# COMMITMENT TO EQUAL OPPORTUNITY?: STUDENTS FOR FAIR ADMISSIONS V. HARVARD AND THE ENDS-ORIENTED CONSTITUTION

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**ABSTRACT**

*In* Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (2023)*, the United States Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the use of affirmative action admissions programs in higher education. Underlying the Court's decision was a commitment to negative constitutionalism, which seeks to restrain the power of government to protect individuals from government. More specifically, the Court adhered to colorblind constitutionalism, perceiving any racial classifications in the law, even those designed to ameliorate entrenched racial disparities like affirmative action, as unconstitutional. However, the Constitution's logic is positive — that is, it empowers the government to pursue public goods to bring about and maintain a desirable social state of affairs. One aspect of this desirable social state of affairs is an equal-opportunity society that "lifts artificial weights from all shoulders," as President Abraham Lincoln contended. Thus, the Court erred in Students for Fair Admissions by proscribing affirmative action in higher education, for it is a reasonable means to achieve that end. This decision officially terminated a constitutional commitment to an equal-opportunity society and epitomized the Court's fundamental misconception of the Constitution's normative character.*

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## I. Introduction

On June 29, 2023, the United States Supreme Court issued its decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("*Students for Fair Admissions*"), holding that the Equal Protection Clause of the Fourteenth Amendment prohibited the use of affirmative action in higher education admissions.[1] These programs reviewed each applicant with one's racial identity serving as a possible "plus" factor amongst many other considerations. Since affirmative action is a racial classification in the law, Chief Justice John Roberts' opinion in *Students for Fair Admissions* subjected Harvard's program to strict scrutiny. For a particular policy to survive this standard of judicial review, the respondent must demonstrate that it is "narrowly tailored" to further a "compelling governmental interest." Roberts determined that Harvard failed to satisfy strict scrutiny. He argued that its admission policy was neither narrowly tailored — it grouped applicants into over-inclusive racial categories — nor did it serve a compelling governmental interest — the university's goal of "diversity" within the student body was inadmissible

[1] Students for Fair Admissions v. Harvard, 600 U.S. 181 (2023). (Official page numbers for *Students for Fair Admissions* are pending formal publication in the U.S. Reports. This paper used the U.S. Reports' preliminary print for page numbers at https://www.supremecourt.gov/opinions/22pdf/600us1r53_4g15.pdf.)

given its immeasurability.[2] Roberts' opinion, joined by the other five conservative justices, showcased his underlying rights-oriented understanding of the Constitution. The Chief Justice disregarded an extensive analysis of whether student body diversity is a legitimate end for universities to pursue because he worried that the judiciary would disparage the rights of some applicants in favor of others in the zero-sum admissions process.[3] In *Students for Fair Admissions*, the conservative legal movement cemented its right-oriented jurisprudence in the realm of higher education and race relations.

Many writers have discussed the disingenuous historical analysis of *Students for Fair Admissions* and the decision's effect on educational outcomes for racial minorities.[4] This paper addresses a problem that constitutional scholars have overlooked: how *Students for Fair Admissions* misconceived the normative character of the Constitution as a whole. By proscribing affirmative action initiatives, the Court assumed that the Constitution promises only colorblind policies for racial groups without

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[2] *Id.* at 214.
[3] *Id.* at 218.
[4] *See*, e.g., Mark Graber, *History' and History in Students for Fair Admissions*, BALKINIZATION BLOG, ( June 31, 2023), https://balkin.blogspot.com/2023/06/history-and-history-in-students-for.html; Cass R. Sunstein, *The Invention of Colorblindness*, 2023 THE SUPREME COURT REVIEW 67, (2023); Anemona Hartocollis, *Harvard's Black Student Enrollment Dips After Affirmative Action Ends*, N.Y. TIMES, Sep. 11, 2024, https://www.nytimes.com/2024/09/11/us/harvard-affirmative-action-diversity-admissions.html.

regard for equal opportunity. This assumption reflects a view of the Constitution as designed chiefly to restrain government, not to empower it to pursue public goods. This is a false conception of American government's purpose; it contradicts the constitutional text and the histories of both the founding period and the Civil War Amendments.

Underlying Roberts' majority opinion in *Students for Fair Admissions* is an understanding of the Constitution as designed chiefly to limit government, not empower it. Negative constitutionalism perceives government as a threat to the liberties and general happiness of its citizens, so the primary obligation of the Constitution is to restrain government to protect individual rights. This understanding of constitutional government begets a question: why establish a government whose chief purpose is to minimize its own agency? This conception of the Constitution's telos is paradoxical. However, since lawyers and judges during litigation most often assess whether government has exceeded its authority, and because the judiciary has become the final arbiter of constitutional meaning,[5] the Constitution is commonly perceived as a negative charter. *DeShaney v. Winnebago County Department of Social Services* (1989) is one of the Court's most famous cases committed to negative constitutionalism. The

[5] *See*, Marbury v. Madison, 5 U.S. 137 (1803).

justices considered whether a county-run child-welfare agency had a constitutional duty to protect four-year-old Joshua DeShaney from his abusive father, a private actor. Chief Justice William Rehnquist held that Winnebago County did not violate Joshua's constitutional rights because the Due Process Clause of the Fourteenth Amendment "is phrased as a limitation on the State's power to act," not an affirmative obligation on government to protect people's liberty against private actors.[6] Members of the Court have continued to espouse a belief in negative constitutionalism,[7] and *Students for Fair Admissions* is yet another example. Roberts and the other conservative justices perceived affirmative action as state-sponsored discrimination in which the judiciary "picks winners and losers based on the color of their skin."[8] The majority claimed that the Court was, therefore, obligated to prevent university officials from pursuing student body diversity and the public goods that follow. The majority's opinion in *Students for Fair Admissions* flowed from a tradition of negative constitutionalism in the Court's jurisprudence.

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[6] DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195 (1989).
[7] *See*, e.g., Obergefell v. Hodges, 576 U.S. 644, 702 (2015) (Roberts, C.J., dissenting) ("Our cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."); *Obergefell* 576 U.S. at 721 (Thomas, J., dissenting) ("Since well before 1787, liberty has been understood as freedom from government action, not entitlement to government benefits. The Framers created our Constitution to preserve that understanding of liberty.").
[8] *Students for Fair Admissions*, 600 U.S. at 229.

Unlike the *Students for Fair Admissions* majority, this paper's first section argues that the Constitution's logic is positive — that is, ends-oriented. It establishes government to pursue public purposes to bring about and maintain a desirable social state of affairs. The Constitution's Preamble reveals government's instrumental nature to achieve public goods, like the common defense, the general Welfare, and other elements of the common good. *The Federalist* corroborates the Constitution's ends orientation; Publius' primary objective was to empower government to seek economic prosperity and national security. In addition to these two governmental objectives, President Abraham Lincoln's speech to Congress on July 4, 1861, political scientist Martin Diamond's analysis of *Federalist* No. 10, and the commitments of the Civil War Amendments demonstrate that equal opportunity is another constitutional end.

Since equal opportunity is an end of government, this paper's second section contends that the Court was wrong to decide *Students for Fair Admissions* through a rights-oriented, colorblind paradigm that perceives any *de jure* racial classification as unconstitutional. The decision's negative constitutionalism distorted Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896) ("*Plessy*") and Chief Justice Earl Warren's opinion in

*Brown v. Board of Education of Topeka* (1954) ("*Brown*"). It also crippled policymakers' ability to ameliorate entrenched racial disparities and achieve equal opportunity. Furthermore, *Students for Fair Admissions* abandoned the Court's approach in *Regents of the University of California v. Bakke* (1978) ("*Bakke*"), *Grutter v. Bollinger* (2003) ("*Grutter*"), and *Fisher v. University of Texas at Austin* (2016) ("*Fisher*"). The majorities in these cases understood that Harlan's *Plessy* dissent and *Brown* were chiefly concerned with establishing an equal-opportunity society, so they upheld affirmative action admissions programs as reasonable means to achieve that end. However, the *Bakke*, *Grutter*, and *Fisher* dissents rejected the Constitution's ends-oriented nature and provided the legal arguments for Roberts in *Students for Fair Admissions* to terminate a constitutional commitment to equal opportunity.

## II. The Constitution as an Ends-Oriented Document

Whereas negative constitutionalism perceives government as the principal threat to individual freedoms, the framers of the Constitution believed that government is necessary to secure liberty and other goods. Alexander Hamilton declared in *Federalist* No. 1 that "the vigor of

government is essential to the security of liberty."[9] A simple point proves Hamilton correct: if government is the chief threat to liberty, and if the primary objective of government is to restrain itself, then there is no rational basis to establish government in the first place. Individuals should opt to remain in the state of nature where the possibility of governmental intrusion into one's personal life does not exist. The decision to leave the state of nature implies that people want government to seek goods that they cannot attain privately.

The framers drafted the Constitution with an instrumental logic to secure public goods. The document's Preamble lists the ends of government — Justice, domestic Tranquility, the common defense, the general Welfare, and the Blessings of Liberty.[10] The Preamble continues that the people of the United States established the Constitution as an instrument "in order to" pursue — or, put differently, "for the purpose of" pursuing — these ends.[11] Thus, individual rights and institutional norms are not ends in themselves but rather are means to the ultimate end — the aspirations of the Preamble. The Constitution is written as an

[9] THE FEDERALIST NO. 1, at 29 (Alexander Hamilton) (Clinton Rossiter ed., 2003).
[10] U.S. CONST. pmbl.
[11] *Id.*

ends-oriented charter whose institutions serve as instruments to attain the goals outlined in the Preamble.

In *The Federalist*, Alexander Hamilton, James Madison, and John Jay, operating under the pseudonym Publius, provided a comprehensive defense of the Constitution's positive logic. During the ratification debate, the Anti-Federalists worried that the proposed Constitution would transfer too much power to the national government at the expense of the states. In response, Publius asked for what purpose was "the precious blood of thousands spilt, and the hard-earned substance of millions lavished" during the American Revolution if not for the country's citizens to "enjoy peace, liberty, and safety . . . The public good, the real welfare of the great body of the people, is the supreme object to be pursued."[12] He later declared that "justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit."[13] Publius believed that the Constitution could achieve the people's "real welfare" and "justice." Thus, he refused to subordinate this ideal social state of affairs to the Anti-Federalists' conception of the appropriate division of power between the state and national governments — a governmental state of affairs. Throughout *The Federalist*, Publius'

[12] THE FEDERALIST NO. 45, 285-286 (James Madison).
[13] THE FEDERALIST NO. 51, 321 (James Madison).

leading concern was whether the Constitution would promote the common good — semantic variations, notwithstanding — and he attempted to design government in a manner conducive to that end.

Publius noted in *Federalist* No. 9 that, throughout the history of popular governments, since ancient Greece and Italy, domestic political factions have condemned democracy to "a state of perpetual vibration between the extremes of tyranny and anarchy."[14] Although the shortcomings of these extremes are different — the former suffocates the rights of individuals while the latter fails to protect its citizens' liberty — their political outcomes are the same. Publius added that if the proposed Constitution could not circumvent the pattern of political extremism that had long plagued democracies, "the enlightened friends to liberty would [be] obliged to abandon the cause of that species of government as indefensible."[15] Thus, Publius did not hold any particular form of government as sacrosanct. Instead, government's institutional structure is subordinate to its ends. Focused principally on the public goods that government can achieve, Publius advocated for popular government as long as it proved to be the political regime best equipped to enhance the well-being of its citizens.

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[14] THE FEDERALIST NO. 9, 66 (Alexander Hamilton).
[15] *Id.* at 67.

Although he did not perceive democracy as the highest good in society, Publius was confident that a new "science of politics" would enable American government to attain the ends for which it was established — liberty, justice, and ultimately the common good.[16] The four principles of this newfound science were "the regular distribution of power into distinct departments . . . legislative balances and checks . . . judges holding their offices during good behavior . . . [and] the representation of the people in the legislature by deputies of their own election."[17] While not ends in themselves, Publius hoped that these political "discoveries" would serve as means by which American government could act in the public interest. *Federalist* No. 9 showcased Publius' positive constitutionalism because he understood a particular form of government and its institutions as instruments to pursue the public good.

In *Federalist* No. 84, Publius even argued against a bill of rights in the Constitution because he believed that it would confuse the document's ends-oriented purpose. He explained that the original guarantees of the proposed Constitution, including the writ of *habeas corpus* and the prohibition of *ex post facto* laws, "are perhaps greater securities to liberty

[16] *Id.*
[17] *Id.*

and republicanism than any [that the proposed bill of rights] contains."[18] According to Publius, a government whose primary objective is to secure the common good for its citizens already implicitly safeguards rights essential to one's welfare. For example, Americans' *habeas corpus* right allows them to challenge the legality of their imprisonment in court. The judiciary, which derives its mandate from the Constitution that commits itself to justice, would forbid confinements not rationally related to the public good. Beyond its superfluity, Publius also worried that private exemptions from authority would handicap government's ability to achieve its affirmative commitments. A bill of rights "would contain various exceptions to powers which are not granted," affording "a colorable pretext to claim more than were granted."[19] Like elsewhere in *The Federalist*, Publius was unwilling to restrain national authority because his primary objective was to empower, not limit, government to actualize a desirable social state of affairs. Publius' positive conception of the Constitution led to his belief that a bill of rights was both unnecessary and dangerous.

Publius was also concerned that the proposed bill of rights would paradoxically limit the true panoply of individual rights. By enumerating

[18] THE FEDERALIST NO. 84, 511 (Alexander Hamilton).
[19] *Id.* at 513.

specific liberties, a bill of rights would provide "a semblance of reason that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given."[20] Publius feared that enumerated abridgments to governmental authority would provide ill-intentioned actors the constitutional guise to disregard unenumerated rights. To assuage this concern, Madison, one of the authors of *The Federalist*, advocated for the Ninth Amendment's inclusion in the Bill of Rights in a speech to the House of Representatives on June 8, 1789. He argued that this amendment would clarify that "enumerating particular exceptions to the grant of power" would not "disparage those rights which were not placed in that enumeration."[21] Ultimately, Congress passed and the states ratified the Bill of Rights to safeguard against governmental violations of particular liberties. However, Publius' refusal to endorse these amendments highlighted his primary goal of empowering government to achieve public ends.

Despite enumerating restraints on governmental power, neither the Bill of Rights, nor subsequent amendments, changed the Constitution's ends-oriented, positive logic. Article V of the document provides that a new

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[20] *Id.*

[21] JAMES MADISON, REP. MADISON ARGUES FOR A BILL OF RIGHTS (Gordon Lloyd ed., 1789), https://teachingamericanhistory.org/document/speech-on-amendments-to-the-constitution/.

amendment becomes "a *part* of the Constitution" [emphasis added].[22] Therefore, additions to the text must be understood in light of the primary objective of the Constitution — a desirable social state of affairs. Chief Justice Charles Evans Hughes' majority opinion in *West Coast Hotel Co. v. Parrish* (1937) ("*Parrish*") showcased the way in which a claim to a particular right must be interpreted in the context of overarching public objectives. The Court considered the constitutionality of a minimum wage statute in Washington State, which the appellant claimed was a deprivation of the freedom to contract implicit in the Due Process Clause of the Fourteenth Amendment. Although Hughes did not explicitly deny the existence of the liberty to contract, he explained that nevertheless "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace" society.[23] Hughes understood in *Parrish* that the purpose of government is principally to improve the lives of its citizens. Minimum wage laws are rationally related to that governmental pursuit: they ensure that employers meet the bare cost of living for their employees and equalize bargaining power between these two parties.[24] Therefore, since the liberty to contract is not a

[22] U.S. CONST. art. V.
[23] West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).
[24] *Id.* at 398-399.

constitutional end, government can regulate contracts to promote citizens' financial security. As the *Parrish* majority recognized, claims to individual constitutional rights exist insofar as they help achieve the desirable social state of affairs that the Constitution envisions.

### *A. Economic Prosperity, National Security, and Equal Opportunity as Constitutional Ends*

In addition to establishing the ends-oriented logic of the Constitution, Publius outlined some of the specific ends that American government is designed to pursue in *Federalist* No. 23. Publius wrote that "the government of the Union must be empowered to pass all laws, and to make all regulations which have relation to" its ends, which include "the common defense of the members . . . the preservation of the public peace . . . the regulation of commerce . . . [and] the superintendence of our intercourse . . . with foreign countries."[25] With these ends as controlling, Article I, § 8 of the Constitution lists the powers authorized to Congress, such as the ability to "lay and collect taxes," "borrow money," "regulate commerce," "declare war," "raise and support Armies," and "provide and maintain a Navy," amongst others.[26] *Federalist* No. 23 announced and the

[25] THE FEDERALIST NO. 23, 149-151 (Alexander Hamilton).
[26] U.S. CONST. art. I, § 8, cl. 1-3, 11-13.

constitutional text corroborates that the national powers within the original Constitution are instruments to pursue the country's economic prosperity and national security.

Beyond economic prosperity and national security, Lincoln argued in effect that equal opportunity is another constitutional end. In his address to Congress on July 4, 1861, the president declared that government's "*leading object* is . . . to lift artificial weights from all shoulders . . . to afford all an unfettered start and a fair chance in the race of life" [emphasis added].[27] Lincoln contended that the national and state governments have an affirmative constitutional duty to dismantle extrinsic barriers that impede individuals' capacity to seek "laudable pursuits" within society, including "all the arts, sciences, professions, and whatever else, whether useful or elegant."[28] A present-day application of Lincoln's assertion could reasonably conclude that government is obligated to combat private and institutional racism, which unjustly denies economic and political opportunity to racial minorities and hinders the attainment of an equal-opportunity society. Of course, whether equal opportunity is an

[27] ABRAHAM LINCOLN, *"Message to Congress in Special Session"* in GREAT SPEECHES, JULY 4, 1861 73 (Stanley Appelbaum ed., 1991).
[28] *Id.*

actual end of American government is debatable.[29] The claim of a former president — his historical influence, notwithstanding — is not dispositive when deciphering the social ends to which the Constitution commits the country.

In support of Lincoln's contention, Diamond showed that a constitutional commitment to an equal-opportunity society was implicit in *Federalist* No. 10. Publius supported popular government insofar as it could control the destructive tendencies of domestic faction, which he defined as groups opposed to the common good. Publius outlined two possible strategies to contain a faction: cure its causes or control its effects. He rejected the former option because government would either have to expunge political liberty, which would be "worse than the disease," or destroy social and economic diversity, which would be "impracticable."[30] Since Publius believed that government could not cure the causes of faction, he contended that it must control the effects. As he discussed his method to control the effects of faction, Publius was primarily concerned with a *majority* faction. He argued that the "republican principle" and the American political culture's distaste for minority rule would minimize any

[29] As this paper later explains, the Court's current adherence to colorblind constitutionalism in contemporary cases concerning race relations denies a constitutional commitment to an equal-opportunity society.
[30] THE FEDERALIST NO. 10, 73 (James Madison).

public danger from a *minority* faction. On the other hand, a majority faction could retain a degree of political legitimacy within a democracy despite its disregard for the public interest.[31] To control this threat, Publius advocated for "a greater number of citizens and extent of territory" or, as he called it in *Federalist* No. 9, an "enlargement of the orbit" of government.[32] A small republic has fewer political interest groups, increasing the likelihood that these distinct parties could consolidate into an oppressive majority. However, a large republic with its more numerous and varied interest groups both reduces the probability that a majority faction develops and undermines its durability when it does. Publius viewed the enlargement of government's orbit as necessary to control the effects of domestic faction and save popular government.

Diamond noted problems within the reasoning of *Federalist* No. 10 that must be resolved if Publius' theory of popular government is to withstand scrutiny. Publius presupposed that an enlarged orbit of government would give rise to a large number of interest groups willing to compromise to create shifting political majorities. However, an expansive territory with a large population could still polarize along economic, racial,

[31] *Id.* at 75.
[32] THE FEDERALIST NOS. 9, 67 (Alexander Hamilton), NOS. 10, 78 (Alexander Hamilton).

religious, ideological, or other social cleavages.[33] Publius even recognized that individuals "fall into mutual animosities" over "the most frivolous and fanciful distinctions."[34] Nevertheless, he assumed that Americans would primarily perceive themselves in terms of their narrow economic interests — that is, as a laborer, manager, creditor, or debtor — because he considered economic conflict "the most common and durable source of faction."[35] The national powers that the Constitution grants reflect Publius' assumption. Article I, § 8 of the Constitution endows the national government with the authority only to regulate economic conflict,[36] not the numerous other social divisions similarly fatal for popular government like religion, ideology, or race.[37] *Federalist* No. 10 insufficiently sketched the political conditions necessary to avoid majority faction.

Diamond supplied the societal conditions and public dispositions necessary for a large country to be pluralist and for the national regulation of economic conflict to ease the sources of non-economic division. America must be (1) an urban-industrial society, providing numerous pathways to financial stability that subsequently bring about manifold

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[33] MARTIN DIAMOND, "*The Federalist*" in HISTORY OF POLITICAL PHILOSOPHY 648 (Leo Strauss and Joseph Cropsey eds., 2nd ed. 1972).
[34] THE FEDERALIST NO. 10, 73-74 (James Madison).
[35] *Id.*
[36] U.S. CONST. art. I, § 8.
[37] SOTIRIOS BARBER AND JAMES FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 40 (New York: Oxford University Press, 2007).

political groups primarily concerned with further economic advancement. If economic interests are to color political ones, Americans need to be (2) a materialistic people. That is, their paramount concern must be to increase their personal wealth, making them (3) religiously and ideologically tolerant. This society would have to be (4) wealthy and likely committed to (5) ever-expanding personal and national wealth to satiate the economic desires and material ambitions of its people. Crucially for this paper, there must be (6) the possibility of upward or downward economic mobility, so Americans believe that their financial achievements are the product of their intrinsic ability, not extrinsic circumstances.[38] For instance, applying these assumptions today, if Black Americans cannot achieve comparable degrees of economic success as their White counterparts, America risks widespread racial resentment and eventual polarization. This sixth condition implies the necessity of an equal-opportunity society that "lift[s] artificial weights from all shoulders" as Lincoln believed.[39] Finally, Americans must be (7) a democratic people who support equal economic and political opportunity, lest social distinctions, such as race, polarize the public and cripple popular government's ability to pursue the common

[38] *Id.* at 41-42. For Diamond's original account of these necessary conditions, *see*, Diamond *supra* note 33, at 648-650.
[39] Lincoln, *supra* note 27.

good.[40] Similar to the previous condition, this one suggests that Lincoln was again correct when he declared that government's "leading object" is to provide all Americans with "an unfettered start and a fair chance in the race of life."[41] Diamond's analysis of *Federalist* No. 10 demonstrated that a governmental commitment to an equal-opportunity society was always implicit in the Constitution's design.

The Civil War Amendments manifest Lincoln's understanding of government's "leading object" and Diamond's analysis of *Federalist* No. 10, for they grant the national government the power to pursue equal opportunity. These amendments outlaw chattel slavery (except in prisons), guarantee birthright citizenship, due process, and equal protection, and prohibit racial discrimination in voting.[42] While the Constitution frames these provisions as negative constitutional guarantees, recall that Article V declares that each amendment becomes "a part of the Constitution."[43] Thus, the rights-oriented constitutional protections within the Civil War Amendments are parts of a larger, ends-oriented whole. Furthermore, the final section of each of these amendments gives the national government

[40] Barber & Fleming *supra* note 37, at 41-42.
[41] Lincoln, *supra* note 27.
[42] U.S. CONST. amend. XIII, § 1; *id.* amend. XIV, § 1; *id.* amend. XV, § 1.
[43] U.S. CONST. art. V.

the authority to enforce their provisions.[44] As Publius explained in *Federalist* No. 23, governmental power exists for the sake of constitutional ends. Just as Article I, § 8 of the Constitution empowers government to pursue economic prosperity and national security, the Civil War Amendments expand national power to secure the rights of racial minorities for the sake of equal opportunity as an affirmative constitutional obligation. The Preamble and *The Federalist* illustrate that government seeks public purposes, and Lincoln, Diamond, and the Civil War Amendments confirm that equal opportunity is an end to which the Constitution commits society.

## III. The Colorblind Triumph over Equal Opportunity

As negative constitutionalists, the Court's conservative justices espouse a commitment to colorblind constitutionalism, a notion that current societal circumstances render incompatible with an equal-opportunity society as a governmental end. Constitutional colorblindness conceives the Fourteenth Amendment's Equal Protection Clause as prohibiting all *de jure* racial classifications. Quoting the proponents of the amendment's ratification, the majority in *Students for*

[44] U.S. Const. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

*Fair Admissions* argued that the Constitution "should not permit any distinctions of law based on race or color."[45] The Court's six conservative justices desire colorblind government indifferent toward entrenched racial disparities that prevent an equal-opportunity society.

While the Court seeks only colorblind government, the Constitution commits the country to a colorblind society, which is synonymous with an equal-opportunity society where race is irrelevant to an individual's opportunity, success, and well-being. America has yet to achieve a colorblind society as it still tolerates racism, whether implicitly or explicitly, in education, employment, healthcare, and other social institutions.[46] Given that systemic racial disparities impede the realization of an equal-opportunity society, Justice Harry Blackmun opined in his dissent in *Bakke* that, "in order to get beyond racism, we must first take account of race."[47] Color-conscious policies, such as affirmative action, are necessary to ameliorate racial prejudice in society, "lift artificial weights

[45] *Students for Fair Admissions*, 600 U.S. at 202.
[46] In her dissent in *Students for Fair Admissions*, 600 U.S. at 393-396, Justice Jackson demonstrated statistically that large racial disparities still exist across multiple indices of well-being in the country. She noted that the average wealth of White Americans is eight times greater than that of Black individuals in large part because of the higher rate of White home ownership. In addition to these financial deficits, Black Americans are less likely to have a college degree than their White counterparts and are, therefore, underrepresented in professional fields, such as law and business. Jackson concluded that current racial health gaps are an unsurprising byproduct of these aforementioned opportunity disparities. There is "at least 50,000 excess deaths a year for Black Americans vis-à-vis White Americans" because of higher rates of obesity, cancer, hypertension, infant and maternal mortality, and other health dangers within the Black population.
[47] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978).

from all shoulders,"[48] and achieve equal opportunity. Colorblind constitutionalism, however, nullifies all color-conscious enactments and is, therefore, incompatible with equal opportunity as an end of government.

In addition to constitutional colorblindness' mutual exclusivity with equal opportunity, genuinely colorblind government is not feasible without a colorblind society. While the Court can attempt to outlaw every vestige of *de jure* racial classifications, it cannot unilaterally change privately held prejudiced attitudes. Since legislators embody their constituents' beliefs in a democracy, colorblind democratic government is only possible if its citizens are racially unbiased. Without first achieving this ideal social state of affairs, it is foolhardy for the Court to believe that it can establish colorblind government simply by removing every racial classification in the law. Instead, if the conservative justices truly desire colorblind government, they would commit themselves to a colorblind society. However, the Court in *Students for Fair Admissions* abdicated this pursuit and, as Justice Sonia Sotomayor stated in dissent, "cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."[49] The Court cannot achieve colorblind government without

[48] Lincoln, *supra* note 27.
[49] *Students for Fair Admissions*, 600 U.S. at 318.

color-conscious policies that change Americans' racial attitudes and distribute opportunity without regard for race.

In his *Students for Fair Admissions* concurrence, Justice Clarence Thomas disagreed and argued that all race-conscious enactments, even those designed to remedy racial disparities like affirmative action, are noxious to the Equal Protection Clause. He explained that affirmative action insinuates that Black applicants are unable to achieve similar degrees of success as their White counterparts without paternalistic intervention. Even if racial minorities succeed academically, Thomas continued, Harvard's affirmative action program "taint[s] the accomplishments of all those who are admitted as a result of racial discrimination."[50] He also agreed with Roberts that "helping" some racial groups invariably harms others.[51] In short, Thomas believed that these seemingly benign racial classifications are, in fact, invidious because they engender notions of Black inferiority and foster White and Asian resentment. He concluded that the Constitution is colorblind and "requires the government to, at long last, put aside its citizens' skin color and focus on their individual achievements."[52] While affirmative action strives to

[50] *Id.* at 270.
[51] *Id.* at 271.
[52] *Id.* at 283.

equalize educational opportunity, Thomas saw no constitutional difference between these programs and other, more evidently sinister racial classifications like *de jure* segregation.

Thomas might be correct about affirmative action's unintended repercussions, but he cannot legitimately constitutionalize his policy preference for colorblindness if equal opportunity is a constitutional end. Contrary to Thomas' assertion, not all color-conscious policies are the same constitutionally.[53] The first difference is intent. Does a particular measure seek to institutionalize racial disparities within the population — hallmarks of a color-conscious society — or advance equal opportunity — that is, create a colorblind society? When an enactment falls into the former category, the Court should strike it down as state-sponsored racial animus incompatible with the Fourteenth Amendment.[54] If a statute is of the latter type, it should presumptively survive judicial review because it seeks a constitutional end. While the Court has periodically claimed that it is difficult, if not impossible, to determine legislative intent,[55] this position

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[53] *See*, e.g., Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

[54] *See*, Civil Rights Cases, 109 U.S. 3, 13 (1883) (Legislation "should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment.).

[55] *See*, e.g., Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("It is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

is untenable.[56] If the Court were genuinely ignorant of affirmative action's intent — establishing a colorblind society — the policy's desired effect would be completely indeterminate. Why not describe affirmative action as an initiative to increase administrative workload or add bureaucratic complexity to the admissions process? Of course, in practice, the Court considered whether these programs impacted equal educational opportunity because it knew that affirmative action intended to achieve this goal.

After determining intent, the Court could then consider the enactment's societal effect. As this paper's first section argues, the Constitution's instrumentality empowers government to pursue constitutional ends for the public interest. However, the Court can overturn statutes and policies, their well-intentionality notwithstanding, if they are not reasonably conducive to the social state of affairs that the Constitution envisions. Were the Court to determine that affirmative action — the means — is never rationally related to the attainment of a colorblind society — the end — it would be obligated to outlaw it. Despite the potential downsides, the Court cannot honestly claim that decision-makers act

[56] *See*, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 136-148 (Cambridge: Harvard University Press, 1980).

wholly unreasonably when implementing affirmative action to achieve equal opportunity — at worst, these programs have a mixed record.[57] Since the Civil War Amendments recognize an equal-opportunity society as a constitutional end, the Court should afford university officials reasonable latitude to determine affirmative action's utility. While Thomas has genuine policy objections to affirmative action, there are reasonable arguments for its use, backed by evidence, on the other side. Thus, the Court should not categorically ban affirmative action as a possible means to an equal-opportunity society.

### *A. The Dubious Origins of Colorblind Constitutionalism*

Thomas derives jurisprudential support for constitutional colorblindness from Harlan's dissent in *Plessy*. In 1890, the Louisiana legislature enacted the Separate Car Act, which required Black and White individuals to sit in segregated railway cars. Homer Plessy, who was one-eighth Black, challenged the statute under the Thirteenth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court disagreed with Plessy and upheld the law. Justice

[57] *See*, e.g., MARY FISCHER AND DOUGLAS MASSEY, *The effects of affirmative action in higher education*, 36 SOCIAL SCIENCE RESEARCH 531, 544 (2007) (This study found that minority students who benefited from affirmative action often earned higher grades and dropped out at lower rates than White students).

Henry Brown wrote that "separate but equal" public accommodations do not stamp "the colored race with a badge of inferiority." He continued that people held this erroneous belief "solely because the colored race chooses to put that construction upon it."[58] In his dissent, Harlan disputed Brown's assessment that the statute in question did not intend to imply Black inferiority. He explained that "the thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one" to recognize that the law sought to perpetuate the racial caste system.[59] Harlan added that "our Constitution is colorblind, and neither knows nor tolerates classes among citizens."[60] Over a century later, Thomas and the other conservative members of the Court have relied on this one sentence of Harlan's dissent in *Plessy* to justify their crusade against affirmative action programs.

Despite their reliance on Harlan, the Court's conservative justices are not faithful to his dissent because they ignore its principle thrust. Harlan argued in *Plessy* that "the destinies of the two races . . . are indissolubly linked together."[61] He understood the Thirteenth Amendment to decree "universal civil freedom" and the Fourteenth Amendment greatly

[58] Plessy v. Ferguson, 163 U.S. 537, 551 (1896).
[59] *Id.* at 562.
[60] *Id.* at 559.
[61] *Id.* at 560.

to enhance "the dignity and glory of American citizenship."[62] Harlen held that these amendments promise more than just liberation from chattel slavery; they also have a positive constitutional dimension that obligates government to prevent private discrimination in public conveyances and accommodations. His position is consistent with Lincoln's view of government's duty to "lift artificial weights from all shoulders."[63] The Louisiana statute undermined that aspiration, so Harlan would have struck it down. Thus, within the context of the case, Harlan did not advocate for governmental indifference toward race *per se*. Instead, he opposed Louisiana's creation of this particular *de jure* racial classification because it hindered the pursuit of racial harmony and a colorblind society. Today, the Court's conservative justices seek to outlaw race-conscious legislative enactments (like Harlan) but disregard how such decisions impact the realization of an equal-opportunity society (unlike Harlan). In *Students for Fair Admissions*, Thomas claimed that "any statistical gaps between the average wealth of Black and White Americans is constitutionally irrelevant. I, of course, agree that our society is not, and has never been, colorblind." However, as a negative constitutionalist, he continued that "law must

[62] *Id.* at 555.
[63] Lincoln, *supra* note 27.

disregard all racial distinctions."[64] While Harlan's reference to colorblindness in *Plessy* was part of a broader commitment to a social state of affairs in which Black Americans possess full equality, colorblind constitutionalism today only envisions an end to racial classifications in the law.

Just as the Court has misrepresented Harlan's dissent in *Plessy*, it has also distorted the constitutional commitment announced in *Brown*. This case consolidated multiple challenges to racial segregation in public schools. A unanimous Court held that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[65] Although both conservative and liberal jurists view Warren's opinion that overturned *Plessy* as sacrosanct, they understand its implications for race relations in *Students for Fair Admissions* differently. The conservative justices believed that the decision principally outlawed *de jure* racial discrimination: public schools operated under state-imposed segregation, and the Warren Court dismantled these statutory racial classifications. In *Students for Fair Admissions*, Roberts wrote that *Brown* "overturned *Plessy* for good and set firmly on the path of

[64] *Students for Fair Admissions*, 600 U.S. at 278.
[65] Brown v. Board of Education of Topeka, 347 U.S. 483, 495 (1954).

invalidating all *de jure* racial discrimination by the States and Federal Government."[66] On the other hand, the liberal justices understood *Brown* as pursuing equal educational opportunity by integrating public schools. Sotomayor declared in her *Students for Fair Admissions* dissent that the Court in *Brown* "recognized the constitutional necessity of racially integrated schools."[67] Even as all members of the Court claim fidelity to *Brown*, the conservative justices interpret Warren's decision as a proscription on a particular governmental behavior while the liberal justices understand it as a prescription for a particular social state of affairs.

Unlike the conservative interpretation, which isolates one aspect of *Brown*, the liberal interpretation is faithful to the decision's major thrust. Warren in *Brown* espoused a positive understanding of the Constitution as an instrument to pursue equal educational opportunity for children regardless of race. In reaching his decision, Warren wrote that the Court "cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy* was written."[68] Instead, he explained that the Court would make its decision based on racial

[66] *Students for Fair Admissions*, 600 U.S. at 203-204.
[67] *Id.* at 318.
[68] *Brown*, 347 U.S. at 492.

segregation's effect on the educational attainment of Black students. He cited social science to corroborate common sense: racial segregation "is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn."[69] Like the Preamble, *The Federalist*, and Lincoln, Warren in *Brown* interpreted the Constitution through an ends-oriented paradigm to improve the educational experience of Black children. Segregation in public schools was unconstitutional because it denied racial minorities equal educational opportunity that they would have received in a racially integrated school system. Like the Court's current liberal justices, Warren's opinion in *Brown* was concerned with racial classifications in the law insofar as they impacted equal educational opportunity.

### *B. From an Ends-Oriented Paradigm to a Colorblind One in Affirmative Action Cases*

*Brown*'s positive understanding of the Constitution is germane to an analysis of *Bakke*, which first upheld affirmative action programs in higher education admissions. The case concerned a special admissions program at the Medical School of the University of California at Davis. The medical

[69] *Id.* at 494.

school allotted 16 of its 100 spots of each entering class to minority applicants. In both 1973 and 1974, the medical school denied admission to Allan Bakke, a White man, despite his stronger application vis-à-vis most of the 16 admitted minority individuals.[70] In a bitterly divided decision, four conservative members of the Court would have proscribed any consideration of race in higher education and ordered Bakke's admission. Justice John Paul Stevens' dissent presented a colorblind attack against affirmative action. He wrote that "it seems clear that the proponents of Title VI [of the Civil Rights Act of 1964] assumed that the Constitution itself required a colorblind standard on the part of government."[71] Stevens' adherence to colorblindness prevented his consideration of whether a constitutional commitment to equal educational opportunity should outweigh the incidental burden that affirmative action might place on some individuals. Almost 50 years prior to *Students for Fair Admissions*, his reasoning demonstrated that judges who believe that the Constitution is colorblind cannot recognize equal opportunity as an end of government; these two ideas are mutually exclusive. The conservative justices in *Bakke* prefigured modern arguments of constitutional colorblindness that nullify a commitment to equal opportunity.

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[70] *Bakke*, 438 U.S. at 275-277.
[71] *Id.* at 416.

On the opposing side of the ideological ledger, four liberal justices would have upheld U.C. Davis' affirmative action program and denied admission to Bakke. Justice William Brennan in dissent, like Warren in *Brown*, perceived the Constitution as a tool to actualize equal educational opportunity for all Americans, including Black ones. He justified race-conscious admissions programs where "the handicap of past discrimination is impeding access of minorities to the medical school."[72] Brennan implicitly rejected the notion of colorblindness that guided the Court's rationale in *Students for Fair Admissions*. Removing all racial classifications in the law would limit government's power to remedy past societal discrimination that had continued to deny aspiring Black medical students equal opportunity.[73] Therefore, as Blackmun declared in his *Bakke* dissent, "in order to treat some persons equally, we must treat them differently."[74] In Lincoln's terms, Blackman argued that systemic discrimination unequally weighed on racial minorities and denied them a "fair chance in the race of life." Government was thus obligated to provide certain advantages to Black applicants to "lift these artificial weights." The liberal dissenters in *Bakke* recognized the Constitution's promise to

[72] *Id.* at 362.
[73] *See*, e.g., *id.* at 403 (Blackmun, J., dissenting) (acknowledging the drastic underrepresentation of racial minorities within the healthcare and legal professions as well as medical and law school).
[74] *Id.* at 407.

ameliorate chronic societal discrimination that had denied Black Americans equal educational opportunity.

With neither the Court's liberal nor conservative wings commanding a majority, Justice Lewis Powell selected a third option in *Bakke* that permitted a limited consideration of an applicant's race. His opinion held that racial quotas in admissions — reserving 16 of the 100 spots for minority applicants — were unconstitutional because they cause some "innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."[75] This acknowledgement prefigured Thomas' contention that affirmative action programs foster resentment between different racial groups.[76] However, unlike Thomas, Powell said that this rights-oriented concern did not supersede the end for which schools establish affirmative action initiatives. Powell recognized that the Constitution empowers government to establish a desirable social state of affairs that includes equal opportunity. For that reason, he wrote that the "attainment of a diverse student body" was a compelling governmental interest that satisfied strict scrutiny because "physicians serve a heterogeneous population" that benefit from a wide array of

[75] *Id.* at 298.
[76] *See*, e.g., *Adarand*, 515 U.S. at 241 (Thomas, J., concurring) ("[Affirmative action] programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race.").

perspectives and experiences when providing clinical services.[77] While outlawing racial quotas, Powell held that school admissions officers could consider an applicant's race as a "plus" factor in an otherwise holistic, individualized process.[78] Powell's opinion authorized a limited use of affirmative action in higher education to achieve equal educational opportunity for racial groups that had been historically underrepresented in the medical profession.

*Grutter* reaffirmed Powell's opinion in *Bakke* that student body diversity was a compelling governmental interest that justified a limited consideration of applicants' racial identity. To achieve the educational and societal benefits that emanate from student diversity, the University of Michigan Law School used applicants' race in a holistic review to reach "a critical mass of underrepresented minority students."[79] As Justice Sandra Day O'Connor inquired whether the law school's admissions policy was narrowly tailored to achieve its goal, her majority opinion subordinated the program's incidental impact on petitioner Grutter to its desired ends. More specifically, O'Connor affirmed that the school's affirmative action initiative "promotes 'cross-racial understanding,' helps to break down racial

[77] *Bakke*, 438 U.S. at 311-312, 314.
[78] *Id.* at 317.
[79] Grutter v. Bollinger, 539 U.S. 306, 318 (2003).

stereotypes, and 'enables [students] to better understand persons of different races.'"[80] Just as Warren in *Brown* understood the Constitution as an instrument to enhance the educational attainment of Black pupils, O'Connor perceived affirmative action as a governmental tool to realize a colorblind society in which racial prejudice no longer impedes the ability of Black Americans to secure full equality. Her opinion also acknowledged that affirmative action "'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals,'" thereby bolstering the country's economic prosperity — another end of government.[81] O'Connor's rationale in *Grutter* for upholding Michigan Law School's affirmative action program focused principally on the desirable social state of affairs that the policy sought to engender.

Although O'Connor in *Grutter* recognized the primacy of constitutional ends, she undermined her opinion's ends-oriented logic by imposing an arbitrary time limit on affirmative action programs. Having determined that the law school's policy satisfied strict scrutiny, the Court deferred to admissions officers to oversee the narrowly tailored consideration of race.[82] While this discretion recognized the responsibility

[80] *Id.* at 330.
[81] *Id.*
[82] *Id.* at 328.

of decision-makers to determine the means to pursue constitutional ends, O'Connor added that the Court "expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[83] Although affirmative action programs might eventually be superfluous — such as when America becomes an equal-opportunity society — O'Connor could not predict that 25 years would be sufficient to reach the requisite progress that these initiatives seek. Justice Ruth Bader Ginsburg's concurrence called out the faulty logic of *Grutter*'s time-limited endorsement of affirmative action. She wrote that the Court could only hope but not assume that "progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[84] The Court could not predict the best future means to pursue constitutional ends. By placing a time limit on affirmative action, O'Connor's opinion weakened the Court's commitment to an ideal social state of affairs that includes equal opportunity.

While O'Connor muddled her support for equal opportunity in *Grutter*, the dissent was wholly uninterested in the potential goods that

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[83] *Id.* at 343.

[84] *Id.* at 346. Ginsburg's refusal to limit preemptively government's possible means to establish an equal-opportunity society comports with THE FEDERALIST NO. 23, at 149. Publius contended that the powers of the national government "ought to exist without limitation, *because it is impossible to foresee or define the extent and variety of national exigencies, and the correspondent extent and variety of the means which may be necessary to satisfy them*" [emphasis original].

arise from affirmative action within higher education. Rehnquist refused to defer to the law school's administrators because he did not trust them to implement a narrowly tailored policy. He argued that, "stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing."[85] To support his allegation, Rehnquist remarked that the percentage of minority applicants and minority admissions year-over-year "is far too precise to be dismissed as merely the result of the school paying 'some attention to [the] numbers.'"[86] He accused admissions officers of creating *de facto* racial quotas, a practice that *Bakke* declared unconstitutional. Rehnquist and the other conservative justices' refusal to consider whether the law school's affirmative action program achieved societal goods revealed their rights-oriented view of the Constitution.

The Court again considered and reaffirmed the constitutionality of narrowly tailored affirmative action admissions programs in *Fisher*. In 1998, the Texas Legislature enacted the Top Ten Percent Law, which guaranteed admission to any state university to students who graduated in the top ten percent of their class. The University of Texas filled roughly 75 percent of its first-year class through this plan. The university selected the

[85] *Grutter*, 539 U.S. at 379.
[86] *Id.* at 383.

remaining quarter of the incoming class through a holistic-review process that included a consideration of race.[87] Abigail Fisher, a White applicant, was not in the top ten percent of her class, so the university evaluated her under a holistic review. She was denied admission and filed suit, alleging that the university's admissions program violated the Equal Protection Clause. The Court disagreed. Writing for the majority, Justice Anthony Kennedy reaffirmed *Grutter* and acknowledged the societal ends that a diverse student body helped achieve, including "'the cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry.'"[88] This specific end of affirmative action hearkens back to Diamond's analysis of the necessary social conditions for *Federalist* No. 10's theory of popular government to work. All individuals, regardless of race, must have opportunity for upward mobility, lest Americans polarize because they believe that racial animus has impeded their potential success.[89] A racially diverse cast of leaders in government and American industry helps all people believe that they have "a fair chance in the race of life" to succeed personally and professionally.[90] Kennedy's ends-oriented analysis of affirmative action in *Fisher* sought to

[87] Fisher v. University of Texas, 579 U.S. 365, 373 (2016).
[88] *Id.* at 382.
[89] Barber & Fleming *supra* note 37, at 41-42.
[90] Lincoln, *supra* note 27.

promote equal educational opportunity for minority applicants and protect American constitutional government from factional collapse.

Kennedy's opinion in *Fisher* also properly affirmed the authority of admissions officers to determine the means to achieve equal educational opportunity. Whereas O'Connor in *Grutter* sought to sunset affirmative action in admissions, Kennedy did not presume to know for how long these programs would be necessary to achieve a diverse student body and the societal goods that follow. He implored the university to "scrutinize the fairness of its admissions program . . . assess whether changing demographics have undermined the need for a race-conscious policy . . . [and] identify the effects" of its affirmative action initiative.[91] Similar to *Federalist* No. 23, which argued for extensive governmental power to pursue constitutional ends, and Ginsburg's concurrence in *Grutter*, Kennedy recognized that changing societal circumstances make it imprudent to foreclose a possible means, such as affirmative action, to achieve governmental ends. In *Fisher*, Kennedy rightly recognized admissions officers' power to utilize and modify affirmative action in the future as needed to pursue equal educational opportunity.

[91] *Fisher*, 579 U.S. at 382.

Like Rehnquist in *Grutter*, Justice Samuel Alito's dissent in *Fisher* alleged that the University of Texas' affirmative action policy failed to satisfy strict scrutiny. He wrote that the university's four proffered goals — demographic parity, classroom diversity, interracial diversity, and avoiding racial isolation — were neither "concrete" nor "precise" and offered "no limiting principle for the use of racial preferences."[92] Given what he saw as the imprecision of the program's objectives, Alito concluded that narrow tailoring was impossible and, therefore, the university's affirmative action policy failed to satisfy strict scrutiny.[93] Of course, measuring the university's four goals would entail some degree of numerical precision. However, Alito assumed that any numerical consideration would constitute racial balancing, which he declared "'patently unconstitutional.'"[94] Therein lies the rub. The dissent would have required universities to evaluate the success of their race-conscious admissions programs with "precision." However, if universities measured the impact of their policies too precisely, they would risk violating the Court's prohibition on racial quotas. Such an uncompromising standard of judicial review would have rendered strict scrutiny "strict in theory, but fatal in fact."[95] Alito's dissent in *Fisher*

[92] *Id.* at 403.
[93] *Id.* at 401.
[94] *Id.* at 406.
[95] *See*, *Bakke*, 438 U.S. at 362 (Brennan, J., concurring in judgment in part and dissenting in part).

established a framework to outlaw affirmative action in higher education admissions that came to fruition in *Students for Fair Admissions*.

The conservative dissents in *Bakke*, *Grutter*, and *Fisher* supplied the constitutional arguments that Robert's used in *Students for Fair Admissions*. Just as Stevens contended in *Bakke* that the Constitution's framers envisioned colorblind government — a dubious historical proposition[96] — Roberts asserted that the Court's decision in *Students for Fair Admissions* "reflect[s] the 'core purpose' of the Equal Protection Clause: 'do[ing] away with all governmentally imposed discrimination based on race.'"[97] Since affirmative action is a *de jure* racial classification supposedly incompatible with equal protection, Roberts, like Rehnquist in *Grutter*, declined to defer to university officials to determine how to achieve student body diversity.[98] Instead, he extended Alito's measurability requirement from *Fisher*, writing that the Court required that "universities operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of

[96] *See*, e.g., Sheyrll Cashin, *The Framers of the 14th Amendment Weren't Color Blind [Opinion]*, POLITICO, October 31, 2022, https://www.politico.com/news/magazine/2022/10/31/why-supreme-court-conservatives-should-back-affirmative-action-00064308.
[97] *Students for Fair Admissions*, 600 U.S. at 206.
[98] *Id.* at 217-218.

strict scrutiny."[99] Of course, as Sotomayor recognized in dissent, the majority did not outline "how much more precision is required or how universities are supposed to meet the Court's measurability requirement . . . That is exactly the point."[100] Roberts' opinion created a constitutional catch-22 in which Court precedent prohibited the most feasible way to measure the impact of affirmative action precisely — racial quotas. After a decades-long legal crusade, constitutional colorblindness ended affirmative action in admissions, entrenched racial disparities in educational outcomes, and terminated a constitutional commitment to equal opportunity.

While Roberts deemed affirmative action unconstitutional in higher education, his opinion qualified that the Court's decision did not apply to the military academies. In a footnote, he declined to consider affirmative action in military admissions "in light of the potentially distinct interests that military academies may present to meaningful judicial review."[101] The Court reserved judgment on whether affirmative action serves as an appropriate means to *some* governmental ends like national security.[102]

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[99] *Id.* at 214.
[100] *Id.* at 366.
[101] *Id.* at 213.
[102] Students for Fair Admissions has sued the United States Naval Academy over its consideration of race in admissions. A district judge rebuffed the organization, writing that the school has a "compelling national security interest in a diverse officer corps." Students for Fair Admissions has appealed the ruling. *See*, e.g., Lexi Lonas Cochran, *Affirmative action fight moves to military*

However, as Justice Ketanji Brown Jackson noted in dissent, Roberts provided no explanation as to why racial diversity in higher education "might be needed to prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom."[103] This unaddressed distinction suggests that the majority takes the country's national security more seriously than the attainment of equal opportunity in other areas of social life. The Court's refusal to pursue an equal-opportunity society is contrary to Lincoln who called equal opportunity government's "leading object," *Federalist* No. 10, which Diamond explained presupposed a commitment to equal opportunity, and the Constitution as a whole.

## IV. Conclusion

The Constitution's instrumental logic endows government with the power to achieve a desirable social state of affairs. Put simply, government is responsible for improving people's lives. Economic prosperity and national security are the most evident aspects of the good life that the constitutional text envisions. In addition to these ends, Lincoln believed

*academies*, The Hill, December 17, 2024, https://thehill.com/homenews/education/5042524-affirmative-action-military-schools/.

[103] *Students for Fair Admissions*, 600 U.S. at 411.

that government's "leading object" was to attain an equal-opportunity society, which is synonymous today with a colorblind society. If Publius' theory of popular government in *Federalist* No. 10 is to control the effects of domestic faction today, it too envisions a colorblind society — one in which every person enjoys "an unfettered start and a fair chance in the race of life."[104] The Civil War Amendments confirm this commitment to equal opportunity by giving government the authority to secure full citizenship and equality for all Americans irrespective of race.

Colorblind constitutionalism denies government's affirmative obligation to an equal-opportunity society and thereby misunderstands the normative character of the Constitution as a whole. Its adherents believe that any color-conscious enactments, including those designed to ameliorate entrenched racial disparities within society, are anathema to equal protection. This proposition replaces a colorblind society as a constitutional end with colorblind government. The former imperative, like Publius, Lincoln, and Warren, envisions a government empowered to achieve equal opportunity, while the latter objective seeks to restrain government to protect individuals from government. In *Students for Fair Admissions*, the Court subscribed to colorblind constitutionalism and

[104] Lincoln, *supra* note 27.

outlawed affirmative action in higher education admissions. This decision stripped the authority of decision-makers to enact reasonable policies to achieve equal educational opportunity and create a colorblind society. Since the Constitution commits the country to equal opportunity and because affirmative action is rationally related to that end,[105] the Court erred in *Students for Fair Admissions*.

Despite the Court's current colorblind jurisprudence, there is still the possibility of a revived commitment to equal opportunity. After Roberts exempted the military academies in *Students for Fair Admissions*, the organization Students for Fair Admissions challenged the United States Naval Academy's affirmative action admissions program. A district court upheld the program's constitutionality, and Students for Fair Admissions appealed the decision.[106] However, after that ruling, Defense Secretary Pete Hegseth issued a memo, prohibiting any component of the Department of Defense from establishing "sex-based, race-based, or ethnicity-based goals

[105] *See*, e.g., WILLIAM BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER (Princeton: Princeton University Press, 1998) (The authors found that Black students who benefited from affirmative action were more likely to graduate college, attain professional degrees, and earn higher incomes than Black individuals who were not beneficiaries of affirmative action. Classmates of affirmative action beneficiaries also expressed heightened positive attitudes toward racial minorities and were more likely to be civically engaged after college. As this paper previously explained, given affirmative action is rationally related to equal opportunity as a constitutional end, the Court should have deferred to decision-makers to implement these programs in *Students for Fair Admissions*).

[106] Cochran, *supra* note 102.

for organizational composition, academic admission, or career fields."[107] If the Naval Academy voluntarily ends its affirmative action admissions program, it is possible that the Court will declare the pending case moot and deprive its conservative members the chance to end affirmative action in admissions completely.

If the Constitution envisions colorblind government, and if that government is a democracy, then the Constitution first envisions a colorblind society. This aspiration has been implicit in the logic of the American system since its inception and in the Civil War Amendments. Yet, over a century and a half after the ratification of these amendments, race remains central to individuals' educational, economic, and health outcomes. Human fallibility warps the country's capacity to secure this constitutional commitment. However, equal opportunity's elusiveness is no excuse to abdicate its pursuit. Even after *Students for Fair Admissions*, the Court's resolve to secure this constitutional end has not collapsed entirely. In her *Students for Fair Admissions* dissent, Jackson hoped that the

[107] Memorandum from Pete Hegseth to Senior Pentagon Leadership, Commanders of the Combatant Commands, Defense Agency, and D.O.D. Field Activity Directors on Restoring America's Fighting Force (official memorandum, Washington, D.C.: Department of Defense, 2025), https://media.defense.gov/2025/Jan/29/2003634987/-1/-1/1/RESTORING-AMERICAS-FIGHTING-FORCE.PDF.

country could realize the Equal Protection Clause's full promise, for failure to do so would be "truly a tragedy for us all."[108]

[108] *Students for Fair Admissions*, 600 U.S. at 411.