Fisher’s Foibles: From Race and Class to Class not Race
Cheryl I. Harris

ABSTRACT
The decision in Fisher II sustained the University of Texas’s use of race in its undergraduate admissions policy, in the face of nearly decade long attack, but on terms that reinscribed the onerous requirements of strict scrutiny on institutions utilizing any form of race-conscious policy. The debate before the Court and the rationales asserted reinforced a framework based on the notion that class considerations can be an effective substitute for race, and even that race conscious measures operated primarily for the benefit of the economically privileged Black students, at the expense of the poor of all races. While the Court reject the claim in Fisher II, the question of the race and class relationship is relevant because the Court’s current equal protection jurisprudence tethers the issue of constitutionality to the viability of alternative, non-racial measures, most of which are based on class. The claims and discussion in Fisher II regarding the relationship between race and class are predicated on several fallacies and contradictions. In casting race-conscious affirmative action as a fight for access to privilege, the class over race discourse erases the history of working class struggle for such programs, the ameliorative effect of race conscious affirmative action in alleviating inequality, and racism’s ongoing negative impact on middle class Blacks. The class not race position rests on a profound contradiction: On the one hand, advocates contend that remediation of class inequality eradicates racial disadvantage on the assumption that class converges with or subsumes race. At the same time, the substitution of class for race is justified on the grounds that attending to race does nothing to eliminate class inequality, assuming little or no relationship between race and class. Rather than conceiving of the relationship between race and class in zero-sum terms, the analysis needs to contend with the fact that race and class are interactive and mutually constitutive.

AUTHOR
Cheryl I. Harris is the Rosalinde and Arthur Gilbert Professor in Civil Rights and Civil Liberties, UCLA School of Law. This essay benefitted from conversations with my colleagues in the Critical Race Studies Program at UCLA Law School, and all the participants in a workshop on Fisher v. University of Texas at Austin: Study on Race and Ethnicity in Admission, Devon Carbado, Kimberlé Crenshaw, Elise Boddie, Liliana Garces, Rachel Godsir, Jerry Kang, William Kidder, Richard Lempert, Nancy Leong, and Kimberly West-Faulcon. Excellent research assistance was provided by Hanna Giuntini and Ashleigh Washington, and as always, the expert research staff of the UCLA Law Library. I also extend my thanks to the editors of the UCLA Law Review for their patience and support.

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INTRODUCTION

The U.S. Supreme Court's 2016 decision in Fisher v. University of Texas at Austin (Fisher II)\(^1\) affirmed the University's use of race in its undergraduate admissions policy and ended a nearly decade long battle. This “round-two” decision represents a significant, albeit partial and fragile,\(^2\) victory for supporters of race-conscious affirmative action, in affirming the basic premise that, under certain specific conditions, race can legitimately be considered as part of a public institution’s policy to advance equality and inclusion. Analyzing the University's admissions procedure under the doctrinal rubric of strict scrutiny, the Court found that the University’s interest in obtaining a diverse class, “ending stereotypes, promoting ‘cross racial understanding,’ preparing students for ‘an increasingly diverse workforce and society,’ and cultivating leaders with ‘legitimacy in the eyes of the citizenry,’”\(^3\) was compelling. And the key question that had largely driven the litigation, whether the University’s use of race was narrowly tailored, was answered affirmatively because of substantial evidence that race-neutral alternatives had not been effective in achieving racial diversity, particularly at the classroom level.\(^4\) Under the limited terms of the debate over race-conscious remediation set by current constitutional doctrine, Fisher II was a significant achievement in sustaining a race-conscious affirmative action program under severe attack. At the same time, the decision not only reinscribes the onerous requirements of strict scrutiny on institutions utilizing any form of race-conscious policy, it reinforces an analytical framework that underwrites the idea that class considerations can be an effective substitute for race and obfuscates the actual relationship between class and race.

This question of the race and class relationship is relevant to Fisher II because the analytical framework applied to race-conscious policies under the Court’s current equal protection jurisprudence tethers the question of the constitutionality of such policies to the viability of alternative nonracial measures. As Grutter v. Bollinger\(^5\) articulated, admissions programs that include

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2. The U.S. Supreme Court decided the case by a vote of 4–3, as a consequence of the recusal of Justice Elena Kagan and the death of Justice Antonin Scalia, which occurred after the case was argued, but before the decision was issued. Abby Jackson & Caroline Simon, Antonin Scalia’s Absence Paved the Way for the Supreme Court to Rule in Favor of Affirmative Action, BUS. INSIDER (June 24, 2016, 9:36 AM), http://www.businessinsider.com/scalias-death-impacted-fisher-v-texas-2016-6 [https://perma.cc/6W5Y-5ALR].
4. See id. at 2214.
considerations of race are subject to strict scrutiny review; this framework applies even to programs like that at issue in *Fisher I*, in which the University of Texas (UT) considered race as a “factor of a factor of a factor of a factor” in one of several pathways to admission. Accordingly, not only must universities establish a compelling governmental interest in diversity (the only acceptable such interest under current law); they also must demonstrate that the race-conscious admissions policy is narrowly tailored, which is supported by evidence that race-neutral measures are insufficient to achieve the University’s goal. This formulation conceives of considerations of class as possible, and even preferable, substitutes for race-conscious affirmative action policies.

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6. See *id.* at 326–27 (describing the applicable standard of review).
8. In *Grutter*, the U.S. Supreme Court stated that “student body diversity is a compelling state interest that can justify the use of race in university admissions.” *Grutter*, 539 U.S. at 325. The Court further required consideration of race-neutral alternatives to meet the narrow tailoring requirement. *Id.* at 339 (“Narrow tailoring does . . . require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.”). The basic idea is that, if the government can achieve its objectives without consideration of race, then race should not be utilized.

*Fisher I* remanded the case on the grounds that the University’s evidence did not clearly establish that race was necessary to achievement of meaningful diversity. *See Fisher I*, 133 S. Ct. at 2421. In particular, the Court noted:

This [evaluation] involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications. Although “narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” strict scrutiny does require a court to examine with care, and not defer to, a university’s “serious, good faith consideration of workable race-neutral alternatives.” Consideration by the university is of course necessary, but it is not sufficient to satisfy strict scrutiny: The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity. If “a non-racial approach . . . could promote the substantial interest about as well and at tolerable administrative expense,” then the university may not consider race.

*Id.* at 2420 (original alterations omitted) (emphasis added) (citations omitted) (first quoting *Grutter*, 539 U.S. at 339–40; and then quoting *Wygant v. Jackson Bd. of Educ.*., 476 U.S. 267, 280 n.6 (1986)).

It concluded by stating that, while strict scrutiny should not be “strict in theory, but fatal in fact,” quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995), it could neither be “strict in theory but feeble in fact.” *Fisher I*, 133 S. Ct. at 2421. In contrast to the majority view, Justice Ginsburg’s dissent asserted that the University’s admissions process complied with narrow tailoring as defined under prior law. *Id.* at 2433–34 (Ginsburg, J., dissenting).

Thus, as *Fisher I* and *Fisher II* exemplify, the precise requirements of narrow tailoring have been subject to much dispute. Moreover, commentators have noted the uncertain and increasingly stringent nature of narrow tailoring requirements. *See, e.g., Mari J. Matsuda, Only We Can Free Ourselves*, 18 UCLA ASIAN PAC. AM. L.J. 5, 9 n.15 (2013) (stating that the court “supercharg[ed] the limiting tools of ‘strict scrutiny’ and ‘narrow tailoring’ as applied to race-conscious admissions”).
This theme was very prominent in *Fisher II*. Among the alternatives that Fisher’s advocates advanced, and that the dissent vigorously promoted, was increased reliance on socioeconomic factors in lieu of race.\(^9\) While the majority found that none of the proposed alternatives were viable ways to advance diversity,\(^10\) Alito’s dissenting opinion assailed the University’s defense of its plan as an effort to admit more privileged Black and Latinx students.\(^11\) Indeed, even more pointedly, Alito accused UT of disavowing this objective, which he asserted it had previously put forward in *Fisher I*.\(^12\) In its defense, the University asserted that the inclusion of race in part of its admissions process was animated by concerns that Black and Latinx students admitted through the Top Ten Percent Plan (TTP), those who graduated in the top ten percent of their high school class based on their grade point average (GPA), were nearly all from de facto segregated, low-income schools.\(^13\) To admit Black and Latinx students only through the TTP would underwrite a racial stereotype that all Blacks and Latinx students are poor and from disadvantaged schools and thus undermine the ability to construct diversity.\(^14\) Alito, however, characterized the University’s argument as a claim that “racial preferences [are needed] to admit privileged minorities [thus] turn[ing] the concept of affirmative action on its head,” given the purpose of the affirmative action to help disadvantaged students.\(^15\)

Thus, while *Fisher II* has resolved the constitutionality of the University’s plan, and rejected the assertion that, at least in that specific context, socioeconomic disadvantage was an effective race-neutral substitute for race, the question of the relationship between racial and economic inequality remains salient as under narrow tailoring, institutions will have to justify the use of race as

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9. *Fisher II*, 136 S. Ct. at 2213 (noting that while Fisher “suggests altering the weight given to academic and socioeconomic factors . . . . This proposal ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors”).
10. *Id.*
11. *Id.* at 2216 (Alito, J. dissenting) (arguing that UT defends the plan because the Top Ten Percent Plan admits “the wrong kind of African-American and Hispanic students, namely, students from poor families who attend schools in which the student body is predominately African-American or Hispanic” (emphasis omitted)).
12. *Id.* (“UT put it in its brief in *Fisher I*, the race-based component of its admissions plan is needed to admit [f]he African-American or Hispanic child of successful professionals in Dallas.” (alteration in original)).
13. The Ten Percent Plan was enacted into law in 1997 following a decision by the Fifth Circuit Court of Appeals, later overruled, that banned considerations of race in college admissions. *TEX. EDUC. CODE ANN.* § 51.803 (West 2012).
15. *Id.*
necessary because of the inadequacy of viable race-neutral alternatives. Alito’s critique that race-conscious affirmative action primarily advances the interests of economically privileged Black and Latinx students at the expense of the poor, implicitly the poor of all races, harkens to a debate about the legality and efficacy of race-conscious affirmative action that is grounded in an enduring contestation over the relationship between race and class.\(^{16}\) For detractors of race-conscious remediation, class is an effective substitute for race, while defenders of race-conscious interventions resist this assertion.\(^{17}\)

16. William Kidder’s essay takes up the critical empirical questions surrounding the efficacy of class-based affirmative action in achieving greater equality. See William C. Kidder, \textit{How Workable Are Class-Based and Race-Neutral Alternatives at Leading American Universities?}, 64 UCLA L. REV. DISC. 100, 131 (2016) (“Socioeconomic status is not an effective alternative to race-conscious measures with respect to undergraduate diversity at selective colleges and universities in the United States.”).

17. The class versus race issue reflects a longstanding and unresolved ideological dispute. Although here I focus on policy debates advancing the view that class should supersede race, there are also theoretical versions of the claim in academic and intellectual circles. See, e.g., Paul Gilroy, \textit{Against Race: Imagining Political Culture Beyond the Color Line} (2000). Gilroy challenged W.E.B. Du Bois’s famous declaration that “[t]he problem of the twentieth century is the problem of the color line.” W.E.B. Du Bois, \textit{Of the Dawn of Freedom}, in \textit{The Souls of Black Folk} 15, 15 (Brent Hayes Edwards ed., Oxford World’s Classics ed. 2007). Gilroy contends that both the century and Du Bois’s insight are distinctly past as we are now in an era when “renouncing race” becomes key to “bring[ing] political culture back to life.” Gilroy, supra, at 41. For a trenchant critique of this argument, see David Roediger, \textit{The Retreat From Race and Class}, 58 MONTHLY REV. 40, (2006) (noting that abandoning race is not only a conservative project, but has become prominent among some liberal and left intellectuals, even as their analysis fails to do any better at addressing the material interaction of race and class inequalities). The question of whether class divisions are more critical than racial inequality has taken on even more salience in light of the 2016 election of Donald Trump as President. While losing the popular vote by a significant margin, Trump secured a solid victory in the Electoral College by winning, against virtually all predictions, the vote in critical states, including Florida, North Carolina, Pennsylvania, and Wisconsin. See \textit{Presidential Election Results: Donald J. Trump Wins}, N.Y. TIMES (Feb. 10, 2017, 4:38 PM), http://www.nytimes.com/elections/results/president. Analysts have asserted that these results reflect the discontent of the white working-class. See, e.g., Thomas B. Edsall, Opinion, \textit{The Not-So-Silent White Majority}, N.Y. TIMES (Nov. 17, 2016), https://www.nytimes.com/2016/11/17/opinion/the-not-so-silent-white-majority.html?_r=0. But see Konstantin Kihlbard & Daria Roithmayr, \textit{The Myth of the Rust Belt Revolt}, SLATE (Dec. 1, 2016, 3:59 PM), http://www.slate.com/articles/news_and_politics/po

The law is not a neutral arbiter in this debate, as the doctrinal requirement of narrow tailoring reflects and constructs the preference for class over race consciousness in public policy and discourse. Paradoxically, this preference is due, in part, to the fact that class-based discrimination is underspecified and treated as less constitutionally concerning; class-based approaches that favored the socioeconomic disadvantaged would be evaluated under rational basis review, as distinct from racially conscious remedial plans which are tested under strict scrutiny. For example, following the passage of an anti-affirmative action initiative in California in 1996, state colleges and universities were instructed to eliminate consideration of race and were encouraged to give increased attention to socioeconomic disadvantage. The TTP, enacted into state law in 1997, in

18. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the U.S. Supreme Court, applying rational basis review, rejected an equal protection challenge to Texas's school funding plan under which students living in poor school districts received significantly less per capita than that given to students in wealthier districts. See id. at 55.

response to a negative circuit decision striking down UT’s previous race-conscious admissions policy, was not explicitly framed as an effort to privilege socioeconomic status (SES) inequality over racial inequality; indeed, its creation was driven by an effort to achieve racial diversity.\(^{20}\) Even though the TTP’s ability to increase admission of Black and Latinx students is premised on the persistence of de facto racial segregation in high schools,\(^{21}\) the plan was touted as an exemplary race-neutral policy that better advanced the interests of poor students of all races.\(^{22}\) In Abigail Fisher’s case she asserted that, although she

The University of California, like many major colleges and universities, has previously made economic disadvantage a part of admissions considerations. See, e.g., Albert Y. Muratsuchi, Comment, Race, Class, and UCLA School of Law Admissions, 1967–1994, 16 CHICANO-LATINO L. REV. 90, 90 (1995) (critiquing the shift from a focus on disadvantage to diversity after Regents of the University of California v. Bakke, 438 U.S. 265 (1978), and citing early iterations of admissions policies at UCLA School of Law that, as far back as 1967, specifically included poverty and economic disadvantage). Even after Bakke, at UCLA School of Law, the development of diversity criteria included “economic disadvantage.” Id. at 107. This general consideration of socioeconomic status was further elaborated in subsequent policy reviews. See Devon W. Carbado & Cheryl I. Harris, The New Racial Preferences, 96 CAL. L. REV. 1139, 1146 n.22 (2008) (citing Ralph J. Bunche Ctr. for African Am. Studies at UCLA, “Merit” Matters: Race, Myth, & UCLA Admissions, 3 BUNCHE RES. REP., no.3, 2006, at 2, http://www.bunchecenter.ucla.edu/wp-content/uploads/2011/09/Bunche-Research-Report-September2006.pdf [https://perma.cc/JR9J-HUEF]; Admissions & Omissions, supra, at 5–6; Ralph J. Bunche Ctr. for African Am. Studies at UCLA, (E)racing Race, Erasing Access, 3 BUNCHE RES. REP., no.1, 2005, at 1, http://www.bunchecenter.ucla.edu/wp-content/uploads/2011/09/Bunche-Research-Report-Nov2005.pdf [https://perma.cc/U3FA-GQXG] (noting reports from the Ralph J. Bunche Center for African American Studies at UCLA on admissions procedures at different UC campuses, including after 2002, a comprehensive review that included more specific socioeconomic factors such as neighbor of residence and schooling); Herma Hill Kay, The Challenge to Diversity in Legal Education, 34 IND. L. REV. 55, 64–65 (2000) (describing policies implemented by schools within the UC system to create and maintain diversity and discussing a UC law school’s admissions program, adopted following the vote of the Regents of the University of California banning affirmative action in university admissions in 1995, described as Regents’ Resolution SP-1).\(^{20}\) Indeed, as Justice Alito has noted, the Top Ten Percent Plan (TTP) was designed to achieve greater racial diversity in the face of Hopwood v. Texas, 236 F.3d 256 (5th Cir. 2000), a Fifth Circuit decision that banned the use of race outright. See Fisher v. Univ. of Tex. at Austin (Fisher II), 136 S. Ct. 2198, 2218 (2016) (Alito, J., dissenting). Primarily because of pervasive de facto school segregation, the TTP included some Black and Latinx children with high GPAs in racially identified schools. Fisher v. Univ. of Tex. at Austin (Fisher I), 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting). Justice Ginsburg further points out: “It is race consciousness, not blindness to race, that drives such plans.” Id.

\(^{21}\) Kidder, supra note 16, at 114.

\(^{22}\) For example, Richard D. Kahlenberg has argued that “[t]he Top 10 Percent plan effectively enables students from disadvantaged schools and lower test scores to be admitted [to University of Texas at Austin] who might otherwise not be.” Richard D. Kahlenberg, A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES 8 (2012) [hereinafter KAHLENBERG, BETTER AFFIRMATIVE ACTION], http://www.tcf.org/assets/downloads/tcf-abaa.pdf [https://perma.cc/USZT-RNNZ]; see, e.g., Richard D. Kahlenberg, ACHIEVING BETTER DIVERSITY: REFORMING AFFIRMATIVE
lacked evidence that she was denied admission to UT because of her race rather than her mediocre academic record. UT’s limited consideration of race violated the constitutional parameters of narrow tailoring because a race-neutral alternative—the TTP—had achieved significant class and race diversity. This argument is central in both Fisher I and II. Contemporary debates over affirmative action have invoked similar claims regarding the superior value of class over race remediation.

Indeed, some pundits and scholars have declared a consensus that affirmative action and race-conscious public policy generally are politically and practically unworkable, unnecessary, and normatively problematic. These critiques are not levied solely by political conservatives. For a number of self-identified liberals and progressives, race-conscious affirmative action undermines efforts to address class inequality, which is understood as more significant, more real than racial inequality. On this view, in failing to deliver for the “truly


See Kimberly West-Faulcon, Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in Fisher v. Texas, in 29 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 335, 335 (Steven Saltzman ed., 2013). “The facts in Fisher reveal clearly that Abigail Fisher had a constitutionally fair opportunity to compete for admission to University of Texas at Austin . . . . Because of her class rank and SAT scores, Fisher was an applicant who had no reasonable expectation of admission to UT, irrespective of any consideration of race.” Id.

See Brief for Petitioner at 37–38, Fisher I, 133 S. Ct. 2411 (No. 11-345), 2012 WL 1882759, at *37–38; see also Fisher I, 133 S. Ct. at 2417.

See, e.g., Brief Amicus Curiae of Pacific Legal Foundation, Center for Equal Opportunity, American Civil Rights Institute, National Association of Scholars, and Project 21 in Support of Petitioner at 14, Fisher I, 133 S. Ct. 2411 (No. 11-345), 2011 WL 5040037, at *1 (arguing that: “Race-Neutral Remedies Are Available and Successful” at achieving racial diversity).


See, e.g., John Cassidy, The Case for Race-Blind Affirmative Action, NEW YORKER (Apr. 23, 2014), http://www.newyorker.com/news/daily-comment/the-case-for-race-blind-affirmative-action (“Given the glaring facts that America remains a very unequal society, with strikingly low levels of social mobility, what’s needed is . . . . [R]ace-blind affirmative action that helps poor and disadvantaged people get ahead regardless of their skin color and ethnic origin.”). But see Walter Benn Michaels, Class-Based Affirmative Action Is Not the Answer, AM. PROSPECT (July 1, 2013), http://prospect.org/article/class-based-affirmative-action-not-answer (arguing that since the inequality gap between the elite and everyone else is not the product of discrimination, neither race- nor class-based affirmative action are effective interventions).
disadvantaged." race-conscious affirmative action provides assistance to those who need it least. 29

The class not race framework is particularly relevant to the issues in Fisher, as a core part of the challenger's argument is that consideration of race is unnecessary to achieve greater racial equity. In fact, this frame is predicated on several fallacies and contradictions. First, in casting race-conscious affirmative action as a fight for access to privilege, class over race discourse erases the history of affirmative action as an intervention advanced by worker organizations and student movements to challenge the racial, wealth, and social network preferences embedded in traditional selection criteria and processes, which constituted barriers to entry into both working-class and more privileged positions. While it is undeniable that some colleges and universities have pursued race-conscious admissions policies in ways that serve other less egalitarian goals, it is equally clear that affirmative action has been, and continues to be, a tool to counteract needlessly exclusionary processes that have traveled under the rubric of merit and operated to entrench white dominance. Secondly, class not race arguments ignore the way in which race-conscious affirmative action has functioned to promote better conditions for segments of poor and working-class people of color, and has been a vehicle for alleviating class inequality. Moreover, class not race discourse fails to acknowledge that racism continues to negatively impact even middle- and upper-class Blacks and Latinos. Elimination of these forms of racial inequality is highly relevant to and consistent with egalitarian and antiracist goals. 30  Third, attending to the consequences of racial subordination does not require ignoring class inequality or the position of poor whites as a sector affected by economic disadvantage. Race- and class-conscious admissions policies are not oppositional, nor has there been any showing that the pursuit of

28. This was the title of William Julius Wilson's early text contending that while civil rights gains increased income for some Blacks, Black poverty also increased, demonstrating that the needs of the Black underclass, or the "truly disadvantaged" remained unmet. See generally WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY (1st ed. 1987). While Wilson argued that class subordination had significant and underappreciated effects on the Black poor, notably, he also argued that affirmative action was still necessary to overcome past discrimination, and rejected the conservative assertion that the conditions of poor Black people are the product of welfare dependency. See id. at 154. In his view, the conditions affecting poor and low income Black communities are the product of race and class subordination. Id.

29. See infra Part II for a full discussion of this view.

30. See Devon W. Carbado et al., Privileged or Mismatched: The Lose-Lose Position of African Americans in the Affirmative Action Debate, 64 UCLA L. REV. DISC. 174, 199 (2016) ("[B]lack students across class, and not just class-disadvantaged black students, experience multiple disadvantages that likely affect their academic performance and the overall competitiveness of their admissions files.")
race-conscious affirmative action admissions policies necessarily prevents attending to class.

Finally, class not race arguments obscure the fact that race and class are co-constitutive yet distinct. Indeed, the class not race position rests on a profound contradiction: On the one hand, advocates contend that remediation of class inequality eradicates racial disadvantage on the assumption that class converges with or subsumes race. At the same time, the substitution of class for race is justified on the grounds that attending to race does nothing to eliminate class inequality, assuming little or no relationship between race and class. In effect, the challenge to UT’s policy raised by Fisher has rested on the conjoined view that class is an effective substitute for race and that class inequality has little to do with race. Race is collapsed into class at the same time race and class are conceptualized as disaggregated, separate social categories. Not only are these presumptions in tension; neither accurately represents the mutually constitutive and interactive relationship between race and class. Even more nuanced views that assume a correlation between race and class do not illuminate a complex interaction in which race and class are simultaneously distinct and mutually determined. In fact, race has structured class relations and class relations have structured race, albeit in ways that are not symmetrical or constant. This is why it is incorrect to assume that class-based interventions always meaningfully address racial inequality, or that race-conscious interventions never reduce economic inequality. Policies ought to take account of the intersectional relationship between race and class rather than construct a zero-sum debate that promotes a binary choice between race and class, as have the advocates in Fisher. This Essay concludes with some thoughts about how the relationship between class and race might help illuminate the role of law in addressing inequality as well as the broader implications of this debate.

31. Kimberlé Williams Crenshaw’s concept of intersectionality critiques traditional antidiscrimination analyses which conceptualize discrimination along a single axis, such as race or gender, and fail to attend to the intersectional and interactive nature of discrimination across multiple categories. See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies, 1989 U. CHI. LEGAL F. 139. Broadly put, the dominant paradigm of antidiscrimination law defined discrimination as race- or sex-based departures from otherwise neutral baselines and processes. See id. at 148–49. This bias-focused model ignored and largely obscured the way that racism and patriarchy worked in tandem to exclude women of color and to embed and normalize white and male privilege in social practices, interactions, and institutions. Id. at 150–52.
Central to the class not race argument is the assertion that race-conscious remediation has pursued only racial diversity and, in service of that goal, has sacrificed efforts to address class inequality. This critique has become ubiquitous and increasingly pointed. Indeed, in some formulations, the failure to address economic inequality in access to higher education is caused by schools’ race-conscious efforts. Race-conscious remediation is then recast as an elitist, anti-populist agenda. Some prominent examples of these critiques follow.

Walter Benn Michaels charges that race-conscious affirmative action simply reproduces elites, doing little more than offering a rainbow version of class inequality: “What is surprising is that the battles over social justice in the university have taken the form of battles over cultural diversity, which is to say, of battles over what color skin the rich kids should have.”32 Richard Sander has charged that race-conscious affirmative action effectively ignores or legitimates class hierarchy33 as part of his much criticized claim that the policy injures Black students by placing them in too competitive academic environments.34 Richard

32. WALTER BENN MICHAELS, THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE EQUALITY 108 (2006). Michaels states that:
[Affirmative action] solves a problem that no longer exists. It’s their lack of family wealth, not the color of their skin, that disproportionately keeps blacks out of elite colleges. . . . The injury done to the poor by our school system has taken place long before anyone gets to Harvard. But this doesn’t mean that these solutions to fake problems serve no purpose. The purpose they serve is to disguise the real problem. We need . . . to believe that poor people aren’t kept out of our elite universities in order to also believe that the economic advantages conferred by going to them are earned and so are justified.
Id. at 99; see also Richard H. Sander, Class in American Legal Education, 88 DENV. U. L. REV. 631, 667–68 (2011) (“[L]aw schools apply radically different academic standards to different racial groups and race is often the predominant basis on which students are admitted. [Socioeconomic status] factors play little or no role in admissions which is particularly relevant in the light of the ‘narrow tailoring’ requirement.”).


34. See RICHARD H. SANDER & STUART TAYLOR, JR., MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT’S INTENDED TO HELP, AND WHY UNIVERSITIES WON’T ADMIT IT (2012). Several scholars have critiqued Sander’s claims. See, e.g., Brief of Empirical Scholars as Amici Curiae in Support of Respondents, Fisher v. Univ. of Tex. at Austin (Fisher I), 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3418837 (explaining that not only is there no consensus in social science regarding Sander’s mismatch research, his research violates basic
Kahlenberg has relentlessly championed class over race-based remedies both in K–12 and higher education. In *Place not Race*, Georgetown Law Professor Sheryll Cashin has asserted that her arguments for “place-based” affirmative action admissions policies, privileging students who live in poor, racially segregated neighborhoods, ought not be confused with other race-neutral, class-based alternatives. But in many respects, her argument is expressed in a similar “against race” register: She describes race-conscious affirmative action as “a policy that primarily benefits the most advantaged children of color while contributing to a divisive politics that makes it difficult to create quality K–12 education for all children.” Like other critics, Cashin points to Sasha and Malia Obama as the poster children for privileged Blacks who do not deserve to, but who are most likely to, benefit from current race-conscious affirmative action. The class not race frame has even leaked into otherwise powerful and progressive antiracist interventions. In the closing chapters of her book *The New Jim Crow*,...


35. See Richard D. Kahlenberg, *From All Walks of Life: New Hope for School Integration*, AM. EDUCATOR, Winter 2012–2013, at 2–3 (stating that in school districts in the U.S.: “Racial integration is a very important aim that I fully support, but if one's goal is boosting academic achievement . . . what really matters is economic integration”); see also KAHLERNBERG, BETTER AFFIRMATIVE ACTION, supra note 22, at 18 (arguing for class-based policies as opposed to racially-based policies in higher education).

36. See SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014).

37. Id. at xix.

38. Cashin argues that “[t]he mantra of diversity might be applied to a school that admits African elites or their American cousins, like Sasha, Malia, Blue Ivy or my kids. But diversity by phenotype puts no pressure on institutions to dismantle underlying systems of exclusion that propagate inequality.” Id. at xvi. Even if one conceded that Blacks who hold privileged class positions do not experience racism—a highly contestable claim—the specific references to children of a U.S. President or of the wealthiest Black families are nearly meaningless, as the number of Black people who occupy comparable positions of economic power and privilege is exceedingly small as a percentage of the group.
Michelle Alexander contends that race-conscious affirmative action is a kind of “racial bribe” in which real racial justice interventions have been sacrificed for superficial and symbolic forms of racial representation.39

This characterization ignores the history of worker and student groups’ organizing efforts to establish race-conscious affirmative action in labor and education policy, reducing their demands for equity in all selection processes to mere requests for access to highly selective colleges and universities. Contrary to supporting elitist agendas, student activists and racial justice advocates demanded robust affirmative action policies to address structural barriers in access to educational and employment opportunity. Affirmative action was a mechanism to strictly scrutinize the claim that selection practices, policies, criteria, and assumptions that functioned in a racially exclusionary way were fair and neutral. These issues were at the center of worker and student demands for race-conscious affirmative action.

As historians have documented, affirmative action grew out of radical protests against discrimination in the construction industry (and particularly the exclusionary practices of the building trade unions), which were advanced by Black workers in Northern cities who challenged the then-dominant gradualist approach to addressing discrimination.40 Workers were particularly frustrated that, under prevailing doctrine, relief depended on establishing proof of intentional racial animus and limited remedies to individual victims when

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40. See Thomas J. Sugrue, Affirmative Action From Below: Civil Rights, the Building Trades, and the Politics of Racial Equality in the Urban North, 1945–1969, 91 J. AM. HIST. 145, 147 (2004) (“Affirmative action emerged amid a great and unresolved contest over race, employment, and civil rights that played out on the streets, in the union halls, and the workplaces of the urban North—a conflict that began well before the 1960s and resonated long after.”). As many construction projects, including public infrastructure and suburban development, relied heavily on government funding and loan guarantees, direct action protests, which sought to shut down construction sites until Blacks were hired, struck the construction industry at a vulnerable point. See id. at 154–55 (“By protesting discrimination in government contracts, they attacked the very core of postwar Keynesian economics: businesses and unions reliant on government spending.”); see also GERTRUDE EZORSKY, RACISM AND JUSTICE: THE CASE FOR AFFIRMATIVE ACTION 31–32 (1991) (noting that grassroots activism expressed through “boycotts, picketing, and wildcat strikes” pressured employers and unions to move beyond voluntary programs, leading to the development of government-sponsored affirmative action programs); David Goldberg & Trevor Griffey, Introduction: Constructing Black Power to BLACK POWER AT WORK 1, 10 (David Goldberg & Trevor Griffey eds., 2010) (describing the period of the summer of 1969 when Black Power activists engaged in direct action protests against exclusionary practices in the construction industry that “was directly responsible for the breakthrough of affirmative action at the federal level”).
discrimination often took other forms. As the federal government sought to respond to unrest and demonstrations, President Lyndon Johnson issued Executive Order 11246, creating the Office of Federal Contract Compliance and investing it with the power to end government contracts with firms that did not adopt affirmative action goals and policies. In challenging entrenched patterns of occupational segregation, affirmative action provoked reexamination of selection criteria that had exclusionary effect without evidence that they advanced job performance. In so doing, the definition of “merit,” and the presumption of its racially neutral character were placed under critical scrutiny.

*United Steelworkers of America v. Weber*, an early Title VII case, exemplifies how affirmative action was asserted to expose and challenge exclusionary selection criteria. Kaiser, a major industrial manufacturer, hired as craft workers only those persons with prior craft experience and, in the absence of in-house training programs, drew its employees from outside the plant. Because of longstanding racial discrimination by the craft unions—practices so ubiquitous that the Court described them as subject to judicial notice—virtually no Black workers had the prior experience necessary to establish eligibility for the craft jobs. Under pressure from the federal government to correct this imbalance, the unions and Kaiser entered into a collective bargaining agreement that adopted affirmative action goals for skilled craft work, and established a training program for those jobs. The plan selected trainees on the basis of seniority, but further required that at least 50 percent of the trainees be Black until the gap between Black skilled craftworkers and the percentage of Blacks in the local labor force was substantially reduced.

As a consequence, Black candidates selected for the training program had less seniority than some whites, like Brian Weber. Weber complained that the plan constituted racially disparate treatment under Title VII, but the Court upheld it as permissible given the manifest racial imbalance in the workforce and

41. See *EZORSKY, supra* note 40, at 33 ("[These AA remedies] grew out of the persistent use of practices such as word of mouth recruiting, 'old boy' networks, aptitude and other tests not related to job performance which continued to prevent the employment of minorities and women even after overt practices of discrimination had ended." (alterations in original) (citing CITIZENS’ COMM’N. ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY 10 (1984))).
44. *Id.* at 198–99, 198 n.1.
45. *Id.* at 198–99.
46. *Id.*
the closed nature of the prior hiring processes. Notably, while Weber targeted the plan as racially discriminatory, he and other unskilled workers had been locked out before the affirmative action plan by the company's prior resistance to establishing any craft training programs and its practice of hiring already trained craft workers from outside. Neither of these structural barriers were justifiable as important merit criteria. Arguably, in the absence of the challenge brought by Black workers and civil rights advocates to the selection criteria for skilled positions, the exclusionary policies would have continued. Thus, by exposing unnecessary barriers to entry and making selection criteria more transparent, affirmative action inured to the benefit of working-class white men and women.

The critique of affirmative action as a quest to secure preferences for the privileged also obscures the more complex story of student social movements that mobilized around affirmative action as a tool to challenge the racial and class privilege embedded in college admissions processes and faculty hiring.

47. Writing for the majority, Brennan's opinion concluded that the plan did not violate the statute because a primary objective of the act was "to open employment opportunities for [Blacks] in occupations . . . traditionally closed to them." Id. at 203. Brennan acknowledged that interpreting the statute to prohibit employers from voluntarily exercising management prerogatives to provide those opportunities would frustrate that purpose. Id. at 203. Simply put, notwithstanding the statutory wording, discrimination within the meaning of the statute did not include race-conscious decisions made pursuant to a valid affirmative action plan.

48. As Derrick Bell explained:

The Weber case is a prime example of the often overlooked benefit to whites of affirmative action programs. Remember that the Kaiser Aluminum Company had steadfastly refused union pressures in the collective bargaining process for the initiation of a training program for unskilled workers. Kaiser initiated such a program under the threat of litigation by the civil rights agencies. When they did establish a program, it was 50% black and 50% white. But whites ignored the benefits for which Blacks had worked and focused on the asserted violation of seniority rules that were necessary to enable black workers to meaningfully participate in the program. Any Black participation at all, not seniority-based, was a threat justifying a major law suit.


49. See DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 8 (1992) ("[W]hites, as disadvantaged by high-status entrance requirements as blacks, fight to end affirmative action policies that, by eliminating class-based entrance requirements and requiring widespread advertising of jobs, have likely helped far more whites than blacks."). Prominent examples include affirmative action policies adopted to compel the inclusion of Black and female workers in historically closed positions. Blackmun's concurrence noted that the plan at issue in Weber was modeled on a court-ordered settlement between the Department of Justice and the steel industry that awarded over $30 million to a class of over fifty thousand minority and female workers, see United States v. Allegheny-Ludlum Indus., 517 F.2d 826, 834–35 (5th Cir. 1975), and restructured hiring and promotional practices under an affirmative action plan. See United Steelworkers of Am. v. Weber, 433 U.S. 193, 210 (1979) (Blackmun, J., concurring) (citing Allegheny-Ludlum, 517 F.2d 826).

50. Affirmative action challenges the inequality built into race-neutral criteria. As Gary Orfield argues:
Central to these efforts was the recognition that seemingly neutral practices were in fact not neutral at all in their origins, operations, or consequences.

Institutional rationales may not have been coextensive with students’ objectives; indeed, it seems evident that schools have shaped their admissions procedures to conform with and accommodate other institutional objectives, such as increasing or maintaining selectivity and ranking, increasing

The truth is, that almost all the traditional considerations in admissions disproportionately help white students since they are much more likely to be legacies, to have households with more educational resources, to attend more competitive suburban schools, to receive more information about college, and to be able to pay for professional preparation for admissions tests. If we are to ban an approach because it happens to disproportionately help African Americans or Latinos as discriminatory, then the same argument could be turned against all those policies that give disproportionate preference to whites.


51. See Kimberly West-Faulcon, *The River Runs Dry: When Title VI Trumps State Anti-Affirmative Action Laws*, 157 U. PA. L. REV. 1075, 1105 (2009) ("The fact that an institution’s prestige ranking and bond rating are tied to its reliance on SAT scores means that institutions concerned about their rankings and ratings have a strong incentive to use SAT scores irrespective of whether the SAT has the capacity to identify meaningful distinctions between applicants with very strong non-SAT academic credentials."). Because of the nearly linear correlation between test scores and parental wealth and income, these choices necessarily skew the distribution towards those who are less economically disadvantaged. *Id.* at 1118–19 ("Decades of analysis of SAT scores have shown a variety of group disparities when students are separated based on certain categories. Specifically, men score, on average, better than women; whites and some Asian groups score better than Latinos and African Americans; the rich score better than the poor; and city dwellers score better than students from rural communities." (footnotes omitted)).

Since either race- or class-based affirmative action programs would require admitting students with scores at or below standardized test score medians at these institutions, many schools have sought to maintain selectivity by preferring lower SES or underrepresented minority candidates with higher test scores. Kimberly West-Faulcon investigates why schools continue to privilege SAT scores and concludes:

[O]ne could argue that highly selective universities do not need the SAT to weed out incompetent applicants, but instead rely on the SAT to fulfill their institutional desire to have a high overall SAT average in order to boost their prestige and bond ratings. With the increasing value placed on a university’s average SAT score by students, alumni, professors, community stakeholders, and competing institutions (whose views play an important role in shaping institutional reputation), courts might conclude that a university’s contention that it uses SAT scores to evaluate student academic skills is a pretext for relying on the SAT in maintaining top-ranked status. *Id.* at 1127.
revenue, and preserving legacy preferences that ostensibly promote development and fundraising goals. Thus, the deep investment many institutions have in the SAT, despite its shortcomings and predictably exclusionary effects on students who are poor, minority, or both, reflects not only the mistaken belief that such tests tightly correlate with “merit;” it also reflects the schools’ response to national rankings systems such as U.S. News & World Reports which rely on SAT scores, as well as bond-rating systems which, in turn, rely on these prestige rankings.

As higher education institutions increasingly depend on the issuance of bonds to raise funds for expansions and repairs, there is a clear financial incentive to develop admissions policies that keep test scores high, apart from any asserted educational benefit or objective. While race-conscious affirmative action admissions policies often incorporate criteria or practices that tend to benefit those at the top of the class distribution, like the heavy reliance on tests like the SAT, in citing these institutional practices as evidence of the flaws of race-conscious affirmative action, many advocates of class not race policies have conflated the schools’ interests with those of racial justice advocates, and not attended to the advocates’ critique of the class and racial preferences embedded in traditional criteria.

Like the demands for affirmative action that came out of the struggle of Black and Latínx workers to break down racial barriers in employment, students sought to dismantle exclusionary policies and practices that perpetuated hierarchy. These concerns motivated students at UCLA School of Law, who

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52. Many colleges and universities recruit students who are not needy and can pay full tuition. See Tamar Lewin, Universities Seeking Out Students of Means, N.Y. TIMES (Sept. 21, 2011), http://www.nytimes.com/2011/09/21/education/21admissions.html?_r=0 [http://perma.cc/UJ7M-UFS3] (reporting results of a survey of over 450 university admissions officers, including reports from 10 percent of respondents indicating that students who required no financial aid had lower grades and test scores than other students who were admitted); see also KATI HAYCOCK ET AL., EDUC. TR., OPPORTUNITY ADRIFT: OUR FLAGSHIP UNIVERSITIES ARE STRAYING FROM THEIR PUBLIC MISSION (2010), http://files.eric.ed.gov/fulltext/ED507851.pdf [https://perma.cc/ALM4-9MEV] (reporting that flagship public universities are shifting funds away from low-income students to students from higher income backgrounds); Lisa Pruitt, The False Choice between Race and Class, 63 BUFF. L. REV. 981, 1047 (2015).


54. See West-Faulcon, supra note 51, at 1107–08.

55. Id.
organized over three decades—from 1969 through and after the enactment of Proposition 209's ban on race-conscious affirmative action in 1996—to enact admissions policies to address racial and economic subordination, and challenge the reification of grade point average and standardized tests as the singular and fair metrics of merit.56

Similar issues were at the center of student mobilizations at UC Berkeley when, from the mid-1970s through the 1980s, a succession of student coalitions challenged the law school's hiring policies, which continued to result in few female faculty appointments and even fewer appointments of faculty of color.57 Inspired by the 1960s Free Speech Movement and the Third World Strike, and shaped by student anti-apartheid activism, the Boalt Coalition for a Diversified Faculty (BCDF) called for affirmative action, echoing earlier movements which challenged the institution's contention that the near total exclusion of people of color and the token numbers of women were the product of fair and neutral processes.58 BCDF's successful student strike in 1988 led to the 1989 Nationwide Law Student Strike that mobilized thousands of students in actions across the country, increasing political pressure on law schools to justify hiring and promotional practices that had, for the most part, been invisible and unquestioned.59 The public debate and scrutiny, while deeply contentious, provoked some reexamination of the criteria for selection and substantially undermined the longstanding assertion that the lack of women and people of color teaching law was a result of insufficient numbers of diverse qualified candidates.

Prominently, struggles at Harvard Law School in the 1980s over a range of issues regarding curriculum, faculty hiring, and admissions similarly exposed the way racial power shaped deeply subjective assessments and funneled

56. See Muratsuchi, supra note 19; see also Cheryl I. Harris, Critical Race Studies: An Introduction, 49 UCLA L. REV. 1215, 1222 (2002) (describing student protests following the enactment of Proposition 209 which challenged, among other issues, the failure to consider broader definitions of merit).


58. See id. at 1398 (arguing that, although after the late 1980s there was a notable decline in organized protest, "the historic political intervention in one of the top public law schools forced into the open the informal hiring and promotion practices that tended to exclude outsiders from membership within the white, male law faculty club"). The authors point out that despite significant numbers of people of color and women law students and growing numbers of graduates, in 1986 at Boalt there was only one tenured faculty of color and fewer than three women. Id. at 1400.

59. See id. at 1395–96, 1402–05.
opportunity to produce stark racial and gender disparities. As Kimberlé Crenshaw explained, with regard to faculty hiring:

[T]he standard criteria that the law school endorsed were predicated on attendance at elite law schools, admission to law review, and clerkships for a prestigious judge—arguably arbitrary criteria that were grossly maldistributed along racial lines. It was entirely unsurprising that candidates of color would not readily emerge from a pool they had largely been prohibited from entering. What was surprising was that that “pool problem” would be readily accepted outside of Harvard’s walls without a serious interrogation of how and to what ends the pool was constituted. Absent in the public discourse was any caution against relying on the same processes for defining merit that helped to create the nearly all-white law school in the first place.

This debate over the composition of the legal academy implicated related structural barriers that constrained access to legal education, the profession, and the entire lawmaking and enforcement enterprise. Affirmative action focused attention on the asymmetric nature of opportunity in this regard, and the way in which merit functioned to ratify the existing racial distribution and social order.

While affirmative action is often cast only as a means to achieve diversity, in alignment with current doctrine, race-conscious admissions policies continue to challenge the premise that the existing racial baseline—the allocation of opportunity, power, and social goods—is neutral and fair. From a critical perspective, affirmative action is not an effort to repopulate hierarchy, but a tactic to expose racial and class privilege embedded in selection systems. In interrogating established metrics and traditional definitions of merit, affirmative action exposes race and class preferences. Indeed, the term “preference” as

60. See Kimberlé Williams Crenshaw, Twenty Years of Critical Race Theory: Looking Back to Move Forward, 43 CONN. L. REV. 1253 (2011) (providing a compelling account of the struggle that emerged when the school refused to consider candidates of color proffered to teach a course previously taught by Derrick Bell, and the creation by the students of the Alternative Course). As Crenshaw has explained, the struggles to desegregate Harvard Law School faculty and the vibrant student protest that emerged proved to be one of a number of similar contestations across the country in the 1980s and 90s. Id. at 1264 n.26 (citing WENDY LEO MOORE, REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY 13 (2008) and Cho & Wesley, supra note 57, at 2).

61. Id. at 1272.

62. Cf. Luke Charles Harris & Uma Narayan, Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate, 11 HARV. BLACKLETTER L.J. 1, 13 (1994) (“[T]he transition to greater inclusiveness has provoked, among other things, some rethinking about the traditional criteria of ‘merit’ for admission to and promotion within various American institutions, and some reexamination of assessment procedures once thought to be unquestionably ‘neutral.’”).
invoked in the affirmative action debate has largely been assumed to apply only to policies that explicitly take account of race. Yet, if the term is taken to mean the granting of an advantage to one racial group over another, clearly, neutral policies can and do enact exclusionary regimes with great efficiency.63 Without awareness or acknowledgement of this history, the affirmative action dispute in Fisher is seen as the paradigmatic case, and cast as competition over admission to elite institutions, whereas it is one of many diverse efforts to destabilize static, and formally race-neutral racial preferences that secure and legitimate white privilege.

II. RACE-CONSCIOUS POLICIES AND THE QUESTION OF CLASS

The class not race discourse indicts race-conscious remediation for sideling the issue of class. More strident critiques assert that the marginalization of class as a legitimate consideration in admissions decisions is a consequence of or is caused by attending to race. There are three points worth underscoring in response. The first is that this critique overstates the claim that race-conscious admissions policies have ignored economic inequality. Secondly, the attribution of institutional practices and perspectives that have elided class to racial justice advocates conflates the goals of these advocates with the objectives of the institutions, as previously discussed. A better approach suggests that the gap between the schools’ stated goals to attend to race and class, and the actual operation of their respective policies that fail to do so in practice, be addressed by holding institutions accountable.

Thirdly, while admissions policies at selective public and private universities have differed widely, many schools have included consideration of socioeconomic disadvantage. Although the policies may not explicitly be designated as class-based affirmative action, effectively they represent efforts to take account of class inequality. Admissions policies at issue in Regents of University of California v. Bakke,64 Grutter, Gratz v. Bollinger,65 and Fisher all endeavored to take race and class into account to varying degrees.66 In Bakke, the

63. See Carbado & Harris, supra note 19, at 1200 & n.204 (noting that racial preferences that advantage upper-class whites in the form of standardized tests, as well as networks of information, are endemic in the admissions processes to elite educational institutions); see also Hidden Biases Continue to Produce Powerful Headwinds for College-Bound Blacks Aiming for Higher Scores on the SAT, J. BLACKS HIGHER EDUC., Autumn 2003, at 90, 90–92; William C. Kidder & Jay Rosner, How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact, 43 SANTA CLARA L. REV. 131 (2002).
65. 539 U.S. 244 (2003).
66. See Grutter v. Bollinger, 539 U.S. 306 (2003); see also Fisher v. Univ. of Tex. at Austin, (Fisher II), 136 S. Ct. 2198 (2016); Fisher v. Univ. of Tex. at Austin (Fisher I), 133 S. Ct. 2411 (2013).
University of California at Davis Medical School provided that applicants from “economically and/or educationally disadvantaged” backgrounds were eligible for consideration. Powell’s opinion explicitly endorsed admissions programs that viewed socioeconomic disadvantage as a legitimate aspect of diversity. In *Grutter*, the University of Michigan Law School admissions policy required evaluation of applicants “based on all the information available in the file, including . . . personal statement[s], letters of recommendation,” as well as academic indicators, the quality of the undergraduate institution, and the applicant’s contribution to diversity. Diversity was not defined “solely in terms of racial and ethnic status,” and included applicants “who have lived or traveled widely abroad, are fluent in several languages, [or] have overcome personal adversity and family hardship.” The undergraduate admissions policy challenged in *Gratz* was based on a point system which assigned a value of 20 points (on a 150 point scale) to any student from a low-income background. Following the passage of Proposal 2, the initiative adopted by Michigan voters in the wake of the *Grutter* decision, the University of Michigan eliminated race from its admissions criteria, while it continued to consider other factors such as geography, socioeconomic status, alumni connections, and athletic ability in making admissions decisions.

67. The Court noted:
On the 1973 application form, candidates were asked to indicate whether they wished to be considered as “economically and/or educationally disadvantaged” applicants; on the 1974 form the question was whether they wished to be considered as members of a “minority group,” which the Medical School apparently viewed as “Blacks,” “Chicanos,” “Asians,” and “American Indians.” No formal definition of “disadvantaged” was ever produced, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. *Bakke*, 438 U.S. at 274–75 (citation omitted).

68. Id. at 315–17.

69. The Court explained:
Focusing on students’ academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy requires admissions officials to evaluate each applicant based on all the information available in the file . . . . The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for ‘substantial weight,’ but it does reaffirm the Law School’s commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers. *Grutter* v. Bollinger, 539 U.S. 306, 306 (2003).

70. Id. at 306, 338.

71. *Gratz* v. Bollinger, 539 U.S. 244, 255 (2003). Twenty points were awarded for underrepresented minority applicants as well, but they could not be combined with points for SES. See id.

72. See MICH. CONST. art. 1, § 26 (2); Mary Sue Coleman & Teresa A. Sullivan, Proposal 2 Next Steps, U. MICH.: OFF. PRESIDENT (Jan. 10, 2007), http://www.umich.edu/pres/speeches
Following the Court’s decisions in *Grutter* and *Gratz*, the University of Texas attempted to navigate the constrained doctrinal space in which race could be considered, but it did so while simultaneously considering SES factors. The policy was amended to include, in addition to the TTP, an academic index incorporating grade point average, SAT scores, and a personal achievement index (PAI), calculated by considering six factors—leadership, extracurricular activities, awards and honors, work experience, community service, and “special circumstances.” This last PAI factor was comprised of seven sub-factors: family socioeconomic status; whether the student lived in a single parent home; the language spoken at home; the socioeconomic status of the student’s high school; how the student’s SAT score compared to the average score for the student’s high school, and finally, the student’s race. This metric clearly considered both class and race, and focused significant attention on economic disadvantage.

The admissions policy at issue in *Fisher* does not represent the only legitimate way to take account of the race/class dynamic, but it more accurately operationalizes the interaction between race and class, potentially reducing the impact of persistent barriers to both racial and economic equity. UT’s policy takes account of race and class; at the same time, the experience of the University and its students illustrates that the use of race is crucial to reducing racial barriers, as structures resistant to solely race-neutral means.

Despite these facts, the indictment of race-attentive admissions policies as legitimating class inequality persists. Partly, this may be the consequence of the fact that schools, especially selective ones, have continued to pursue policies and practices that make it more difficult for the poor of any race and that continue to privilege students from upper-class families. In this context the considerations of socioeconomic disadvantage operate as exceptions to otherwise facially neutral processes that favor the wealthy. The focus on selectivity itself, which relies heavily on standardized test medians, operates to disadvantage poorer students because of the well-established relationship...
between family wealth and test scores. The skewed allocation of scholarship money based on merit over need also functions to benefit upper-class applicants. Schools further prefer and pursue students who can pay tuition over those who cannot. These practices all cohere with and support class inequality. They are not, however, an inherent part of race-conscious affirmative action programs. They are part of the routine admissions context in which policies like affirmative action seek to intervene.

Additionally, the view that race-conscious affirmative action is a defense of elite hierarchy may be so dominant because the terms of debate, both in litigation and public discourse, have been articulated within a jurisprudential environment in which the only compelling interest has been the need for a diverse educational environment. Universities defending the policies as well as those attacking them have adhered closely to this analysis, as the dominant interpretation of the doctrinal framework articulated in *Bakke* and reaffirmed in *Grutter*. In fact, while different conceptions of diversity could and have included class as well as racial inequality, under the prevailing formulation, inequality of any kind occupies marginal space.

76. See Zumbrun, *supra* note 50 (describing the relationship between SAT performance and parental wealth). Indeed, some data suggest that students from advantaged backgrounds do better than lower-SES students in college admissions even when the poorer students have higher test scores. Pruitt, *supra* note 52, at 983–84.


78. *Id.* at 985.

79. Derrick Bell notes:

For at least [three] reasons, the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing efforts to achieve racial justice: 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 . . . .

Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622 (2003); see also Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 765–66 (1997) (asserting that while diversity can be a valuable concept if understood in the context of ongoing racism, the analysis of diversity in Justice Powell's *Bakke* opinion "contribute[s] to a shallow and ultimately retrogressive understanding of diversity").

Additionally, eliminating structural racial and economic inequality has been absent from the debate over admissions in part because those most likely to challenge institutional practices that buttress inequality—historically underrepresented minority students—have never been actual parties to the legal contests. From *Bakke* to *Grutter* and now *Fisher*, these stakeholders have been consigned to the sidelines, at best participating as intervenors, most often as amici. Their view of a compelling governmental interest has not been widely considered nor has their vision of a more equitable process been part of the debate. To the extent class inequality has been marginalized, however, responsibility does not lie with racial justice advocates or race-conscious affirmative action policies per se.

Certainly not all policies adopted by every institution have included well-developed metrics of race and class inequality, nor have all institutions implemented even carefully designed plans with the same level of commitment or nuance. These conceptual and performance gaps, however, do not prove that racially attentive policies are inherently flawed, or are inexorably tied to protecting economic privilege and ignoring the condition of poor whites.

### III. RACE-CONSCIOUS POLICY AND CLASS INEQUALITY

The question of class inequality is central to the critique offered by advocates of the class not race framework. These critics characterize race-conscious admissions policies as normatively problematic for two major reasons. First, race-conscious affirmative action allegedly favors privileged Blacks—the

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81. Student and other intervenors in a recent series of affirmative action cases have asserted that there is a compelling interest in desegregation. See Brief for Amicus Curiae National Association for the Advancement of Colored People Texas State Conference of NAACP Branches and Barbara Bader Aldave in Support of Respondents at 3, Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 3527863, at *3 (arguing that UT's admissions program "serve(d) one of the most compelling state interests: undoing the scarring damage of state-imposed and encouraged discrimination in higher education"); see also Brief of Amici Curiae UCLA School of Law Students of Color in Support of Respondents at 3, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 554405, at *3 ("[P]reventing the resegregation of colleges and universities is a compelling state interest.").

82. Some scholars have noted that despite Powell's opinion in *Bakke* affirming socioeconomic disadvantage as an element of holistic review, the Supreme Court and the federal judiciary failed to attend to this dimension of inequality, and focused instead on the racial dimensions of diversity. Pruitt, supra note 52, at 989. In some sense, law, legal discourse, and the media have played a role in distorting and misrepresenting the issue as a zero-sum game.
Sasha and Malia problem—and overlooks the poor of all races. In this formulation, affirmative action policies that include considerations of race, like the program enacted at the University of Texas, presumably leave behind worthy economically disadvantaged students while economically privileged Black students, as measured by income and educational attainment, take their place. In addition to critiquing the alleged exclusion of low-income people of color from benefitting from affirmative action—a contestable claim—on this view, race-conscious affirmative action awards a remedy to well-to-do Blacks who are not significantly harmed by racial discrimination. I consider each of these arguments in turn as exemplars of the conceptual confusion around race and class at the heart of the class not race argument.

While critics characterize race-conscious affirmative action as a policy that simply entrenches class inequality, in fact, there is considerable evidence that affirmative action and antidiscrimination policies played a crucial role in changing the living conditions of working-class and poorer Blacks, and were significant factors in alleviating economic inequality and increasing the growth of the Black middle class. This is not to claim that these policies have effectively dismantled the intertwined structures of racial and economic oppression that adversely affect the lives of poor and working-class people of color. No one social policy could be expected to undo the country’s racial legacy. But Black workers’ organizations and their allies demanded affirmative action as a means to break open closed hiring and promotional networks. These policies created some of the opportunities that they fought to secure and were determined to pursue. The

83. Critics of race-conscious affirmative action for ostensibly favoring privileged Blacks have pointed to President Obama’s daughters, Sasha and Malia, as examples of Blacks who do not deserve affirmative action. Carbado et al., supra note 30.

84. See, e.g., Richard D. Kahlenberg, Class-Based Affirmative Action, 84 CAL. L. REV. 1037, 1038, 1061 (1996) (discussing the benefit of socioeconomic affirmative action over “toxic . . . biological preference[s]” like race or gender: “Whereas a racial preference will unfairly benefit Bill Cosby’s offspring over the son of a white sanitation worker, class preferences help those who need it”).

85. Sugrue, supra note 42, at 505–06 (“To a great extent, black economic fortunes were hitched to the new and still-controversial policy of affirmative action, which was most aggressively enforced in the public sector and in government contracts.”); see also Bob Blauner, Black Lives, White Lives: Three Decades of Race Relations in America 166 (1989) (noting that between 1960 and the early 1980s, the percentage of Black families that had incomes of more than $25,000 [in constant dollars] increased from 8.7 percent to nearly 25 percent, the proportion of Blacks holding middle-class jobs increased from 13.4 percent to 37.8 percent, and the number of Black college students rose from 340,000 to more than one million); Ezorsky, supra note 40, at 63–65 (disputing the claim that affirmative action has aided only advantaged Blacks and citing studies indicating increased and better employment among poorer Blacks as a result of affirmative action); William L. Taylor, Brown, Equal Protection, and the Isolation of the Poor, 95 YALE L.J. 1700, 1713–14 (1986) (citing evidence of increased job opportunities for Blacks in blue-collar work).
attainment of these jobs was the first step for many families of color in a long, difficult, and nonlinear climb out of poverty.\textsuperscript{86} Contrary to the claim that affirmative action benefitted only upper-class Blacks, in fact these mechanisms contributed to class mobility and the emergence of a Black middle class.

Despite these gains, racial inequality and subordination continue to impact the Black middle class, but this fact has largely been obscured in public debate, which has been focused almost exclusively on well-to-do or poor Blacks. Cashin’s book, \textit{Place, Not Race}, exemplifies this limitation. While making a strong case for race-neutral policies that privilege geography as a way of capturing concentrated racial poverty, she tethers her argument to a critique of existing affirmative action programs which, she contends, have inappropriately been available to assist well-to-do Blacks, like her family, whose economic and educational attainment over several generations has been very high.\textsuperscript{87} In this view, race is a blunt instrument that cannot be calibrated to target the “truly disadvantaged.”\textsuperscript{88}

This formulation of affirmative action rests upon a conception of the race/class relationship that posits a bipolar class distribution in which Blacks are either very wealthy and privileged, or, on the other hand, very poor and disadvantaged. This obscures the existence of a Black middle class that is marked differently by racial disadvantage than the Black poor, but is marked by it nevertheless. While the racial gap in median family income between white and Black families has narrowed—median Black family income in 2014 was roughly 60 percent of the white median in 2010\textsuperscript{89}—the wealth gap is yawning: White household wealth is thirteen times the median wealth of Black households.\textsuperscript{90}

\begin{itemize}
\item \textsuperscript{86} See EZORSKY, supra note 40, at 48–49 (challenging the notion that poor and working-class Blacks neither sought nor benefitted from affirmative action); BRYAN K. FAIR, Preface: Telling Stories to NOTES OF A RACIAL CASTE BABY: COLOR BLINDNESS AND THE END OF AFFIRMATIVE ACTION, at xv, xv–xixii (1997) (recounting the poor and working-class background of the author who became a law professor); Luke Charles Harris, \textit{Affirmative Action and the White Backlash: Notes From a Child of Apartheid}, in PICTURING US: AFRICAN AMERICAN IDENTITY IN PHOTOGRAPHY 113 (Deborah Willis ed., 1994) (providing a personal account of the author’s background from a poor, Black neighborhood in Camden and describing the role affirmative action played in his life).
\item \textsuperscript{87} See CASHIN, supra note 36, at 113–15.
\item \textsuperscript{88} See generally Carbado et al., supra note 30 (referring to the criticism of race-conscious affirmative action as failing to address the needs of poor minorities).
\item \textsuperscript{89} Richard Rothstein, \textit{The Colorblind Bind}, Am. Prospect (June 22, 2014), http://prospect.org/article/race-or-class-future-affirmative-action-college-campus [https://perma.cc/9YBG-5X3C]
This gap is no less profound for the Black middle class. Black middle-class families have significantly less wealth than their white counterparts. In some studies, they have less net worth than the white working-class. This represents the continuing effects and legacy of housing segregation and discriminatory and predatory lending, both of which negatively impact the value of Black-owned property and render Black middle-class status highly precarious.

Yet, even assuming that affirmative action has failed to eradicate the economic disadvantage and vulnerability of the Black poor, it does not follow that middle-class racial minorities do not experience racialized inequality, or that what they do experience is irrelevant. Because racial subordination produces both tangible and intangible inequality, the social capital that accrues to whiteness is not available to Blacks—not even to those of the middle class. As Luke Harris and Uma Narayan argue, if we think about the analogy to gender, the fallacy is obvious:

There has been no serious attempt to argue that the sexism and gender-based discrimination that women encounter within a variety of institutions are merely a product of their class status. No one argues that middle class status shields white women from the inequalities that often result from institutional sexism.

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92. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 7–8 (2d ed. 2006) (analyzing racial inequality in the United States using the lens of private wealth and concluding that “[t]he black middle-class position is precarious and fragile with insubstantial wealth resources”). Black families have less wealth than white families at every income level. Moreover, whites in the lower income percentile (20–39) have more wealth than Black families in the next higher income percentile (40–59). See Bruenig, supra note 91.

93. See OLIVER & SHAPIRO, supra note 92; see also Ta-Nehisi Coates, The Case for Reparations, ATLANTIC (June 2014), http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/ [https://perma.cc/6W4J-F9XE] (citing studies detailing the continuing effects of discriminatory housing policies).

It is similarly illogical to believe that class status consistently and completely insulates Blacks from racial discrimination. Access to material resources as a consequence of class privilege surely differentially shapes the experience of middle-class Blacks from that of the Black poor, but racism is not so easily cabined, and is expressed in many ways and through many practices. Lending discrimination, for example, may take different forms across class difference, promoting payday lending for poor Black people while denying a loan to a middle-class Black family whose credit profile is equivalent to a white middle-class family.95

While one can certainly debate whether, as between a Black middle-class student or a Black student from an impoverished background, the former warrants favorable consideration in an admissions process, it is important to note that this “dilemma” is more a product of how class is invoked theoretically as a necessary tradeoff. A more grounded discussion would have to include an examination of the background assumptions about qualifications, the admissions rates of traditionally favored groups, decisions by the institutions about the size of the class, as well as the varied ways in which racial barriers have shaped the experience of Black students across a range of class backgrounds.96 Moreover, the relevant comparison might not be between the class characteristics of a Black middle-class student and his lower-SES counterpart, but rather the relative difference between both of them and the more advantaged students, many of whom are white, who make up significantly greater proportions of the class. This is not to flatten out the issue of intra-racial class difference. But to assume that racism only impacts the lives of poor people of color reflects a too simplistic understanding of class as well as the race/class interaction.

As Richard Rothstein’s review of Cashin’s book, Place, Not Race points out:


96. See Goodwin Liu, Race, Class, Diversity, Complexity, 80 NOTRE DAME L. REV. 289, 294 (2004) (“[A]lthough minority students at top colleges may be more well-off than the general population, they are still, on the whole, significantly less well-off than their white peers at the same schools.”). As Liu points out, the question of disadvantage is always a relative one. See id. at 295 (“When you hear the claim that the beneficiaries of affirmative action are not ‘disadvantaged,’ the important question is ‘disadvantaged relative to what?’”).
Cashin’s understanding of the country’s, and African-Americans’, social-class distribution is without nuance; she focuses only on the poor and the affluent . . . . [H]er college admissions recommendations mostly overlook a substantial, nonaffluent African-American middle class, sitting between the very poor and the rich. These are children not of inherited wealth and status but of ordinary lawyers, engineers, administrative workers, civil servants, paraprofessionals, police, firemen, bus drivers, or blue-collar workers—children of men like Michelle Obama’s father, who worked in Chicago’s water plant, or Randall Kennedy’s father, a postal clerk, who completed only two years of college. This working and middle class of African Americans both needs and deserves affirmative action to level the playing field after centuries of discrimination.  

Even against the growth of the Black middle class, the fragility of its status is in part a measure of the continuing effects of racial inequality. This inattention to the effects of race across the class spectrum, and particularly its impact on Black middle-class families and students facilitates the mischaracterization of efforts to include them through race-conscious affirmative action as efforts to protect elite Blacks, the Sasha and Melias, and continue the exclusion of the poor. 

IV. CLASS NOT RACE: CONTRADICTIONS AND CONFUSIONS 

The argument to substitute class for race-conscious affirmative action rests on two premises. The first is that class-based admissions policies can adequately address racial inequality; the second is that race-attentive admissions programs fail to address class inequality. These linked arguments actually rest on two opposing conceptions of the relationship between race and class; that class is an effective substitute for race and that race cannot be an effective substitute for class. This Part critically examines each of these assertions.

A. Policies Addressing Class Inequality Will Eradicate Racial Inequality 

Prominent in the arguments in favor of class over race-based policies is the claim that policies addressing class inequality will eradicate racial inequality. This is one reason that the arguments against race-conscious affirmative action have been situated as a populist intervention and aligned with liberal and progressive agendas. The notion that through attending to class, race inequality will be
ameliorated rests upon certain empirical claims and underlying assumptions. Conceptually, one might represent the presumption as follows:

On this view, since racial discrimination is not the real driver of social inequality, measures that focus on class will also reduce patterns of racial exclusion.

As researchers and commentators have pointed out, however, the assumption that class-based interventions will adequately address racial inequality is not only contested, but lacks supporting proof. This was the case in Texas, where the TTP was touted as a race-neutral alternative that could achieve class and racial diversity. In fact, the proponents of the TTP were clear that, while the policy had some ameliorative effects, it was not an effective substitution for race-conscious policies. This result was not unique to Texas. The research on the effects in California and elsewhere disclose that significant racial disparity persisted in the face of race-neutral alternatives focused on socioeconomic class.


99. See Marta Tienda et al., Closing the Gap? Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action 41 (Jan. 21, 2003) (unpublished manuscript), http://www.texastop10.princeton.edu/reports/wp/closing_the_gap.pdf [https://perma.cc/GKN9-KTTP] (“[T]he top ten percent admission policy is not an alternative to affirmative action and by itself can only achieve minimal campus diversity, even if the presence of high levels of school segregation.” (emphasis omitted)).

Crucially, the question of whether class-based remediation can substitute for consideration of race is not one in which the judiciary can claim competence or insight. As the Fifth Circuit decision in *Fisher* noted, the issue of using socioeconomic disadvantage as a substitute for race required a different kind of inquiry:

At bottom, the argument is that minority students are disadvantaged by class, not race; the socioeconomic inquiry is a neutral proxy for race. Bakke accepts that skin color matters—it disadvantages and ought not be relevant but it is. We are ill-equipped to sort out race, class, and socioeconomic structures, and Bakke did not undertake to do so. To the point, we are ill-equipped to disentangle them and conclude that skin color is no longer an index of prejudice; that we would will it does not make it so.\(^\text{101}\)

Even beyond the empirical question of the impact of a particular race-based policy on economic inequality, however, lies the basic conceptual error in treating race as a subset of class. Class not race adherents labor under the misconception that a precondition of addressing class inequality is erasing race. This conceives of race as an ascriptive characteristic, a kind of free floating signifier. This ignores the ways in which race and class are mutually constitutive. To talk about class is to invoke a category that is always already racially marked. A neighborhood bar described as “working-class” evokes an image of its racial demographics, as does a description of a neighborhood as “upper-class.” A common inference would mark both locations as occupied by whites. David Roediger’s classic book, *The Wages of Whiteness*, explains why “working-class” is a racially coded social category.\(^\text{102}\) The very construction of a working, laboring class was crafted by differentiating from slavery.

Centuries later, whiteness confers relative advantage across the board: Whites at every income level have significantly more wealth than Blacks who earn roughly the same amount, have better health outcomes, live in better neighborhoods, and are less likely to attend racially segregated high-poverty schools even if they are poor. Most importantly, whites are ensured that their political interests are not at the margins of the political discourse even if the

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8S76] (noting that UC’s student population is more economically diverse but that some racial groups, particularly Blacks, experience considerable isolation).


system fails to deliver on its promises. For poor whites, these advantages are often so limited as to be ephemeral and are clearly outweighed by the costs of class inequality. Poor whites suffer greatly in all areas, and the gap between them and wealthier whites is profound, and by all metrics, growing.\(^{103}\) Yet, the promise of relative advantage, even when it lacks consistent material form, helps to explain how whiteness comes to function as a cross-class coalition.\(^{104}\)

Economic inequality and disadvantage are significant ways that racial oppression is manifested materially, but racial oppression transcends that form of inequality and is instantiated across a range of social, political, and cultural contexts. To collapse race into class is then to misdescribe both.

B. Race-Conscious Policies Have Little or no Impact on Class Inequality

In contrast to the prior assumption that class can substitute for race, proponents of class not race policies assert that race-conscious policies have little or no impact on class inequality.\(^{105}\) Examples of these arguments can be found at the outset of this Essay. Indeed, the more strenuous versions of this argument assert that class inequality persists in part because race-conscious policies cohere with and serve to legitimate it. Fundamentally, this argument assumes that there is little or no relationship between race and class.

This converse assumption is equally as flawed as the one described in the foregoing Section. Just as conflating race and class misapprehends the

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104. By noting this phenomenon, I do not ascribe greater racist sentiments, beliefs, or moral culpability to poor whites than other whites, contrary to recent claims. See, e.g., Lisa R. Pruitt, *Who’s Afraid of White Class Migrants? On Denial, Discrediting and Disdain (And Toward a Richer Conception of Diversity)*, 31 COLUM. J. GENDER & LAW 196, 204 n.18 (2015) (contending that this analytical frame “can be read to imply that low-income whites are a bigger culprit—and more racist—that are other whites”). It is simply to describe a well-established historical pattern in which alignments between poor and working-class whites and Blacks, in particular, have often been unstable in part because whites fear the loss of white privilege, although in material terms they too are economically exploited. The wages of whiteness are neither constant, accepted by all whites, nor a matter of individual status. They are an expression of the relative value of not being part of a group at the absolute bottom of the social and economic hierarchy.

105. One version of this claim is advanced by Justice Alito’s dissent in *Fisher II*, decrying UT’s pursuit of more privileged Black students, when “[a]ffirmative action programs were created to help disadvantaged students.” Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S.Ct. 2198, 2216 (2016) (Alito, J., dissenting).
relationship between them, it is equally problematic to assume that they are so disconnected that an intervention along one dimension will have no effect on the other.

Discrimination operates not as exclusive or separable processes or phenomena but is intersectional and interactive.

![Venn Diagram](image)

It may be too simplistic, however, to convey the relationship through the intersection of circles in a Venn diagram. While the great bugbear of social science research is to conflate correlations with causation, the problem with class not race arguments is to treat the relationship between class and race—specifically between relative advantage and whiteness and relative disadvantage and Blackness—as correlational when the relationship is in fact causal. The fact that Blacks are clustered at the lower end of the distribution of wealth and income is not coincidental; it reflects ongoing practices and social relations that secured relative value and privilege for whiteness. Class in this country has meaning beyond income or wealth. It is a material expression of racial hierarchy. Whiteness confers some benefits on all whites, even those burdened by class oppression. At the same time, whiteness is no insurance against the effects of structural inequality: Whites who are poor are solicited and summoned to the stage to argue against race-conscious remediation, but their specific concerns are rarely if ever addressed.

Class not race arguments fail to appreciate these facts and rest on conflicting and contradictory claims. We would do better to consider the power of creating policies that target the interaction of race and class, not their artificial conflation or disaggregation.
CONCLUSION

The long durée of the *Fisher* litigation reflects the continuing contest over critical issues of educational access, opportunity, and the meaning of race. Simultaneously, as one of the more visible affirmative action cases, it has been a terrain in which the debate over race and class has been engaged, often in ways more confounding than productive. For the most part, the dominant view has narrated the *Fisher* case as one in which ameliorating class inequality, the more salient concern, has been bypassed in policies that have centered on race. Indeed, some disappointed observers decried the results in *Fisher II* as a win for wealthy students of all races, and a loss for all low-income students.\(^{106}\) This lament mischaracterizes the outcome of the case which affirmed UT’s very limited consideration of race; it was neither a transformative victory, nor a catastrophic loss. The problem and irony of the class not race critique that is now privileged in equal protection analysis is that in endeavoring to resist any consideration of race, meaningful efforts to address class inequality are compromised as they are premised on an ill-conceived notion of the race and class relationship. Certainly, the class not race framework in *Fisher II* reiterates a theme which has been a relative constant in the affirmative action debate—that attending to class is preferable to paying attention to race. That the decision in the case ultimately acknowledged that, at least in this instance of UT, class could not substitute for race is important. But it is most important to acknowledge that a more frank and full assessment of the race and class issue would resist the presumption that class is the best substitute for race.