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## Brown, Fisher, and the Necessity of Context to Achieve Racial Equity in Public Institutions

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# ***Brown, Fisher, and the Necessity of Context to Achieve Racial Equity in Public Institutions***

KIYANA DAVIS KIEL\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	914
II.	REFRAMING THE CONVERSATION: RACIAL EQUITY, STRUCTURAL AND INSTITUTIONAL RACISM, AND WHITE PRIVILEGE.....	915
	<i>A. Structural Racism</i> .....	916
	<i>B. Institutional Racism</i> .....	917
	<i>C. White Privilege</i> .....	920
III.	<i>BROWN</i> : EDUCATIONAL ACCESS, OPPORTUNITY, AND RACIAL EQUITY .....	924
IV.	<i>FISHER</i> AND CONNECTING DIVERSITY TO A COMPELLING GOVERNMENT INTEREST: RACIAL EQUITY IN PUBLIC INSTITUTIONS .....	926
	<i>A. The Fisher Admissions Policy</i> .....	926
	<i>B. Justices Scalia and Thomas' Fisher Concurrences: The Attack on Racial Considerations in Admissions Decisions</i> .....	928
V.	A WAY FORWARD: THE VALUE PROPOSITION FOR THE CONSIDERATION OF RACE IN PUBLIC EDUCATION.....	930

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A.	<i>Overcoming the Equal Protection Argument: A Guide to Implementation</i> .....	931
VI.	CONCLUSION .....	932

## I. INTRODUCTION

The United States Constitution is a social, as well as legal, document and should be interpreted and applied as such. Context is crucial in constitutional interpretations. The law cannot and should not exist in a vacuum. When interpreting the Constitution, the lasting and pervasive impact of structural and institutional racism and the undercurrents of white privilege should not be ignored. In other words, when interpreting the Constitution, the civil rights of non-white society members must be acknowledged and addressed. Purely literal interpretations of law must give way to both legal—precedential—and societal contexts and, in particular, racial equity in the context of equal protection.

*Brown v. Board of Education*, decided by the United States Supreme Court in 1954, is a seminal case from 20th century jurisprudence because the Court used context to reach its landmark decision.<sup>1</sup> The Court looked to the realities of segregation by boldly recognizing, acknowledging, and responding to inequality and racial injustice— instead of turning a blind eye to it. In recent decisions, however, the Supreme Court, particularly Justices Clarence Thomas and Antonin Scalia, has distanced itself from *Brown*'s contextual approach, instead retreating into “intentional blindness”<sup>2</sup> and “post-racial determinism”<sup>3</sup> that interprets the Constitution in an intellectual vacuum rooted in doctrinal and societal stereotypes decrying affirmative action.<sup>4</sup> In the wake of *Fisher v. University of Texas at Austin*, there is much concern over the lifespan of the educational benefits of diversity as a compelling government interest. This article argues: (1) achieving racial equity, not the educational benefits of diversity, is a compelling government interest; (2) holistic diversity review policies in admissions decisions is a method to achieve said interest; and (3) the educational benefits of a diverse student body are merely a positive outcome of striving to attain racial equity.

Diversity of thought and experience is informed by the various attributes that make up an individual and that individual's perspectives, including those attributes informed by the individual's race or ethnicity. As such, considering race and ethnicity in a holistic review process is a

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).  
2. Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1779 (2012).  
3. Cedric Merlin Powell, *Justice Thomas, Brown, and Post-Racial Determinism*, 53 WASHBURN L.J. 451, 452 (2014).  
4. *See id.* at 453–54.

narrowly tailored balance between the realities of this nation's racial inequities, segregated and discriminatory past, racial tension—past and present—and equal protection. In *Fisher v. University of Texas at Austin*,<sup>5</sup> Justice Ruth Bader Ginsburg's dissenting opinion articulated the necessity of context when analyzing equal protection and public school admission policies: "government actors, including [institutions of public education], need not be blind to the lingering effects of 'an overtly discriminatory past,' the legacy of 'centuries of law-sanctioned inequality.'"<sup>6</sup> Likewise, government actors, including the Supreme Court, need not be blind to the lingering and pervasive effects of the racial inequities caused by this nation's "overtly discriminatory past."<sup>7</sup> the legacy of centuries of law-sanctioned inequality. In other words, when the government ignores racial inequity, equal protection is not equal, nor are its principles achieved.

This Article reframes the analysis by viewing educational diversity through the lens of racial justice, specifically racial inequities in public institutions. It argues that until racial equity is the structural, institutional, and societal norm in America, achieving racial equity through educational diversity must remain a compelling government interest. Part II defines and provides examples of structural and institutional racism and white privilege. Part III outlines the use of context in the *Brown* decision. Part IV discusses the admissions policy in *Fisher*; analyzes the concurrences of Justices Thomas and Scalia, and challenges the contention that the "use of race in higher education admissions [policies and] decisions is categorically prohibited by the Equal Protection Clause."<sup>8</sup> Part V further deconstructs the concurring opinions in *Fisher* and argues the use of race, when framed by the necessity of racial equity, is a compelling government interest and does not violate the Equal Protection Clause.

## II. REFRAMING THE CONVERSATION: RACIAL EQUITY, STRUCTURAL AND INSTITUTIONAL RACISM, AND WHITE PRIVILEGE

An inquiry into racial equity, structural racism, institutional racism, and white privilege is required to understand the necessity of context in

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5. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting).

6. *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (citing *Gratz v. Bollinger*, 539 U.S. 244, 298 (2003)).

7. *Id.*

8. *Fisher*, 133 S. Ct. at 2422 (Thomas, J., concurring).

constitutional decisions. Racial equity—or a genuinely non-racist society—should be the ideal our nation strives to attain; a society where the distribution of benefits and burdens are not skewed by race or because of a person’s race.

In other words, racial equity would be a reality in which a person is no more or less likely to experience society’s benefits or burdens just because of the color of their skin. . . . Racial equity holds society to a higher standard. It demands that we pay attention not just to individual-level discrimination, but to overall social outcomes.<sup>9</sup>

However, until racial equity is attained, consideration of race remains necessary.

### A. *Structural Racism*

Structural racism,<sup>10</sup> sometimes referred to as systemic racism, is a system that perpetuates racial injustice in various, often reinforcing ways, such as through its public policies, institutional practices, cultural representations, national values, and other societal norms.<sup>11</sup> The Structural Racism Glossary defines cultural representations as:

[P]opular stereotypes, images, frames and narratives that are socialized and reinforced by media, language and other forms of mass communication and “common sense.” Cultural representations can be positive or negative, but from the perspective of the dismantling structural racism analysis, too often cultural representations depict people of color in ways that are dehumanizing, perpetuate inaccurate stereotypes, and have the overall effect of allowing unfair treatment within the society as a whole to seem fair, or “natural.”<sup>12</sup>

It defines national values as:

[B]ehaviors and characteristics that we as members of a society are taught to value and enact. Fairness, equal treatment, individual responsibility, and meritocracy are examples of some key national values in the United States. When looking at national values through a structural racism lens, however, we can see that there are certain values that have allowed structural racism to exist in ways that are hard to detect. This is because these national values are referred to in ways that ignore historical realities. Two examples of such national values are ‘personal responsibility’ and ‘individualism,’ which convey the idea that people

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9. *Glossary for Understanding the Dismantling Structural Racism/Promoting Equity Analysis*, ASPEN INST. (last visited Oct. 15, 2015) [hereinafter *Structural Racism Glossary*], <http://www.aspeninstitute.org/sites/default/files/content/docs/rcc/RCC-Structural-Racism-Glossary.pdf> [<http://perma.cc/DAF7-8FX3>].

10. Keith Lawrence & Terry Keleher, *Address at Race & Public Policy Conference: Structural Racism* (2004), <http://www.intergroupresources.com/rc/Definitions%20of%20Racism.pdf> [<http://perma.cc/G2Z4-7AF6>].

11. *Structural Racism Glossary*, *supra* note 9.

12. *Id.*

control their fates regardless of social position, and that individual behaviors and choices alone determine material outcomes.<sup>13</sup>

### Structural Racism:

Lies *underneath, all around and across society*. It encompasses: (1) history, which lies underneath the surface, providing the foundation for white supremacy [and privilege] in this country. (2) culture, which exists all around our everyday lives, providing the normalization and replication of racism and, (3) interconnected institutions and policies, [the] key relationships and rules across society providing the legitimacy and reinforcements to maintain and perpetuate racism.<sup>14</sup>

Examples of structural racism include, “racist history, dominant cultural representations, popular myths, and compounded and chronic [racial] inequities.”<sup>15</sup> In the United States, it routinely advantages whites, while producing cumulative and chronic adverse outcomes for people of color; it is a system of hierarchy and inequity, primarily categorized by white privilege and exacerbated by institutional racism.<sup>16</sup>

### *B. Institutional Racism*

Institutional racism “occurs within and between institutions.”<sup>17</sup> It “refers to the policies and practices within and across institutions that, intentionally or not, produce outcomes that chronically favor, or put a [non-majority] racial group at a disadvantage.”<sup>18</sup> It encompasses “discriminatory treatment, unfair policies and inequitable opportunities or impacts based on race” in public institutions.<sup>19</sup> Examples of institutional racism include:

1. Police officers treating individuals of color with racial bias—Baltimore, Ferguson, New York.<sup>20</sup>

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13. *Id.*

14. Lawrence & Keleher, *supra* note 10 (emphasis added).

15. *Id.*

16. *Id.*

17. *Id.* (emphasis removed).

18. Structural Racism Glossary, *supra* note 9.

19. Lawrence & Keleher, *supra* note 10.

20. Jeff Nesbit, *Institutional Racism Is Our Way of Life*, U.S. NEWS & WORLD REP. (May 6, 2015, 1:16 PM), <http://www.usnews.com/news/blogs/at-the-edge/2015/05/06/institutional-racism-is-our-way-of-life> [<http://perma.cc/BK6R-XPXA>]; see also Joshua Correll et al., *The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision To Shoot*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 201 (2014), [http://www.csun.edu/~dma/Correll,%20Hudson,%20Guillermo,%20&%20Ma%20\(2014\).pdf](http://www.csun.edu/~dma/Correll,%20Hudson,%20Guillermo,%20&%20Ma%20(2014).pdf)

2. Racial disparities in media representation of white versus black criminals and victims.<sup>21</sup>
3. “In the workplace, black college graduates are twice as likely as whites to struggle to find jobs - the jobless rate for blacks has been double that of whites for decades. A study even found that people with ‘black-sounding names’ [, all other things being equal.] had to send out 50 percent more job applications than people with ‘white-sounding names’ just to get a call back.”<sup>22</sup>
4. Black men are three times more likely to be searched during traffic stops, and six times more likely to go jail than a white person.<sup>23</sup>
5. “Black people stay in prison longer than white people—up to 20 percent longer than white people serving time for essentially similar crimes.”<sup>24</sup>
6. “Black people receive harsher sentences—black people are 38 percent more likely to be sentenced to death than white people for the same crimes.”<sup>25</sup>
7. The skin color of a victim matters greatly in the punishment for capital crimes. “Whites and blacks represent about half of murder victims from year to year, but 77 percent of people who are executed killed a white person, while only 13 percent of death row executions represent those who killed a black person.”<sup>26</sup>
8. “About 73 percent of whites own homes, compared to just 43 percent of blacks. The gap between median household incomes for whites (about \$91,000) compared to blacks (about \$7,000) is staggering, and that gap has tripled in just the past 25 years.

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[<http://perma.cc/TTK2-3SAH>] (examining racial bias in the decision to shoot and identification of weapon and threats).

21. Nick Wing, *When the Media Treats White Suspects and Killers Better than Black Victims*, HUFFINGTON POST (Aug. 14, 2014, 8:59 AM), [http://www.huffingtonpost.com/2014/08/14/media-black-victims\\_n\\_5673291.html](http://www.huffingtonpost.com/2014/08/14/media-black-victims_n_5673291.html) [<http://perma.cc/A9RP-DWUK>].

22. Nesbit, *supra* note 20; *see also* JANELLE JONES & JOHN SCHMITT, CTR. FOR ECON. & POLICY RESEARCH, A COLLEGE DEGREE IS NO GUARANTEE 2–4 (2014), <http://www.cepr.net/documents/black-coll-grads-2014-05.pdf> [<http://perma.cc/7XNB-DZTB>] (reporting that the unemployment rate for black workers is much higher than it is for other workers).

23. Nesbit, *supra* note 20 (citing THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE: REGARDING RACIAL DISPARITIES IN THE UNITED STATES CRIMINAL JUSTICE SYSTEM 1, 5 (2013), [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf) [<http://perma.cc/GRV2-YTZN>]).

24. *Id.* (citing THE SENTENCING PROJECT, *supra* note 22, at 12).

25. *Id.* (citing THE SENTENCING PROJECT, *supra* note 22, at 14).

26. *Id.* (citing THE SENTENCING PROJECT, *supra* note 22, at 13).

The median net worth of white families is about \$265,000, while it was just \$28,500 for blacks.”<sup>27</sup>

Education-specific examples of institutional racism:

9. The application of school disciplinary policies punishes students of color at much higher rates than their white counterparts for the same infraction.<sup>28</sup>
10. Across age groups, black students are three times more likely than white students to be suspended.<sup>29</sup>
11. Black children represent 18% of preschool enrollment, but 48% of black preschool children receive more than one out-of-school suspension; in comparison, white children represent 43% of preschool enrollment but only 26% of white preschool children receive more than one out-of-school suspension.<sup>30</sup>
12. Black girls are suspended at higher rates—12%—than girls of any other race or ethnicity and most boys; the suspension rate for white boys is 6% and white girls is 2%.<sup>31</sup>
13. Black students make up only 16% of student enrollment, but they represent 27% of students referred to law enforcement and 31% of students subjected to a school-related arrest—almost double the percent of actual enrollment. Compare this to white students: they represent 51% of enrollment, 41% of students

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27. *Id.*; see also Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession> [<http://perma.cc/GGW6-GUDS>] (providing data on wealth disparity between different races); *Nine Charts About Wealth Inequality in America*, URB. INST., <http://datatools.urban.org/Features/wealth-inequality-charts> [<http://perma.cc/3NUZ-7XFU>] (last visited Oct. 15, 2015) (providing more data on income and homeownership disparity between races).

28. DANIEL J. LOSEN, NAT’L EDUC. POLICY CTR., *DISCIPLINE POLICIES, SUCCESSFUL SCHOOLS, AND RACIAL JUSTICE* 4–8, (2011), <http://nepc.colorado.edu/publication/discipline-policies> [<http://perma.cc/4AC7-JJZ2>]; see also Nesbit, *supra* note 20 (“[B]lack children are three times more likely to be suspended than white children.”).

29. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *CIVIL RIGHTS DATA COLLECTION: DATA SNAPSHOT: SCHOOL DISCIPLINE* 1–3 (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> [<https://perma.cc/F46D-HYE3>].

30. *Id.* at 1.

31. *Id.* at 3.



referred to law enforcement, and 39% of those arrested—all percentages smaller than the percent of actual enrollment.<sup>32</sup>

These racial disparities are glaring examples of institutional racism and must be addressed, and stamped out if racial equity is ever to be achieved in this country.

*c. White Privilege*

White privilege refers to the advantages whites receive in access, both historical and contemporary, such as “to quality education, decent jobs and livable wages, homeownership, retirement benefits[,]. . .wealth.”<sup>33</sup> For most white people, taking advantage of white privileges is not intentional or done with racial animus, but that does not negate the benefits received from the privilege. White privilege is illuminated by the following quote:

As a white person I [was] taught about racism that puts others at a disadvantage, but [was not] taught . . . to see one of its corollary aspects, white privilege, which puts me at an advantage . . . White privilege is an invisible package of unearned assets which I can count on cashing in every day, but about which I was meant to remain oblivious.<sup>34</sup>

The following examples of white privilege may help readers better understand white privilege. Consider the impact each example would have on you if the consideration were a part of your daily life:

1. I can, if I wish, arrange to be in the company of people of my race most of the time.
2. I can avoid spending time with people whom I was trained to mistrust and who have learned to mistrust my kind or me.
3. If I should need to move, I can be pretty sure of renting or purchasing housing in an area, which I can afford and in which I would want to live.
4. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.
5. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.

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32. *Id.* at 1.

33. Structural Racism Glossary, *supra* note 9.

34. Structural Racism Glossary, *supra* note 9 (quoting Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences Through Work in Women's Studies* 1 (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988), <http://files.eric.ed.gov/fulltext/ED335262.pdf> [<http://perma.cc/WQ53-3UVL>]).

6. I can turn on the television or open to the front page of the paper and see people of my race widely represented.
7. When I am told about our national heritage or about “civilization,” I am shown that people of my color made it what it is.
8. I can be sure that my children will be given curricular materials that testify to the existence of their race [at all levels of the education continuum] . . .
9. I can be pretty sure of having my voice heard in a group in which I am the only member of my race.
10. I can be casual about whether or not to listen to another person’s voice in a group in which they are the only member of their race.
11. I can go into a music shop and count on finding the music of my race represented, into a supermarket and find the staple foods, which fit with my cultural traditions, into a hairdresser’s shop and find someone who can cut my hair.
12. Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability.
13. I can arrange to protect my children most of the time from people who might not like them.
14. I do not have to educate my children to be aware of [structural or institutional] racism for their own daily physical protection.
15. I can be pretty sure that my children’s teachers and employers will tolerate them if they fit school and workplace norms; my chief worries about them do not concern others’ attitudes toward their race. . .
16. I can swear, or dress in second hand clothes, or not answer letters, without having people attribute these choices to the bad morals, the poverty or the illiteracy of my race.
17. I can speak in public to a powerful male group without putting my race on trial.
18. I can do well in a challenging situation without being called a [or thought of as] credit to my race.
19. I am never asked to speak for all the people of my racial group.

20. I can remain oblivious of the language and customs of persons of color who constitute the world's majority without feeling in my culture any penalty for such oblivion.
21. I can criticize our government and talk about how much I fear its policies and behavior without being seen as a cultural outsider.
22. I can be pretty sure that if I ask to talk to the "person in charge," I will be facing a person of my race.
23. If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I have not been singled out because of my race.
24. I can easily buy posters, post-cards, picture books, greeting cards, dolls, toys, and children's magazines featuring people of my race.
25. I can go home from most meetings of organizations I belong to feeling somewhat tied in, rather than isolated, out-of-place, outnumbered, unheard, held at a distance or feared.
26. I can be pretty sure that an argument with a colleague of another race is more likely to jeopardize their chance for advancement than to jeopardize mine.
27. I can be pretty sure that if I argue for the promotion of a person of another race, or a program centering on race, this is not likely to cost me heavily within my present setting, even if my colleagues disagree with me.
28. If I declare there is a racial issue at hand or there is not a racial issue at hand, my race will lend me more credibility for either position than a person of color will have.
29. I can choose to ignore developments in minority writing and minority activist programs, or disparage them, or learn from them, but in any case, I can find ways to be more or less protected from negative consequences of any of these choices.
30. My culture gives me little fear about ignoring the perspectives and powers of people of other races.
31. I am not made acutely aware that my shape, bearing, or body odor will be taken as a reflection on my race.
32. I can worry [or talk] about racism without being seen as self-interested or self-seeking[, or detrimentally impacting my opportunities for advancement in a corporate setting].
33. I can take a job . . . without having my co-workers on the job suspect that I got it [only] because of my race.
34. If my day, week or year is going badly, I need not ask of each negative episode or situation whether it had racial overtones.

35. I can be pretty sure of finding people who would be willing to talk with me and advise me about my next steps, professionally.
36. I can think over many options, social, political, imaginative or professional, without asking whether a person of my race would be accepted or allowed to do what I want to do.
37. I can be late to a meeting without having the lateness reflect on my race.
38. I can choose public accommodation without fearing that people of my race cannot get in or will be mistreated in the places I have chosen.
39. I can be sure that if I need legal or medical help, my race will not work against me.
40. I can arrange my activities so that I will never have to experience feelings of rejection owing to my race.
41. If I have low credibility as a leader, I can be sure that my race is not the problem.
42. I can easily find academic courses and institutions which give attention only to people of my race.
43. I can expect figurative language and imagery in all of the arts to testify to experiences of my race . . .
44. I can travel alone or with my spouse without expecting embarrassment or hostility in those who deal with us.
45. I have no difficulty finding neighborhoods where people approve of our household.
46. My children are given texts and classes, which implicitly support our kind of family unit and do not turn them against my choice of domestic partnership.
47. I will feel welcomed and “normal” in the usual walks of public life, [both] institutional and social.<sup>35</sup>

As a member of either the majority or minority, it is easy to forget these examples of white privilege because they are meant to be “elusive and fugitive,” easy to forget, because to acknowledge it means, “facing . . . the

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35. McIntosh, *supra* note 34, at 5–9, 16–17; Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, CIRTL NETWORK, [http://www.cirtl.net/files/PartI\\_CreatingAwareness\\_WhitePrivilegeUnpackingtheInvisibleKnapsack.pdf](http://www.cirtl.net/files/PartI_CreatingAwareness_WhitePrivilegeUnpackingtheInvisibleKnapsack.pdf) (last visited Oct. 15, 2015).

myth of meritocracy.”<sup>36</sup> Ignoring the existence of white privilege, focusing instead on meritocracy, allows many to also ignore the reality of the pervasive racial inequities in our society. White privilege is not having to entertain these considerations and relieves white people of the burden they place on those that must consider them.

### III. *BROWN*: EDUCATIONAL ACCESS, OPPORTUNITY, AND RACIAL EQUITY

The language of the Court’s analysis in *Brown* explicitly uses context, specifically racial context, and emphasizes the necessity of considering it when interpreting the Constitution:

We must look instead to the *effect* of segregation itself on public education.

. . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.<sup>37</sup>

Likewise, we must look to the effect of racial inequity in public education and consider the educational benefits of a diverse student body. The consideration of context remains valid and necessary today because, as the *Brown* Court recognized:

[E]ducation is perhaps the most important function of state and local governments. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.<sup>38</sup>

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36. McIntosh, *supra* note 34, at 18; see also Nicholas Fitz, *Economic Inequality: It’s Far Worse than You Think*, SCI. AM. (Mar. 31, 2015), <http://www.scientificamerican.com/article/economic-inequality-it-s-far-worse-than-you-think> [<http://perma.cc/94G2-K8TW>] (“George Carlin joked that, ‘the reason they call it the American Dream is because you have to be asleep to believe it.’”).

37. *Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) (emphasis added). Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system. *Id.* at 494 (quoting Findings of Fact of Judge Huxman, *Brown v. Bd. of Educ.*, 98 F. Supp. 797 (D. Kan. 1951) (No. T-316), [http://law2.umkc.edu/faculty/projects/ftrials/brownvboard/brown\\_huxman.html#FINDINGS\\_OF\\_FACT](http://law2.umkc.edu/faculty/projects/ftrials/brownvboard/brown_huxman.html#FINDINGS_OF_FACT) [<http://perma.cc/Z3WB-CRSW>]).

38. *Brown*, 347 U.S. at 493 (emphasis added).

Racial equity in and access to public educational opportunities should be a cornerstone of America's education system. We must not become stagnant, ignoring "those qualities which are incapable of objective measurement but which make for greatness in" public education.<sup>39</sup>

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.<sup>40</sup>

Just as separate but equal educational facilities are abhorrent to our democratic ideals and the Constitution, so too is jurisprudence that would lead to or cause "separate but equal" or re-segregation in practice. *Brown* stands for the acknowledgement of structural and institutional racism, and combatting the same. Racial inequities in access to education, educational opportunities, and educational discipline are the modern day separate but equal in practice because the impact of these inequities essentially separates children—in access to quality education and application of educational opportunities and discipline—based on race.<sup>41</sup> These racial inequities lead to a sense of inferiority perpetuated by the media and some educators, and are heightened because they have the sanction of the law.<sup>42</sup> Institutions that do not reflect the diversity of our society subliminally bolster the idea that the unrepresented groups are inferior.<sup>43</sup> This perceived, and in cases projected, inferiority affects the motivation to learn and tends to hinder the educational development of the unrepresented groups, and deprives them of the benefits they would receive in a diverse student population.<sup>44</sup> These benefits include:

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39. *Id.* (quoting *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)).

40. *Id.* at 495.

41. *Id.* at 494.

42. *Id.*

43. *Id.*; see also Roy Brooks, *Helping Minorities by Ending Affirmative Action? A Review of Mismatch: How Affirmative Action Hurts Students It's Intended To Help and Why Universities Won't Admit It*, 6 GEO. J. L. & MOD. CRITICAL RACE PERSP. 69 (2014) (book review) (criticizing the authors' argument for ending affirmative action in undergraduate colleges and law schools).

44. *Brown*, 347 U.S. at 494; see also Brooks, *supra* note 43.

1. Increased perspectives that improve educational quality by making classroom discussion “livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”<sup>45</sup>
2. Professionalism “because the skills students need for the ‘increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.’”<sup>46</sup>
3. Civic engagement that fosters “[e]ffective participation by members of all racial and ethnic groups in the civil life of our Nation[, which] is essential if the dream of one Nation, indivisible, is to be realized.”<sup>47</sup>

What the Court does in *Brown*, but does not explicitly articulate, is consider the context of structural—historical and cultural context: segregation, Jim Crow, slavery, and the psychological implications of “separate but equal”—and institutional—the realities of “separate but equal” public education facilities—racism; their impacts and effects on black children attending segregated schools. In our modern environment, where information is available at our fingertips, it is incumbent on the Supreme Court to consider these realities in making its decisions regarding the consideration of race as a component of holistic diversity review in higher education admissions.<sup>48</sup>

#### IV. *FISHER* AND CONNECTING DIVERSITY TO A COMPELLING GOVERNMENT INTEREST: RACIAL EQUITY IN PUBLIC INSTITUTIONS

Admittedly, looking at educational diversity through the context of achieving racial equity does require taking an uncomfortable look and acknowledgement of structural racism, institutional racism, and white privilege. Yes, it will be uncomfortable, but it is a step we must take if equal protection is to be applied equally to all.

##### *A. The Fisher Admissions Policy*

In *Fisher v. the University of Texas at Austin*, a white applicant alleged the University’s consideration of race and ethnicity in its admissions

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45. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 643 (5th Cir. 2014) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003)).

46. *Id.* (quoting *Grutter*, 539 U.S. at 330).

47. *Id.* (quoting *Grutter*, 539 U.S. at 332).

48. *See supra* notes 9–36 and accompanying text.

process violated her Equal Protection rights.<sup>49</sup> The University's admission policy consists of two main components: the Texas Top Ten Percent Law and holistic application review. Under the Top Ten Percent Law, any student that graduates in the top 10% of their high school receives automatic admission to any public state college.<sup>50</sup>

The holistic review process at issue in *Fisher* assigns each applicant two numerical scores calculated by the applicants' Academic Index (AI) and Personal Achievement Index (PAI).<sup>51</sup> The standardized test scores, class rank, and high school classes of each applicant determine the AI.<sup>52</sup> The PAI "measures a student's leadership and work experience, awards, extracurricular activities, community service, and other special circumstances that give insight into a student's background."<sup>53</sup> The special circumstances considered "included growing up in a single-parent home, speaking a language other than English at home, significant family responsibilities assumed by the applicant, and the general socioeconomic condition of the student's family."<sup>54</sup>

The University calculates the PAI from the score received from two required essays<sup>55</sup> and the personal achievement score based on the review of the applicant's entire application file.<sup>56</sup> The personal achievement score receives slightly more weight than the essay scores and is calculated by:<sup>57</sup>

[C]onduct[ing] a holistic review of the contents of the applicant's entire file, including demonstrated leadership qualities, extracurricular activities, honors and awards, essays, work experience, community service, and special circumstances, such as the applicant's socioeconomic status, family composition, special family responsibilities, the socioeconomic status of the applicant's high school, and race. No numerical value is ever assigned to any of the components of personal achievement scores, and *because race is a factor considered in the unique context of each applicant's entire experience, it may be a beneficial factor for a minority or a non-minority student.*<sup>58</sup>

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49. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013).

50. *Fisher*, 758 F.3d at 638, 654 (noting to qualify, applicants must attend high schools that meet certain standards established by the law).

51. *Id.* at 638.

52. *Id.*

53. *Fisher*, 133 S. Ct. at 2415–16 (2013).

54. *Id.* at 2416.

55. *Fisher*, 758 F.3d at 638 (stating the essays receive a weighted average score).

56. *Id.*

57. *Id.*

58. *Id.* (emphasis added).



The University does not assign a numerical score to race, although it is definitely a meaningful factor in the process.<sup>59</sup> Once scores are assigned to the relevant applications, they are plotted on a grid and students are placed in cells based on their individual scores. Students in cells above a certain line are admitted; those below the line are not.<sup>60</sup>

*B. Justices Scalia and Thomas' Fisher Concurrences: The Attack on Racial Considerations in Admissions Decisions*

In his concurring opinion, Justice Scalia adheres to the view that racial discrimination is unconstitutional. “The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”<sup>61</sup> It is important to note, although race is a “meaningful” factor of consideration, it was only one of multiple factors considered and, therefore, does not constitute discrimination based on race—black students did not gain admission merely because they were black; neither were white students rejected merely because they were white. Under the University’s admission policy, race could be a positive factor for both white and black students.<sup>62</sup> Justice Scalia also insinuates he would not support the finding that the educational benefits of diversity can justify racial preferences in university admissions and are thus not a compelling government interest.<sup>63</sup>

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To admit applicants through this holistic review, the admissions office generates an initial AI/PAI matrix for each academic program, wherein applicants are placed into groups that share the same combination of AI and PAI scores. School liaisons then draw stair-step lines along this matrix, selecting groups of students on the basis of their combined AI and PAI scores. This process is repeated until each program admits a sufficient number of students.

Fisher’s AI scores were too low for admission to her preferred academic programs at UT Austin; Fisher had a Liberal Arts AI of 3.1 and a Business AI of 3.1. And, because nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students, all holistic review applicants “were only eligible for Summer Freshman Class or CAP [Coordinated Admissions Program] admission, unless their AI exceeded 3.5. Accordingly, even if she had received a perfect PAI score of 6, she could not have received an offer of admission to the Fall 2008 freshman class. If she had been a minority, the result would have been the same.

*Id.* at 638–39.

59. *Id.* at 638.

60. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415, 2416–17 (2013). (“Each college—such as Liberal Arts or Engineering—admits students separately. So a student is considered initially for her first-choice college, then for her second choice, and finally for general admission as an undeclared major.”).

61. *Id.* at 2422 (Scalia, J., concurring) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., concurring in part and dissenting in part)).

62. *Fisher*, 758 F.3d at 638.

63. *Fisher*, 133 S. Ct. at 2411 (Scalia, J., concurring).

In section II of his concurrence, Justice Thomas concludes, “I would overrule *Grutter* and hold that the University’s admissions program violates the Equal Protection Clause because the University has not put forward a compelling interest that could possibly justify racial discrimination”<sup>64</sup> because the equal protection principle reflects his opinion that racial classifications destructively impact our society and individuals.<sup>65</sup> He further contends, “[t]he Constitution abhors classifications based on race” because “every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”<sup>66</sup> This phrase is steeped in the myth of meritocracy and simply ignores the realities of racial inequity in public institutions, including public education. Race should be a relevant consideration in the provision of burdens and benefits because racial equity has not been achieved in this country. The consideration of race to achieve racial equity should not “demean us all” because this nation was, and continues to be, built on racial inequity. As a result, remedying racial inequities should not demean our national conscious; it should dignify it.

Justice Thomas further decries *Grutter* because the compelling government interest advanced—the educational benefits of diversity—did not concern remedying past discrimination.<sup>67</sup> Citing Justice Scalia’s concurrence in *Croson*, Justice Thomas argues, “there is nothing ‘pressing’ or ‘necessary’ about obtaining whatever educational benefits may flow from racial diversity.”<sup>68</sup> I agree with Justice Thomas that the interest advanced does not concern remedying past discrimination; however, eradicating racial inequities does, and its eradication is necessary and pressing. As such, achieving racial equity is a compelling government interest; holistic diversity review in admissions is a method to achieve the interest; and the educational benefits of a diverse student body are a positive outcome of striving to attain the compelling government interest of racial equity.

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64. *Id.* at 2429 (Thomas, J., concurring).

65. *Id.* at 2422 (Thomas, J., concurring) (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring in part and concurring in judgment)).

66. *Id.* (quoting *Grutter*, 539 U.S. at 353 (Thomas, J., concurring in part and dissenting in part)).

67. *Id.* at 2423–24 (interpreting *Grutter*, 539 U.S. at 328).

68. *Id.* at 2424 (quoting *Grutter*, 539 U.S. at 356 (Thomas, J., concurring in part and dissenting in part)); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520–21, 525 (Scalia, J., concurring).

V. A WAY FORWARD: THE VALUE PROPOSITION FOR THE  
CONSIDERATION OF RACE IN PUBLIC EDUCATION

When responding to the viewpoints and arguments of Justices Scalia and Thomas, it is necessary to view diversity through the lens of achieving racial equity—a genuinely non-racist society where the “distribution of society’s benefits and burdens would not be skewed by race.”<sup>69</sup> The holistic review of diversity admissions, including those that consider race, is a form of inclusion, not exclusion or racial discrimination, as Justice Thomas would have us believe. Nor does it operate to provide racial preference, as Justice Scalia suggests. Simply stated, a holistic approach, by its very nature, considers the whole individual, attempts to obtain a “critical mass” representing all types diversity, and is a necessary step in the direction of obtaining racial equity in public education. The segregation Justice Thomas attempts to analogize to considering diversity in admissions processes excluded individuals solely on the basis of race/ethnicity and is therefore distinguishable from holistic diversity, which considers race as one of many factors in the decision-making process.

It is important to make this distinction because although Justice Thomas asserts the arguments in favor of holistic diversity review are the same or similar to those made by segregationists, the underlying purposes, and results are in complete contradiction to each other. Segregationists wanted and, in fact, supported outright racial discrimination and separation. Whereas proponents of educational diversity seek to attain a well-rounded student body, reflecting the diversity of our society, and the benefits flowing from that diversity, as well as equitable access to educational opportunities for all members of society. Considering the diversity of a candidate does not constitute discrimination because it is not selecting—or excluding—the candidate solely based on race. When race/ethnicity is one consideration of many, then all are treated equally under the law, so long as race/ethnicity does not become the single, determinative factor. For example, when making decisions on the admission of two identical candidates, the only difference being the race of the student, then the university should consider the students as individuals within the context of its entire class of admitted applicants—looking to fill the gaps in “diversity” that are not exclusively racial or ethnic in origin, or admit both applicants.

Justice Thomas urges us to believe, “[there] is no principled distinction between the University’s assertion that diversity yields educational benefits and the segregationists’ assertion that segregation yielded those same benefits.”<sup>70</sup> But there is a “principled distinction” when both are viewed

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69. Structural Racism Glossary, *supra* note 9.

70. *Fisher*, 133 S. Ct. at 2428 (Thomas, J., concurring).

through the lens of racial equity, including the consideration of structural and institutional racism, and white privilege: diversity reflects the composition of our society; segregation does not, it shuts the door to access.

*A. Overcoming the Equal Protection Argument:  
A Guide to Implementation*

Affirmative action and quotas are violative of the equal protection of those citizens that do not benefit from the quota; however, holistic review of an individual's many characteristics, including the consideration of race/ethnicity, do not violate those protections. When adopting or enforcing a holistic diversity review policy, universities should consider race as one of many aspects of the individual student's potential for positive contributions to the educational community, but must ensure race is not the single, determining factor for admission. The university's policy in *Fisher* is a good model. To ensure compliance with equal protection, universities should institute a holistic approach by reviewing an applicant's entire file, including, but not limited to:

- Standardized test scores
- Class rank
- Classes taken
- Writing samples
- Demonstrated leadership qualities
- Extracurricular activities
- Honors and awards
- Work experience
- Community service
- Socioeconomic status
- Family/household composition
- Special family responsibilities
- Socioeconomic status of the applicant's high school
- Language(s) spoken in the home
- Ethnicity
- Race<sup>71</sup>

It is not racial discrimination to consider the whole person—including that person's race. This broad review is not racial discrimination because

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71. See *id.* at 2415–16.

neither race nor ethnicity are the determinative factor, and the race or ethnicity of majority and minority candidates would be considered to obtain the benefits of a diverse student body.

## VI. CONCLUSION

Racial equity is vital to this nation because without it the principles that are the hallmark and foundation of our democracy are hollow and incurably flawed. Until there are no disparities—access to education, treatment of racial minorities in educational institutions, and access to educational opportunities—the consideration of race in public education admissions policies will remain a compelling government interest necessary to ensure/move toward the standard of racial equity in public institutions—educational institutions are just a beginning.

The judiciary in isolation is not enough; we the people must also ensure the record reflects the context necessary to establish a solid case for racial equity as a compelling government interest. As suggested by previous scholars on the topic, we must also pursue other mechanisms—legislative, policy, activism—to realize racial equity in our institutions of public education.

Regardless of the Court's perceived hostility, obtaining racial equity is a compelling government interest consistent with the principles of equal protection. Holistic diversity review is the current mechanism to achieve—or at least move toward achieving—this compelling interest while simultaneously ensuring all receive equal treatment under the law. Ignoring the absence of racial equity in our public institutions, including those of higher education, is not the way forward. As a nation we must open our eyes, confront our past and present, and work toward the racial equity that continues to elude us; we must acknowledge and repair the chronic racial inequities in our country. Only then will we begin the journey to a wholly racially equitable society.