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## Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of “House Rules” in Race-Related Education Cases

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# Different Script, Same Caste in the Use of Passive and Active Racism: A Critical Race Theory Analysis of the (Ab)use of “House Rules” in Race-Related Education Cases

Steven L. Nelson\*

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### *I. Introduction*

Having a fall birthday, especially one that falls around—and sometimes on—Thanksgiving, can be troubling. In previous years, I was often required to split time with close family and friends who wanted to wish me a happy holiday season as well as a happy birthday (all while inappropriately celebrating the mass genocide of American Indians). On one such celebratory occasion, I attended a dinner party hosted by a good friend. I attended the dinner party with my closest fraternity brother. He was accompanied by his fiancé. Always ones with competitive spirits, my fraternity brother and I challenged his fiancé and my good friend’s sister to a “friendly” game of

Spades.<sup>1</sup> We played a quick game, one to 350 points. At the end of the game, the score was “tied.” More correctly, my fraternity brother and I had a score of 358 points. The ladies had a score of 352 points. Under customary rules, my fraternity brother and I would be declared the victors, for it is tradition—in Spades—to declare the team with the most points when either team or both teams surpass 350 points the winner of the game.

That day would be different, though. My good friend’s sister, who lived with my good friend, declared that the rules of her house dictated a sudden death overtime hand of Spades. My fraternity brother and I would play the requested hand although we were both chagrined and bewildered at this sudden rule change/announcement. We went on to win that hand, too. We earned seven books; they earned six books. My friend’s sister would preempt any further celebration and/or exuberance by declaring that house rules required that the victors win by a decisive number of books when the game is in overtime. To this day, I am unsure as to how a score of 7–6 was not decisive because seven is certainly and decidedly more than six. We would ultimately play several hands before my fraternity brother and I would lose a hand outright (8–5). The game would end immediately. When my fraternity brother and I protested, my friend’s sister asserted that she was simply applying the house rules!

In a dispute over a card game, house rules dramatically shifted the outcome(s) of the game. More importantly, the shift in house rules provided an insurmountable barrier to achieving my team’s goal: winning the game. As I prepared for my first class (one about politics and power in education) as a tenure-track faculty member, I re-read race-related education federal court cases. In many ways, it appears that the Supreme Court and other federal courts have endorsed the use of “house rules” in race-related education cases, except the stakes are much higher when considering the gatekeeper that a college diploma may serve in opening or shutting doors to future

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1. See generally WANDA GARNER, *HOW TO PLAY SPADES* (2012) (stating that spades is a card game played with four players, though it can be played with only two and the objective is to score 500 points before the opponents).

educational, occupational, and social mobility. This paper discusses the existence of house rules and the circumstances necessary to perpetuate that power in both primary and secondary education and higher education, acknowledging the similarities between the use of house rules in both arenas.

*II. The Half-Hearted Attempt to Desegregate Schools: The  
Creation of a White Power to Dictate the Pace of Forgiveness via  
Brown and its Progeny*

The power of the pen may not always be mightier than the power of the sword, but such is currently the case when considering how the story of desegregating the nation's public schools is told. While many scholars debate the merits of integrated public schools as opposed to segregated public schools based on the nation's failed attempt to desegregate its public schools, little attention is paid to the fact that the nation never wholeheartedly attempted to desegregate its schools. It is necessary, then, to recast the facts of K-12 school desegregation efforts as taken up by the Supreme Court of the United States. The Supreme Court misplaced the power to dictate the pace of desegregation and followed that misplacement with the provision of an opt-out clause for those parents seeking shelter from the requirement to desegregate the nation's public schools. Though often trumpeted as a victory, the Court's decisions in *Brown v. Board of Education of Topeka*<sup>2</sup> and much of its progeny were empty promises that have not been fully realized by later generations of minority students at the secondary and primary levels of education. The Court's endorsement of a right for White Americans to be comfortable with the speed and procedure of desegregation later developed into the power to set house rules regarding the use of race in education. As realized in the story provided in the introduction,

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2. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495 (1954) [hereinafter *Brown I*] (finding that “[s]eparate educational facilities are inherently unequal,” and holding “plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.”).

one is in the proverbial catbird's seat when he or she has the power to set and adjust the house rules. The person who sets the house rules always has the option of winning the game since the house rules for winning may well change at their discretion until the setter of house rules has won the game.

*A. The Illusion of "Forced Integration:" The Court's Approval of Integration on the Terms of Whites*

Since *Plessy v. Ferguson*, and even before that case, it was legal to deny Black Americans entrance into public accommodations that were thought to be reserved for White Americans so long as there was a "separate but equal" facility reserved for Black Americans.<sup>3</sup> The Supreme Court of the United States invalidated segregative statutes and explicitly overruled the holding in *Plessy*<sup>4</sup> that allowed for the separate but equal education of Black students in *Brown v. Board of Education of Topeka*.<sup>5</sup> Despite the fact that the Black schools had been or were being equalized in many cases, the Court struck down the statutes and policies requiring the segregation of public primary and secondary schools on the grounds that segregated schools could not be made equal.<sup>6</sup> The Court's opinion in *Brown I* appeared and is sometimes remembered to have been a forceful repudiation of the ugly truths of racism and segregation, but such memories of the watershed case ruled on in 1954 are nostalgic at best. Perhaps these memories are even delusional. A passive reading of the Court's opinion in *Brown v. Board of Education of Topeka II*, the remedies portions of *Brown*, reveals that the desegregation of the nation's public schools was not to be done immediately but rather with "all deliberate speed."<sup>7</sup>

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3. See *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) (establishing the infamous phrase "separate but equal," and upholding the Louisiana statute requiring railway companies to maintain such accommodations as valid).

4. *Id.*

5. *Brown I*, 347 U.S. at 495.

6. *Id.* at 487–93.

7. See *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 300 (1955) [hereinafter *Brown II*] (requiring that the defendants "make a prompt and

What exactly did the Court mean by the phrase “all deliberate speed”?<sup>8</sup> Tradition would create the perception that attempts at desegregation in the primary and secondary school settings of the United States occurred by force or judicial fiat; neither case occurred in actuality. Far from the requirement of desegregating all of the nation’s schools at once and at all costs, the Court in *Brown II* ordered that schools be desegregated in a method guided by equity.<sup>9</sup> Unfortunately, the idea of equity was addressed from the perspective of White Americans who had previously adopted systems intended to segregate the nation’s public schools.<sup>10</sup> The most appalling focus of the Court’s decision in *Brown II* is the High Court’s instruction that equitable principles take into account “the public interest in the elimination of such obstacles in a systematic and effective manner.”<sup>11</sup> In other words, desegregation would move at the pace that White Americans found comfortable. The Court’s reasoning in the most exalted race-related education case violated a core principle of forgiveness and restoration: those who were wronged could only be made whole to the extent and at the pace that those who wronged the victims found appropriate. This reasoning flies in the face of concepts of forgiveness. Thus, the myth that an activist court violated the ability of White parents to choose the educational setting for their children is a non-truth, if not an outright lie.

What pace did the public interest dictate? The pace of desegregating the nation’s public schools was, in fact,

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reasonable start to full compliance with [the Court’s] May 17, 1954 ruling.”).

8. *See id.* (“[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.”).

9. *See id.* (“[T]he courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power.”).

10. *See generally* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (analyzing Supreme Court cases in a discussion questioning how Black Americans have become marginalized despite the illegality of racial discrimination).

11. *Brown II*, 349 U.S. at 299–300.

deliberate. It was deliberately slow to be exact. Over a decade after the Court's decisions in *Brown I* and *Brown II*, little had changed in terms of the racial composition of the nation's public schools.<sup>12</sup> School districts devised plans that were intended to give a mirage of school desegregation, but in effect did very little to desegregate schools. In fact, some—if not most—of the plans maintained the segregated school systems that existed before *Brown I* and *Brown II*. So little had changed to address the segregation of the nation's public schools across many locales in the nation that the Supreme Court decided to deliver measurable criteria for determining whether districts had effectively desegregated its schools. The thrust of cases like *Griffin v. County School Board of Prince Edward County* and *Green v. County School Board of New Kent County* was that recalcitrant school districts could purportedly no longer overtly or covertly avoid the desegregation of their publicly-funded schools.<sup>13</sup>

White Americans had been given great leniency in remedying the immediate and lasting effects of segregated schools after their efforts to segregate and mistreat Black students. Presumably, the Court imagined that White Americans, who had supported the segregation of the nation's public schools, would openly accept the idea of desegregated schools. Having offered that the desegregation of the nation's public schools must occur but at a pace that is acceptable to White Americans, the Supreme Court had given preference to the psyches of White Americans over the equitable interests of Black Americans. The school desegregation cases were no longer about the wrong that White Americans had done to Black Americans, the school desegregation cases were now about how White Americans could most easily accept the new

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12. Compare *Griffin v. Cty. Sch. Bd. of Prince Edward Cty.*, 377 U.S. 218, 233–34 (1964) (commenting that school closures did not comply with the “all deliberate speed” requirement, and these children were being denied their constitutional right to “an education equal to that afforded by the public schools in the other parts of Virginia”), and *Green v. Cty. Sch. Bd. of New Kent Cty.*, Va., 391 U.S. 430, 441 (1968) (finding that the school board's plan had impermissibly created a dual system).

13. See *Brown II*, *supra* note 7, at 298 (providing cases showing examples of school districts employing plans that failed to comport with the “all deliberate speed” requirement).

realities of desegregated schools. Against this backdrop, the Court would sanction what started as an attempt of recalcitrant White populations to wait out the national will to desegregate (which was successful) and what later transformed into a blatant return to a system that explicitly advantaged White Americans' ideas of segregation in the K-12 setting and (later) preferential admissions in the higher education settings.<sup>14</sup>

*B. The Delusional Responses to Efforts to “Forcibly” Integrate Public Schools in the United States: The Development, Banning, and Approval of School Choice Models*

The pace of desegregation was painfully slow for Black Americans. Some school districts created school choice plans; these plans had various manifestations and avoided any meaningful integration of public schools. In Prince Edward County, Virginia, school choice manifested itself in the form of divestment.<sup>15</sup> The school district decided to defund its public schools while creating a voucher program that would afford White students the equivalent of public education at segregated private schools.<sup>16</sup> In New Kent County, Virginia, school choice took the form of freedom of choice plans.<sup>17</sup> Under these plans, a student would generally be assigned to whichever school the student previously attended prior to the plan's adoption unless the student's parent made an official request to transfer to another school.<sup>18</sup>

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14. See *id.* at 299 (“School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”).

15. See generally *Griffin*, 377 U.S.

16. See *id.* at 221–26 (enacting a new tuition grant program and making school attendance a matter of local option).

17. See *Green*, 391 U.S. at 431 (allowing a pupil to choose his own public school).

18. See *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, 433–34 (1968) (stating that “each pupil except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice were assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school.”).

As one might expect, freedom of choice plans did not result in schools that were substantially more desegregated than was the case immediately preceding the school desegregation cases.<sup>19</sup> Moreover, freedom of choice plans placed the onus of desegregating the nation's public schools on Black parents and students as opposed to placing the burden of desegregation on the states that had sanctioned racial segregation in violation of the Equal Protection Clause of the Fourteenth Amendment.<sup>20</sup> Some other districts, particularly those in the Deep South, arranged to supply vouchers for families to send their school-age students to private sectarian schools, which were believed to have the right to discriminate on racial bases.<sup>21</sup> Other White enclaves—or disproportionately White areas within predominately Black areas—chose or attempted to secede from school districts and create alternative, predominately White school districts.<sup>22</sup> This was especially the case of those districts subject to court supervision and ordered to desegregate under the watch of the federal courts.

School districts outside of the Deep South were implicated in the school choice escape from integration as well. The Denver Public Schools chose to situate school buildings in areas that

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19. *See id.* at 441–42 (“In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967, 85% of the Negro children in the system still attend the all-Negro Watkins school.”).

20. *See id.* at 442 (describing how the plan operated simply to burden children and their parents with a responsibility which *Brown II* placed on the School Board).

21. *See, e.g.,* *Norwood v. Harrison*, 413 U.S. 455, 471 (1973) (vacating the decision of the lower court and holding that the Mississippi book-lending program was constitutionally infirm in that it significantly aided organization and continuation of separate system of private schools which might discriminate if they so desired).

22. *See, e.g.,* *Wright v. Council of the City of Emporia*, 407 U.S. 451, 482–83 (1972) (stating that the city's creation of a school district is not permissible when the effect of this districting would impede the dismantling of a dual system when the county school system had been found to be in violation of the Constitution); *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484, 490–91 (1972) (indicating that carving out a school district, in which 57% of students would be white while 43% would be African American is not permitted, when 89% of students in the remaining district frustrates attempts to eliminate a dual system).

would be prohibitive to attempts at desegregation.<sup>23</sup> There seemed to be no end to the litany of ingenious and imaginative plans to disrupt efforts at desegregation. In the name of parents having free choice over the educational settings of their school-age students, White Americans thwarted attempts at segregation after having been successful at waiting out the national will to desegregate those same public schools.

The Court saw fit to remedy many manifestations of school choice having seen these efforts as thinly veiled attempts to end-run desegregation attempts. The Court, until the mid-1970s, judicially vetoed attempts to sidestep desegregation through school choice models, but one form of school choice proved friendly to the Court and remains contemporaneously insurmountable for advocates of desegregation. In *Milliken v. Bradley I*,<sup>24</sup> the Court endorsed a “suburban veto”<sup>25</sup> to desegregation attempts.<sup>26</sup> Under the Court’s ruling in *Milliken I*, those seeking to avoid desegregation could relocate their residency to the suburbs and be absolved of responsibility to make right the immediate and lingering advantages that had resulted from the segregation of public schools.<sup>27</sup> The curse of *Milliken* lives on and manifests itself as an obstacle to redress a past history of state-sponsored segregation as well as

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23. See *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 213–14 (1973) (describing how actions of a school board known to support racial and ethnic segregation that resulted in prohibited racially and ethnically segregated schools shifted the burden of proving that segregated schools in their district were not intentionally segregated).

24. See *Milliken v. Bradley*, 418 U.S. 717, 761–62 (1974) [hereinafter *Milliken I*] (stating it was inappropriate to impose a multi-district solution when one district operated a unitary school system or acted in a way that effected segregation without allowing other districts to argue if that remedy was appropriate or provide evidence whether these other districts ran afoul of the Constitution).

25. See generally James E. Ryan, *Brown, School Choice, and the Suburban Veto*, 90 VA. L. REV. 1635 (2004) (explaining how *Brown* extended the availability of school choice into our contemporary era and how that affects integration).

26. *Id.*

27. *Id.*; see also Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education: the Court’s Role*, 81 N.C. L. REV. 1597, 1597–1622 (2003) (explaining how the court decisions aiming to end desegregation put American schools on a path towards greater inequality).

address the resegregation of the nation's public schools. Ironically, *Milliken's* effect mostly protects the right of northerners to avoid desegregation. Because school districts in the South are generally countywide and expansive, it is more difficult for those avoiding desegregation to vacate the school district without also moving well beyond reasonable driving distance to the benefits of the inner city.<sup>28</sup>

The opposite is true in the North. Geographically smaller school districts allow for those avoiding school desegregation to dodge the desegregation of public schools while remaining well within reasonable commuting distance to the inner city, sometimes within the very same county.<sup>29</sup> Thus, the Court—with its pronouncement in *Milliken*—created a pressure release valve for those attempting to avoid desegregation of the nation's public schools, particularly in the North where school segregation was viewed as a southern problem.<sup>30</sup> To be abundantly clear, the Court chose to prefer the interest of White Americans when attempting to remedy the wrongs of desegregation and to particularly dictate the pace of desegregation efforts.

There was very little public interest, however, in desegregating the nation's public schools; to the contrary, school districts created school choice plans that would protect the status quo of segregated public schools. The Court realized that these plans were for the purpose of avoiding the desegregation of the nation's public schools and banned the use of those plans as methods for desegregating the nation's public schools (at least as those plans were then constructed and applied). The Court went on to accept a later manifestation of school choice that allowed White parents to flee inner cities yet maintain the benefits of living close to the inner cities

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28. See generally CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* (2004) (analyzing how *Brown's* most visible effect—contact between students of different racial groups—has changed over the fifty years since the decision).

29. See *id.* at 8 (describing how it is not unusual for suburban school district to be small in the Northeast and Midwest, so that families living in some of the largest metropolitan areas in the country had dozens of school districts from which to choose).

30. See generally *Milliken I*, 418 U.S. 717 (1974).

that the parents had fled. Put most simply, the Court allowed White Americans to set the terms for desegregation of the nation's public schools since White Americans would control the pace and scope of desegregation.

White Americans would go on to use school choice to change the rules to desegregation attempts and change the conversation about school desegregation. School desegregation would become more about the right of parents to choose the setting(s) of their child's schooling as opposed to providing for schooling in a desegregated context. When all was said and done, more was said than done: White Americans maintained power in the politics of education, even after the school desegregation cases. For many Black families and students, the current context of educational equity is often worse than was the case before attempts at desegregation.<sup>31</sup> In effect, the desegregation of schools produced a different script because the actions after desegregation were new manifestations of power and privilege, but the desegregation of public schools in the United States produced the same caste since equitable access to public schools remained out of reach for nearly all Black school-aged children, especially if one defines equitable access as the ability to attend desegregated schools.

### *III. How the Court's Decisions in K-12 Desegregation Cases Led to Decisions in Later Affirmative Action Cases: Protecting the Power to Set House Rules*

The Court's decisions regarding the desegregation of primary and secondary schools are instructive in the results of affirmative action cases in higher education. Though generally thought of as isolated lines of case law, the K-12 and higher education cases bear a striking resemblance to each other. The end result is the same: White Americans get to set the rules for the game. When White Americans can no longer win with

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31. See GARY OREFIELD ET AL., *E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS* 42 (2012) (noting that school segregation across the United States is substantially worse than it was forty years ago and that black segregation is increasing in the Southern States and remains high in others).

the rules that they set, the Supreme Court's role is to give its approbation to rule changes that are proposed by White Americans. Recall that the Court allowed White Americans to set the pace of the desegregation of the nation's public schools. The Court did, however, order that the desegregation must appear to have occurred. When White Americans could no longer outlast the nation's will for desegregated schools, the Court acquiesced in the proposal to allow White parents to opt out of school desegregation via the decision in *Milliken I*.<sup>32</sup>

*Milliken II*, effectively the remedies portion of *Milliken I*, was decided in 1977.<sup>33</sup> Only a year after *Milliken II*, the Court would entertain its first affirmative action case. That affirmative action case is similar to the K-12 desegregation cases because the result of that case (and subsequent affirmative action cases) was that White Americans would continue to enjoy academic environments that were for the most part free of Black students (and some other racial minorities). More than that, the cases are similar in that White Americans maintained the benefit of setting the house rules. As will be detailed below, the Court used the affirmative action cases to cement the power to control the house rules in favor of White Americans. This occurred in three phases.

First, the Court would allow White Americans to determine which indicators were accorded the most weight in admissions processes. Of course, White applicants went on to choose the indicators that most benefitted them. The Court then went on to declare that White applicants who are presumptively more qualified than applicants who are racial minorities should not be denied admission into incoming classes.

Next, the Court would allow the rule in the first case to transform to allow White applicants to challenge the admission of admittedly equally qualified applicants who are racial minorities. The Court entertained the second set of cases

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32. See *Milliken I*, at 745 (1974) ("Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.").

33. See *Milliken v. Bradley II*, 433 U.S. 267, 289–91 (1977) [hereinafter *Milliken II*] (entitling as part of a desegregation decree, compensatory or remedial educational programs for schoolchildren subjected to past acts of de jure segregation at defrayed costs).

although there was no indication that the minority applicants were under- or unqualified as relative to the nonminority applicants. The chief complaint of the plaintiffs in those cases, therefore, was they could not believe that they would not be preferred even as compared to equally qualified racial minorities. Having lost this battle in the judiciary, the Court would later allow opponents of affirmative action in that same state to place the civil rights of minorities to a popular vote.

Finally, the Court would let the power of house rules develop into the right of under- or unqualified White applicants to challenge the admission of more qualified minority candidates, almost assuring that White applicants would become mandatory winners. Not much in the K-12 context is different than in the context of affirmative action cases: racial minorities may pursue equity so long as White Americans are prohibitive favorites and perpetual winners in that pursuit. The following subsections of this Article will detail how the Supreme Court has maintained the White privilege to set the house rules as well as sanctioned the enhancement of that privilege. Indeed, this argument requires a recasting of the facts of affirmative action cases.

*A. More than Forgiveness on Their Terms: The Supreme Court Sanctions the White Power of “House Rules” via Bakke*

The Court first addressed the issue of programs that sought to include racial minorities who had previously been marginalized in higher education in *Regents of the University of California v. Bakke*.<sup>34</sup> In sum, Allan Bakke, a white male applicant, applied for admission into the University of California-Davis Medical School.<sup>35</sup> The University of California-Davis Medical School operated two separate application review pools.<sup>36</sup> One was aimed at white applicants and minorities who

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34. *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319–20 (1978) (deciding that a medical school's admission program that used racial classifications violated the Fourteenth Amendment; however, the school's goals in using racial classifications could be legitimately served by the competitive consideration of race).

35. *Id.* at 276.

36. *Id.*

were not underrepresented in the Medical School.<sup>37</sup> The other was aimed at minority applicants who were underrepresented at the Medical School.<sup>38</sup> Bakke's grade point average was slightly below the average of the White applicants from the general application pool and well above the average of those students admitted under the special application pool.<sup>39</sup> Bakke's standardized test scores far outpaced students accepted through either applicant pool.<sup>40</sup> His interview received mixed reviews although the highest-ranking official of the admissions committee was not impressed with Bakke's in-person interview during Bakke's second application cycle.<sup>41</sup> After being denied admission to the Medical School in both 1973 and 1974, Bakke filed suit in the Superior Court of California, alleging that the admissions program constituted a violation of his right to equal protection of laws under the California and United States constitutions and a violation of Title VI of the

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37. *See id.* at 274 (identifying the classes of persons eligible for the special admissions program). In 1973, applicants were considered under the special admissions program if they self-identified as "economically and/or educationally disadvantaged" on the 1973 application form. In 1974, applicants were eligible for the special admissions program if they self-identified on the 1974 application form as belonging to certain minority groups, effectively limited to "Blacks," "Chicanos," "Asians," and "American Indians." The term "disadvantaged" was not formally defined, but self-identified applicants had their applications reviewed for eligibility on a case-by-case basis. In 1974, the special admissions program only considered "disadvantaged" applicants who were members of one of the designated minority groups. *Id.* at 274–76.

38. *See id.* at 274–75 (stating that a special admissions program operated with a separate committee, a majority of whom were members of minority groups).

39. *See id.* at 277 n.7 (comparing Bakke's grade point averages with those of applicants admitted through the regular and special admissions programs in both the 1973 and 1974 application cycles). In 1973, Bakke's overall grade point average was 0.03 points lower than the average for "regular" admittees and 0.58 points higher than the average for "special" admittees. In 1974, Bakke's overall grade point average was 0.17 points higher than the average for "regular" admittees and 0.84 points higher than the average for "special" admittees. *Id.*

40. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265 (comparing Bakke's MCAT percentiles with those of applicants admitted through both the regular and special admissions programs in both the 1973 and 1974 application cycles).

41. *See id.* at 276–77 (noting that Bakke's faculty interviewer in 1973 considered Bakke "a very desirable applicant" while his faculty interviewer in 1974 gave Bakke his lowest rating out of six reviewers' scores).

Civil Rights Act of 1964 because he could not compete for the 16 (out of 100) seats reserved for underrepresented racial minorities.<sup>42</sup> The California trial court determined that the Medical School's admission program violated the United States and California constitutions and Title VI, but that Bakke had not sufficiently shown he would have been admitted but for the special admissions program.<sup>43</sup> The case was then transferred directly to the California Supreme Court, which ultimately determined that the admissions program violated the Fourteenth Amendment's Equal Protection Clause and that Bakke was entitled to admission because the university could not show that Bakke would not have been admitted even without the special admissions program.<sup>44</sup> After granting certiorari, the United States Supreme Court held in favor of Bakke and ordered the Medical School to admit Bakke in contravention of the Medical School's desires.<sup>45</sup>

The Court's decision in *Bakke* privileged White applicants seeking admission into competitive state-sponsored academic programs. Despite the fact that every applicant was evaluated on a number of criteria, Allan Bakke argued for and the Court approved that his test scores would become the primary measure for his suitability for enrollment at the University of California-Davis Medical School.<sup>46</sup> Surely, Bakke's test scores and grade point average far outpaced those of the applicants admitted under the special program, but it is uncontested that the director of admissions found Bakke's interview to be lacking on numerous accounts.<sup>47</sup> Setting aside the exceptional test scores that Mr. Bakke submitted and the fairly competitive grade point average achieved in his coursework, there was no particularly explicit reason why Mr. Bakke's poor performance

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42. *Id.* at 277–78.

43. *Id.* at 277–79.

44. *Id.* at 279–81.

45. *Id.* at 271–72.

46. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272–280 (1978).

47. *See id.* at 276–77 (describing how Bakke had written to the chairman of the admissions committee complaining about the special admissions program after being denied admittance in 1973 and how, in 1974, that same person conducted Bakke's faculty interview and subsequently gave Bakke his lowest rating out of all reviewers).

on the interview portion of his admissions process was to be excused.<sup>48</sup> The only reasonable reason for ordering Allan Bakke's admission into the Medical School in spite of his poor interview was that the rules would be different for White applicants than for applicants from underrepresented racial minority groups. All applicants would be measured by several measures, but White applicants would get to weigh the application process in a manner that highlighted their strengths as opposed to weaknesses. Thus, White applicants would be assured to be perpetual winners in the higher education application process.

That the Court sought to shift the rules to maintain the privileged position of White applicants to elite state schools is evident in at least one other instance of the Court's opinion in *Bakke*. Diversity was to be considered a variety of soft factors after the decision in *Bakke*.<sup>49</sup> Relying on language from the admission process at Harvard University, the Court sanctioned the use of various forms of diversity that go beyond racial and ethnic diversity.<sup>50</sup> While such measures are not in conflict with efforts towards racial diversity, they may be if such efforts at diversity displace efforts at racial diversity with race-neutral efforts at diversity that maintain the privileged position of White applicants. This can easily become the case when accounting for sex, class, religion, geography, etc. The categories promoted by Harvard's policy are not exact proxies for race, and they may actually be more beneficial to White applicants who are still the majority of applicants in each of these areas by nature of their majority in the general population. Once again, the Court expressed a willingness to protect the privileged position of White applicants at the expense of minority applicants. The Court approved the consideration of diversity, but only insofar as diversity would also benefit White

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48. *See id.* (declining to expressly consider whether Bakke's interviewers in 1974 were explicitly biased against Bakke, nor otherwise questioning the validity of Bakke's 1974 interview scores).

49. *See id.* at 317 (explaining that ethnic diversity could be considered a "plus" factor as part of a matrix of other nonobjective factors).

50. *See id.* at 316–20 (stating that race or ethnic background is simply one element to be weighted fairly against other elements).

applicants while benefiting racial and ethnic minority applicants.

*B. Changing the “House Rules”: Grutter, Gratz, and the Preference for Whites over Equally Qualified Black, Brown, and Native Applicants*

Notwithstanding the result in *Bakke*, most people would sympathize with Mr. Bakke. Under what he perceived to be the objective standard of evaluating merit, Mr. Bakke believed himself to have outclassed the competition on this “objective” measures. It is easy to understand how the admissions committee might have rejected Allan Bakke given his poor performance at his in-person interview (on the second application). The Supreme Court, however, appeared to bless White applicants for admission into higher education with a right to admission, at least as preferred against racial minorities. The Court allowed Bakke to determine which criteria for merit was given greater weight in his admissions process. Although it was well understood that minority applicants would have to do well on both the objective and subjective portions of the application process, *Bakke’s* results changed the rules for nonminority applicants. Under the new rules, White applicants’ admissibility could practically be measured by performance on standardized tests alone.<sup>51</sup> The effect of this rule change in combination with the Court’s lack of resolve to end segregation in the nation’s public elementary and secondary schools was that White Americans were able to avoid the presence of minority students throughout their educational experiences.

The Court did not hear another case on affirmative action until roughly twenty-five years after *Bakke*. The Supreme Court would hear two cases from the same university at that time. In *Grutter v. Bollinger*, the Supreme Court upheld the use of affirmative action measures in the admissions decisions

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51. *See id.* at 320 (stating that Medical School could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted).

at the University of Michigan's law school.<sup>52</sup> The Supreme Court preceded its decision in *Grutter* by striking down the use of affirmative action measures in the admissions decisions for undergraduate students at the University of Michigan in *Gratz v. Bollinger*.<sup>53</sup> The law school and undergraduate admissions processes contained different fact patterns and, therefore, produced variant rulings according to the Court.

The University of Michigan's law school individually scrutinized each applicant and whether the applicant could use life experiences to influence the culture of the law school.<sup>54</sup> Barbara Grutter, a white female applicant from Michigan, applied for admission into the law school at the University of Michigan.<sup>55</sup> The University of Michigan's law school is considered one of the most prestigious public law schools in the United States and is perennially considered to be one of the most sought after law schools (whether public or private) by most peer institutions and law school applicants.<sup>56</sup> Given the competitive nature of admissions into the law school, many applicants—including Barbara Grutter—did not receive affirmative admissions decisions during her application cycle.<sup>57</sup> To the contrary, the undergraduate admissions process at the University of Michigan afforded a set amount of points, twenty

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52. See *Grutter v. Bollinger*, 539 U.S. 306, 333–34 (2003) (holding that the affirmative action admissions program at University of Michigan Law school, which used a strict points system to grade applicants and allotted points for the applicants' racial diversity, did not violate the Equal Protection Clause).

53. See *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003) (holding that the University's use of race in its current freshman admissions policy was not narrowly tailored to achieve respondents' asserted interest in diversity, violating the Equal Protection Clause).

54. See *Grutter*, 539 U.S. at 306 ("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. . .").

55. See *id.* at 316–17 (describing how Barbara Grutter had a 3.8 GPA and a 161 LSAT score).

56. See *id.* at 313 (stating that the law school receives more than 3,500 applications each year for a class of around 350 students).

57. See *id.* at 313–17 (explaining that the law school received more than ten times as many applicants as there were seats available for the entering class and that Grutter was initially placed on the waiting list and then rejected).

to be exact, to all racial minorities.<sup>58</sup> The purported effect of the addition of twenty points was that “virtually every qualified underrepresented minority applicant [was] admitted.”<sup>59</sup>

Jennifer Gratz applied for admission to the University of Michigan as an incoming freshman for the fall semester in 1995.<sup>60</sup> She was denied admission.<sup>61</sup> Patrick Hamacher applied for admission as an incoming freshman for the fall semester in 1997.<sup>62</sup> Like Jennifer Gratz, Hamacher was denied admission into his sought after incoming class.<sup>63</sup> The Court struck down the University of Michigan’s use of affirmative action in its undergraduate admissions process.<sup>64</sup>

Though the Supreme Court states that Michigan affirmative action cases present different issues, that statement does not confront the striking similarities of the plaintiffs’ arguments. The arguments in both *Grutter* and *Gratz* are the same: White applicants should be preferred to Black applicants who are admittedly equally qualified. In both Michigan cases, there is never an allegation that racial minorities who received admission to the University of Michigan were under- or unqualified.<sup>65</sup> Moreover, in both cases the plaintiffs accepted—as was required by the circumstances—that the racial minorities at issue were just as qualified as the

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58. *See* Gratz v. Bollinger, 539 U.S. 244, 258 (2003) (noting that an applicant from an underrepresented racial or ethnic minority group is automatically awarded 20 points of the 100 needed to guarantee admission).

59. *Id.* at 244, 274.

60. *See id.* at 251 (stating that Gratz’s admission had been delayed because she was “well qualified” but “less competitive than the students who had been admitted on first review” and then rejected).

61. *See id.* (noting that after LSA rejected her, she enrolled in the University of Michigan at Dearborn and graduated in the spring of 1999).

62. *See id.* (rejecting his application in April 1997).

63. *See id.* (delaying his application initially because his “academic credentials were in the qualified range” but “were not at the level needed for first review admission.”).

64. *See* Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (striking down the undergraduate admissions policy because it was not narrowly tailored to achieve asserted compelling interest in diversity).

65. *Id.* at 303 (Ginsburg, J., dissenting); Grutter v. Bollinger, 539 U.S. 306, 337–38 (2003).

White plaintiffs.<sup>66</sup> Were this not the case, the plaintiffs' cases would be moot since the plaintiffs would then be asserting that they, themselves, would be under- or unqualified for admission. The plaintiffs' arguments in *Grutter* and *Gratz* stands in juxtaposition to the argument presented in *Bakke*, where the allegation—however misguided—was that Bakke was more qualified than the admitted racial minorities on *some* measures. The cases of *Grutter* and *Gratz* differed from the case of *Bakke* in that there was scantily an argument that minorities were under or unqualified; the facts dictated that minority applicants were viewed as equally as qualified as the non-admitted White applicants.

White Americans, the setters and keepers of the house rules, needed to change the rules to fit this new reality. There needed to be a path to assure White applicants would be preferred over not only purportedly under- or unqualified minority applicants but also equally qualified minority applicants. The Court's decision to even hear a case premised largely on the fact that the University of Michigan admitted several minority applicants over an equally qualified White applicant where there were a limited number of available seats signaled a shift in the rules. There was a new rule of equality and equity: in a battle of equally qualified minority and nonminority applicants, White applicants could force universities to explain why Black candidates were chosen over White candidates. Not shockingly, the non-admitted White applicants in *Grutter* and *Gratz* failed to challenge the admission of White applicants who were both less qualified than the non-admitted White plaintiffs and were also admitted into their respective programs. With this being the case, it is difficult to agree that the plaintiffs in the University of Michigan cases were forthright in alleging that the gravamen of their cases were that minority students were preferred in the University of Michigan's admissions processes; instead, the

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66. Compare *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) ("Every applicant admitted under the current plan, petitioners do not here dispute, is qualified under the current plan"), with *Grutter*, 539 U.S. at 337–38 ("With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified.").

true issue here was that minority applicants—no matter how qualified—were selected above White applicants.

The Court's analysis of difference misses the mark on another similarity of *Grutter* and *Gratz*. Both cases fail to acknowledge that qualified minority applicants might contribute to the diversity of the student body in intersectional manners. In both cases, the Court counts the sheer number of racial minorities, but the Court fails to acknowledge the unique intersections between the status of racial minorities as individuals. The Court and the plaintiffs assume that all racial minorities are the same. The Court's error manifests itself differently in both cases. In *Grutter*, the Court argues that the law school's process accounts for other forms of diversity allowing for nonracial minorities to take advantage of the individualized review process.<sup>67</sup> In *Gratz*, the Court asserts that the twenty-point value assigned to racial minorities is determinative in the admissions process assuring that "virtually every" underrepresented racial minority was admitted.<sup>68</sup> The assertion ignores the fact that those students might have collected points for being both Native American and the nation's premier oboist. Likewise, one could have received points for both being Latina and a prized entrepreneur. Similarly, one could have received points for being a Black female who was raised in poverty yet also an exalted scientist. In many ways, the Court's handling of the Michigan cases proved that racial minorities were and remained to be considered static beings who contribute to diversity in a very limited manner while White applicants are dynamic and contribute to diversity in a plethora of ways. This was not a new rule; this was simply a shifting of the rules pertaining to diversity.

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67. See *Grutter*, 539 U.S. at 337 ("Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.").

68. See *Gratz*, 539 U.S. at 274 (explaining that awarding 20 points to minorities ignores each student's individual characteristics that contribute to diversity). The Court's analysis did not consider racial minorities who might have been admitted without the 20 points.

White applicants in the Michigan cases merely took advantage of the rule created in *Bakke*: diversity was acceptable so long as diversity allowed White applicants to be presumptive and perpetual winners in admission to prestigious state-sponsored universities. White applicants could now, however, publicly call to question universities when that presumption did not bear proper and appropriate results (i.e., White students being admitted to competitive state universities at the near exclusion of Black and Brown students). The Court's involvement in the *Gratz* and *Grutter* cases would pave the way for a broader and more appalling change to the rules of access and equity in college admissions.

*C. The Debate Moves Between Un(der)qualified Whites and  
Qualified Minorities: Under New House Rules Whites  
Must Always Win*

In 2013, the Supreme Court first heard the case of Abigail Fisher, a White woman denied admission to the prestigious University of Texas at Austin.<sup>69</sup> The facts of *Fisher v. University of Texas at Austin*<sup>70</sup> are also relatively simple. The University of Texas at Austin automatically admits all students graduating in the top decile of their graduating classes from public high schools in the state of Texas.<sup>71</sup> These seats comprise about four of every five seats in the incoming class at the University of Texas' Austin campus.<sup>72</sup> The remaining seats—as few as they are—are filled through a holistic review process that assesses an applicant's academic performance in

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69. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (affirming the Supreme Court order remanding the case to the Court of Appeals and denying the University's motion to remand the case to District Court).

70. See generally *id.* (holding that University had demonstrated that race-conscious holistic review was necessary to make Top Ten Percent plan workable by patching holes that mechanical admissions program left in its ability to achieve rich diversity that contributed to its academic mission).

71. See *id.* at 637 (stating that Fisher did not graduate in the top ten percent of her class and did not therefore qualify for automatic admission under the Top Ten Percent Plan, which that year took 81% of the seats available for Texas residents).

72. *Id.*

combination with the applicant's personal achievements and contributions to diversity.<sup>73</sup> There are no specific weights or parameters for identifying and measuring diversity.<sup>74</sup> Although all applicants may merit an individual review of their application, the University does exclude some students not in the top decile of their graduating classes in Texas from further consideration based on inadequate academic performance alone.<sup>75</sup> Abigail Fisher did not complete high school in the top ten percent of her graduating class although she did graduate from a high school in Texas.<sup>76</sup> She was later excluded from further consideration for admission to the University of Texas at Austin due to test scores, grades and high school course selection that the University of Texas deemed inadequate as compared to the other applications not automatically admitted, notwithstanding whether those applicants were minority or nonminority.<sup>77</sup>

Abigail Fisher, disappointed with her inability to achieve admission into the elite public university of her home state, sued alleging that the University's efforts to admit Black and Brown students prevented her admission to the University of Texas at Austin.<sup>78</sup> The case was heard at the United States District Court for Western Texas, which awarded summary judgment in favor of the University of Texas.<sup>79</sup> The generally

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73. See *id.* at 637 (describing how Fisher became one of 17,131 applicants for the remaining 1,216 seats for Texas residents because she was considered under the holistic review program, which looks past class rank to evaluate each applicant as an individual based on his or her achievements and experiences).

74. See *id.* at 638 (stating that race is a factor considered in the unique context of applicant's entire experience, and it may be a beneficial factor for a minority or non-minority student).

75. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 638–39 (explaining how Abigail Fisher would have not been admitted because her Academic Index Score was assessed at 3.1, and no students under 3.5 were admitted under holistic review).

76. See *id.* at 637 (stating the circumstances in which Fisher had graduated high school).

77. *Id.* at 638–39.

78. See *id.* at 644–45 (implying that Fisher's concern was that students who are racial minorities and not her poor performance was the reason she was denied admission to the University of Texas at Austin).

79. See *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587, 613 (W.D. Tex. 2009) (stating that as long as *Grutter* remained good law, the University's

conservative Fifth Circuit Court of Appeals affirmed the district court's issuance of summary judgment.<sup>80</sup> The Supreme Court vacated the summary judgment and remanded the case to the Fifth Circuit Court of Appeals for further proceedings.<sup>81</sup> On remand, the Fifth Circuit reaffirmed summary judgment.<sup>82</sup> The Supreme Court granted certiorari, oral arguments were held on December 9, 2015,<sup>83</sup> and the Court has since upheld the University of Texas at Austin's use of race in its holistic review process.<sup>84</sup>

Although the federal court's rulings in previous cases pertaining to education and race, particularly affirmative action cases, were troubling, that the federal courts would entertain Abigail Fisher's case sets aside all previous understandings of the role of race in education. In doing so, the federal courts authorized and effectively reified the right of all Whites to challenge the very presence of Black and Brown students on selective, public university campuses. As noted in previous sections, the plaintiff in *Bakke* argued that he was *more* qualified than the racial minorities admitted through the Affirmative Action program at the University of California-Davis Medical School.<sup>85</sup> The plaintiffs in both *Grutter* and *Gratz* argued that they were *just as* qualified as the racial minorities

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admissions program was constitutional).

80. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 247 (5th Cir. 2011) ("Finally it is neither our role nor purpose to dance from *Grutter's* firm holding that diversity is an interest supporting compelling necessity.").

81. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2412 (2013) [hereinafter *Fisher I*] (holding that the Court of Appeals did not apply the correct standard of scrutiny).

82. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014) ("With the benefit of additional briefing, oral argument, and the ordered exacting scrutiny, we affirm the district court's grant of summary judgment.").

83. See *Fisher v. Univ. of Tex. at Austin*, 135 S. Ct. 2888, 2888 (2015) [hereinafter *Fisher II*] (granting certiorari); see also *Fisher v. University of Texas*, OYEZ, <https://www.oyez.org/cases/2015/14-981> (last visited Jan. 5, 2016) (outlining the status of *Fisher II*).

84. See *Fisher v. Univ. of Tex. at Austin*, 136 S.Ct. 2198, 2202 (2016) (holding that the university's admissions program did not violate equal protection).

85. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 276–81 (1978) (explaining the Plaintiff's argument that less qualified students were being admitted and thus he was being discriminated against based on his race).

who were admitted through the University of Michigan's affirmative action programs.<sup>86</sup> *Bakke*, *Grutter* and *Gratz* all brought into question which qualifications were most important.<sup>87</sup> Fisher's argument diverged from the previous arguments, although those arguments were also weak in nature and privileged White Americans, in that Fisher's argument was never that she was more or as equally as qualified as the minorities applicants who were admitted to the University of Texas at Austin.<sup>88</sup> Abigail Fisher did not finish her high school experience ranked in the top ten percent of her graduating class; thus, she was ineligible for automatic admission into the University.<sup>89</sup>

The University offered Fisher another chance at admission through a holistic review process that evaluated her qualifications outside of class rank.<sup>90</sup> The holistic review process afforded 17,131 applicants as chance at 1,216 remaining seats in the freshmen class at the University of Texas at Austin.<sup>91</sup> The applicant pool for holistic review is dramatically and drastically more academically competitive than the applicant pool of

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86. See *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (explaining that petitioner felt she was discriminated against because she was denied admission although she had credentials similar to applicants from disfavored racial groups who had a greater chance of being admitted); see also *Gratz v. Bollinger*, 539 U.S. 244, 251–57 (2003) (detailing the admissions process used by the University of Michigan and how the petitioners' scores compared to qualified minority students' scores).

87. See *Bakke*, 438 U.S. at 276–81 (explaining that Bakke challenged the assessment of his merit that placed the totality of his qualification in a less favorable measurement in relation to his test scores, which by far outpaced most, if not all, other candidates); see also *Grutter*, 539 U.S. at 317 (describing the admission system used and detailing the petitioners' argument that the objective components of their applications—grade point average and test scores—should outweigh the composite assessment of total qualifications of minority applicants); *Gratz*, 539 U.S. at 251–57 (describing the admission system used).

88. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014) (arguing that the University's race-conscious admissions program violated the Fourteenth Amendment).

89. See *id.* (detailing Fisher's academic achievements and qualifications).

90. See *id.* (evaluating each applicant as an individual based on his or her experiences).

91. See *id.* (stating that 81% of the seats available for Texas residents were taken by students qualifying under the Top Ten Percent Plan the year Fisher applied).

students graduating in the top decile of their high school graduating classes in public high schools in Texas.<sup>92</sup> Even for the most competitive applicants, the competition would be fierce; approximately seven percent of applicants are offered admission through the holistic review process.<sup>93</sup> Fisher was not, however, the most competitive applicant; in fact, Abigail Fisher was not even minimally qualified.<sup>94</sup> No applicant—whether minority or nonminority—was admitted at or below Fisher’s Academic Index, which takes into account an applicant’s test scores, grades and high school coursework.<sup>95</sup> Fisher was excluded for falling below the minimum Academic Index required for further consideration for admissions into the University of Texas.<sup>96</sup> The reality is that Fisher was not admitted in her application cycle without any fault at all assigned to efforts to admit minority applicants.<sup>97</sup>

It is also not true that Abigail Fisher did not get admitted because of her mediocre academic credentials, as has been argued. Abigail Fisher was not admitted to the University of Texas at Austin in 2008 because her qualifications were lackluster and otherwise below minimal expectations. Abigail Fisher was under- or un-qualified for admission into the University of Texas. In fact, Fisher alternatively argued that the University should have altered its selection process for the benefit of admitting her (and other White applicants) into the class.<sup>98</sup> The plaintiff argues for complete reliance on the “Top

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92. *See id.* at 650 (stating that the Top Ten Percent students had an average standardized test score of 1219, 66 points lower than the average standardized test score of 1285 attained by holistic review admittees).

93. *See id.* at 637–38 (explaining that 81 percent of available spots were filled by students in the top 10% of their class, so the rest of the remaining applicants would be admitted through the holistic review process and that 17,131 applicants competed for 1,216 seats).

94. *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 638–39 (5th Cir. 2014) (describing how Fisher’s “Academic Index” scores were too low for admission to her preferred academic programs at UT Austin).

95. *Id.*

96. *See id.* at 639 (explaining how the University did not admit students unless their AI exceeded 3.5, and Fisher’s was 3.1).

97. *See generally id.*

98. *See id.* at 656 (discussing Abigail Fisher’s argument that socio-economic status would be a race-neutral method of assuring racial diversity). In doing so, the Fifth Circuit explains that socio-economic status would benefit White

Ten Percent” plan, which would have ironically left her without admission but might have resulted in fewer Black and Brown admittees or for reliance on class, which maintains privilege for White Americans (although not particularly Fisher).<sup>99</sup> Both the Top Ten Percent plan and the holistic review processes overrepresented Whites in the admissions process.<sup>100</sup> It appears that Fisher would only be satisfied if White applicants were absolute and perpetual winners in relation to Black and Brown applicants in the admissions process at the University of Texas at Austin. In other words, White applicants would have to be collective mandatory winners in Fisher’s mind, even if Abigail Fisher, herself, would have to suffer exclusion to maintain the underrepresentation of racial and ethnic minorities at the University of Texas’ Austin campus.

Still, the federal courts heard Fisher’s case. That the federal courts entertained Abigail Fisher’s case is a great departure from the Court’s previous affirmative action cases. Never had the Court considered whether universities were required to admit unqualified applicants solely because the applicants were White (which is the case here since Abigail Fisher never claimed to be as equally qualified as any admitted student, regardless of race or ethnicity, but merely offers to redefine the qualifications to advantage herself). Moreover, such consideration was and remains a departure from the expectations of the Equal Protection Clause of the Fourteenth Amendment: that similarly situated people are treated similarly.<sup>101</sup> Fisher was not similarly situated to

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applicants because White applicants who have low socio-economic status substantially outnumber Black applicants who are have low socio-economic statuses. *Id.*

99. *See id.* (explaining that there are many more White Americans than Black or Brown Americans in poverty in terms of absolute numbers; thus, reliance on class would result in larger numbers of White applicants being admitted through the holistic review process than Black or Brown applicants).

100. *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 657 (5th Cir. 2014) (noting that Black and Latino students admitted through the holistic review process represented only 3.3% of all students admitted into the University of Texas in Abigail Fisher’s application year).

101. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (illustrating that the Supreme Court has interpreted the Equal Protection Clause of the Fourteenth Amendment to ban disparate treatment of similarly situated persons).

minorities or non-minorities who were admitted (or even considered and not admitted) since she did not exhibit the minimum qualifications to merit further consideration.

Setting aside Fisher's lack of qualifications, the federal court's entertaining of *Fisher* is problematic for a number of other reasons. The University of Texas at Austin admits many times more White applicants through its holistic review process than it does Black or Brown applicants.<sup>102</sup> Abigail Fisher argues, in part, that the admission of Black and Brown applicants is the reason for her failure to receive admission into the University of Texas at Austin.<sup>103</sup> Fisher's argument fails to acknowledge that the number of White students admitted through the holistic review process is many times more than that of Black and Brown students.<sup>104</sup> Likewise, the number of White students admitted through the holistic review process is five-fold that of Brown students.<sup>105</sup> With such overwhelming preference for White applicants, it is abundantly clear that Fisher's assertion that Black and Brown students stand in the way of her admission is, and was at the time of her complaint, erroneous.

Moreover, the message to Black and Brown Americans is clear: White Americans must not only be advantaged in the college admissions process, but White Americans must also win every time. As mentioned above, Abigail Fisher was woefully un(der)qualified and ill-equipped to compete with the much more qualified applicants—both minority and nonminority—in the University of Texas at Austin's applicant

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102. See *Fisher v. Univ. of Tex., at Austin*, 631 F.3d 213, 240 (5th Cir. 2011) (explaining that University of Texas' College of Social Work had a quarter Hispanic and more than 10% African-American students, the College of Education had 22.4% Hispanic and 10.1% African American students and the College of Business Administration had only 14.5% Hispanic and 3.4% African-American students).

103. See *id.* at 217 (arguing that the UT's admissions policies discriminated against them on the basis of race in violation of their right to equal protection under the Fourteenth Amendment).

104. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 663, 661 (5th Cir. 2014) (portraying the admission compositions of the income class from 1996 to 2008).

105. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

pool.<sup>106</sup> Instead of the federal courts encouraging Fisher to work harder and apply for admission at a later time or consider other educational or occupational pursuits, Black and Brown Americans—who have worked hard to gather the requisite qualifications for admission—have been targeted as the primary reason for Abigail Fisher’s poor performance. It is unmistakable that the core of Abigail Fisher’s argument and the federal courts’ entertaining of her case is that even unqualified White applicants may request further vetting of admitted minority applicants, for it is apparently unreasonable to assume that *some* racial and ethnic minorities might be better qualified than any or all White applicants.

Moreover, Abigail Fisher’s analysis of the few Black and Brown students admitted fails to recognize that Black and Brown students may contribute to diversity in ways that extend beyond their racial identities, just as the case was in *Gratz* and *Grutter*. The Supreme Court has mandated that race not be the sole determinant of admission or rejection from admission to public universities in the United States.<sup>107</sup> The Court has encouraged universities to consider various forms of diversity in selecting their incoming classes.<sup>108</sup> Despite this order, Fisher and the Court refuse to acknowledge that Black and Brown students might contribute to diversity in numerous manners. The admission classes in recent Supreme Court cases have counted the numbers and percentages of Black and Brown students without mentioning that these students might contribute to diversity in a number of ways. According to Abigail Fisher’s arguments, even constitutionally compliant affirmative action plans are racial quotas or programs that limit the seats

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106. See *Fisher*, 758 F.3d, at 638–39 (explaining that nearly all the seats in the undeclared major program in Liberal Arts were filled with Top Ten Percent students, so Fisher would not have been admitted with her Academic Index score). This suggests that Fisher’s rejection was not a near-miss but rather an indication that her qualifications were no match for her competitors. *Id.*

107. See *Gratz v. Bollinger*, 539 U.S. 244, 246 (2003) (concluding that the University’s policy of distributing 20 points to every single “underrepresented minority” applicant solely because of race was not narrowly tailored to achieve educational diversity).

108. See *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003) (stating that an admissions program must be flexible enough to consider all elements of diversity).

open to White applicants.<sup>109</sup> This argument should fail on the grounds that it is conceivable and generally provable that Black and Brown applicants have diverse experiences that are intersectional. Why might a White male also be a great chess player, a Peace Corp volunteer or activist while the same is not true for Black and Brown males? How could a White female contribute to the diversity of a school through her experience as a sexual orientation minority, a single mother, or as an athlete, but a Black female or Latina not have the same ability? The assumption and lack of investigation into such intersectionality is troubling, if not racist, in and of itself. Thus, while Abigail Fisher and the federal courts encourage society to view the various frames of diversity that White applicants might provide, the same parties encourage society to view Black and Brown applicants as only providing a very static example of diversity.

Another display of the use of house rules in *Fisher* addresses the irony of the inability of Black and Brown people to use disparate impact analysis in cases relying upon the Equal Protection Clause. To avail oneself of the Equal Protection Clause, Black and Brown plaintiffs must prove not only impact, but also intent.<sup>110</sup> While the same is definitely true of White plaintiffs, it is troubling that the full or near full exclusion of Black and Brown people from some segments of life is not quite grounds for a lawsuit based on the Equal Protection Clause. Here, as is usually the case, only a few

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109. See *Fisher*, 758 F.3d, at 646 (rebutting argument that the University of Texas' Affirmative Action plan was a racial quota merely because there was the potential of using race as one of many factors in admissions decisions).

110. See *Washington v. Davis*, 426 U.S. 229, 242 (1976) (arguing that disparate impact alone is not enough to use the Equal Protection Clause to invalidate a statute and explaining that the complainant must show an invidious motive for passing and implementing the challenged statute). In *Washington v. Davis*, the court denied the challenge of Black applicants aspiring to become police officers. Although race was mentioned as one part of the secondary review at the University of Texas-Austin, all parties could avail themselves of this advantage. Thus, the statute was facially neutral and should not have been eligible of an Equal Protection Clause challenge. The University of Texas-Austin does not pretend that the secondary review does not assist racial and ethnic minorities, but the University of Texas-Austin also does not have control over the construction of the processes by which students are admitted into the university. *Id.*

White people, who were un(der)qualified for admission, were denied admission into the incoming class. Although the admissions process is generally known to be very competitive, the fact that even one Black or Brown person is offered admission ahead of a White person is the crux of Fisher's frustrations. It is becoming customary for White applicants disgruntled with their mediocre or subpar performance to blame not all accepted applicants but only applicants who are racial or ethnic minorities. Given that education is a commodity that allows for entry into a higher educational, social, and occupational class, it is no shock that litigants such as Fisher are interested in limiting these opportunities for applicants who are racial or ethnic minorities. While the Court, according to its precedent, would not find the general exclusion of racial minorities to be a violation of the Equal Protection Clause, the very suggestion of a White applicant—no matter how robust, moderate, or shabby his or her qualifications are as compared to only students who are racial and/or ethnic minorities—demands the most exacting review of the federal courts.

*D. Schuette v. BAMN: Raising the Policy-Sanctioning Bar for Affirmative Action Policies*

The Court's consideration of *Fisher* was striking for many reasons.<sup>111</sup> First, the case approving of the University of Texas at Austin's use of affirmative action originated in the Fifth Circuit, long known for its conservative opinions. Having survived the scrutiny of the Fifth Circuit, the Supreme Court effectively punted *Fisher* back to the Fifth Circuit. This is perhaps because the Court was unwilling or otherwise hesitant to so quickly overrule its decision in *Grutter*. In many ways, no one got what they expected in *Fisher*. Proponents of educational equity through affirmative action feared the overturning of *Grutter* and likely the end of affirmative action. Opponents of affirmative action were hopeful for the worst fears of proponents of affirmative action. At the last

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111. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 636 (5th Cir. 2014) (alleging that the University's race-conscious admissions program violated the Fourteenth Amendment).

stroke of the federal courts' pens, very little drama had taken place. Much more was feared and hoped than was done in actuality. The Supreme Court would, however, sanction the changing of the house rules—yet again—in less than one year. In *Schuette v. BAMN*<sup>112</sup>, the Court would allow opponents of affirmative action to specifically burden proponents of affirmative action with the task of amending the constitution to achieve educational equity through opening the doors to state higher education campuses.

Having failed to defeat affirmative action in *Fisher* and more importantly, *Grutter*, the conservative wing of the Supreme Court issued a potential vanquishing blow to affirmative action policies in *Schuette*. The Court allowed White populations to place the civil rights of minorities to a vote when the court approved of a Michigan ban on race-based affirmative action plans that favored racial minorities.<sup>113</sup> The Court gave a nod to the Michigan constitutional amendment although other forms of affirmative action such as alumni, athletic and donor preferences—all with racial implications albeit indirectly—were not similarly targeted by the amendment.<sup>114</sup> The relevant facts of *Schuette* are simple to recite. As a result of their inability to have affirmative action programs at the University of Michigan struck down as facial violations of the Equal Protection Clause, opponents of affirmative action in Michigan sought to ban racial equity in higher education at state-sponsored universities via a statewide referendum on the rights of minorities.<sup>115</sup> The state of Michigan placed the civil rights of Black, Brown, and American Indian would-be-students to a popular vote. Not surprisingly, a

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112. See *Schuette v. BAMN*, 134 S.Ct. 1623, 1623 (2014) (holding that no authority in United States Constitution would allow judiciary to set aside amendment to Michigan Constitution prohibiting affirmative action in public education, employment, and contracting).

113. See *id.* at 1624 (questioning whether voters in the States may choose to prohibit the consideration of such racial preferences).

114. See *id.* at 1629 (stating that under the amendment, race-based preferences cannot be part of the admissions process for state universities).

115. See *id.* at 1653 (Sotomayor, J., dissenting) (stating that the Court discards those precedents that recognized that when the majority reconfigures the political process in a manner that burdens only a racial minority, that alteration triggers strict scrutiny).

predominately White electorate voted to cease and desist efforts at achieving educational equality for Black, Brown, and American Indian students in Michigan. With its endorsement of Michigan's actions, the Supreme Court of the United States would allow White Americans to change the house rules. No longer were the rules that civil rights should not be voted upon by the general public; the new rule would be that civil rights are up for public debate and vote.<sup>116</sup>

It is hard to conceptualize a change of rules more drastic than what occurred in *Schuette*. In the most obvious manner, opponents of affirmative action in Michigan changed not only the rules but also the nature of the game itself. Efforts at civil rights have seldom gained steam among popular voters. It is for this reason that the federal courts have intervened to protect civil rights of minorities from the tyranny of the majority. *Schuette* gives every racial minority solid reasons for doubting those who argue towards trusting the political system with the civil rights of minorities.<sup>117</sup> By definition, as a minority, these groups are unable to win elections that pit their political aims against the political aims of the majority.<sup>118</sup> It is unnecessary to look to recent history for this concept as applied to racial minorities. Consider the following examples. One can only imagine the results if White American Southerners had been asked to vote on the end of slavery. Well, there is not much need for imagination: we know what happened when White American Southerners considered voting on the end of slavery. Southern states voted to secede from the United States. Later, the most costly war in our nation's history—in terms of human lives—was waged to resolve this very question. More appropriate to this Article, White

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116. *See id.* at 1629 (stating that some voters in Michigan set out to eliminate the use of race-sensitive admissions policies and that Proposal 2 was passed by a margin of 58 percent to 42 percent).

117. *See id.* at 1653 (Sotomayor, J., dissenting) (finding that the only policy a Michigan citizen may not seek through the process used by everything else is a race-sensitive admissions policy that considers race in an individualized manner when it is clear that race-neutral alternatives are not adequate to achieve diversity).

118. *See* MERRIAM-WEBSTER DICTIONARY (2015) (defining “minority” as “the smaller in number of two groups constituting a whole; *specifically*: a group having less than the number of votes necessary for control.”).

Americans were asked to vote—through the integration of schools—on a movement towards educational equity for racial minorities by way of school desegregation. We need not postulate the results of that vote although there was never a formal election on the issue. The resolution of that question also involved federal troops although to a much lesser capacity than the Civil War. Public opinion, as requested by the Supreme Court, never reached a point that would afford racial minorities adequate, equitable, or equal educational opportunities. Because of the difficulties of being a minority and having political goals in direct opposition to the majority, the Supreme Court had previously frowned upon the act of putting the civil rights of minorities to a vote or subjecting those rights to a heckler's veto. In *Cooper v. Aaron*, the Court ordered the desegregation of Arkansas' public schools notwithstanding the threat of upsetting those opposed to such desegregation.<sup>119</sup> It did so against voter-sanctioned measures in *Hunter v. Erickson*<sup>120</sup> and *Washington v. Seattle School District No. 1*.<sup>121</sup> In both cases, the general population attempted to thwart movements towards civil rights and equity via constitutional amendment.<sup>122</sup> Both times, the Court intervened and struck down those constitutional amendments. The Court

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119. See *Cooper v. Aaron*, 358 U.S. 1, 4 (1958) (rejecting the contentions of the Arkansas Governor and Legislature that there is no duty on state officials to obey federal court orders resting on the Supreme Court's considered interpretation of the United States Constitution).

120. See generally *Hunter v. Erickson*, 89 S.Ct. 557 (1969) (explaining that an amendment of the city charter violated the Equal Protection Clause by allowing regulations based on race, color, religion, national origin or ancestry when approved by a majority).

121. See generally *Wash. v. Seattle Sch. Dist. No. 1*, 102 S.Ct. 3187 (1982) (deciding that an initiative prohibiting schools from requiring students to attend a school geographically nearest them, but allowing school boards to assign students away from their nearest school for reasons other than racial desegregation, violated the Equal Protection Clause).

122. See *id.* at 3188 (attempting to terminate the use of mandatory busing for purposes of racial integration in the public schools of the State of Washington); *Cooper*, 358 U.S. 1, at 1403 (deciding that there was a duty for state officials to obey federal court orders resting on the Supreme Court's interpretation of the Constitution, specifically the decision in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

would reverse course in *Schuette* and condone the very actions it forsake in *Hunter* and *Washington*.<sup>123</sup>

#### *IV. Towards an Understanding of the Power to Set House Rules*

It is important to summarize how the Supreme Court delivered to White Americans the power to set house rules and how that power has been protected, not only by the Supreme Court's decisions but also by the Court's decisions to hear cases. Starting with the Court's decisions in *Brown I* and *Brown II*, the terms of desegregation attempts would be set by the public mood as displayed by White Americans.<sup>124</sup> The terms put forth by White Americans included delaying the desegregation of the nation's public schools until the Court would tolerate no more delays. When required to desegregate public schools, recalcitrant school districts avoided meaningful desegregation attempts by implementing halfhearted school choice plans designed to maintain racial segregation in the public schools as opposed to implementing plans that would undermine racial segregation in the public schools. The Court would strike down most of those choice plans as not effective at remedying the immediate and lingering effects of state-sponsored segregation. Efforts at segregation would not, however, die quickly or easily. The Supreme Court would later accept the idea of a suburban veto and allow for White Americans who opposed the idea of desegregated public schools to opt out of the process of desegregating the nation's public schools.

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123. See *Schuette v. BAMN*, 134 S.Ct. 1623, 1638 (2014) ("Democracy does not presume that some subjects are either too divisive or too profound for public debate.").

124. See *Brown I*, 74 S.Ct. 686 (1954) (ruling that segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment); see also *Brown II*, 75 S.Ct. 753 (1955) (explaining that racial discrimination in public education was unconstitutional and restored cases to docket for further argument regarding formulation of decrees).

In many ways, the development of a school choice agenda did more than just privilege White Americans. It also allowed White Americans to avoid accepting fault in the state-sponsorship of segregation while also allowing them to change the conversations about desegregation (from desegregation to a parent's control of their child's upbringing) and, most importantly, the rules by which desegregation would occur. In a couple of decades, the Supreme Court's rule that schools be desegregated without respect for opposition transformed—through a challenge from White Americans—from desegregation at all costs to an exception that some White families may opt out of the desegregation of the nation's public schools.

In the K-12 setting, Whites not only had the state-sanctioned power to set pace, but they also had the state-sanctioned power to set the rules as well as change the rules midcourse. This power transferred to the higher education setting. First, White males challenged affirmative action programs benefiting racial minorities on the grounds that qualified White applicants were purportedly shunted in favor of unqualified racial minorities.<sup>125</sup> Though this iteration of the facts of *Bakke* is generally accepted, a close read of the Court's decision reveals that Allan Bakke was afforded the opportunity to choose which indicators would best support his admissibility.<sup>126</sup> He chose standardized test scores, in which he easily outclassed his competitors. Neither Bakke nor the Court examines or gives credibility to the Medical School's assessment of Bakke's in-person interview as being lackluster.<sup>127</sup> After *Bakke*, the rule was that presumptively qualified White applicants could challenge minority admittees as presumptively

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125. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 266 (1978) (describing plaintiff's argument that he was excluded from admission in violation of the Equal Protection Clause because applicants with lower scores than him were admitted).

126. See *id.* at 277 (focusing on the grade point averages, MCAT scores, and "benchmark scores" of the applicant).

127. See *id.* (noting that Dr. Lowrey, Bakke's faculty interviewer, gave him the lowest of his six ratings after the interview).

unqualified based on unreliable, but supposedly objective, standardized test scores.<sup>128</sup>

White Americans would later change that rule in the Michigan affirmative action cases. Unlike Allan Bakke, the plaintiffs in the Michigan cases never put forth an argument that minority students were under or unqualified.<sup>129</sup> To the contrary, the qualifications of the applicants who were racial minorities was nearly stipulated; nevertheless, the Court would hear the complaint of White applicants who were upset that equally qualified applicants who were racial minorities were accepted for admission into the competitive state school.<sup>130</sup> The rule was no longer that presumptively qualified White applicants could challenge the admission of presumptively unqualified admittees who were racial minorities.<sup>131</sup> Now, starting in 2003, White applicants who were presumptively qualified could also challenge the admission of presumptively qualified admittees who were racial minorities.<sup>132</sup> More poignantly, the unspoken and unwritten new rule after the Michigan affirmative action cases was that White applicants had to maintain an advantage over applicants who are racial minorities, even if all applicants in question were equally qualified.

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128. See *id.* at 377 (stating that race is positively correlated with difference in GPA and MCAT scores, but economic disadvantage is not, which is how Davis chose 16 of the 100 positions in the class—spots were reserved for “disadvantaged” minority students).

129. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003) (arguing instead that the University of Michigan Law School admissions policy encouraging student body diversity violated their equal protection rights); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (alleging that the University of Michigan’s College of Literature, Science, and the Arts’ use of racial preferences in undergraduate admission violated the Equal Protection Clause).

130. See generally *Grutter*, 539 U.S.; see also *Gratz*, 539 U.S..

131. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277 (1978) (arguing against refusal of admittance because “disadvantaged” minority students were admitted with lower test scores).

132. See *Grutter*, 539 U.S. at 329 (describing the law school’s goal as seeking to “assemble a class that is both exceptionally academically qualified and broadly diverse,” and seeking to “enroll a ‘critical mass’ of minority students.”); see also *Gratz*, 539 U.S. at 244 (noting that the University had considered African-Americans, Hispanics, and Native Americans to be “underrepresented minorities,” and stating that it was undisputed that the University admitted virtually every qualified applicant from these groups).

Just about a decade later, White Americans would change the rule yet again. In the affirmative action case out of Texas, the Court would fail to dismiss the suit of an under- or unqualified White applicant who would challenge the admission of more qualified applicants who were racial minorities.<sup>133</sup> Despite the fact that the White applicant could not have been admitted, even if she were a racial minority, the Court would entertain her lawsuit.<sup>134</sup> Most interestingly, the plaintiff in the Texas case—just as in almost all other affirmative action cases—only challenges the admission of the more qualified racial minority applicants.<sup>135</sup> She never challenges the admission of White applicants who comprised the largest and disproportionate share of students admitted.<sup>136</sup> The Court's hearing of Abigail Fisher's complaint was another shift in the rules. Not only could presumptively qualified White applicants challenge the admission of presumptively unqualified applicants who were racial minorities,<sup>137</sup> presumptively qualified White applicants could also challenge admittedly qualified applicants who were racial minorities.<sup>138</sup> *Fisher* establishes yet a new rule

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133. See *Fisher v. Univ. of Tex. at Austin*, 133 S.Ct. 2411, 2413 (2013) (holding that the Fifth Circuit did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Bakke*, so remanded back to the district court).

134. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 223 (5th Cir. 2011) (describing how Fisher was denied after the University accepted students from the top ten percent of their class automatically and then utilized a Personal Achievement Index to be used with an Academic Index, based on high school rank, standardized test scores, and curriculum, to merit applicants not adequately reflected by their academic scores).

135. See *id.* at 240 (alleging that the University's consideration of race in admissions violated the Equal Protection Clause even though UT's College of Social Work had a quarter Hispanic and more than 10% African-American students, the College of Education had 22.4% Hispanic and 10.1% African American students and the College of Business Administration had only 14.5% Hispanic and 3.4% African-American students).

136. See generally *id.*; see generally *Fisher II*, 133 S.Ct. 2411.

137. See *Regents of the Univ. of Cal. v. Bakke*, 98 S.Ct. 2733, 2742, 2736 (1978) (arguing that the Medical School's special admissions program operated to exclude Bakke from the school on the basis of his race, especially because special applicants were admitted with significantly lower scores than Bakke's in both years of application).

138. See *Gratz v. Bollinger*, 539 U.S. 244, 244 (2003) (noting how the LSA considered petitioners Gratz and Hamacher to be within the qualified range but both were denied, claiming that the University's use of racial preferences for

for challenging affirmative action in federal cases, admittedly under- or unqualified White applicants can challenge the admission of admitted qualified applicants who are racial minorities. Of course, the corollary to this rule is that it is now allowable, although it has not always been, to place the civil rights of minorities to popular vote when the Supreme Court chooses not to set aside the civil rights of racial minorities.

To be able to set the rules of a game is powerful. To be able to change the rules of the game—midstride—might be insurmountable. In many race-related cases in education, White Americans have set the initial rules for access, but they have also held a Supreme Court-endorsed power to alter those rules as racial minorities rise to overcome the barriers imposed by the initial rules. Even the most qualified racial minority is subject to the approval of the least qualified White Americans under the rule in *Fisher*, but such approval will only be granted after racial minorities prove beyond a shadow of a doubt their qualifications. Even that is not assured, however. Such is the educational life of a racial minority in the United States.

*V. The Impacts of the House Rules Privilege on Racial Minorities: Placing the House Rules Privilege in the Context of Critical Race Theory*

Because White Americans have access to and do use the House Rules Power, efforts at equity—as opposed to equality—have done little to deliver racial minorities to a better place and space than during or before Jim Crow. There might be a different group of racial minorities with facially different lots in life, yet the result is the same, if not worse, for racial minorities. Once again, the script (roles) have changed, but the cast(e) is the same. This argument makes sense when evaluated within the philosophy of Critical Race Theory.

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“underrepresented minorities” in undergraduate admissions violated the Fourteenth Amendment); *see also* Grutter v. Bollinger, 539 U.S. 306, 306 (2003) (stating that petitioner maintained a 3.6 GPA and 161 LSAT score and claimed that she was rejected because the Law School used race as a “predominant” factor).

Ladson-Billings and Tate IV best describe Critical Race Theory as a documentation of how traditional civil rights law has and is regularly co-opted to benefit White Americans.<sup>139</sup> Ladson-Billings and Tate IV reassert the traditional doubt of Critical Race Theorists: that incrementalism in the context of civil rights may be and often is insufficient to obtain adequate and appropriate remedies towards equity for racial and ethnic minorities.<sup>140</sup> Although Critical Race Theorists do not all subscribe to one set of imperative and concrete tenets (and could not while also supporting the theory of individual narrative), there are some predominately agreed upon tenets of the Critical Race Theory Movement. These tenets focus on the endemic and continuing nature of race and oppression in our post-modern and post-racial society, the intersection of power and politics in shaping institutional disadvantage towards racial and ethnic minorities, a critique of the liberal agenda and the restrictive nature of interest convergence on effective civil rights remedies, and the need for counternarratives to challenge concepts of race and racism.

The exclusive application of Critical Race Theory in the context of education began with the work of Gloria Ladson-Billings and William Tate IV.<sup>141</sup> Though acknowledging the broader work of Critical Race Theory, the authors specifically discussed how specific tenets of Critical Race Theory are applicable in education. In doing so, Ladson-Billings and Tate IV established several broad application points for Critical Race Theory in education: 1) that racism is part and parcel of life in the United States, 2) the need for the reconstruction of historical narratives and 3) confronting the concept of race neutrality, colorblindness and meritocracy.<sup>142</sup> Given the slant of the article

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139. See Gloria Ladson-Billings & William F. Tate IV, *Toward a Critical Race Theory of Education*, in 97(1) *TEACHERS COLLEGE RECORD* 47, 62 (1995) (describing critical race theory).

140. See *id.* (suggesting that inequalities are a logical and predictable result of a racialized society in which discussions of race and racism continue to be muted and marginalized).

141. See *id.* at 47 (“This article argues for a critical race theoretical perspective in education analogous to that of critical race theory in legal scholarship. . .”).

142. See generally *id.*

written by Ladson-Billings and Tate IV, one could more appropriately position their seminal work on Critical Race Theory in Education as having a predominately primary and secondary education focus.<sup>143</sup>

Other scholars have considered how Critical Race Theory might be applicable in the context of higher education. Payne Hiraldo applies the tenets of Critical Race Theory to the context of higher education but focuses predominately on issues occurring while students are enrolled; little attention, however, is paid to the process for obtaining and assuring equitable inputs.<sup>144</sup> Likewise, Shaun Harper has discussed how Black male students are “niggered” on the campuses of Predominately White Institutions.<sup>145</sup> Harper, Patton and Wooden apply Critical Race Theory to other aspects of higher education.<sup>146</sup> Among those covered in the paper are higher education funding laws and policies, HBCU desegregation, and affirmative action programs.<sup>147</sup> Though the paper by Harper and colleagues discusses the role—albeit dwindling—of the interest convergence theory,<sup>148</sup> something seems too amiss

143. See generally *id.* (discussing the education of children as well as high school-aged children).

144. See Payne Hiraldo, *The Role of Critical Race Theory in Higher Education*, 31 THE VT. CONNECTION 53, 53 (2010) (analyzing critical race theory in the context of diversity and inclusion in higher education).

145. See Shaun R. Harper, *Niggers no more: A Critical Race Counternarrative on Black Male Student Achievement at Predominately White Colleges and Universities*, 22(6) INT’L J. OF QUALITATIVE STUD. IN EDUC. 697, 697–712 (2009) (describing how 143 interviews across the United States with black male undergraduates demonstrated that black men are resistant to racist stereotyping).

146. See Shaun R. Harper, Lori D. Patton & Ontario S. Wooden, *Access and Equity for African-American Students in Higher Education: A Critical Race Historical Analysis of Policy Efforts*, 80(4) THE J. OF HIGHER EDUC. 389, 389–414 (2009) (using critical race theory to understand how white racist ideology has developed, and exploring reasons why African-American men have lower rates of enrollment and degree attainment in higher education).

147. See *id.* at 398–400 (discussing African-American enrollment declines, funding inequities, forced HBCU desegregation, affirmative action and race-based policies at Predominately White Universities (PWI)).

148. See *id.* at 409 (explaining how the interest-convergence principle is manifested in that white people will support efforts for African Americans when their own interests are not threatened, or when they too stand to gain benefits).

when arguing that interest convergence can explain away the attacks on affirmative action.

*A. Do White People Get to Play By “House Rules”?*

Recall the story of Thanksgiving Day at my close friend’s home. My fraternity brother and I stood no chance at all to win that game of Spades. We never knew that the only way for the game of spades to be played was for the other team to win. The rules to the game continued to change, and each time that my fraternity brother and I would overcome a rule change, another rule would change and create yet another obstacle to be overcome by our team. The excuse for each rule change was always the same, “This is how we play in our house.” The rule changes only occurred when our opponents could not defeat our team using the then-existent rules. Furthermore, if the rule changes were always actual rules, those rules appeared purposefully unclear to our team at the beginning of the game; thus, we were wholly unable to take advantage of rules that might have been advantageous to our team in earlier rounds of the game. Despite our best efforts at perfection, there came a point where the other team finally came out on top. Immediately, the game ended. To this day, my fraternity brother and I joke about the imposition of “house rules.”

Before moving forward with this analysis, it is important to provide a succinct definition of the phrase “house rules.” House rules are not a static set of rules at all; instead, house rules come with the power to set, impose and alter rules as to provide a sought after and predetermined result. At first blush, it is difficult to determine how to position house rules in light of Critical Race Theory. This difficulty arises because house rules is not an explicit tenet of Critical Race Theory but rather explains how the compilations, the intersections, the interchangeability, the robust nature of racism in and of its facets operate to cripple the ability of traditionally marginalized and disenfranchised groups to overcome the ever-amorphous and ever-arising barriers set before them in American society. In fact, when these groups do find ways to overcome, they may find that new barriers are constructed.

These new barriers often arise without notice and are not foreseeable by disadvantaged and marginalized populations.

House rules played out in the creation of the school choice/suburban veto movement at the primary and secondary education level. Perhaps because of Ladson-Billings and Tate IV's work, Critical Race Theory has been most used and therefore most useful for analyzing power, politics and policy at the K-12 level as opposed to in higher education scholarship where scholars have particularly addressed affirmative action policies and other policies in higher education in light of Critical Race Theory;<sup>149</sup> the house rules power is a little more difficult to situate solely in the primary and secondary level of education. The most evident use of the House Rules Power in primary and secondary education was the creation of a rule to disconnect the past racist actions of Whites who had newly moved to the suburbs to avoid desegregation in *Milliken*.<sup>150</sup> Though it had not been historically the case, the holding in *Milliken* would thereafter allow for parents seeking to escape the requirements to desegregate the ability to opt out by merely moving across what is the equivalent of an arbitrary, if not often imaginary, geographic boundary.<sup>151</sup>

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149. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993) (explaining that the concept of whiteness as a protectable property interest is the epicenter of affirmative action); Kwame Agyemang & Joshua DeLorme, *Examining the Dearth of Black Head Coaches at the NCAA Football Bowl Subdivision Level: A Critical Race Theory and Social Dominance Theory Analysis*, 3 J. OF ISSUES IN INTERCOLLEGIATE ATHLETICS 35–52 (2010) (using critical race theory in examining why there are so few Black head coaches at the College Level); Harper, Patton & Wooden, *supra* note 146, at 390 (analyzing how racist ideas have shaped policies in higher education using critical race theory as a lens); see also Harper, *supra* note 145, at 697 (using a critical race theory approach to discuss the student achievement of Black male college students at predominantly white colleges and universities); Alex M. Johnson, Jr., *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95(4) MICH. L. REV. 1005 (1997) (discussing how to use critical race theory ideas to fix the issue of underrepresentation of Blacks in the legal profession).

150. See *Milliken I*, 418 U.S. 717, 718 (1974) (holding that it was improper to impose a multidistrict metropolitan remedy for single-district de jure segregation in this case).

151. See *id.* at 725 (explaining how the Detroit Board of Education created and maintained optional attendance zones which had the “natural, probable, foreseeable, and actual effect” of allowing white pupils to escape identifiably

House rules are not limited to use in primary and secondary schools although they might have arisen from the Court's reasoning(s) in those cases. House rules have always been utilized in the context of affirmative action in higher education. Allan Bakke used house rules to determine what portions of his application would be granted the greatest—and dispositive—weight.<sup>152</sup> The Court added to Bakke's use of House Rules by defining diversity in a way that would allow White applicants to be advantaged, even in application pools meant to open doors for racial and ethnic minorities.<sup>153</sup> It was clear that Whites could choose whichever portion of their application was most advantageous to contrast against minority student applications in an effort to prove that White applicants were objectively meritorious as compared to racial minorities. This rule was relatively effective since racial minorities lagged Whites on standardized test scores for decades.<sup>154</sup> As minority students performed better on standardized tests, a new rule was needed. The Court would move from allowing White applicants professing to be more qualified than racial minority applicants to challenge admissions decisions to allowing White applicants who held no purported competitive edge against racial minority applicants to challenge admissions decisions. Instead of dismissing the plaintiffs' cases in Michigan as a case where a school—with a limited allotment of seats—chose one qualified candidate over another, the Court would sanction an investigation into the qualification of admittedly qualified applicants who were racial minorities. Even that rule needed some tweaking, however. The Court would then allow admittedly under- or unqualified White applicants to challenge the admission of admittedly qualified applicants who were racial minorities. Finally, the Court—unable to reach a

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Negro schools).

152. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

153. *See id.* at 267 (holding that race may be one of a number of factors considered by school in passing on applications).

154. *See The Widening Racial Scoring Gap in Standardized Tests for Admissions to Graduate School*, THE J. OF BLACKS IN HIGHER EDUC. (2006), [http://www.jbhe.com/news\\_views/51\\_graduate\\_admissions\\_test.html](http://www.jbhe.com/news_views/51_graduate_admissions_test.html) (finding that Black students have historically and continue to lag behind their White counterparts on standardized tests).

consensus on either granting or excluding racial minority applicants equitable methods into higher education—decided to allow one more rule change. Now, the Court would allow the civil rights of minorities to be put to public referendum.

Though the plaintiffs in most anti-affirmative action cases declare motives based on race-neutrality and meritocracy, it is inescapable and unnerving that White applicants only challenge the admission of racial minorities in *some* circumstances. This is particularly relevant at the undergraduate level. In the cases of the University of Michigan and University of Texas, White undergraduate students challenged the admission of either equally or more qualified racial minority applicants.<sup>155</sup>

Both federal court decisions are void of any analysis of the impact of affirmative action admissions of Black athletes. Where it is proven that student-athletes are routinely admitted with lower test scores than their nonathletic counterparts,<sup>156</sup> one would expect—at least—some challenge to the admission of applicants who are presumptively less academically meritorious than the applicant-plaintiffs for admission into the University of Michigan or the University of Texas under the plaintiffs' own analyses. Critical Race Theory provides a lens for analyzing the lack of challenges to the disproportionate admission of Black athletes: the interests of the rejected White applicants are in some way aligned with the interest of Black athletes. The enrollment of Black athletes, who are assumed to be more athletic and less intelligent,<sup>157</sup> promotes

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155. See *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) (stating that the plaintiffs did not argue that the minority plaintiffs at issue failed to meet the prescribed criteria); see also, *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 638–39 (5th Cir. 2014) (discussing that no student with Fisher's scores were admitted into Fisher's preferred academic programs).

156. See Jamel K. Donnor, *Towards an Interest-Convergence in the Education of African-American Football Student Athletes in Major College Sports*, 8(1) RACE, ETHNICITY AND EDUC. 45, 49 (2005) (explaining that this is particularly the case at the University of Michigan Ann Arbor—the site of the *Gratz* case—where the typical athlete admitted to the university on average scores an astonishing 364 points less on the SAT than their non-athlete counterparts).

157. See Harry Edwards, *The Black 'Dumb Jock': An American Sports Tragedy*, 131 THE C. BOARD REV. 8, 8–13 (1984) (explaining how false expectations for Black athletes to be dumb encourages their social

institutional advancement,<sup>158</sup> and institutional advancement benefits White students.<sup>159</sup> This argument is in sync with Derrick Bell's foundational Critical Race Theory tenet, interest convergence theory.<sup>160</sup> The racial circumstances of high paid coaches and essentially free-wage athletes in NCAA Division I is eerily similar to slavery with White people dominating the high paid positions and Blacks dominating the money-producing, low-paid positions.<sup>161</sup> With this knowledge, it is not surprising that White would-be-applicants fail to consider the impact of Black male athletes on reducing the number of available spots for White students' admission.

The case of Black athletes is also explainable by the theory advanced previously in this Article: diversity should be pursued in higher education so long as White applicants may also benefit without suffering undue loss of power and privilege. Black athletes contribute to diversity while not taking the place of White students. In many ways, Black athletes often place themselves in harm's way for the sake of advancing the institution while assuring that White students' place(s) at the institution will not be put in harm's way.

The institution and White students benefit in multiple ways from the presence of Black athletes. The existence and attention of a competitive sports program has financial and reputational rewards.<sup>162</sup> What is more important is the fact that Black athletes have lower graduation rates from post-secondary schools<sup>163</sup> and often do not provide competition in the

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exploitation).

158. See Donnor, *supra* note 156, at 49 ("Consequently, the institutional pressure to compete annually for prestige and revenue not only defines a student athlete's existence on campus; it explicitly tells him where to concentrate his energies for the next four or five years.").

159. *Id.*

160. See *id.* at 57–63 (stating that Bell believed that judicial relief for racism only occurs when it directly or indirectly furthers the best interest of the nation rather than the group that suffered the injustice).

161. See generally Agyemang & DeLorme, *supra* note 149.

162. See Donnor, *supra* note 156, at 49 ("[T]he more successful a football program is, the more that institution is able to enhance its image and market itself as a first-rate university.").

163. *Id.* at 46.

job markets dominated by White degree holders.<sup>164</sup> Black athletes, therefore, serve to entertain White students during their college years and get to be easily dismissed after their usefulness to the institution and White people has expired. Supporting this thesis is the fact that Black athletes account for over half of all Division I athletes, yet Black athletes struggle to get the most profitable jobs in college athletics after graduation, positions for which they might be most qualified to hold.<sup>165</sup> In other words, the pursuit of diversity is an excellent endeavor when 1) there is a perceived benefit that does not undo the privilege and power of being White (before, during, and/or after collegiate studies) and 2) a White person is able to monitor the Black players—keeping them in check—while making large sums of money from what is routinely considered amateur sports. This may not seem to be a changing of the rules, and in fact, it is not. There is no need to change the rules for most athletes since large numbers of Black athletes will return to their rightful, subjugated place in society after completing their respective tasks. That is, of course, unless White people allow otherwise.

*B. Amendment Rather Than A Replacement: Passive and Active Racism in the Context of the Foundation of Critical Race Theory*

The early foundations of Critical Race Theory implied but did not explicitly state the amorphous nature of racism and when those foundational texts did address the amorphous nature of racism, they did so in language concerning the institutional impositions of racism. This language has been more recently co-opted to provide an intervening and preventive step in addressing the individual culprits of racism. From its beginning, Critical Race Theory has challenged the Court's efforts at addressing racism as ineffective due primarily to the Court's fascination with addressing only some explicitly stated forms of racism. Critical Race Theorists have responded to the Court's ineffectiveness in remedying racial inequity,

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164. See *id.* at 50 (arguing that Black male athletes in major sports are enrolled in less rigorous courses than their peers).

165. See generally Agyemang & Joshua DeLorme, *supra* note 149.

inequality, and oppression through substantial debate around the ideas of interest convergence, perspectives on remedying racism, unconscious racism, and Whiteness as property. This subsection places the idea of a House Rules Power in the context of the early foundations of Critical Race Theory.

One must fully understand the requisite circumstances to utilizing the House Rules Power. To use the House Rules Power, White Americans must be able to participate in both passive and active racism.<sup>166</sup> Passive racism is the scenario in which White Americans may and often do intentionally opt into the systemic structures that enable and perpetuate the oppression of racial minorities.<sup>167</sup> Passive racism has the appearance of a systemic problem because intent is hard to identify; moreover, passive racism does not involve a clearly discernible individual motive against racial minorities and towards racial oppression.<sup>168</sup> White flight is passive racism. Through White flight, White Americans are opting into a structure that has the result and is fully intended to place racial and ethnic minorities in a particular subjugated caste. Some may argue that White flight is systemic racism; in other words, while some White Americans are opting into White flight, the structure of White flight is racist but the individual White flighters are not racist.<sup>169</sup> It goes without saying, however, that White Americans must make individual and intent-driven choices to perpetuate White flight. The school-to-prison pipeline is another form of passive racism. Through the school-to-prison pipeline, the educational system is opting to place and contain Black and Brown students in particularly low castes, or in prison. Some have argued that the school-to-prison pipeline is a version of systemic racism, but what is most true about the school-to-prison pipeline is that educators must make individual choices to remove Black and Brown

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166. See generally BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA: AND OTHER CONVERSATIONS ABOUT RACE 11 (1997) (conceptualizing the difference between active and passive racism).

167. See *id.* (explaining how passive racism is more subtle than active racism).

168. See generally *id.*

169. See *id.* (stating that not all White people are bad people, but that White people, intentionally or unintentionally, do benefit from racism).

students from inclusive educational settings, and in making these choices, these individual educators are empowering the racist system. Despite efforts purporting to create interventions to stem the school-to-prison pipeline, there need not be any intervention to stop the school-to-prison pipeline. If society desires to stop removing Black and Brown students from schools, policymakers and policy implementers could choose to 1) not create policy that is aimed to specifically address students who are racial and/or ethnic minorities and/or 2) simply not remove Black and Brown students from school.

The other side of the requisites for the use of House Rules is active racism.<sup>170</sup> Active racism is the scenario in which White Americans may and often do opt to use systems that specifically target racial and ethnic minorities for identifiable oppression and exclusion.<sup>171</sup> Active racism has a clear—though often overlooked—racial motive. Challenges to affirmative action policies are active racism. Through challenges to affirmative action policies, White Americans have only sought to exclude racial and ethnic minorities. For instance, in the Michigan and Texas cases only the admission of racial minorities was challenged despite the fact that 1) the Michigan plaintiffs never alleged that the admitted racial minorities were under- or unqualified<sup>172</sup> and 2) the federal courts acknowledged that every admitted racial minority in the Texas case was more qualified than the plaintiff.<sup>173</sup> To fully effectuate the use of house rules, White Americans must be able to opt into systemically racist structures; thus, passive racism is the preferred type of racism. This option mutes the need for consistent and persistent explicit individual oppression; thereby, White Americans do not have to face the ghastly charge of individual and overt racism on a daily basis. Occasionally, passive racism is ineffective at effectuating the magnitude of necessary oppression against racial and

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170. See *id.* (describing “active racism” as “blatant, intentional acts of racial bigotry and discrimination.”).

171. *Id.*

172. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

173. See generally *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014).

ethnic minorities. In this case, passive racism becomes active and overt attacks against minorities occur to quash further efforts at equity. Passive and active racism are not mutually exclusive; instead, the two are necessary components of each other. Active racism is necessary to create systems that passively racist White Americans can later opt into without expressed intent to discriminate (and the concomitant reproach from a post-racial society).

Evidence of the House Rules Power and its prerequisites (passive and active racism) exist from the foundation of Critical Race Theory. Many Critical Race Theory scholars have intimated, if not explicitly stated, the changing nature of race and racism in American society. For instance, Professor Derrick Bell's Theory of Interest Convergence asserts that the remedies of the Civil Rights Movement exist in large measures with the conjoined values of the White and Black populations.<sup>174</sup> Not only do the remedies of the Civil Rights Movement serve to support Bell's theory, so do the plaintiffs' and the federal courts' actions in affirmative action cases. The fact that White plaintiffs in affirmative action cases have not challenged the admission of Black and Brown athletes into selective state universities is explainable in that the interest of those Black and Brown students converge with the interests of White dominant society.<sup>175</sup> Professor Bell's theory does not, however, answer all questions pertaining to the argument against even equally or more qualified Black and Brown students (as compared to White applicants) seeking admission into state universities, for even White dominant society considers these students as objectively better prepared for post-secondary studies. Here, the contrast between passive and active racism is useful. It is possible and likely that White Americans may have experienced interest convergence during the initial phases of desegregation and affirmative action.<sup>176</sup> It is also possible, and Bell has argued,

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174. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (suggesting that it is better to focus on quality education for Blacks rather than ensuring racial balance at schools).

175. Donnor, *supra* note 156, at 45–67.

176. See Bell, *supra* note 174, at 525 (stating that Whites realized that segregation was a barrier to further industrialization of the South).

that this interest convergence might have been begrudged.<sup>177</sup> If, in fact, Whites experienced reluctant interest convergence, then there may never have been a true disdain for racism among White dominant society writ large. White Americans may have been willing to deal with affirmative action so long as they lost nothing—or very little—in the movement towards racial equity.

Starting with *Bakke*, White Americans could be passively racist and opt to challenge the qualifications of racial minorities on test scores alone since admissions test scores were often skewed in favor of White applicants and against racial minorities.<sup>178</sup> These challenges appeared ostensibly nonracist since the objectives were lodged on “objective” measures of merit. The ability to opt into passive racism appeared to be in jeopardy in *Gratz* and *Fisher*; standardized tests were no longer as effective a barrier against minority applicants. White Americans needed active racism, and active racism came in the form of changing the rules to allow challenges to the admission of even objectively qualified racial minorities. Thus, passive and active racism fit well within Bell’s Theory of Interest Convergence. When interests converge, racism is typically passive. When interests diverge, racism becomes active to recast(e) systems to allow for further and enhanced passive racism.

The concepts of passive and active racism may be properly situated in the foundations of Critical Race Theory outside of Professor Bell’s Theory of Interest Convergence. Passive and active racism fit within Alan David Freeman’s analysis of civil rights case law from the perspective of perpetrators versus victims’ perspectives. Freeman’s argues that the Court’s analysis of civil rights challenges has occurred in the context of the perpetrator’s perspective as opposed to the victim’s perspective.<sup>179</sup> Freeman argues that evaluation of civil rights

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177. See *id.* at 523–28 (citing the outside factors requiring interest convergence).

178. See generally Maria Veronica Santelices & Mark Wilson, *Unfair Treatment: The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 HARV. EDUC. REV. 106 (2010) (explaining how the SAT is proven to function differently for Blacks and other White subgroups, and how this phenomenon should be further researched).

179. See generally Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court*

cases through the lens of a victim's perspective would give a more robust and effective remedy for racial and ethnic minorities because such a perspective would provide more flexibility to deal with the social and historical circumstances as opposed to individual yet shapeshifting actions that are associated with racism and oppression.<sup>180</sup>

Freeman's argument appears to set the stage for the development of ideas and ideals of systemic racism.<sup>181</sup> He even predicts the Court's discussion of a needed critical mass in his discussion about the "tipping point"<sup>182</sup> and, most importantly, addresses the issue of intentional racism.<sup>183</sup> To add another facet to Freeman's theory, the active and passive theory of racism challenges not the existence and/or intentionality of individual racist acts but asserts that even "unintentional" or systemic racism is intentional racism. As previously stated, to consciously opt into systemic racism is an actual and intentional act in and of itself. Thus, to exculpate individual actions under a theory of the institutionalism of racism is patently wrong. Allowing for the option and existence of institutional or systemic racism has accomplished numerous objectives for those choosing racism (whether passive or active). Perpetrators of racism have been able to use a stealth and robust form of passive racism to perpetuate extant forms of overt racism. Perhaps a soothsayer of sorts, Freeman's allegation that a victim's perspective in civil rights cases would result in a more useful and manipulative approach to advancing meaningful civil rights remedies has come true in the converse: a perpetrator's perspective has allowed a more useful and manipulative approach to preventing meaningful

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*Doctrine*, 62 MINN. L. REV. 1049 (1978) (using Supreme Court cases to question how racial discrimination is illegal and yet Black Americans often find themselves in disproportionate amounts of hardship).

180. *Id.*

181. *See id.* at 1102 (stating that the Court had offered to black people expectations of proportional racial political power, a working system of equality of opportunity and integrated schools and then these expectations were systematically defeated).

182. *See id.* at 1076 (explaining that there is a level where a "tipping point" will be reached where the white majority will leave the area if the quota of black people reaches a certain point).

183. *See generally id.*

civil rights remedies. Likewise, denial of the impact of racism is a purposeful rejection of others' realities.

Further connections between passive and active racism exist between the foundations of Critical Race Theory when accounting for Charles R. Lawrence III's assessment of unconscious racism. Lawrence III asserts that "the injury of racial inequality exists irrespective of the decision makers' motives."<sup>184</sup> Lawrence proffers an argument using slips of tongues to address unconscious racism.<sup>185</sup> He later attests that slips of tongues are products of larger societal issues paving the way for greater oppression of racial minorities.<sup>186</sup> Lawrence concludes his essay by noting that the Supreme Court and the academic establishment may be slow to adopt approaches that address unconscious racism.<sup>187</sup> It is necessary to further develop or contest Lawrence's theory of unconscious racism to place the concepts of passive and active racism into a concept of unconscious racism unless the term unconscious racism is a misnomer. I submit that Lawrence does not speak of unconscious racism because he specifically discusses the reliance of unconscious racism on the acceptance of cultural stereotypes.<sup>188</sup> I propose that to accept a cultural stereotype and to not explicitly reject one are offenses with similar results, processes, and intentions. The similar result is the further perpetuation of the stereotype. The similar intent is to leave intact the options for passive racism. The similar process is choice. In other words, to accept the concept that Black men are violent, uneducated, or whatever other unsavory stereotype may exist has the same intent of not challenging those very same stereotypes. The non-challenger and acceptor may easily dismiss any individual or overt racism while blaming the extant oppression of the group stereotyped on societal oppression rather than the individual and overt decision to not opt out of the very privilege allowing the non-challenger and/or acceptor to

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184. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).

185. *Id.*

186. *See generally id.* at 333–39.

187. *See generally id.* at 387–88.

188. *Id.*

experience some tangible benefit. Given this scenario, it is possible and probable that all “unconscious” racism is to some extent intentional and conscious though it is comfortable to think otherwise. In many ways, people may be merely picking when to assert their power, privilege, and prejudice under the cover of accidental or more appropriately incidental racism; they may also be picking to preserve the option to slyly opt into what can then be proclaimed to be mere accidental racism (or racism by mistake).<sup>189</sup>

In the interest of clarification, the importance of intent (or lack thereof) must be addressed at this point. The very structure of society’s parsing of intent is based on the notion that one’s actions become less vile if the actor’s actions can be proven to lack a certain degree of intentionality. This argument takes the perpetrator’s perspective. This perspective misplaces the power to design remedies in the hands of the perpetrator by restricting the victim’s wide range of potential grievances and emotions and allowing the perpetrator (or some other person or entity) to construct and assess the perpetrator’s culpability. In many ways, the legal system has acculturated society to assume the importance of intent. Sliding scales of intentionality and culpability might be appropriate for crimes, but their use in oppression is severely inappropriate. For instance, despite the fact that manslaughter and murder have the same consequence, the intent of one makes the perpetrator’s culpability greater than the other. Assessing the

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189. I admittedly do not understand the concept of accidental racism. While I experience very little struggle in understanding how one might accidentally trip and fall, burn his or her morning toast, or lose a sum of money, I have greater difficulty understanding the circumstances under which one might—by mere mistake—be racist. Could one be not paying enough attention while talking to or texting a friend and—for reason of lack of attention—be racist? Could one be in a hurry to work and absentmindedly—for reason of haste—bring his or her racism to work? Under what conditions is such racism completely disconnected from some previous choice to be racist? I remain confused on the appropriateness of a phraseology that considers any form of racism or oppression as mistaken. It is more appropriate to refer to what is commonly misnamed accidental racism as incidental racism, or racism that coincides or rather is triggered by certain events. In the theory of passive and active racism, I need only be actively oppressive when the incidence occurs that jeopardizes my ability to be passively oppressive.

perpetrator's culpability under a sliding scale of intentionality assumes, however, that there are sliding scales of harm occurring as the result of racist acts. This is patently untrue in most, if not all, cases of oppression.

There are not sliding scales of racism; racism, whether commissioned by lack of intention to the aggrieved party (assume here that the perpetrator by not recognizing the existence of the victim is stripping the victim of his or her humanity) or for reason of intentional harm, has the same impact for the victim. Sliding scales of intent and culpability do, however, allow White Americans and especially White liberals, to disassociate their bad acts with the bad acts of other, more racist White people. At its core, sliding scales of intentionality and culpability allow White Americans to be "not that racist," maintaining the structures and benefits of oppressive systems while only making marginal, if any, progress towards equity. When the victim's perspective is taken, the idea of intent becomes somewhat of a legal and practical fiction. The victim of a racist act will seldom care if the perpetrator of the act acts without "intention" for the pain will almost certainly be the same, except that the pain might be more if the victim viewed the perpetrator as an ally or someone who might otherwise not be expected to be racist. Intent, under the victim's perspective, does not matter for only the perpetrator may feel good about his or her "unintentional" transgression. The perpetrator is allowed to mold a story where he or she becomes a protagonist (hero for being less racist than a Klansman) or a redemption-seeking antagonist (as racist as a Klansman but seeking improvement). The victim does not enjoy a similar privilege.

Passive and active racism are finally linked to the foundations of Critical Race Theory as a parallel to Neil Gotanda's theory of formal race as opposed to racial subordination. Gotanda propounds a Critical Race Theory framework that challenges the judicial system to cease and desist the ignoring of racial subordination in favor of the court's preoccupation with a view of race that dismisses and is decoupled from the historical realities of racial oppression.<sup>190</sup>

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190. See Neil Gotanda, *A Critique of 'Our Constitution is Color-Blind'*, 44

Gotanda properly understands the mutable nature of racism and racial oppression in this avowal. Moreover, Gotanda advances a framework that assumes that “[s]ubordination occurs in the very act of a White person recognizing a Black person’s race.”<sup>191</sup> It is important under the concept of passive and active racism to understand that subordination also occurs in the very act of a White person opting to be White and exercise Whiteness to their advantage.<sup>192</sup> Cheryl I. Harris has also argued for an understanding that Whiteness and the status of being White has a court-protected property interest;<sup>193</sup> understanding that Whites may subordinate other races by merely opting into Whiteness is near the core of passive racism. White Americans can be passively or actively racist by opting into Whiteness, particularly, those parts of Whiteness that represent systems and institutions of oppression and subordination. As previously argued in this section, Whites are also passively racist by choosing to opt out of challenging systems and institutions of oppression and subordination. In many ways, refusing to challenge racially oppressive structures or pretending that those structures do not exist is opting into Whiteness. Whites are actively racist by choosing to actively exclude and/or oppress racial and/or ethnic minorities.

Though numerous other connections exist between the concepts of active and passive racism and the foundations of Critical Race Theory, time and space limit the ability to make such connections. Notwithstanding those limitations, it remains important to situate and ground active and passive representation within the Critical Race Theory frameworks. Moreover, it is paramount to assess both individual, overt racism and systemic (or institutional racism) in the context of

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STAN. L. REV. 1, 6–8 (1991) (examining the benefits and drawbacks of a social and political model of a color-blind constitutionalism versus a model that addresses racial categories).

191. *See id.* at 26 (stating that racial classification assumes that there is a pure race and results in racial subordination, while advancing white interests).

192. *See Harris, supra* note 149, at 1709 (discussing the economic and racial supremacy that a property interest in Whiteness has had over Black and Native American people throughout the history of the United States).

193. *Id.*

passive and active racism. This is particularly true of systemic racism, which may pardon the intentional and overt choices of White Americans to take advantage of systems and institutions constructed to maintain and/or expand systems of oppression.

### *VI. Conclusion: Moving Forward*

In many ways, the foundations of Critical Race Theory explain the existence of the House Rules Power. Questions arise when considering the factors necessary for the effectuation of the House Rules Power and the effectuation of that power: Is systemic racism the same as overt racism? Do the two operate concurrently? Could it be that the idea of systemic/institutional racism could be used to obfuscate occurrences of overt racism? I suppose that institutional racism is at its essence another form of individual and overt racism. It is often regarded as ungracious to be overtly racist in contemporary society. Perhaps this societal expectation is misstated. Might it be more acceptable to be occasionally racist, much like one might be an occasional drinker or smoker? Does this same result hold for a social racist, or one that is racist in certain social environments? A more distant look at the Court's decision in race-related education cases reveals that it is okay to be racist as long as one can blame the faux pas on systemic racism as opposed to individual, overt racism although the two are the same.

While anti-racist minds continue to endeavor to uncover ways that systemic racism has displaced or become more prevalent than overt racism, it is necessary to start assessing the coexistence of the two. In many ways, the House Rules Power reveals the unique ability of racism to oscillate between systemic and overt, at the whim of White Americans. The Supreme Court's case law reveals that the house changes the rules midgame when White Americans are no longer prohibitively favored for college admissions. Of course, one middle-class, hardworking White applicant must be sacrificed to change the rules, but those Whites who are sacrificed still win. They might just as well be called martyrs. When racism wavers between systemic and overt manifestations, White Americans

are, thus, protected from the dreaded label of being individual, overt racists. This occurs because systemic racism tends to absolve individual White Americans of the guilt of the many racist choices involved in embracing systemic racism. The argument is that the system is unfair, not the individual person. It is far easier to declare that the perpetuation of exclusionary, oppressive and racist practices are examples of systemic—or more appropriately in this case “accidental”—racism rather than examples of individual or series of intentional acts of racism. In other words, the perpetrator of the racist act is not racist per se; he or she is simply unaware of the racist impact of their actions.

There is, however, a more pernicious fact about treating systemic racism and overt racism as two independent phenomena; it creates the ability for racism (and racists) to hibernate or become dormant. The House Rules Power is only successful because it operates in an alternative space of passive and active racism. Under a theory of passive and active racism, even systemic racism is actually overt in that it specifically allows for Whites—who can disguise themselves as unbiased pursuers of racial justice and equality (as opposed to equity)—to become overtly racists when necessary and avoid blame by distorting the true intent of their actions: to disrupt the progress of racial equity for racial minorities or protect their own power positions. This happens when a system has been designed to stymie the progress of a racial minority group.

This happened when the Court—in *Bakke*—allowed Allan Bakke to choose how he could be compared to minority candidates and simultaneously expanded diversity to include examples that would make White applicants eligible.<sup>194</sup> By focusing on test scores, which have handicapped racial minorities, the Court assured that the system could continue to privilege membership in the White race as opposed to others. The Court would expand the process of identifying diversity to allow for schools to be diverse in many ways while avoiding racial diversity. The Court would establish a new rule when

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194. See generally *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 265–320 (1978).

too many racial minorities would overcome the barriers of standardized tests. Now even equally qualified racial minorities needed intensified vetting beyond the traditional application process and conducted by the highest court in the land, to assure they are acceptable as replacements for White applicants. The Court would focus on the role of systemic racism in preventing the admission of applicants who were racial minorities, but that focus is misplaced. Systemic racism is overt racism. The plaintiffs in both Michigan and Texas contested the admission of applicants who were racial minorities on race alone. In Michigan, the qualifications of the admitted racial minorities were not challenged. In Texas, the admitted racial minorities were better qualified than the rejected White applicant. Still, the challenge moved forward. Notably, under- or unqualified White applicants—though they existed in both Michigan and Texas—went unchallenged. There is nothing systemic about an individual White plaintiff challenging only racial minorities who were admitted into an elite university; this is individual and overt racism, yet the White plaintiffs in those cases are allowed to escape the identification and the scrutiny that accompanies such identification because their racism was perpetuating a racist system while those same racist plaintiffs are hailed as martyrs for the cause of racial oppression.