is ironic that although UT Austin relied on the racial isolation as a justification for qualitative diversity, it neglected to consider the isolation faced by Asian Americans. As Justice Alito keenly noted,

If, on the other hand, state demographics are not driving UT's interest in avoiding racial isolation, then its treatment of Asian-American students is hard to understand. As the District Court noted, "the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students." In 2008, for example, UT enrolled 1,338 Hispanic freshmen and 1,249 Asian-American freshmen. UT never explains why the Hispanic students—but not the Asian-American students—are isolated and lonely enough to receive an admissions boost, notwithstanding the fact that there are more Hispanics than Asian-Americans in the student population. The anecdotal statements from UT officials certainly do not indicate that Hispanics are somehow lonelier than Asian-Americans.⁶⁰

Thus, the pursuit of diversity over the concern of students feeling isolated has once again squeezed out Asian Americans.

Another way that Asians have been left out of the diversity pursuit is through mirroring admissions of racial groups to the applicant pool. Such proportioning causes Asian Americans to be construed as an overrepresented group and is another form of balancing that disadvantages Asian Americans. Professor Tung Yin points out that many campuses have embraced a narrow conception of diversity that focuses on correlating admissions for minority groups with applicant pools, allowing for admissions of minority groups in equal proportion to each other, except for Whites: Schools universally allot 5%–12% of its admissions for each minority group and 65%–70% for Whites.⁶¹

⁵⁹ See *infra* Part V.A.3.

⁶⁰ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2236 (2016) (Alito, J., dissenting) (citations omitted).

⁶¹ Yin, *supra* note 3, at 96. Professor Yin offers a novel formulation for diversity—that the percentage of admissions relegated to be shared among Asians, Blacks, Latinos, and Other be redistributed in order that one minority racial group may have a greater percentage at some schools. Thus, he proposes that the overall White to non-White proportion at all law schools can be maintained, but minority groups need not be evenly divided at each school. *Id.* at 91–92. For example, he suggests that instead of each school admitting one to four Native Americans, some schools would have zero while others would have amassed the bulk of Native American students. *Id.* at 105–06. The benefit of this proposal, he suggests, would reduce the potential for the one to four Native Americans to

When this balance is disturbed, cries of lack of diversity can be heard. For example, *Frontline* reported that when California's Prop. 209 ban on race-based preferences for admissions became effective in its undergraduate campuses, the University of California at Berkeley "accepted its least diverse freshman class in 17 years, admitting 56 percent fewer blacks and 49 percent fewer Latinos than in 1997,"⁶² despite the fact that Asians outnumbered Whites.⁶³ In another instance, when Black students amounted to only 0.9% of the student body at the California Institute of Technology ("Caltech"), the *Journal of Blacks in Higher Education* assailed Caltech as "[t]he Whitest of the Nation's 25 Highest-Ranked Universities."⁶⁴ In 2008 Caltech's entering class consisted of less than 1% Black and 6% Hispanic students.⁶⁵ In that same year, Caltech's Asian student population (at 40%) exceeded Whites (at 39%). However, Harvard, rather than Caltech, was lauded for admitting the "most diverse" entering class in its history when it admitted an entering class of 60% Whites.⁶⁶

Many colleges and universities have adopted a conception of diversity that mirrors proportions of the applicant pool.⁶⁷ Law schools, in particular, follow this narrow conception of diversity. The application pool to ABA accredited law schools has hovered around 60%–65% White, and for Black, Asian Americans, and Latinos, each group ranged from 5% to 12%.⁶⁸ Law school admissions tend to reflect the ABA applicant pool distribution: "around 60–70 percent white students, with the remainder divided fairly evenly among Asian American, African American, and Latino/Hispanic American students, with a handful of Native American students."⁶⁹

feel racially isolated. *Id.* Professor Yin concludes that each school does not need "the same or similar kind of diversity. Rather, what is important is that across all comparable institutions (and in particular, elite institutions) there exists sufficient diversity." *Id.* at 127.

⁶² *Id.* at 99; *Challenging Race Sensitive Admission Policies*, *supra* note 3.

⁶³ *See* Yin, *supra* note 3, at 99 n.30 (citing other characterizations of decreased diversity after Prop. 209).

⁶⁴ *See id.* at 102 (alteration in original).

⁶⁵ *See id.* (citing Russell K. Nieli, *Why Caltech is in a Class by Itself*, MINDING THE CAMPUS (Dec. 9, 2010), http://www.mindingthecampus.org/2010/12/why_caltech_is_in_a_class_by_itself/ [<https://perma.cc/TM25-UJ2E>]).

⁶⁶ *See id.* (quoting *College Class of 2010 is the Most Diverse in Harvard History*, HARV. UNIV. GAZETTE (Apr. 6, 2006), <http://www.news.harvard.edu/gazette/2006/04.06/03-admissions.html> [<https://perma.cc/Q7MJ-MCB3>]).

⁶⁷ *See id.* at 91, 96–97 (noting that most law schools have a minority student population between 17.6 and 30.8 percent).

⁶⁸ *See id.*, at 96; *see also* ACCESS GROUP, 2015 LEGAL EDUCATION DATA DECK: KEY TRENDS ON ACCESS, AFFORDABILITY, AND VALUE 5 (2015), https://www.accessgroup.org/system/tdf/2015_legal_education_data_deck.pdf?file=1&type=node&id=406. [<https://perma.cc/MGG3-HGVZ>].

⁶⁹ *See* Yin, *supra* note 3, at 89.

Some idealized that a diverse school would consist of 20% White, Black, Asian, Hispanic, and Other.⁷⁰ Some lower courts, however, have rejected such propositions: “[N]othing in *Grutter* requires a university to give equal preference to every minority group.”⁷¹ But if courts were to permit or require this idealized standard, Berkeley, Caltech, and Harvard could hardly be described as diverse under this standard. Yet, neither would Howard University. The student racial composition of Howard is “0.8% American Indian/Alaskan Native, 1.4% Asian, 95.3% Black/African-American, 0.5% Hispanic/Latino, 0.0% Multi-race (not Hispanic/Latino), 0.2% Native Hawaiian/ Pacific Islander, 1.9% White, [and] 0.0% Unknown.”⁷² Putting aside Howard’s historical origins as a Historically Black College and University (HBCU), no one would think to criticize Howard for its abysmal admission of Native American, Asian, and Hispanic students as lacking in diversity. To be clear, the Author is not suggesting that there is anything wrong with Howard’s admissions⁷³ but only raises its admissions statistics as a foil to prompt conversations about what diversity means.⁷⁴

B. Intra-racial Diversity

Equally elusive is the question of what qualitative diversity means. This section examines how qualitative diversity will be determined with respect to class, the distinction between immigrant Blacks and legacy Blacks, and intra-racial Asian American groups, which naturally prompts inquiries into the deservedness of each of these groups.

1. The Privileged

The dialogue initiated by the Justices during oral arguments in the *Fisher* case captured the Justices’ concern over conceptualization and implementation of qualitative diversity:

⁷⁰ See Deirdre M. Bowen, *American Skin: Dispensing with Colorblindness and Critical Mass in Affirmative Action*, 73 U. PITT. L. REV. 339, 384 (2011); see also Yin, *supra* note 3, at 108.

⁷¹ *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 606 (W.D. Tex. 2009).

⁷² *Howard University Overview*, C. DATA, http://www.collegedata.com/cs/data/college/college_pg01_tmpl.jhtml?schoolId=1024 [https://perma.cc/42ZU-22KN] (last visited Mar. 7, 2017).

⁷³ In fact, Blacks attending Howard and other HCBUs are better prepared for graduate schools than those who attend colleges and universities with predominately White student populations. See Yin, *supra* note 3, at 110.

⁷⁴ If one were to employ a White vs. non-White conception of diversity, then in a comparison of the four schools, Howard would rank at the top, and Caltech and Berkeley would be second, with Harvard trailing behind.

Mr. Garre: . . . And I don't think it's been seriously disputed in this—this case to this point that, although the percentage plan certainly helps with minority admissions, by and large, the—the minorities who are admitted tend to come from segregated, racially-identifiable schools.

Justice Alito: Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before. The top 10 percent plan admits lots of African Americans—lots of Hispanics and a fair number of African Americans. But you say, well, it's—it's faulty because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds. And you specifically have the example of the child of successful professionals in Dallas. Now, that's your—that's your argument? If you . . . have an applicant whose parents are—let's say they're—one of them is a partner in your law firm in Texas, another one is . . . another corporate lawyer. They have income that puts them in the top 1 percent of earners in the country, and they have—parents both have graduate degrees. They deserve a leg-up against, let's say, an Asian or a white applicant whose parents are absolutely average in terms of education and income?

Mr. Garre: No, Your Honor. . . .

Justice Alito: Well, how can the answer to that question be no, because being an African American or being a Hispanic is a plus factor.

Mr. Garre: Because, Your Honor, our point is, is that we want minorities from different backgrounds. We go out of our way to recruit minorities from disadvantaged backgrounds.

Justice Kennedy: So what you're saying is that what counts is race above all?

. . . .

Justice Kennedy: You want underprivileged of a certain race and privileged of a certain race. So that's race.⁷⁵

As Justice Alito's question highlights, the qualitative diversity argument risks undermining affirmative action through the attention that the approach gives to

⁷⁵ Transcript of Oral Argument, *supra* note 9, at 43–45.

privileged minorities.⁷⁶ UT Austin’s justification that its raced-based policy is an effort to bring diverse viewpoints beyond those attained through the Top Ten Percent program naturally links UT Austin’s qualitative diversity approach to privileged minorities.⁷⁷ Because studies show that affirmative action tends to benefit affluent minorities, UT Austin’s desire to use its race-based admissions program to reach other minorities outside of the Top Ten Percent program will result in increased admissions for the privileged.⁷⁸

Assuming *arguendo* that UT Austin was genuinely interested in admitting privileged minorities to overcome racial stereotypes and promote cross racial understanding, rather than to maintain its prestigious ranking through the admissions of privileged minorities with higher credentials,⁷⁹ the argument for qualitative diversity would actually militate against allowing racial preferences for the university’s holistic review. Because of the broad perception that affirmative action benefits privileged minorities—who are first-generation and second-generation Blacks—over underprivileged minorities,⁸⁰ racial stereotypes would

⁷⁶ Professor Carbado suggests that the appropriate response would be to remind Justice Alito that helping underprivileged students was not constitutionally sanctioned for affirmative action. He offers that the University should have explained that diversity has been the constitutionally accepted rationale for affirmative action and that intraracial diversity would advance that rationale. Carbado, *supra* note 11, at 1180. While it is true that diversity, rather than remedying societal discrimination, garnered constitutional traction, some advocates conflate the remedial rationale with the diversity rationale. The Reverend Jesse Jackson, for example, asserted that “Universities have to give weight to the African-American experience because that is for whom affirmative action was aimed in the first place. That intent must be honored.” Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1150–51 (2007).

⁷⁷ See *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S.Ct. 2198, 2241–42 (Alito, J., dissenting).

⁷⁸ See Ngov, *supra* note 1, at 23–25 (discussing the impact of socioeconomic status on college admissions); see also *University Race-Sensitive Admissions Programs Are Not Helping Black Students Who Most Need Assistance*, J. BLACKS HIGHER EDUC., http://www.jbhe.com/news_views/56_race_sensitive_not_helping.html [<https://perma.cc/L8WM-KNBJ>] (last visited Mar. 27, 2017) (examining the socioeconomic background of black students at selective colleges).

⁷⁹ *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 650 (5th Cir. 2014), *cert. granted*, 135 S. Ct. 2888 (2015). The data show that students admitted through the race-based holistic review possess higher credentials than those admitted through the Top Ten Percent program. Judge Higginbotham observed, “With each entering class, there was a gap between the lower standardized test scores of students admitted under the Top Ten Percent Plan and the higher scores of those admitted under holistic review . . . A gap persisted not only among students overall and white students, but also among racial and ethnic minority students.” *Id.*

⁸⁰ Professor Lani Guinier observes that

admissions decisions recreate a “geography of unequal opportunity” in which suburban students succeed and rural and urban students are left behind.

more likely be dismantled by admitting more impoverished minority students, like those admitted through the Top Ten Percent program. Similarly, because first-generation and second-generation Blacks comprise over 40% of black students at Ivy League universities,⁸¹ a critic is likely to point out that if qualitative diversity is the goal of race-based policies, then the diversity attained through the Top Ten Percent program would be diluted through UT Austin's race-based program, which is more likely to admit first-generation and second-generation Blacks. As Professor Onwuachi-Willig has argued,

the[] overrepresentation [of mixed-race, first-generation, and second-generation black students] at elite institutions of learning does not necessarily advance the factors that are commonly viewed as the primary benefits of diversity. . . . In other words, overrepresentation of certain groups of Blacks, such as second-generation West Indian Blacks or Blacks from the Northeast, decreases the likelihood of differing viewpoints in the classroom and on campus⁸²

The purpose of this discussion is not to advance a particular notion of whether privileged as opposed to impoverished Blacks, or whether first-generation and second-generation Blacks as opposed to legacy Blacks, better facilitate the benefits of diversity. But rather, the purpose is to bring to the forefront that UT Austin's qualitative diversity argument may undermine the very benefits of diversity it seeks to realize.

2. *Legacy Blacks versus Immigrant Blacks*

The question of deservedness has been entwined with distinctions between legacy Blacks, who are descendant of slaves, and immigrant blacks. "Many argue

. . . Risk-averse admissions officers cherry pick among applicants of color and fail to recruit in urban or rural public schools.

Many colleges rely on private networks that disproportionately benefit the children of African and West Indian immigrants who come from majority black countries and who arrived in the United States after 1965. Affluent, well-educated new immigrants from South America bolster Latino diversity statistics while the children of migrant farm workers are left behind.

Lani Guinier, Opinion, *Our Preference for the Privileged*, BOS. GLOBE (July 9, 2004), at A13, <http://www.law.harvard.edu/faculty/guinier/publications/preference.pdf> [<https://perma.cc/B2VZ-N5LY>]. *Accord* Carbado, *supra* note 11, at 1181 (recognizing the "general criticism of affirmative action—namely, that the policy only benefits class-privileged blacks").

⁸¹ Douglas S. Massey et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 248 tbl.1 (2007); Brown & Bell, *supra* note 15, at 1249–54; Onwuachi-Willig, *supra* note 76, at 1147.

⁸² Onwuachi-Willig, *supra* note 76, at 1184–85.

that it was students like these [i.e., the descendants of slaves], disadvantaged by the legacy of Jim Crow laws, segregation and decades of racism, poverty and inferior schools, who were intended as principal beneficiaries of affirmative action in university admissions.”⁸³ For example,

[t]he president of Amherst College, Anthony W. Marx, says that colleges should care about the ethnicity of black students because in overlooking those with predominantly American roots, colleges are missing an “opportunity to correct a past injustice” and depriving their campuses “of voices that are particular to being African-American, with all the historical disadvantages that that entails.”⁸⁴

Similarly, Professor Angela Onwuachi-Willig argues that immigrant Blacks have garnered the benefits of affirmative action in greater proportion to legacy Blacks, and she proposes that although immigrant Blacks should not be excluded, schools should consider ancestral heritage as part of their racial preference in making admissions decisions.⁸⁵ She draws upon differences between legacy Blacks and immigrant Blacks in education, culture, and economics to support her claim.⁸⁶ Although Professor Onwuachi-Willig is careful not to explicitly state this,⁸⁷ the question lurking in the background is whether black descendants of slavery have a stronger claim for affirmative action than immigrant Blacks. After building her case for greater inclusion of legacy Blacks, Professor Onwuachi-Willig takes care to refute any insinuations that immigrant Blacks should be excluded from affirmative action considerations. Professors Kevin Brown and Jeannine Bell, on the other hand, expressly argue that legacy Blacks, or to use their phrase “Ascendants,” have a greater entitlement to affirmative action: “From the perspective of the struggle of blacks in the United States to overcome the historical racism here, however, the descendants of those blacks who suffered from racism in this country should receive priority. After all, their parents did not choose to come to the United States.”⁸⁸ Therefore, if the answer is yes to the question of whether legacy Blacks have a stronger claim to affirmative action, then critics are likely to argue that not all Blacks should be given a “plus” for affirmative action

⁸³ Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES (June 24, 2004), <http://www.nytimes.com/2004/06/24/us/top-colleges-take-more-blacks-but-which-ones.html> [https://perma.cc/5SAX-ZU9W].

⁸⁴ *Id.*

⁸⁵ Onwuachi-Willig, *supra* note 77, at 1144–49, 1157–58.

⁸⁶ *Id.* at 1157–58; *see* Brown & Bell, *supra* note 15, at 1265 (distinguishing differences between immigrant and ascendant Blacks).

⁸⁷ *But see* Yin, *supra* note 3, at 116 (interpreting Onwuachi-Willig’s work as arguing “that affirmative action programs should specially benefit legacy blacks, who have suffered the worst effects of discrimination and oppression”).

⁸⁸ Brown & Bell, *supra* note 15, at 1236.

admissions—even under a qualitative diversity approach that encompasses a compensatory motive for affirmative action.

Because the qualitative diversity argument relies on intraracial distinctions, it necessarily implicates questions of deservedness—a question that risks exclusion of subgroups within a racial group. If racial preferences are given for social justice concerns, qualitative diversity leads to the question of which group has suffered more. Consider the example of Professor Onwuachi-Willig’s discussion about the discriminatory experiences of legacy Blacks and immigrant Blacks. She explains that immigrant Blacks do not suffer stigma and maltreatment as acutely as legacy Blacks because they are more likely to be viewed by Whites as “good Blacks” as opposed to “bad Blacks,”⁸⁹ which facilitates their inclusion in communities and schools. But others opine that immigrant Blacks experience as great or even greater discrimination at the hands of legacy Blacks.⁹⁰

In fact, studies have shown that one reason why some first- and second-generation Blacks may work to form identities separate from legacy Blacks is the negative social treatment that they have experienced from legacy Blacks, such as taunting because of accents and family dress. Immigrant Blacks often experience deeper hurt as a result of such criticism from legacy Blacks than from Whites. In this sense, first- and second-generation black Americans suffer a double discrimination that many African-Americans do not have to endure, both the disadvantage of blackness in a racist American society and the disadvantage of foreignness in a nationalist society.⁹¹

Thus, the purpose of this discussion is not to debate who has been more aggrieved but to point out that a conception of qualitative diversity that includes delineations of merit based on past suffering inescapably requires weighing of past harms. Of course, a response might be to include all those who suffer discrimination, but when seats at elite colleges are limited, inevitably, line drawing on the basis of past harms will have to be made. Justice Douglas, when he opposed affirmative action on the premise for redressing historical harms, was attuned to the “slippery slope”⁹² nature of making such valuations in “the . . . attempt to

⁸⁹ Onwuachi-Willig, *supra* note 76, at 1177.

⁹⁰ Immigrant Blacks “have negative experiences of rejection from Ascendants who may also see them as different.” Brown & Bell, *supra* note 15, at 1271. Similarly, bi-racial black students feel alienation and perhaps discrimination by monoracial blacks. *Id.* at 1262. “Some 40% of the biracial black students described negative experiences with other blacks compared to only 12% of the monoracial black students.” *Id.*

⁹¹ Onwuachi-Willig, *supra* note 76, at 1203.

⁹² Yena Lee, *Asian Americans and Affirmative Action: Through the Study of Fisher v. University of Texas*, 5 GEO. J.L. & MOD. CRITICAL RACE PERSP. 127, 133 (2013); Wu, *supra* note 39, at 258.

assess how grievously each group has suffered from discrimination, and allocate proportions accordingly.”⁹³

On the other hand, if qualitative diversity focuses on racial diversity, the qualitative diversity argument leads to the question of who is more Black, Asian, Hispanic, Native American, etc. For example, Professor Onwuachi-Willig is concerned about students who do not “live the experiences of racial minorities” but, nevertheless, claim minority status on college applications by virtue of their biology, as determined by genetic testing.⁹⁴ Although one might characterize their actions as a “fraud” and “misrepresentation,”⁹⁵ a critic might argue that one is implicitly questioning if these students are “black enough” or “Asian enough” and the like. One might conclude that those individuals who only have a biological component of minority ancestry but otherwise live white lives “seemingly bring very little to the table in terms of promoting cross-racial understanding and exchange.”⁹⁶ Yet, an argument can be made that there is value to the experiences of those who “grew up White” but later discover their partial ethnic heritage. Perhaps they might have a new found appreciation for minorities and can speak from the perspective of someone with a newly found ethnic background.

For another example, consider the conclusion of some scholars that

many Black/White Biracials are less likely than Ascendants to ensure the unique contributions to the character of education at a selective higher education program. As a result, some of the benefits of making classroom discussions more lively, spirited and more enlightening are lost. Ascendants are also more likely to contribute more to the benefits of cross-racial understanding that enables students to understand better persons of different races than many Black/White Biracials.⁹⁷

Those scholars make an identical conclusion regarding the superior ability of “Ascendants” or legacy Blacks over those of immigrant Blacks to promote cross racial understanding and contribute to robust classroom discussions.⁹⁸ Again, an argument can be made that Black/White Biracials might have more to offer in contributing to classroom discussions than monoracial Blacks because they have exposure to a greater variety of social and cultural experiences, which benefit them in facilitating cross racial understanding. Likewise, immigrant Blacks might better foster cross racial understanding than legacy Blacks because they have been discriminated against by both Whites and legacy Blacks.⁹⁹

⁹³ *Defunis v. Odegaard*, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting).

⁹⁴ Onwuachi-Willig, *supra* note 76, at 1217–19.

⁹⁵ *Id.* at 1217.

⁹⁶ *Id.* at 1219.

⁹⁷ Brown & Bell, *supra* note 15, at 1264.

⁹⁸ *Id.* at 1274–75.

⁹⁹ See *supra* notes 90–91 and accompanying text.

The point is not to debate which is the right conclusion to draw about biracial Blacks, immigrant Blacks, or applicants who discover their ethnic heritage through genetic testing, but rather that the conclusions drawn, whatever they may be, necessarily question deservedness among intraracial groups. Through these contested inquiries of deservedness, a qualitative diversity approach to school admissions risks intraracial balkanization.¹⁰⁰

The Model Minority label¹⁰¹ ascribed to Asians serves as a current example of interracial fragmentation¹⁰² and is instructive for the potential of *intraracial* fragmentation. The phrase Model Minority conveys the image of Asian Americans as hardworking, intelligent, and focused on achievement, and that through these attributes, Asian Americans succeed in American society.¹⁰³ The origins of the Model Minority myth can be traced to the arrival of the Chinese laborers, “Coolies,” imported through a slave trade to work at plantations and factories.¹⁰⁴ In an effort to “punish the negro for having abandoned the control of his old master,” the Chinese laborers were praised for being “more obedient and industrious than the negro.”¹⁰⁵ To attack the Irish, *The New York Times* contrasted the Chinese laborers from the Irish immigrants: “‘John Chinaman’ was a better addition to society than was ‘Paddy’” because the Chinese were not prone to excessive drinking and violence.¹⁰⁶ In the mid-1960s, the phrase “model minority” was coined, and the image was propelled by an article featured in the *New York Times Sunday Magazine* that praised Japanese Americans as “a minority that has risen above even prejudiced criticism.”¹⁰⁷ The article proclaimed that “[b]y any criterion of good citizenship that we choose, the Japanese Americans are better than any group in our society, including native-born whites.”¹⁰⁸

¹⁰⁰ For example, “[e]ven among black scholars there is disagreement on whether a discussion about the origins of black students is helpful. Orlando Patterson, a Harvard sociologist and West Indian native, said he wished others would ‘let sleeping dogs lie.’” Rimer & Arenson, *supra* note 83.

¹⁰¹ For a critique of the Model Minority image, see Wu, *supra* note 39, at 244–47.

¹⁰² Lee, *supra* note 50, at 136 (“[T]he [Model Minority] image serves to divide Asian Americans from other racial groups, essentially pitting minorities against each other.”). For other examples of racial tension between Asians and other groups, see Allred, *supra* note 48, at 74–75.

¹⁰³ Chew, *supra* note 39, at 24; see also Jean Shin, *The Asian American Closet*, 11 ASIAN L. J. 1, 3–7 (2004) (discussing the stereotypes that accompany the Model Minority image).

¹⁰⁴ Wu, *supra* note 39, at 230–33 (recounting the arrival and experiences of Chinese laborers around the Reconstruction era). Chew, *supra* note 39, at 9 n.15.

¹⁰⁵ Wu, *supra* note 39, at 231.

¹⁰⁶ *Id.*

¹⁰⁷ Wu, *supra* note 39, at 237.

¹⁰⁸ *Id.* at 237.

As a result of the Model Minority myth,

Asian Americans are isolated from both sides of the black/white paradigm. African Americans and Hispanic Americans may resent Asian Americans for their perceived success. On the other hand, whites are also not eager to claim Asians as their own. The perpetual foreigner stereotype¹⁰⁹ belies any alliance between Asian Americans and whites, as does the very term “model minority.” By specifically calling Asian Americans a minority, it sets them apart as the “other.”¹¹⁰

In his dissent in *Plessy v. Ferguson*, Justice Harlan candidly noted how perceptions of Asian Americans as foreigners function to exclude them: “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.”¹¹¹

Similarly, immigrant Blacks are cast as Model Black Minorities. They are described as “exceptionally motivated,”¹¹² “with an immense drive to succeed by traditional standards,”¹¹³ and assimilable.¹¹⁴ “[P]ast research has shown that, in the employment context, immigrant Blacks are identified as the ‘good Blacks’ or the ‘model black minority’ when compared to legacy Blacks.”¹¹⁵ Likewise, Black/White Biracials are described as “seem[ing] more polite, less hostile, more solicitous and easier to get along with than Ascendants.”¹¹⁶ The image ascribed to immigrant Blacks and Black/White Biracials as more favored over legacy Blacks or Ascendants causes isolation between them. As a result, “biracial black students were less likely to feel close to other black students and more likely to report extreme or considerable alienation from black students on campus.”¹¹⁷

Consequently, these model minority myths, conjured by those who view one racial group as more deserved than another, can cause interracial and intraracial fragmentation. Because qualitative diversity seeks to measure merit by means of determining which intraracial group better confers the benefits of diversity, a qualitative diversity approach is likely to exacerbate the current fragmentation between and among racial groups.

¹⁰⁹ See Chew, *supra* note 39, at 33–38 (describing the perception of foreignness).

¹¹⁰ Allred, *supra* note 48, at 72–73.

¹¹¹ *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896).

¹¹² Onwuachi-Willig, *supra* note 76, at 1170.

¹¹³ *Id.* at 1170.

¹¹⁴ *Id.* at 1173.

¹¹⁵ *Id.* at 1175.

¹¹⁶ Brown & Bell, *supra* note 15, at 1264.

¹¹⁷ *Id.* at 1262.

3. *Is There Room for Asian Americans?*

Qualitative diversity, some would argue, has the potential to re-conceptualize Asians from a monolithic group to a group with varying ethnicities. The cramped view of Asians as a monolithic racial group has harmed Southeast Asians, such as Cambodians, Hmong, and Laotians, who are underrepresented.¹¹⁸ “Nearly half of all Americans of Southeast Asian descent live in poverty,” and a large percentage are first-generation immigrants who fled their home country as political refugees.¹¹⁹ While the qualitative diversity approach may hold promise for Southeast Asians to break away from the monolithic “Asian” group and to garner more seats in America’s colleges, it would require a concomitant nuanced conception of diversity that does not mirror the population or applicant pool, as is the current trend among higher education institutions. Otherwise, under existing caps for Asians, the increased admissions of Southeast Asians would be perceived as a “‘negative action’ against highly represented Asian Americans (i.e., Chinese, Korean, etc.), as the school would be redistributing spots that otherwise would have gone to those groups of Asian Americans.”¹²⁰

Whether there is room for more Asians Americans, Blacks, etc. is contingent upon a school’s conception of diversity and critical mass. If diversity is capped for each racial group in proportion to the applicant pool or population, the contests over deservedness will heighten. Thus, whether the debate centers on legacy Blacks versus immigrant Blacks, or Southeast Asians versus other Asians, the qualitative diversity approach brings us back full circle to the uncomfortable discussion of deservedness.

III. RELIANCE ON STEREOTYPES

For qualitative diversity to be realized, admissions officers would need to sift through thousands of applications while making finer distinctions among applicants than previously necessitated by the broader diversity rationale. The qualitative diversity rationale brings greater temptation for these admissions officers to employ stereotypes as a proxy to facilitate expedient considerations of the mounds of application files.

Professor Devon Carbado explains how intraracial diversity might be implemented for higher education admissions and uses three hypothetical black applicants to illustrate.¹²¹ He creates three profiles for an admissions officer to

¹¹⁸ Gee, *supra* note 45, at 180; Yin, *supra* note 3, at 113 (noting the differences among Cambodians, Hmong, and Laotians as compared to Chinese, Japanese, Filipino, Korean, and Indians in obtaining college degrees).

¹¹⁹ Allred, *supra* note 48, at 72 (quoting Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 41 n.193 (1996)); Chew, *supra* note 39, at 28.

¹²⁰ Yin, *supra* note 3, at 114.

¹²¹ Carbado, *supra* note 11, at 1148–49.

consider: Kimberly, who is raised by a single mother in the inner city and attends a high school composed mostly of Blacks; Tanisha, who is raised by a policeman and a stay-at-home mother and lives in the inner city, but attends school in the suburbs; and Rachel, with parents who are a dentist and lawyer, who attends an elite private high school and lives in a white neighborhood.¹²² Professor Carbado explores how, depending on the diversity benefit a school seeks to attain, an admissions officer would prefer a particular profile over another, thereby making intraracial distinctions.

Whether the admissions officer prefers racially salient African Americans could turn on the precise diversity benefit she seeks to advance. If that officer wants black students who will facilitate racial cooperation and understanding, for example, that preferred diversity benefit increases the likelihood that the officer will admit Blacks whose racial identities are not salient. If, on the other hand, an officer wants black students who will make the environment more racially conscious, she will likely admit black students whose racial identities are salient.¹²³

The notable problem in any defense of qualitative diversity, as seen in Professor Carbado's illustrations, is the reliance on racial stereotypes. For example, Professor Carbado examines whether Rachel, a black applicant of West Indian descent, would be an effective debiasing agent to promote the diversity benefit of breaking down racial stereotypes.¹²⁴ He concludes that whether Rachel will more effectively advance the goal of dismantling racial stereotypes will depend on whether her Caribbean background is salient—whether she outwardly displays and embraces her Caribbean heritage.¹²⁵ “This different treatment,” he explains, “is based on the view that Caribbean blacks are not ‘really’ black or that, unlike African Americans, they are not ‘negatively’ black. This limits the ability of people of Caribbean descent to stand in for African Americans” in a way that could alter other students’ views of African Americans.¹²⁶

As Professor Carbado ultimately recognizes, “intraracial selections likely trade on biases and stereotypes.”¹²⁷ He explains, “Crudely, and with respect to African Americans, we judge them based not only on whether we think they are black but also on how stereotypically black, or how race-consciously black, we perceive them to be.”¹²⁸

Similarly, to advance her argument for greater inclusion of legacy Blacks at elite schools, Professor Onwuachi-Willig details the advantages that immigrant

¹²² *Id.* at 1148–49.

¹²³ *Id.* at 1139.

¹²⁴ *Id.*, at 1150–52.

¹²⁵ *Id.* at 1139.

¹²⁶ *Id.* at 1151–52.

¹²⁷ Carbado, *supra* note 11, at 1158.

¹²⁸ *Id.* at 1135.

Blacks experience. She posits that “mixed-race students and first- and second-generation Blacks may be better positioned to be admitted to and survive elite college and university environments because of the relative ease (compared to legacy Blacks) with which they can integrate and assimilate into white circles.”¹²⁹ The explanation for this, as Professor Onwuachi-Willig suggests, rests on the integration of immigrant Blacks in white neighborhoods.¹³⁰ Another commentator surmises that because immigrant Blacks have a more diverse group of high school friends, they are “less likely to find interactions across racial lines to be foreign and alienating on campus.”¹³¹ Additionally, Professor Onwuachi-Willig contends that “acculturation into American society is easier for immigrant Blacks because of positive images of hard-working immigrants, which stand in contrast to stereotypes of lazy black Americans.”¹³² Furthermore, Onwuachi-Willig points out that “psychological advantages may derive from being a voluntary immigrant as opposed to an involuntary immigrant, and such advantages include the self-assurances of coming from a majority black country with black leaders and role models as well as immigrant optimism about future opportunities in the United States.”¹³³

The possibility of a contrary assumption, however, should be recognized—that immigrant Blacks might have greater difficulty integrating into white environments because they previously have been accustomed, more so than legacy Blacks, to living in a minority dominant country. Another possibility is that immigrant Blacks likely experience greater difficulty in assimilating with Whites because they are burdened with navigating through a new economic, social, political, cultural, and educational system and establishing a new way of life. Again, the purpose of this discussion is not to declare which conclusions are correct but to point out that qualitative diversity invites distinctions between immigrant Blacks and legacy Blacks and other intraracial groups that are laden with stereotypes and presumptions. The irony is that deciding who can better confer the benefits of diversity in overcoming racial stereotypes, fostering racial understanding, and contributing to a robust classroom discussion begets making racial stereotypes.¹³⁴

¹²⁹ Onwuachi-Willig, *supra* note 76, at 1173.

¹³⁰ *Id.* at 1173.

¹³¹ *Id.* (citing Aisha Cecilia Haynie, *Not ‘Just Black’ Policy Considerations: The Influence of Ethnicity on Pathways to Academic Success Amongst Black Undergraduates at Harvard University*, 13 J. PUB. INT’L AFF. 40, 44 (2002)).

¹³² *Id.* at 1152.

¹³³ *Id.* at 1152–53.

¹³⁴ Justice Alito similarly pointed out UT’s reliance on stereotypes when it tried to distinguish among minorities admitted through the Top Ten Percent and those admitted through the race-based holistic program: “that minorities admitted under the Top Ten Percent Law . . . are somehow more homogenous, less dynamic, and more undesirably stereotypical than those admitted under holistic review.” *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2232 (2016) (Alito, J., dissenting). “And UT’s assumptions

Critics of affirmative action will quickly point out this irony when qualitative diversity distinctions are made. Or, worse, they may even disparage it as hypocrisy. A critic might complain that when used negatively, an intraracial distinction is bluntly condemned as discrimination, but an interesting conceptual reframing takes place when those who want to increase minority representation rely on it: it is lauded as promoting intraracial diversity or qualitative diversity. In sum, the qualitative diversity approach is fraught with contradictions, and thereby strains the diversity rationale.

IV. THE DILEMMA OF NARROW TAILORING

The battle for affirmative action will be fought over the strict scrutiny test's requirements for necessity and narrow tailoring. Previously, I examined in a different work whether a university's resort to a race-based policy satisfies the Court's demand for showing necessity.¹³⁵ This part builds upon my prior work by exploring whether the qualitative diversity rationale complies with narrow tailoring.

Because racial classifications, benign or invidious, trigger strict scrutiny, defendants must satisfy two prongs: 1) compelling interest and 2) necessity and narrow tailoring. "[T]he use of quotas,¹³⁶ the flexibility of the program,¹³⁷ the duration of the relief,¹³⁸ the scope of the program,¹³⁹ individualized considerations,¹⁴⁰ and the necessity of the program compared with the efficacy of race neutral alternatives"¹⁴¹ have been relevant factors in the Court's determination of narrowly tailored.¹⁴² In evaluating qualitative diversity for narrow tailoring, the approach will be most susceptible to criticisms that it lacks a logical endpoint¹⁴³

appear to be based on the pernicious stereotype that the African-Americans and Hispanics admitted through the Top Ten Percent Plan only got in because they did not have to compete against very many whites and Asian-Americans." *Id.*

¹³⁵ Ngov, *supra* note 1.

¹³⁶ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 320 (1978).

¹³⁷ *United States v. Paradise*, 480 U.S. 149, 171 (1987).

¹³⁸ *Croson*, 488 U.S. at 510; *Paradise*, 480 U.S. at 171.

¹³⁹ *Croson*, 488 U.S. at 506.

¹⁴⁰ *Gutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Croson*, 488 U.S. at 508; *Bakke*, 438 U.S. at 318 n.52.

¹⁴¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237–38 (1995); *Croson*, 488 U.S. at 507; *Paradise*, 480 U.S. at 171; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

¹⁴² Eang L. Ngov, *When "The Evil Day" Comes, Will Title VII's Disparate Impact Provision Be Narrowly Tailored to Survive an Equal Protection Clause Challenge?*, 60 AM. U. L. REV. 535, 546 (2011).

¹⁴³ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2235 (2016) (Alito, J., dissenting) ("Furthermore, UT has not identified 'when, if ever, its goal (which remains

because universities will attempt to carry qualitative diversity beyond the macro level of the student body population to the microcosm of “small classes”; use the approach to achieve racial balancing; and stretch the meaning of qualitative diversity to the point of hairsplitting the concept. Moreover, because qualitative diversity relies on presumptions about how students’ race affects how they act and think, and how others will react and feel, it is likely to fail narrow tailoring.

A. No Logical Endpoint

1. Student Population versus Classroom Population

UT Austin’s recent deployment of the diversity rationale seeks to extend diversity to a finer level—from the student body population to the classroom population. According to the university’s study, in “classes with 10 to 24 students, [it] found that 89% of those classes had either one or zero African–American students, 41% had one or zero Asian–American students, and 37% had either one or zero Hispanic students.”¹⁴⁴ One scholar contends that

[t]hese small classes are presumably the classroom settings where racial stereotypes could be broken down and cross-racial understanding could be fostered, and unless there are at least two students of any group, there cannot be diverse perspectives represented from that group. In that sense, diversity within racial groups was implicit in UT’s concept of critical mass, although not stated directly.¹⁴⁵

The university revised its earlier study that surveyed classes containing between five and twenty-four students, perhaps because of its realization that it is numerically impossible for a class with fewer than ten students to contain at least two students from every racial group (White, Black, Hispanic/Latino, Native American, and Asian American).¹⁴⁶ Even if a significant number of minorities were admitted, it would still be a statistical challenge to produce a class of ten students, with exactly two students representing each race. The university’s constrained conception of diversity in small classes contorts the critical mass calculus.

Now that the *Fisher II* Court has embraced the diversity rationale in smaller classes, it is no stretch of the imagination that higher education institutions will

undefined) for qualitative diversity will be reached.’ UT’s intra-racial diversity rationale is thus too imprecise to permit strict scrutiny analysis.” (citations omitted)).

¹⁴⁴ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 225 (5th Cir. 2011), *vacated and remanded*, 133 S. Ct. 2411 (2013); *see Fisher II*, 136 S. Ct. at 2235 (Alito, J., dissenting) (pointing out UT’s attempted retreat from advancing the classroom diversity argument).

¹⁴⁵ Harpalani, *supra* note 11, at 505.

¹⁴⁶ *Id.* at 505 n.181.

push the boundary to advocate for qualitative diversity in those small classes.¹⁴⁷ Thus, although a small class might be racially diverse, having the minimum of two students from each racial group as suggested by one scholar, a university might likely argue that race-based admissions are still needed to achieve qualitative diversity in these classes. Again, it would be a statistical feat to enroll at least two students of each intraracial group in these small classes. Consider the following: 1) there are 562 tribes or federally recognized Indian Nations in the U.S.;¹⁴⁸ 2) the U.S. Census recognizes Asians to include “a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent, including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam”;¹⁴⁹ 3) the U.S. Census also applies “[t]he Black racial category [to] include[] people who marked the ‘Black, African Am., or Negro’ checkbox. . . . [or] respondents who reported entries such as African American; Sub-Saharan African entries, such as Kenyan and Nigerian; and Afro-Caribbean entries, such as Haitian and Jamaican”;¹⁵⁰ and 4) the U.S. Census applies the “Hispanic or Latino” category to include “a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.”¹⁵¹ In light of the innumerable intraracial groups, achieving intraracial diversity in small classes would require increasing class enrollment to include more than fifty students, which would obviate the very purpose of a small class, in order to allow for two students from each ethnicity or intraracial group to enroll. The university might respond that it would not carry the qualitative diversity to this extreme, but critics might not be comforted by this assurance.

2. *Racial Balancing*

Furthermore, critics would point out that a university’s objective to have each racial group represented in small classes would amount to racial balancing. These small classes are likely elective classes, which students enroll in to satisfy their

¹⁴⁷ *Fisher II*, 136 S. Ct. at 2211.

¹⁴⁸ NATIONAL CONGRESS OF AMERICAN INDIANS, TRIBAL NATIONS AND THE UNITED STATES: AN INTRODUCTION 11, http://www.ncai.org/tribalnations/introduction/Tribal_Nations_and_the_United_States_An_Introduction-web-.pdf [<https://perma.cc/QP7U-3TXP>] (last visited May 8, 2017).

¹⁴⁹ ELIZABETH M. HOEFFEL ET AL., 2010 CENSUS BRIEFS: THE ASIAN POPULATION: 2010 2 (Mar. 2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-11.pdf> [<https://perma.cc/D6RG-TAAP>].

¹⁵⁰ SONYA RASTOGI ET AL., 2010 CENSUS BRIEFS: THE BLACK POPULATION: 2010 2 (Sept. 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> [<https://perma.cc/6HGE-BH33>].

¹⁵¹ SHARON R. ENNIS ET AL., 2010 CENSUS BRIEFS: THE HISPANIC POPULATION: 2010, at 2 (May 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> [<https://perma.cc/TD3U-TAYA>].

chosen major, and are driven by a student's choice.¹⁵² Studies show that particular professions or majors attract more students of a certain racial group—that “race and ethnicity affects major choice.”¹⁵³ A study found, for example, that “[f]or engineering and computer science, slightly smaller shares of black and Hispanic males choose this field of study compared with white males. In their freshman year, Asian and other males, including foreign students, are much more likely than white males to identify a major in engineering and computer science.”¹⁵⁴ As I have pointed out in my earlier work, “designing admissions procedures for the purpose of reflecting a population's diversity would violate the Court's prohibition on racial balancing.”¹⁵⁵ Similarly, using race-based admissions to attain diversity or qualitative diversity in small classes in proportion to the general population or student body population would offend the Court's jurisprudential constraints.¹⁵⁶ The Court has found it “‘completely unrealistic’ to expect that ‘minorities will choose a particular trade in lockstep proportion to their representation in the local population’”¹⁵⁷ and unequivocally held that “[r]acial balancing is not to be achieved for its own sake.”¹⁵⁸

3. *Hairsplitting Qualitative Diversity*

The qualitative diversity approach has no logical endpoint because intraracial diversity is susceptible to hairsplitting. Who is sufficiently diverse, and to what degree do we measure diversity? As previously discussed, students who were part descendants of minority groups but grew up in a white household could not claim minority status without being accused as frauds.¹⁵⁹ In one situation, genetic testing confirmed that a pair of twins, who grew up with adoptive white parents, were “nine percent Native American and eleven percent North African.”¹⁶⁰ Thus, these students were one-fifth minority, yet they could not claim minority status without

¹⁵² Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 VAND. L. REV. EN BANC 113, 136 (2012) (recognizing “racial and ethnic stratification by majors,” but explaining that a student's choice of majors is shaped by “racial isolation, stereotyping, and hostility”).

¹⁵³ LISA DICKSON, RACE AND GENDER DIFFERENCES IN COLLEGE MAJOR CHOICE 15 (2009), http://theop.princeton.edu/reports/forthcoming/ANNALS_07_Dickson_Manuscript_June2009.pdf [<https://perma.cc/65MK-5MQ8>].

¹⁵⁴ *Id.* at 5.

¹⁵⁵ Ngov, *supra* note 1, at 17.

¹⁵⁶ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting); Ngov, *supra* note 1, at 17.

¹⁵⁷ Ngov, *supra* note 1, at 17 (quoting *Richmond v. J. A. Croson Co.*, 488 U.S. 468, 507 (1989)).

¹⁵⁸ *Id.* at 17 (alteration in original) (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729–30 (2007)).

¹⁵⁹ Onwuachi-Willig, *supra* note 76, at 1217–19.

¹⁶⁰ *Id.* at 1218.

insinuations of misrepresentation.¹⁶¹ Ironically, these students had a greater biological claim to minority status than Homer Plessy, who was only one-eighth Black and lacked any Afro-centric phenotypes.¹⁶² Query, if Homer Plessy were applying for admissions, would we allow him to check the Black box?

The implementation of qualitative diversity requires institutions of higher education to discern “racial merit,” which at bottom depends on one’s definition of race. Although the debate over racial box checking is not new within the broader diversity discussion, qualitative diversity can potentially draw the controversy to a new height because whether race is a biological or social construct¹⁶³ is contested.¹⁶⁴

The ready availability of genetic testing has advanced our understanding of race, but in the process, it raises difficult questions that must be grappled with in applying qualitative diversity. For instance, researchers at 23andMe, a private genetic testing company, found that

people who identified as African-American had genes that were only 73.2 percent African. European genes accounted for 24 percent of their DNA, while .8 percent came from Native Americans. Latinos, on the other hand, had genes that were on average 65.1 percent European, 18 percent Native American, and 6.2 percent African. The researchers found that European-Americans had genomes that were on average 98.6 percent European, .19 percent African, and .18 Native American.¹⁶⁵

¹⁶¹ *Id.*

¹⁶² *Plessy v. Ferguson*, 163 U.S. 537, 538 (1896), *overruled by* *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483 (1954). Granted, Plessy was not necessarily trying to use his black heritage to claim a privilege.

¹⁶³ See Wu, *supra* note 39, at 228 (viewing “Asian American” as a social construct).

¹⁶⁴ Social and scientific discourse disagree on the meaning of “race.” For example, “[t]he Blackwell Encyclopaedia of Social Work defines race as ‘a word which has been used in an essentialist way as a biological, social and cultural construct to classify and distinguish one group of people from another, by using criteria as skin colour, language and customary behaviour.’” Samuel Coleman, *Addressing the Puzzle of Race*, 47 J. SOC. WORK EDUC. 91, 92 (2011). Others reject race as having any scientific basis. *Id.* at 93. And others define race “as a social construct, but one that continues to operate in the United States as real and primarily biological.” *Id.* Still others conclude, “[t]oday, most theorists favor the view that races are social constructs.” Robin O. Andreasen, *Race: Biological Reality or Social Construct?*, 67 PHIL. SCI. S653, S654 (2000).

¹⁶⁵ Carl Zimmer, *White? Black? A Murky Distinction Grows Still Murkier*, N.Y. TIMES (Dec. 24, 2014), http://www.nytimes.com/2014/12/25/science/23andme-genetic-ethnicity-study.html?_r=0 [<https://perma.cc/B8LE-2YLL>]. The 23andMe research team studied genes of 160,000 persons who originally paid for genetic testing and later agreed to have their genes studied by researchers. *Id.* Because these were paid tests, the researchers acknowledged a selection bias. *Id.* For detailed analysis of their findings see Katarzyna Bryc et al., *The Genetic Ancestry of African Americans, Latinos, and European Americans Across the United States*, 96 AM. J. HUM. GENETICS 37, 50 (Jan. 8, 2015).

If race is a biological construct, the results of the 23andMe research leads to questions about how qualitative diversity addresses the genetic melting pot that is America. Historically, racial classifications were made based on blood quantum. For example, hypodescent laws ascribed persons with one drop of blood from black ancestry as Black.¹⁶⁶ Although hypodescent laws were used as a vehicle to discriminate against minorities,¹⁶⁷ the blood quantum principle underlying hypodescent laws can be redeployed as a vehicle for inclusion. A reliance on genetic results would be consistent with the biological approach to racial classification and would entitle people, such as the adoptive twins mentioned above, to check the minority box(es).

On the other hand, if race is a social construct, then Rachel Dolezal, the former President of the Spokane chapter of the NAACP, can legitimately claim she is Black. Yet, Rachel Dolezal has been vilified as a fraud because she is biologically white but claimed to be black on an application.¹⁶⁸ Dolezal grew up with four adoptive Black siblings; attended Howard University, an HBCU; became an activist for African Americans through her work with the NAACP; and assumed a black appearance.¹⁶⁹ That Dolezal identifies as Black is unquestionable.¹⁷⁰ Ironically, Professor Onwuachi-Willig's definition of race as "a social construct, which makes one's race just as much about how others perceive him or her as it does about how one identifies or perceives oneself,"¹⁷¹ should permit Dolezal to check the box for Black on her application, but would prevent the adoptive twins discussed above from doing so because they "share none of the social and psychological experiences of being a racial minority."¹⁷²

Moreover, biracial or multiracial students prompt questions of which racial category may students claim. Should President Barack Obama, who is half-White and half-Black, was raised by his white mother and abandoned by his black father, and is a second generation immigrant be permitted to identify as Black on an application?¹⁷³ Consider Tiger Woods, whose mother is "half-Thai, one-quarter

¹⁶⁶ Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 26 (1991).

¹⁶⁷ *Id.*

¹⁶⁸ Elizabeth Chuck, *Parents of NAACP Chapter President Rachel Dolezal Say She Is Not Black*, MSNBC (June 13, 2015, 2:11 PM), <http://www.msnbc.com/msnbc/parents-naacp-chapter-president-rachel-dolezal-say-she-not-black> [https://perma.cc/L96B-6VGR] (reporting that although both her birth parents are White, Rachel Dolezal stated she is Black on official documents).

¹⁶⁹ Dana Ford & Greg Botelho, *Who Is Rachel Dolezal?*, CNN (June 17, 2015, 5:30 PM), <http://www.cnn.com/2015/06/16/us/rachel-dolezal/> [https://perma.cc/5YPN-CK3D].

¹⁷⁰ *Id.*

¹⁷¹ Onwuachi-Willig, *supra* note 76, at 1224.

¹⁷² *Id.* 1222.

¹⁷³ Associated Press, *Obama's True Colors: Black, White . . . or Neither?*, NBC NEWS (Dec. 14, 2008, 11:10:56 AM), http://www.nbcnews.com/id/28216005/ns/us_news-

Chinese and one-quarter white” and whose father is “half-black, one-quarter American Indian, and one-quarter Chinese.”¹⁷⁴ Although Tiger Woods publicly refused to be labeled singularly as African American and coined his own identity as “Cablinasian” to reflect his Caucasian, Black, Native American, and Asian heritage, may he check the Black box on a college application and receive racial preference for college admission?¹⁷⁵ Or because he descends from a greater combined percentage of Asian ancestry, must Tiger Woods check the Asian box and suffer the admissions cap that some elite universities apply to Asian Americans?

B. *The Guessing Game*

Qualitative diversity is based on fuzzy notions of what viewpoints or contributions certain subpopulations of a particular race can make and, ultimately, is nothing more than mere guesswork at what an applicant may think or feel. In formulating a potential defense for UT Austin, Professor Carbado offers that “UT could . . . argue that students who grow up in racially segregated neighborhoods and attend racially segregated schools might not be the best diversity candidates to facilitate racial cooperation and understanding because they will have had little or no exposure to whites or other nonblacks.”¹⁷⁶ He admits that the school may be mistaken, but nonetheless its decision would comport with “good faith.”¹⁷⁷

Qualitative diversity is fraught with presumptions about how people act, think, believe, and want. Whether presumptions are sufficient to satisfy the constitutional mandate of “good faith” is questionable. Even more tenuous is whether admission decisions founded on such presumptions are narrowly tailored.

First, it is important to clear up any ambiguity about the meaning of good faith. One must ascertain whether good faith pertains to the compelling interest prong or the narrow tailoring prong of strict scrutiny. The *Grutter* Court made two distinct conclusions concerning good faith that can be interpreted to require good faith for both prongs. The first conclusion stated,

life/t/obamas-true-colors-black-white-or-neither/#.VzfN5_krLIU [https://perma.cc/RMD2-A763]; Jason Carroll, *Behind the Scenes: Is Barack Obama Black or Biracial?*, CNN POLITICS (June 9, 2008, 3:28 PM), <http://www.cnn.com/2008/POLITICS/06/09/btsc.obama.race/index.html?iref=newssearch%20> [https://perma.cc/S8JA-PFEP].

¹⁷⁴ Oliver Brown, *Why Tiger Woods Refused to Play the Race Card Against His Former Caddie Steve Williams*, THE TELEGRAPH (Nov. 9, 2011, 10:30 PM), <http://www.telegraph.co.uk/sport/golf/tigerwoods/8879865/Why-Tiger-Woods-refused-to-play-the-race-card-against-his-former-caddie.html> [https://perma.cc/Z3SD-ZHWW].

¹⁷⁵ *Id.*; Brown & Bell, *supra* note 15, at 1259.

¹⁷⁶ Carbado, *supra* note 11, at 1176–77.

¹⁷⁷ *Id.* at 1177.

[T]hat the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."¹⁷⁸

The second conclusion stated, "Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."¹⁷⁹ The first statement concerning good faith pertains to the compelling interest prong—that the Court will presume good faith in a school's determination that diversity is necessary for its mission—and is distinct from the second statement, which is focused on the narrow tailoring prong.

Perhaps under previous interpretations of *Grutter*, presumptions about what students think, feel, and want with regards to their classmates might go unquestioned because some courts erroneously interpreted *Grutter* as conferring substantial deference to schools for both prongs of strict scrutiny, namely as to whether diversity is central to their mission and the means chosen to achieve diversity. For example, the Fifth Circuit in *Fisher*

held that to "second-guess the merits" of this aspect of the University's decision was a task it was "ill-equipped to perform" and that it would attempt only to "ensure that [the University's] decision to adopt a race-conscious admissions policy followed from [a process of] good faith consideration." The Court of Appeals thus concluded that "the narrow-tailoring inquiry—like the compelling-interest inquiry—is undertaken with a degree of deference to the Universit[y]."¹⁸⁰

The deference conferred to schools in evaluating narrow tailoring has been the subject of much scholarly criticism, and ultimately, the Supreme Court in *Fisher I* clarified that *Grutter* intended for courts to evaluate the narrow tailoring prong without ceding deference to schools: "Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice."¹⁸¹

Under *Fisher*'s stringent adherence to narrow tailoring, a school's use of race to attain qualitative diversity might appear specious when presumptions are made about students' racial mentality and behavior. The Court has rejected treating

¹⁷⁸ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

¹⁷⁹ *Id.* at 339.

¹⁸⁰ *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 133 S. Ct. 2411, 2420 (2013), *vacated and remanded*, 133 S. Ct. 2411, 186 L. Ed. 2d 474 (2013) (alterations in original) (quoting *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 236 (5th Cir. 2011)). For an analysis of *Fisher*'s impact on the narrow tailoring inquiry, see Ngov, *supra* note 1.

¹⁸¹ *Fisher I*, 133 S. Ct. at 2421.

people differently based on presumptions about how their racial background might affect their actions and thoughts. In *Metro Broadcasting, Inc. v. Federal Communications Commission*,¹⁸² Justice O'Connor's dissent maintained that "[s]ocial scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."¹⁸³

V. RETHINKING DIVERSITY AND AFFIRMATIVE ACTION

Scholarly works are replete with critiques of affirmative action, and they need not be repeated here. Rather, in this Part, this Article highlights a few possible challenges that critics might lodge against affirmative action as they specifically relate to the qualitative diversity rationale. The concerns analyzed in this part serve to alert advocates to the danger that a push to advance the qualitative diversity rationale might invite the Court to reexamine whether diversity is a compelling purpose. Although *Fisher* did not challenge diversity as a compelling interest,¹⁸⁴ the Court is primed to reconsider it in future litigation.¹⁸⁵

A. Elusive Justifications for Affirmative Action

The first concern is that a qualitative diversity approach propounds the problems that inhere in the broader diversity rationale. Scholars, even those who support affirmative action, have questioned the efficacy of the diversity rationale as a vehicle for promoting affirmative action.¹⁸⁶

¹⁸² 497 U.S. 547 (1990), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁸³ *Id.* at 602 (O'Connor, J., dissenting). Justice O'Connor's dissent in *Metro* found vindication in her later authored majority opinion in *Adarand*. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁸⁴ *Fisher I*, 133 S. Ct. at 2419 ("There is disagreement about whether *Grutter* was consistent with the principles of equal protection in approving this compelling interest in diversity. But the parties here do not ask the Court to revisit that aspect of *Grutter's* holding." (citations omitted)).

¹⁸⁵ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2215 (2016) (Thomas, J., dissenting); *Fisher I*, 133 S. Ct. at 2422 (Thomas, J., concurring).

¹⁸⁶ For example, Professor Samuel Issacharoff has pondered the deployment of the diversity rationale and pointed out its limits on fully realizing diversity:

[I]f diversity of the learning environment is the real objective behind affirmative action, one must wonder why preferential admission is limited to groups that are defined to some extent by histories of being subject to official discrimination. As the philosopher George Sher asks,

Professor Derrick Bell identified four concerns with the diversity rationale:

1) Diversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants; 2) Diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected; 3) Diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants; and 4) The tremendous attention directed at diversity programs diverts concern and resources from the serious barriers of poverty that exclude far more students from entering college than are likely to gain admission under an affirmative action program.¹⁸⁷

Professor Richard Ford criticized the diversity rationale for “essentializ[ing] minorities by ascribing certain characteristics to them and requiring racial minorities to ‘perform’ stereotyped versions of their identities in order to justify their presence within institutions.”¹⁸⁸

Additionally, some researchers question whether diversity truly enhances a student’s educational experience.¹⁸⁹ Two studies are worth examining.¹⁹⁰ These

For even if diversity yields every one of the intellectual benefits that are claimed for it, why should we benefit most when the scholarly community contains substantial numbers of blacks, women, Hispanics, (American) Indians, Aleuts, and Chinese-Americans? Why not focus instead, or in addition, on Americans of Eastern European, Arabic, or (Asian) Indian extraction? For that matter, can’t we achieve even greater benefit by extending preference to native Africans, Asians, Arabs, and Europeans?

Samuel Issacharoff, *Law and Misdirection in the Debate over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 22 (2002); see also Brandon Paradise, *Racially Transcendent Diversity*, 50 U. LOUISVILLE L. REV. 415, 422 (2012) (“To remedy the diversity rationale’s failure to ensure racial diversity some scholars have continued to argue that the Court’s amorphous concept of diversity should be replaced with a substantive understanding of diversity that acknowledges the special significance of racial diversity over diversity factors with less normative importance”); Yin, *supra* note 3, at 95–96 (“[N]ot all affirmative action defenders fully support the diversity theory, and some others openly admit that they promote diversity primarily because it is the justification that the Supreme Court has permitted for affirmative action programs.”).

¹⁸⁷ Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003).

¹⁸⁸ Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2168 (2013) (quoting RICHARD T. FORD, RACIAL CULTURE 59–64 (2005)).

¹⁸⁹ See, e.g., Charles A. O’Reilly III et al., *Work Group Demography, Social Integration, and Turnover*, 34 ADMIN. SCI. Q. 21, 29–30 (1989) (concluding that homogeneity increases social integration and reduces turnover); Leong, *supra* note 188, at

studies concluded that those “who attended historically Black universities reported better academic performance, greater social involvement, and higher occupational aspirations than Black students who attended predominantly White institutions.”¹⁹¹ Because of their small sample size, the studies’ statistical significance should not be overstated. But if these studies can be further validated, they suggest that African Americans, and maybe all minorities, are better off in minority-majority schools¹⁹² and give us pause to question who really benefits from diversity or qualitative diversity.

B. Diversity as a Means to an End for Whites

The qualitative diversity approach, much like the general diversity rationale, utilizes individuals, particularly minorities, for the actualization of benefits that accrue to the class and institution. In this way, the qualitative diversity approach is prone to the criticism that the presence of minorities for cross racial understanding and overcoming racial stereotypes benefits Whites,¹⁹³ and substantiates Professor Derrick Bell’s interest convergence theory that nonwhites only progress when it benefits Whites.¹⁹⁴

In the same vein as Professor Bell’s theory, Professor Nancy Leong develops a theory of racial capitalism that highlights the commodification of nonwhites for social utility.¹⁹⁵ She identifies the harms to nonwhites resulting from racial capitalism to include “fractur[ing] identity, creat[ing] pressure for nonwhite people

2166. For an excellent analysis of the social science data on the benefits of diversity, see Justin Pidot, Note, *Intuition or Proof: The Social Science Justification for the Diversity Rationale in Grutter v. Bollinger and Gratz v. Bollinger*, 59 STAN. L. REV. 761 (2006). Pidot concludes that “[d]espite all of these data, no clear picture emerges. Virtually all of the studies have some degree of methodological flaw, and, at best, correlations exist between certain types of experiences (which may or may not be correlated with numeric diversity) and certain positive outcomes. Even these correlations, however, explain little of the variance in outcomes.” *Id.* at 794. *Contra* Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 RUTGERS RACE & L. REV. 75, 76 (2012) (concluding that diversity improves educational quality).

¹⁹⁰ See Pidot, *supra* note 189, at 794 (evaluating studies about the educational benefits of diversity).

¹⁹¹ See *id.*

¹⁹² I am cognizant that this question might invoke criticisms of paternalism. I am mindful of Professor Kermit Roosevelt III’s insightful commentary regarding Justice Thomas’s reference to the mismatch theory: “Their claim, remember, is that attending an elite school will ultimately prove harmful to minority students . . . and that, therefore, this option should be taken away from them. That is paternalism, plain and simple.” Kermit Roosevelt III, *The Ironies of Affirmative Action*, 17 U. PA. J. CONST. L. 729, 750 (2015).

¹⁹³ Leong, *supra* note 188, at 2171.

¹⁹⁴ Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

¹⁹⁵ Leong, *supra* note 188, at 2152.

to engage in particular identity performances, and inflict[ing] economic harm by placing nonwhite people at the greater mercy of the market.”¹⁹⁶ By connecting racial identity formation’s importance to self-esteem, she posits that racial capitalism “dissociates racial identity from the individual.”¹⁹⁷ Additionally, racial capitalism forces nonwhites to perform in a way that alters their identity.¹⁹⁸ As an example, nonwhite individuals may be encouraged to emphasize their nonwhiteness to enhance their consideration for admissions under the diversity rationale,¹⁹⁹ or to distance themselves from their nonwhiteness to form a more favorable version of themselves.²⁰⁰ Additionally, she identifies the societal harms wreaked by racial capitalism, which approximate those identified by Professor Bell in his critique of diversity’s distractions.²⁰¹ The societal harms include “impoverish[ing] our discourse around race, foster[ing] racial resentment, and ultimately displac[ing] more meaningful antiracism measures.”²⁰²

Qualitative diversity relies on racial capitalism in that an individual’s worth is measured by the individual’s contribution to the school and class. In doing so, qualitative diversity can create the types of societal and individual harms that Professor Leong described. For example, to appeal to admissions officers, nonwhite individuals might engage in identity performance to a greater degree under the qualitative diversity approach because they must now emphasize their nonwhiteness to distinguish themselves from other intraracial individuals, i.e., they are “more black” than the other Black applicants. Or conversely, they might conceal or minimize their nonwhiteness to separate themselves from other nonwhites in their racial group, i.e., they are “not as black” as the other Black applicants. The harm to identity formation is greater under the pursuit for qualitative diversity because the nonwhite must reconcile not only her disassociation of her identity from her true self, but also her disassociation of her racial group. As applicants employ strategies to cloak their intraracial identity, they confine themselves to a “closet [that] can become an ‘identity prison.’”²⁰³ As for the societal harms, qualitative diversity requires a more nuanced examination into the diversity benefits each intraracial applicant can provide, and by burying our noses in the minutiae of intraracial qualities, we become more divorced from the structural barriers that created the original inequities that affirmative action was intended to remedy.

¹⁹⁶ *Id.* at 2204.

¹⁹⁷ *Id.* at 2205.

¹⁹⁸ *Id.*, at 2207.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2208. For additional in-depth discussion about the strategy of “covering” as a coping mechanism and means to assimilate, see Shin, *supra* note 103, at 1–2 (exploring how Asians “closet” themselves much like homosexuals to avoid social disapproval).

²⁰¹ See *supra* note 187 and accompanying text.

²⁰² Leong, *supra* note 188, at 2213.

²⁰³ Shin, *supra* note 103, at 22.

C. Pandering to the Majority

As minorities become consumed with distinguishing themselves from their intraracial cohorts, they fall prey to pandering to the majoritarian conception of qualitative diversity. In his thoughtful work on intraracial diversity, Professor Carbado provides suggestions on how a university can implement qualitative diversity to realize the benefits of diversity. For example, he elaborates on how the UT Austin could have asserted the goal of stereotype negation to defend its pursuit of qualitative diversity:

The university could believe that white students will perceive the black students who are admitted under the Ten Percent Law as racially salient—that is, as students who attended the black schools and/or lived in the black neighborhoods. More colorfully, white students could perceive these students as “really” black and attribute a range of negative racial stereotypes to them. Alternatively, the university might believe that white students will experience these African American admittees as overly racially conscious and thus racially uncomfortable to be around. None of the foregoing dynamics are helpful in terms of negating negative racial stereotypes. Indeed, all of them, in one way or another, activate racial stereotypes.²⁰⁴

Aside from the fact that the above suggestions rely on a double dose of racial stereotypes—what black students from the Top Ten Percent Plan can contribute and what white students think of these students—they raise another objection that critics might launch: pandering to the majority. The above example suggests that white students’ discomfort around students perceived as “really” black can guide an admission officer’s decision to prefer and admit a black student who is “less” black, thereby giving credence to the “discomfort” felt by whites in the name of “negating negative racial stereotypes.”²⁰⁵ Such acquiescence to the discomfort of whites implicates discrimination concerns, contradicting the original purpose of dismantling racial stereotypes and the Court’s jurisprudence.

The Court has consistently denounced acquiescence to a heckler’s veto as a sufficient constitutional basis for discrimination. In *City of Cleburne v. Cleburne Living Center, Inc.*,²⁰⁶ the Court reviewed the constitutionality of a city council’s refusal to grant a special use permit for a facility intended for the mentally retarded.²⁰⁷ One basis for the council’s refusal was premised on its concern about “the negative attitude of the majority of property owners” and “fears of elderly”

²⁰⁴ Carbado, *supra* note 11, at 1177–78.

²⁰⁵ *Id.*

²⁰⁶ 473 U.S. 432 (1985).

²⁰⁷ *Id.* at 435.

neighbors.²⁰⁸ The Court rebuked the city's assent to those fears: "But mere negative attitudes, or fear, . . . are not permissible bases for treating a home for the mentally retarded differently It is plain that . . . the City may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic."²⁰⁹

Similarly, in *Palmore v. Sidoti*,²¹⁰ the Supreme Court invalidated the removal of a child from a white mother's custody simply because she remarried a black man.²¹¹ The state court had divested the mother's custody due to fear of the social stigma that the child might face growing up with a black stepparent.²¹² The Supreme Court reiterated that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."²¹³

Finally, qualitative diversity decisions that tinker with the racial makeup of an entering class or small classroom based on the sensitivities of whites or other racial groups bear a strong resemblance to allowing customers to influence an employer's hiring decision based on race. In the employment context, it is abundantly clear, as a constitutional matter as well as statutory, that employment practices cannot be driven by the consumer's racial preference. "Race and color—the other two grounds of discrimination that are made unlawful by Title VII—are omitted, and certainly not by an oversight. . . . Title VII is a blanket prohibition of racial discrimination, rational and irrational alike, even more so than of other forms of discrimination attacked in Title VII."²¹⁴ Just as employment decisions cannot be substantiated on customers' racial preferences, neither can admissions decisions—even for intraracial distinctions.

D. Gaming the System

By subjecting themselves to guessing about the majoritarian preferences of an institution, minority students make themselves vulnerable to gaming the system. The Court has been keen to note the "perverse incentives" created by the class rank system, which encourages students to stay in lower performing schools.²¹⁵ Yet, it failed to recognize the "perverse incentives" presented by the qualitative diversity approach. Qualitative diversity invites students to game the system by minimizing or maximizing intraracial attributes in order to take advantage of racial preferences.

²⁰⁸ *Id.* at 448.

²⁰⁹ *Id.* (citation omitted).

²¹⁰ 466 U.S. 429 (1984).

²¹¹ *Id.* at 434.

²¹² *Id.* at 432.

²¹³ *Id.* at 433.

²¹⁴ *Rucker v. Higher Educ. Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982) (citations omitted).

²¹⁵ *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2214 (2016).

Professor Carbado provides examples of how Blacks can work their identity to become attractive in a qualitative diversity sense: “I illustrate the subtle but significant ways in which applicants can ‘blacken’ or ‘whiten’ their applications in relation to their sense of the specific racial types an institution might want to admit.”²¹⁶ He offers the following example:

A student of Trinidadian descent, for example, might highlight that background in the hope that an admissions official will assume that he is a “good” black—a black who is likely to fit into a predominantly white school and not trigger stereotypes about blackness. Alternatively, that very same student might worry that highlighting his Trinidadian background could render him less authentically black from the perspective of an admissions official and thus not a good candidate for advancing that school’s preferred diversity benefit. He may choose instead, then, to emphasize the fact that he lives in Inglewood, a predominantly working class African American neighborhood south of the city of Los Angeles. In short, whether a black applicant plays up the Caribbean background or his upbringing in Inglewood, there is an incentive for him to cloak himself in the characteristics that he thinks best mimic the diversity goals he believes an admissions committee wants to instantiate.²¹⁷

As previously discussed, encouraging students to work their identities in pursuit of qualitative diversity points causes individual and societal harms through racial capitalism.

Additionally, it must be recognized that all players may begin to game the system. When Whites engage in working their identity, it would be unfair to cry foul. For example, when students who discover their multiethnicity through genetic testing decide to identify as a minority for admissions purposes, they are criticized for taking advantage of the system and chastised as dishonest.²¹⁸ We must be prepared for the prospect that qualitative diversity opens the door to greater racial identity construction by all involved and greater manipulation of the admissions process. Lowell High School serves as a lesson on how affirmative action, initiated for corrective justice, evolved into “affirmative action for whites.”²¹⁹ Similarly, affirmative action advocates must be cautious about the potential for the qualitative diversity approach to be appropriated as a mechanism for advancing Whites.

²¹⁶ Carbado, *supra* note 11, at 1143.

²¹⁷ *Id.*, at 1159.

²¹⁸ Onwuachi-Willig, *supra* note 76, at 1217–19.

²¹⁹ Liu, *supra* note 48, at 343.

CONCLUSION

Much energy has been exerted and ink spilled over debating the merits of the diversity rationale and affirmative action. A qualitative diversity approach is likely to lead us deeper into the morass. It invites questions of deservedness; presumptions about how a person's race affects the way others act, think, and feel; applicants to manipulate their intraracial attributes in order to game the system; and balkanization of intraracial groups. The qualitative diversity approach subjects applicants to work their identity to appeal to a majoritarian construction of diversity and results in greater harm to the individual and society. In the end, the qualitative diversity approach, which was intended to bring us together through robust discussions, gains in cross racial understanding, and dismantling racial stereotypes, threatens to propel us further apart.