

ANTI-SUBORDINATION IN THE EQUAL PROTECTION CLAUSE: A CASE STUDY

ABIGAIL NURSE*

In recent years, many scholars have argued that the U.S. Supreme Court has moved away from following an anti-subordination approach to the Equal Protection Clause of the Fourteenth Amendment and toward an anti-classification approach. In turn, advocates have shied away from anti-subordination arguments in the equal protection cases that are brought before the U.S. Supreme Court. Discussing the briefs and oral argument from Fisher v. University of Texas at Austin as an example, this Note argues that underemphasizing anti-subordination principles is detrimental to equal protection doctrine because these arguments help steer the Court in the right direction. When historical context and ongoing inequitable realities are not incorporated into the doctrine, equal protection moves further from its core mission—ensuring equal treatment under the laws. In addition, the gains for people of color and other marginalized communities will be on tenuous ground without full emphasis on inequality. Advocates must use anti-subordination arguments in order to engage the Court and Justices in the slow process of struggling for a more just world.

INTRODUCTION	294
I. BACKGROUND	298
A. <i>Two Approaches to the Equal Protection Clause</i>	298
1. <i>Anti-classification</i>	298
2. <i>Anti-subordination</i>	300
3. <i>A Comparison</i>	304
B. <i>The Doctrine Has Moved Away from Anti-subordination</i>	307
1. <i>Movement in the Supreme Court</i>	308
2. <i>Movement in Lower Courts</i>	312
II. <i>ADVOCACY IN FISHER V. UNIVERSITY OF TEXAS AT AUSTIN</i>	314
A. <i>The Case: Fisher v. University of Texas at Austin</i> ..	315
B. <i>Critiquing the Arguments Used by the University of Texas in Fisher</i>	316
1. <i>Reframing the Stakes in the Case</i>	317
2. <i>Rethinking the Diversity Argument</i>	320

* Copyright © 2014 by Abigail Nurse, J.D., 2013, New York University School of Law; B.A., 2008, University of Michigan. I am grateful to my parents for their encouragement and my sister for her inspiration. In addition, I thank Professors Cooper Davis and Yoshino for their comments and guidance. Finally, I owe many thanks to the the staff of the New York University Law Review for its thoughtful editing and to Anthony, Ashley, Cassandre, Chris, Kevin, Michele, Natasha, and Yan in particular for their support of this project.

- 3. *Rethinking the Beneficiaries of Race-Conscious Admissions* 324
- 4. *Rethinking the Meaning of Isolation at the University* 325
- C. *The Outcome* 327
- III. ANTI-CLASSIFICATION IS NOT ENOUGH 328
 - A. *Anti-subordination and Anti-classification Together* . 329
 - B. *Anti-classification on Its Own* 330
 - C. *Short-term and Long-term Goals* 333
- CONCLUSION 334

INTRODUCTION

The Equal Protection Clause of the Fourteenth Amendment of the Constitution declares that all citizens must be accorded equal protection under the law.¹ At its core, the Clause is meant to ensure that citizens are protected from treatment that would be discriminatory or inequitable. To effectuate this purpose, state action is reviewed in an analysis that applies a greater degree of scrutiny to laws or policies impacting historically marginalized groups. In the context of race, for example, “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”² Courts analyze such laws with the “most rigid scrutiny.”³ To be constitutional under this standard, the policy at issue must be narrowly tailored to serve a compelling governmental interest.⁴

Over time, the Supreme Court has expanded this tiered system of review to encompass laws impacting non-racial social identity groups.⁵

¹ U.S. CONST. amend. XIV, § 1.

² *Korematsu v. United States*, 323 U.S. 214, 216 (1944). The *Korematsu* Court went on to uphold the power of the U.S. military to intern Japanese Americans and limit their movements even though it was not clear that it was a military necessity. Subsequent cases have revealed that this “most rigid scrutiny” has become much more exacting. See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that strict scrutiny, as applied, seems to be only strict in theory and fatal in fact). It was not until *Grutter v. Bollinger* that the Court failed to strike down a law analyzed under a strict scrutiny regime. 539 U.S. 306, 328–35 (2003).

³ *Korematsu*, 323 U.S. at 216. It is also referred to as “strict scrutiny.” Before the *Korematsu* decision in 1944, the Court applied an extremely deferential standard. See *infra* notes 54–57 (discussing *United States v. Carolene Products Co.*).

⁴ *Loving v. Virginia* and *Richmond v. J.A. Croson Company* provide a modern application of heightened, or “strict,” scrutiny. See *Loving v. Virginia*, 388 U.S. 1 (1967) (finding Virginia’s miscegenation laws unconstitutional); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion) (holding a set-aside program that gave preference to minority business enterprises unconstitutional).

⁵ For instance, “intermediate scrutiny” was added to the judiciary’s arsenal, along with strict scrutiny and rational basis review, and applied to classifications based on gender. See,

A complex area of law has emerged wherein, depending on the group being classified and the policy at issue, the state action would be reviewed on a sliding scale of scrutiny. In response to this growing body of law, scholars have developed theories to explain what is driving the Court's jurisprudence. Anti-classification theories argue that, in order to have a world in which discrimination is absent, we should not *classify* people based on race (or any other social identity) and should ignore any classifications completely.⁶ Anti-subordination theories, on the other hand, argue that the Clause should protect against classifications only when they create social hierarchies based on race (or any other social identity).⁷ In addition, advocates⁸ and courts have debated whether the most certain path to racial justice (as well as other types of justice) involves an anti-classification or an anti-subordination approach.

In an age with frequent litigation under the Equal Protection Clause,⁹ advocates and courts must grapple with these theories. Most recently, in *Fisher v. University of Texas at Austin*,¹⁰ advocates for the consideration of race as a method to achieve social justice in the post-secondary school admissions process used a down-the-middle approach that provides a less than vigorous defense of anti-subordination. This Note argues that this kind of retreat from anti-subordination arguments is problematic because anti-subordination arguments help the Court stay true to the purpose of the Equal Protection Clause. Relying on *Fisher* as one example of practitioners shying away from anti-subordination arguments, this Note connects an academic principle (anti-subordination) to a concrete case (*Fisher*) to argue that civil rights advocates must keep anti-subordination arguments central to their briefs and oral arguments. This Note also suggests arguments that could have been made in *Fisher*. Although the

e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976) (requiring state action to be substantially related to an important governmental interest).

⁶ See *infra* Part I.A.1.

⁷ See *infra* Part I.A.2.

⁸ Throughout this Note, I use the term “advocate” to encompass all people who advance and advocate policies that aim to challenge racism and racial hierarchies as well as other social hierarchies. This includes, but is certainly not limited to, the respondents in *Fisher*.

⁹ See, *e.g.*, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (determining that the Defense of Marriage Act violates the Fifth Amendment's guarantee of equal protection under the laws); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (assessing the constitutionality of the University of Texas's race-conscious admissions program); *Coal. to Defend Affirmative Action v. Regents of Univ. of Mich.*, 701 F.3d 466 (6th Cir. 2012), *cert. granted, sub nom. Schuette v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633 (2013) (holding that Michigan violated the Equal Protection Clause when it amended its constitution to prohibit race- and sex-conscious admissions programs).

¹⁰ 133 S. Ct. 2411 (2013).

thrust of this Note relies on *Fisher*, anti-subordination arguments should be used in every case decided under the Equal Protection Clause; *Fisher* is but one example.

Many scholars have suggested frameworks for applying the Equal Protection Clause that would incorporate anti-subordination principles. One such approach would be to bring de facto inequality within the ambit of heightened scrutiny—either by analyzing “explicit race and sex classifications, facially neutral efforts to reduce inequality, and accommodation of sex differences to promote equality” in the same fashion,¹¹ or by “focusing on the disparate life outcomes produced by social identity differences.”¹² A second approach would collapse the tiered system of review into a system that weighs various factors while taking into account subordination.¹³

Other scholars have outlined the theoretical underpinnings to anti-subordination in the context of the Equal Protection Clause. For instance, some theorists discuss the role that social disagreement about race-conscious events, laws, and headline-making measures have in shifting the Court’s application of anti-subordination principles over time.¹⁴

Unlike other literature, this Note will not advance a unified theme of the doctrine, nor seek to create a new approach to it. Instead, it will discuss the use of (or failure to use) the anti-subordination framework by the advocates in *Fisher*. I hope to bring attention to what I consider a worrisome trend among advocates, in which they stray from anti-subordination arguments in equal protection litigation.¹⁵ I argue that this is problematic because it moves fur-

¹¹ Jennifer S. Hendricks, *Contingent Equal Protection: Reaching for Equality After Ricci and Pics*, 16 MICH. J. GENDER & L. 397, 399 (2010) (proposing an equal protection analysis “contingent upon the existence of structural, *de facto* inequality”).

¹² Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1066 (2011) (critiquing the Court’s “over-reliance on ‘purposeful’ conduct and near complete refusal to acknowledge that many forms of discrimination are unconscious” in order to “return to more directly serving the ends of the Reconstruction Amendments”).

¹³ See Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 533 (2004) (weighing the purpose of burdening one group, the relationship between the purpose and the classification, and the potential stereotyping or animus at play).

¹⁴ See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 10 (2003) (asserting that anti-subordination and anti-classification principles overlap, and “that their application shifts over time in response to social contestation and social struggle”).

¹⁵ I call attention to a divide between progressive race scholarship and the advocates litigating these cases. I hope to give a concrete suggestion on how to connect theory with the practice of law. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 827 (1997) (referring to the litigation in *Ho v. San Francisco Unified Sch. Dist.*, 965 F. Supp. 1316 (N.D. Cal.

ther from the core reasons that the Equal Protection Clause exists: protecting people of color, women, and other marginalized groups from discrimination, unequal treatment, and limited access to society's social structures. This Note argues that ignoring anti-subordination principles forces advocates to defend their positions with less effective arguments. Arguments that ignore anti-subordination principles are less effective because, in order to make them, the advocates must hide behind the farce that anti-classification theories are correct. This farce permits advocates to avoid confronting, and thereby challenging, the real harms—oppression and subordination. Finally, this Note contends that, without including the history and context that anti-subordination requires in their arguments, advocates may get a win in one setting¹⁶ that ultimately proves to be shortsighted.¹⁷ Paying heed to the late Derrick Bell, advocates seeking racial justice must continue to discuss hierarchies of power and oppression in litigation and elsewhere.¹⁸ I urge legal practitioners to continue to advance a “true antisubordination agenda” which would “apply reasonable accommodation to all differences . . . that are historically subject to exploitation or oppression”¹⁹ In Part I of this Note, I discuss the foundational support for an anti-subordination approach to equal protection doctrine, as well as an alternative to this approach (anti-classification). I also discuss key equal protection cases in order to give context to the notion that anti-subordination principles are waning in the Court's jurisprudence. In Part II, I examine arguments advanced in *Fisher* in order to analyze advocates' responses to the Court's reluctance to adopt anti-subordination principles. I argue that the advocates missed an opportunity to advance anti-subordination

1997), and suggesting “a disjuncture between progressive race theory and frontline political lawyering practice”).

¹⁶ For example, both *Grutter v. Bollinger* and *Regents of the University of California v. Bakke* narrowly upheld the use of affirmative action in the college-admissions process on a diversity in education rationale. *Grutter v. Bollinger*, 539 U.S. 306, 328–33 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311 (1978) (plurality opinion).

¹⁷ Later, in *Parents Involved*, the Court struck down the use of race as a means of achieving public school integration. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. 1*, 551 U.S. 701, 722–25 (2007). Derrick Bell has also written about this dynamic. See Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 369 (1992) (asserting that abstract principles lead to harmful results); *infra* notes 232–34 and accompanying text (discussing how a reliance on the anti-classification principle makes the struggle for equal rights more challenging).

¹⁸ See *id.* at 378 (asserting that “Racial Realism” requires “a hard-eyed view of racism as it is and our subordinate role in it” and realizing, “as our slave forebears, that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression, even if that oppression is never overcome”).

¹⁹ Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1400 (1991).

principles to their detriment. I provide examples of anti-subordination arguments the advocates could have used in support of their claims. In Part III, I address counterarguments to using anti-subordination principles, given the Court's seeming resistance.

I

BACKGROUND

A. Two Approaches to the Equal Protection Clause

The following Part describes two means of interpreting the Equal Protection Clause: anti-subordination and anti-classification. This Part first describes both interpretive approaches and then provides an overview of the reasons that many scholars believe that anti-subordination is the superior interpretative method.

1. Anti-classification

Anti-classification urges an application of equal protection that focuses on whether a law or policy categorizes individuals based on a social identity group. As the name suggests, the evil that the principle seeks to address is the classification that occurs, like "Black," "white," or "Native."²⁰ Unlike anti-subordination, which focuses on groups, anti-classification "is an individual rights perspective."²¹ This means, in part, that intergroup dynamics are not relevant under this principle.²² Consequently, there is no reason to look at the history or political context of the groups involved.²³ In fact, under the anti-classification approach, one is discouraged from exploring any

²⁰ See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1058 (1986) ("That principle creates the presumption that *all* race- and sex-specific policies are discriminatory, and that *no* race- and sex-neutral policies are discriminatory unless accompanied by race- or sex-specific motivation.").

²¹ *Id.* at 1005; see also *Missouri v. Jenkins*, 515 U.S. 70, 120–21 (1995) (Thomas, J., concurring) ("At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups."); John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 892 (1995) ("[T]he colorblind position assumes that the law does not recognize groups, only individuals.").

²² See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 129 (1976) ("The antidiscrimination principle does not formally acknowledge social groups, such as blacks; nor does it offer any special dispensation for conduct that benefits a disadvantaged group.").

²³ See Colker, *supra* note 20, at 1005 (asserting that anti-classification principles "focus [] on the motivation of the individual institution that has allegedly discriminated, without attention to the larger societal context in which the institution operates"); Powell, *supra* note 21, at 892 ("[T]he colorblind position assumes that race is irrelevant and that law should avoid any recognition of race at all costs.").

institutional and structural barriers that an individual may face.²⁴ This approach is often described as a “colorblind” approach.²⁵ Chief Justice Roberts famously illustrated anti-classification arguments in *Parents Involved*, stating: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”²⁶ Chief Justice Roberts’s opinion suggests that to end discrimination, individuals should stop thinking about,²⁷ or classifying individuals based on, race.²⁸ Under the anti-classification approach, refusing to discuss race (or subordination) will result in a world without discrimination, because subordination and oppression are caused by the minds of “bad people.”²⁹ Anti-classification theories ignore the fact that, as discussed below, individuals are stratified based on social identities, and this stratification occurs not solely because of “bad people.” The strat-

²⁴ See THOMAS SOWELL, *CIVIL RIGHTS: RHETORIC OR REALITY?* 138–40 (1984) (“Commitments to ending institutional racism and to a methodology of adversariness are not only unnecessary but divisive in a society no longer tolerant of intentional racial discrimination by the bad-hearted.”); Powell, *supra* note 21, at 892 (“The apparent goal is to treat everyone equally without reference to context, situation, history or culture.”); Yamamoto, *supra* note 15, at 831 n.40 (citing DINESH D’SOUZA, *THE END OF RACISM* (1995) as an example of neoconservative race scholarship that views the civil rights approach to antidiscrimination as unnecessary and divisive).

²⁵ Several equal protection analyses that have embraced an anti-classification approach have made reference to colorblindness. See, Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 *YALE L.J.* 1278, 1287 (2011) (“[P]roponents of the anticlassification principle associate the rule against classifying by race with a value commonly associated with colorblindness claims.”). Owen Fiss credits Albion W. Tourgee, a lawyer for Homer Plessy in *Plessy v. Ferguson* with this terminology: In his brief, Tourgee wrote that “Justice is pictured blind and her daughter, the Law, ought at least to be color-blind.” Fiss, *supra* note 22, at 119 n.17 (citing Brief of Plaintiff in Error at *19, *Plessy v. Ferguson*, 163 U.S. 537 (1896), 1893 WL 10660). As Fiss notes, Justice Harlan’s dissent in *Plessy* picks up on this language by stating, “Our Constitution is color-blind.” Fiss, *supra* note 22, at 119 (citing *Plessy v. Ferguson*, 163 U.S. at 559 (Harlan, J., dissenting)).

²⁶ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. 1*, 551 U.S. 701, 748 (2007).

²⁷ This implies that it is possible to stop thinking about race. But, as scholars have pointed out, “[o]f course it cannot be that whites do not notice the race of others.” T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 *COLUM. L. REV.* 1060, 1079 (1991). Even to say that one will “not begin her evaluation with any preconceived notions . . . is difficult to believe, given the deep and implicit ways in which our minds are color-coded.” *Id.* Ironically, “[t]o be truly colorblind[,] . . . one must notice race in order to tell oneself not to trigger the usual mental processes that take race into account.” *Id.* (citing David A. Strauss, *The Myth of Colorblindness*, 1986 *SUP. CT. REV.* 99, 114 (1986)).

²⁸ One worry is that thinking about race will “threaten . . . to incite racial hostility.” *Shaw v. Reno*, 509 U.S. 630, 643 (1993); see also Yamamoto, *supra* note 15, at 862 (“[T]he Court’s ostensible quest for harmony has focused on outlawing race consciousness.”).

²⁹ See William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 *U. CHI. L. REV.* 775, 809 (1978) (“Rather, one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race.”).

ification is historical and entrenched in the fabric of the United States as a result of centuries of behavior.³⁰ Therefore, anti-classification can only purport to take a neutral approach to the Equal Protection Clause by ignoring race. It would be impossible to ignore something, like race, that is inherent in institutions based on centuries of inequality. However, anti-classification is held by its proponents to be preferable to other approaches, because it is blind to social identities like race.³¹

2. *Anti-subordination*

The anti-subordination doctrine suggests that heightened scrutiny should be applied when a classification creates hierarchies, rather than solely when legislation classifies a group.³² When scholars discuss anti-subordination principles, three key themes emerge: (1) the existence of a group status that perpetuates subordination, (2) group history that includes discrimination or subordination, and (3) group political powerlessness. The remainder of this Subpart will discuss each of these prongs.

The first prong, the existence of a group status that perpetuates subordination, is central to anti-subordination.³³ This prong is predi-

³⁰ Derrick Bell, *Racism Is Here to Stay: Now What?*, 35 How. L.J. 79, 89 (1991) [hereinafter Bell, *Now What?*] (“[T]his nation’s social stability is built on a belief in and a determination to maintain white dominance, that racism is the manifestation of this deeply entrenched determination . . .”).

³¹ See, e.g., Colker, *supra* note 20, at 1006 (“Anti-differentiation[, or anti-classification,] advocates therefore argue for ‘color-blindness’ or ‘sex-blindness’ in the development and analysis of legislative and institutional policies, and frequently criticize affirmative action as violating that principle.”).

³² Owen Fiss laid the foundational work for the principle in 1976. See *id.* at 1008 n.15 (citing Fiss, *supra* note 22, at 123) (asserting that Fiss was “among the first to articulate the anti-subordination principle within equal protection doctrine”). For a more in-depth discussion of the meaning behind “subordination,” see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370–76 (1988) (discussing the subordination of Black people in the United States).

³³ See DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 167 (1987) (invoking the understanding that “[t]he Court must review with great care laws that burden a racial minority”); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32–45 (1987) (repudiating a model of equality focused on “difference” in favor of one that analyzes “dominance”); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 117 (1979) (arguing that courts should inquire “whether [a] policy or practice . . . integrally contributes to the maintenance of an underclass or a deprived position because of gender status”); Colker, *supra* note 20, at 1008–09 (“First, [anti-subordination] focuses on society’s role in creating subordination.”); Matsuda, *supra* note 19, at 1398 (“The process of unmasking hidden centers and false objectivity is an important first step in producing a counter-ideology of antisubordination, as is acknowledging the psychology of dominance that accompanies subordination.”).

cated on an understanding that socially constructed identity groups, like race, categorize individuals.³⁴ These groups exist on hierarchies whereby some are more valued than others.³⁵ Anti-subordination theories analyze these hierarchies to “ask[] whether certain status hierarchies exist that are so unjust that the Constitution demands their disestablishment.”³⁶ For example, people of African descent in the United States are classified by their racial identity (“Black”) and are disadvantaged by this group status. Anti-subordination principles urge equal protection doctrine to focus on the very groups whose statuses are harmed.³⁷ When a law categorizes people based on race and other social identities, further inquiry into the effect of such classification is essential.³⁸ The relevant inquiry is whether the categorization subordinates individuals in the group.

The second prong, closely linked to the first, is a history that includes discrimination or subordination. One must not only assess the subordination associated with a group’s categorization in current times but also look to the past for a demonstrated history of discrimination against the group.³⁹ For instance, the current status of Black people in the United States is relevant, as is that the group has “occu-

³⁴ See Fiss, *supra* note 22, at 148 (asserting that, as a socially constructed group, “[t]here are natural classes, or social groups, in American society and blacks are such a group,” which means that Black people “are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, institutional and personal, is based on these perspectives”). See generally PETER L. BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 51–55, 59–61 (1966) (defining “social construct”).

³⁵ See, e.g., Balkin & Siegel, *supra* note 14, at 31 (“[An anti-subordination approach] is about the struggle against subordination in societies with entrenched social hierarchies.”).

³⁶ J.M. Balkin, *The Constitution of Status*, 106 *YALE L.J.* 2313, 2358 (1997); see also Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 *COLUM. L. REV.* 928, 951 (2001) (arguing for a consideration of “the constitutional and moral command of equal protection as one requiring the elimination of society’s racism rather than mandating equal treatment as an individual right”); Fiss, *supra* note 22, at 157 (“The concern should be with those laws or practices that particularly hurt a disadvantaged group.”).

³⁷ See *id.* at 157 (“What is needed in order to bring a state practice within the equal protection ban is a theory of status-harm, one that shows how the challenged practice has this effect on the status of the group.”).

³⁸ See *id.* at 153 (emphasizing that “the need for this rectification does not turn on whether the law embodies a classification, racial or otherwise; it is sufficient if the state law simply has the effect of hurting blacks”).

³⁹ See, e.g., Balkin, *supra* note 36, at 2366 (“The question to ask is not whether a trait is immutable, but whether there has been a history of using the trait to create a system of social meanings, or define a social hierarchy, that helps dominate and oppress people.”); Colker, *supra* note 20, at 1009 (“[I]t focuses on the way in which this subordination affects, or has affected, groups of people.”); Matsuda, *supra* note 19, at 1400 (discussing the importance of history in analyzing oppression).

pied the lowest rung for several centuries.”⁴⁰ Under anti-subordination, a group’s status as the “perpetual underclass” makes it necessary for the Court to step in and to protect it under the Equal Protection Clause.⁴¹ An analysis consistent with anti-subordination will focus “heavily on factual and historical contexts, and in particular, on the laws and social mores that prevail in a given society at a given moment in history.”⁴²

The seminal equal protection case, *Korematsu v. United States*,⁴³ provides a useful illustration of how the Supreme Court has considered both a classification that perpetuates subordination and a history of discrimination in its equal protection doctrine.⁴⁴ The *Korematsu* Court upheld the power of Congress, at behest of the U.S. military, to exclude certain individuals from being in certain areas, severely limiting the locations where Japanese Americans could reside.⁴⁵ The Court emphasized that a suspect classification was not per se unconstitutional. Instead, a suspect classification depended on whether the law “curtail[ed] the civil rights” of the group.⁴⁶ In dissent,⁴⁷ Justice Murphy emphasized that the classification was unconstitutional

⁴⁰ Fiss, *supra* note 22, at 150; *see also id.* (“[B]lack people are very badly off, probably our worst-off class (in terms of material well-being second only to the American Indians).”).

⁴¹ *See id.* (“It is both . . . the relative position of the group and the duration of the position [] that make efforts to improve the status of the group defensible.”).

⁴² Balkin & Siegel, *supra* note 14, at 15; *see also* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1520 (2d ed. 1988) (arguing that facially neutral state action be analyzed in accordance with an anti-subordination principle, such that “strict . . . scrutiny would be reserved for those government acts that, given their history, context, source, and effect, seem most likely not only to perpetuate subordination but also to reflect a tradition of hostility toward a historically subjugated group, or a pattern of blindness or indifference to [that group’s] interests”).

⁴³ 323 U.S. 214 (1944).

⁴⁴ As discussed above, in *Korematsu*, the Supreme Court pronounced heightened scrutiny for the first time. *See supra* notes 2–3 (discussing the level of scrutiny applied in *Korematsu*).

⁴⁵ 323 U.S. at 214–15.

⁴⁶ *Id.* at 216. Despite its abstract defense of people of color, the *Korematsu* Court still condoned the internment of Japanese Americans. Although *Korematsu*’s outcome is generally understood as problematic (in *Adarand*, Justice Ginsburg stated that “[a] *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited” (*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting))), it is still good law.

⁴⁷ Writing in dissent, Justice Murphy agreed that the government’s policy of placing Japanese Americans in internment camps should be subject to the most rigid scrutiny, but concluded that, under heightened scrutiny, the policy was unconstitutional. *Korematsu*, 323 U.S. at 242 (Murphy, J., dissenting). Because *Korematsu*’s outcome is disfavored, Justice Murphy’s dissent may provide better guidance for when to apply heightened scrutiny to a group. *See* Bruce Ackerman, *The Emergency Constitution*, 113 *YALE L.J.* 1029, 1043 (2004) (stating that *Korematsu* “is bad law, very bad law, very, very bad law”).

because it resulted from “racial and economic prejudices” that existed “for years.”⁴⁸

Finally, the third prong of the anti-subordination principle is a group’s political powerlessness.⁴⁹ This prong refers to the sheer size of the group as compared to other groups, as well as the group’s “political status.”⁵⁰ One interpretation of political status is whether the group is being used as a scapegoat in the political sphere.⁵¹ The group may be “the object of ‘prejudice’—that is, the subject of fear, hatred, and distaste that make it particularly difficult for them to form coalitions with others . . . and that make it advantageous for the dominant political parties to hurt them, or use them as a scapegoat.”⁵² It is also linked to socioeconomic status, which makes the group disadvantaged when lobbying the legislature for protection.⁵³

Footnote four in *United States v. Carolene Products* provides the doctrinal foundation for the protection of politically powerless groups.⁵⁴ The Court suggested that laws that limit the rights of individuals based on their classification in different social identity groups (as opposed to only classifying without limiting rights) should be analyzed more closely than laws that do not.⁵⁵ The Court explicitly noted that it was worried about “prejudice against discrete and insular minorities” out of concern that this may “seriously . . . curtail the operation of . . .

⁴⁸ *Korematsu*, 323 U.S. at 239 (Murphy, J., dissenting) (emphasis added).

⁴⁹ Owen Fiss highlighted three elements for protection under the Equal Protection Clause: “(a) they are a social group; (b) the group has been in a position of perpetual subordination; and (c) the political power of the group is severely circumscribed.” Fiss, *supra* note 22, at 154–55.

⁵⁰ *See id.* at 153 (“[D]espite recent demographic shifts in several large cities, I think it appropriate to view blacks as a group that is relatively powerless in the political arena and in my judgment that political status of the group justifies a special judicial solicitude on their behalf.”).

⁵¹ *See id.* at 152 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)) (“One source of weakness is . . . the fact that they are a numerical minority; the second is their economic status, their position as the perpetual underclass; and the third is that, as a ‘discrete and insular’ minority, they are the object of ‘prejudice’ . . .”).

⁵² *Id.*; *see also* Bell, *supra* note 17, at 377 (“The practice of using blacks as scapegoats for failed economic or political policies works every time.”).

⁵³ *See* Fiss, *supra* note 22, at 151–52 (“It is not just the socioeconomic status of blacks as a group that explains their special position in equal protection theory. It is also their political status. The power of blacks in the political arena is severely limited [as a result of disenfranchisement, less electoral strength, and other structural limitations].”).

⁵⁴ 304 U.S. at 152 n.4.

⁵⁵ *See id.* (reserving the use of a different standard of review for “statutes directed at particular religious, or national, or racial minorities” even as it applied an extremely deferential standard of review to milk regulation).

political processes.”⁵⁶ As a result, courts have come to review these laws differently, in a more “searching” manner.⁵⁷

3. *A Comparison*

Many scholars strongly believe that anti-subordination is a more accurate and preferable method of interpreting the Equal Protection Clause because of its emphasis on history and context.⁵⁸ Engaging with historical context is important because history informs the present. It does this by “fram[ing] matters in such a way as to expose the real issues and thus be more likely to lead to the correct decision”⁵⁹ This situation occurs because social identities, like race, are in part defined by their histories—we must engage the past in order to address the conflicts in the present.⁶⁰ Anti-subordination principles allow equal protection jurisprudence to maintain its mission of equal treatment under the laws by incorporating the inequitable realities that exist in our society.⁶¹ Anti-classification fails to acknowledge the role that historical institutional and structural barriers play.⁶² As a result, that approach fails to acknowledge any difference in the discrimination felt by white people as compared with discrimination felt by people of color.⁶³

Furthermore, an anti-subordination approach to the Equal Protection Clause acknowledges that individuals are grouped by hierarchical⁶⁴ social categories (like race) that continue to have an impact

⁵⁶ *Id.*

⁵⁷ *See, e.g.,* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 471 (1985) (applying a “more searching judicial inquiry” to a group that is politically powerless) (quoting *Carolene Products Co.*, 304 U.S. at 153 n.4); *see also* Balkin & Siegel, *supra* note 14, at 18 (citing *Carolene Products Co.*, 304 U.S. at 152 n.4) (noting the Court’s suggestion that heightened scrutiny “applied to laws burdening discrete and insular minorities”); Colker, *supra* note 20, at 1007 (defining anti-subordination to include a “lack of power in society as a whole”).

⁵⁸ *See, e.g.,* Balkin, *supra* note 36, at 2366 (discussing the importance of history in analyzing oppression); Matsuda, *supra* note 19, at 1400 (same).

⁵⁹ Fiss, *supra* note 22, at 171; *see also id.* (claiming that the correct decision is one that “invalidat[es] . . . those state practices that aggravate the subordinate position of the specially disadvantaged groups”).

⁶⁰ *See infra* notes 70–73 and accompanying text (discussing the shortcomings of a “neutral” approach).

⁶¹ *See infra* notes 64–69 and accompanying text (discussing social hierarchies).

⁶² *Id.*

⁶³ “The [anti-classification] principle . . . does a disservice to [the] history and fundamental aspiration [of the Equal Protection Clause] by asserting that discrimination against whites is as problematic as discrimination against blacks.” Colker, *supra* note 20, at 1012.

⁶⁴ *See* Fiss, *supra* note 22, at 148 (“There are natural classes, or social groups, in American society and blacks are such a group.”).

on the lives of individuals in those groups.⁶⁵ As a result, anti-subordination is more appropriate because it takes into account an individual's group identity.⁶⁶ If it were the case that the Equal Protection Clause was intended to protect individuals, without attention to the groups they are in, then perhaps anti-classification would be appropriate. However, the precise purpose of the Equal Protection Clause is to protect not merely individuals, but individuals *who are also in social identity groups*.⁶⁷ As discussed above, the Court is attentive to the prejudices against *groups* of people—including people of color and religious minorities—in *Carolene Products* and *Korematsu*.⁶⁸ Consequently, interpretations of the Equal Protection Clause should be attentive to the groups of which the individuals are a part.⁶⁹

The biggest failure of the anti-classification approach is its efforts to ignore race and be “colorblind,” or “neutral.” The problem with purported neutrality is that the world is not neutral: Hierarchies continue to shape everyone's existence, regardless of whether they are acknowledged or not.⁷⁰ Therefore, an approach that attempts to impose neutrality will maintain the problematic power structures that are currently in place—the status quo will go uninterrupted.⁷¹ Instead,

⁶⁵ See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (“[R]ace unfortunately still matters.”); see also Powell, *supra* note 21, at 899 (“Race remains important despite the fact that it is to a great degree a social construction.”).

⁶⁶ For further discussion of group identity and social stratification on account of race, see *supra* notes 33–40.

⁶⁷ In *Korematsu*, the foundational case for heightened scrutiny under the Equal Protection Clause, the Court asserted that groups are relevant to the application of the Equal Protection Clause. See *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial *group* are immediately suspect.” (emphasis added)). But see *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (“The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.”).

⁶⁸ For a discussion of this protection of individuals in social identity groups, see *supra* notes 43–46, 54–57.

⁶⁹ This reality, that individuals are also stratified based on group membership, may be why, as an approach to a constitutional doctrine, anti-subordination better explains outcomes in the law. See Colker, *supra* note 20, at 1011–12 (focusing on the text and history of the Constitution to argue that anti-subordination provides the best guidance and explanation for the equal protection doctrine, primarily in race and gender cases); see also Powell, *supra* note 21, at 906 (“Any serious effort to address racial problems requires the recognition of both race and racial subordination, something that the modern colorblind doctrine fails to do, because it lacks an analysis of subordination.”).

⁷⁰ See *supra* notes 33–38 (discussing hierarchies); see also Fiss, *supra* note 22, at 148–49 (discussing social inequality tied to group identity and membership).

⁷¹ See, e.g., Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind,”* 44 STAN. L. REV. 1, 2–3 (1991) (“A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans.”); Powell, *supra* note 21, at 893 n.18 (“Colorblindness is based on both a

courts implementing the Equal Protection Clause should seek to improve the status of marginalized groups. To do this, given that each group comes from a different place in the hierarchy, classifications must not all be treated the same.⁷² Treating everyone alike perpetuates existing institutional barriers.⁷³

An anti-subordination approach to the equal protection doctrine is a flexible solution to make laws more equitable.⁷⁴ As discussed above, an anti-subordination approach provides a searching inquiry into the effects and context of a particular law. This is important because discrimination and racism change form over time.⁷⁵ Anti-subordination provides better guidance when discrimination and racism are unconscious⁷⁶ or when a law is “benign.”⁷⁷ Anti-subordination accomplishes this by allowing for a nuanced analysis so that one can determine when something may be “unfair” (for example, a white

false neutrality and a false symmetry that simultaneously hides and supports racial domination.”).

⁷² See Powell, *supra* note 21, at 895 (“In fact, if eradicating racism is the goal of the civil rights movement, a colorblind approach to ending discrimination, as well as any ostensibly neutral solution to racial injustice, is a substantial impediment to achieving substantive racial justice.”).

⁷³ See, e.g., Bell, *supra* note 17, at 373 (concluding that “equality” as an “abstract legal right” is not a useful concept for achieving racial justice). “The promise of value neutrality is only an illusion.” Fiss, *supra* note 22, at 120–21 (stating that, while anti-classification may be attractive because of its seeming neutrality, this is a false hope).

⁷⁴ See Colker, *supra* note 20, at 1013 (“It is simply a more flexible doctrine that permits the courts or employers to use race- or sex-specific remedies in some situations that call out for redress of prior discrimination.”); cf. Goldberg, *supra* note 13, at 487–88 (“[T]he Court’s categorical use of rigorous review for all suspect classifications, regardless of context, functions today as a barrier to programs designed to redress race discrimination.” (citations omitted)).

⁷⁵ See, e.g., Barnes & Chemerinsky, *supra* note 12, at 1066 (“[T]he ills of societal subordinating enterprises . . . manifest themselves in new and myriad ways.”); Fiss, *supra* note 22, at 170–72 (discussing “first-order,” “second-order,” and “third-order” discrimination where the form of racism becomes more obscure in increasing order); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987) (“In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.”); Yamamoto, *supra* note 15, at 848 (arguing that because “color and culture are inextricably intertwined,” discrimination against traditionally marginalized communities can be legitimated when “cultural difference[s] are used effectively by some in dominant power positions to justify excluding racialized groups from the polity”).

⁷⁶ See Gotanda, *supra* note 71, at 54 (“Color-blindness strikes down Jim Crow segregation, but offers no vision for attacking less overt forms of racial subordination.” (citations omitted)).

⁷⁷ In situations of “benign” racism, it may be hard to assess whether there is a negative implication of the law. Owen Fiss, a scholar in the anti-subordination tradition, suggests that rational basis is a more appropriate standard for policies that benefit a specially disadvantaged group. Fiss, *supra* note 22, at 161. This exemplifies how the theory of anti-subordination can afford greater flexibility in applying—and in fulfilling the purpose of—the Equal Protection Clause.

woman not getting into her university of choice)⁷⁸ or “group disadvantaging” (for example, standardized tests having implicit biases that disadvantage people of color and low-income people)^{79,80} Something that is “unfair” may not need the protection of the Equal Protection Clause in the same way as something that is “group disadvantaging.” That means, though, that not all harms will be remedied.

B. *The Doctrine Has Moved Away from Anti-subordination*

Even though anti-subordination principles are a more effective mode of interpreting the Equal Protection Clause, the Supreme Court has not consistently applied them.⁸¹ This Section outlines the recent movement away from anti-subordination principles. The movement in the Supreme Court does not seem to be consistent; it is as if the Court is engaged in a process of taking one step toward anti-subordination principles, and two steps away from them (and toward anti-classification principles).⁸² Many opinions from lower courts, however, demonstrate a reliance on anti-subordination arguments.⁸³ The goal of this Section is to sketch the doctrinal landscape that the advocates in *Fisher* faced.⁸⁴

⁷⁸ See *infra* note 129 and accompanying text for a discussion of Abigail Fisher, a white woman who was not accepted for admission into the University of Texas.

⁷⁹ See, e.g., Harold Berlak, *Race and the Achievement Gap*, in *RETHINKING MULTICULTURAL EDUCATION: TEACHING FOR RACIAL AND CULTURAL JUSTICE* 63, 71 (Wayne Au ed., 2009) (“Standardized tests are a particularly invidious form of institutional racism.”).

⁸⁰ See Fiss, *supra* note 22, at 160 (“As a protection for specially disadvantaged groups, the Equal Protection Clause should be viewed as a prohibition against group-disadvantaging practices, not unfair treatment.”).

⁸¹ See, e.g., Powell, *supra* note 21, at 893 (“This colorblind, race-neutral position currently occupies center stage in the American debate on race, both in politics and in the law.”). Many scholars have asserted that equal protection jurisprudence cannot easily be pegged as supporting one consistent approach; instead, many scholars identify a “debate” or “struggle[]” between anti-classification and anti-subordination. See Colker, *supra* note 20, at 1010 (“The courts have struggled with the choice between the anti-differentiation and anti-subordination perspectives.”); Siegel, *supra* note 25, at 1287 (“In constitutional law, this long-running debate has, since the 1970s, been described as a debate between the anticlassification principle and the antistubordination principle.”).

⁸² See Jack M. Balkin, Plessy, Brown, and Grutter: *A Play in Three Acts*, 26 *CARDOZO L. REV.* 1689, 1692, 1728 (2005) (discussing how equal protection doctrine reveals “new guarantees of equality” which may be consistent with anti-subordination, while simultaneously “preserving newly developed forms of economic and social inequality”).

⁸³ See *infra* notes 113–14 and accompanying text for a discussion of Mary Kathryn Nagle’s empirical findings of lower courts’ applications of the rule in *Parents Involved*.

⁸⁴ However, I will ultimately argue that advocates must look to more than just precedent. If advocates rely only on existing precedent, they will miss opportunities to advance the law. This is true even when an advocate is defending that precedent, as the *Fisher* advocates needed to defend *Grutter*. They should instead urge the Court to advance the

1. *Movement in the Supreme Court*

The Supreme Court has failed to consistently embrace either anti-classification or anti-subordination to interpret the Equal Protection Clause. This Sub-part will discuss how the Supreme Court's jurisprudence has both embraced and neglected anti-subordination analysis.

In *Brown v. Board of Education*,⁸⁵ the Supreme Court unanimously held that “[t]o separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁸⁶ While this may sound like a conclusion that relies solely on the anti-classification doctrine, the Court unequivocally stated “[w]e must look instead to the effect of segregation itself on public education.”⁸⁷ Moreover, the *Brown* Court made clear that its holding depended on the results of making racial classifications, and referenced the history of discrimination demonstrated through recent litigation on segregation.⁸⁸

In *Loving v. Virginia*,⁸⁹ the Supreme Court expressly used an anti-subordination approach to support its use of heightened scrutiny to hold Virginia's miscegenation law, which the Supreme Court of Virginia claimed prevented “the corruption of blood” or “a mongrel breed of citizens,” unconstitutional under the Equal Protection Clause.⁹⁰ The Court reached this conclusion even as it acknowledged the “repugnan[ce]” of racial classifications, which may suggest an anti-classification approach.⁹¹ The Court applied heightened scrutiny not

law, not just abide by past precedent. See *infra* notes 221–34 for a discussion of Derrick Bell's analysis of this dynamic at play in *Grutter*.

⁸⁵ 347 U.S. 483 (1954).

⁸⁶ *Id.* at 494.

⁸⁷ *Id.* at 492 (emphasis added).

⁸⁸ See *id.* at 491–93 (requiring an equal protection inquiry to consider “the effect of segregation itself []” and the relevant state action “in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws”); see also *id.* at 491–92 (“In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications.”) (citing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950)).

⁸⁹ 388 U.S. 1 (1967).

⁹⁰ See *id.* at 7 (discussing the reason the lower court upheld the law prohibiting white people from marrying non-white people) (citing *Naim v. Naim*, 87 S. E. 2d 749, 756 (Va. 1955)).

⁹¹ *Id.* at 11 n.11 (finding “the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the ‘integrity’ of all races”). Note how similar the arguments are between protecting the “integrity” of the races and arguments made in the context of sexual orientation discussing

because there had been a classification based on a suspect class, but because that classification perpetuated subordination. The Court stated the connection to anti-subordination: “There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification. That Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.”⁹² *Loving’s* ruling relied on the underlying existence of white supremacy to rule the Virginia miscegenation statutes unconstitutional.

Unfortunately, in the context of race-conscious admissions, the Court took a major step back in *Regents of the University of California v. Bakke*.⁹³ Indeed, many scholars point to this opinion as the death knell for the anti-subordination principle, or at least its submission to anti-classification principles. In *Bakke*, the Court excluded the race of the individual from the very beginning of its analysis, stating that “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.”⁹⁴ In doing so, the Court retreated from anti-subordination. Justice Powell acknowledged that factors contributing to a group’s discreteness or insularity may be relevant for determining whether that class should be considered suspect. Nonetheless, he unequivocally asserted that once strict scrutiny attaches to a suspect classification (like race), the Court must undertake a “stringent examination without regard to [discreteness or insularity].”⁹⁵ This means that there would be no nuanced inquiry into the effect of the law—whether the law’s effect is benign or a result of unconscious racism.⁹⁶ Instead, all classifications would be treated the same solely because they are classifications. Justice Powell failed to recognize the

the “integrity” and “sanctity” of marriage. *E.g.* Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. GENDER RACE & JUST. 105, 117–19 (2009); Rebecca Schatschneider, Comment, *On Shifting Sand: The Perils of Grounding the Case for Same-Sex Marriage in the Context of Antimiscegenation*, 14 TEMP. POL. & CIV. RTS. L. REV. 285, 297–302 (2004); James Trosino, Note, *American Wedding: Same-Sex Marriage and the Miscegenation Analogy*, 73 B.U. L. REV. 93, 108–10 (1993).

⁹² *Id.* at 11.

⁹³ 438 U.S. 265 (1978). In *Bakke* the medical school at the University of California, Davis sought to ensure a diverse incoming class through the use of quotas. *See id.* at 273–76 (explaining the admissions process at the medical school). A majority of the Court found those quotas to be unconstitutional. *Id.* at 319–20.

⁹⁴ *Id.* at 289–90 (Powell, J., concurring).

⁹⁵ *Id.* at 290 (Powell, J., concurring).

⁹⁶ *See supra* notes 77, 80 (discussing how an anti-subordination approach would account for these nuances).

continuing struggle with race that persists even in the face of some victories, a struggle that the petitioners highlighted in their brief.⁹⁷ As a result, dramatic, albeit crude, race-conscious admissions like a quota system were still necessary for universities like the University of California, Davis.

Grutter v. Bollinger,⁹⁸ which upheld a university's ability to consider classifications based on race in its admissions program, was a step toward anti-subordination.⁹⁹ Writing for the majority, Justice O'Connor observed that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."¹⁰⁰ But that "dream" is not a reality. This unequal status—a result of historical discrimination and the political powerlessness of people of African descent—provides a basis for taking affirmative steps to remedy this issue.¹⁰¹ Justice O'Connor connected the barriers to "our Nation's struggle with racial inequality,"¹⁰² and acknowledged that "race unfortunately still matters."¹⁰³ In determining whether "diversity" was a legitimate interest, Justice O'Connor stepped back to recognize the long-term struggle that the nation has had with race relations, and how this challenge continues to impact the positions of individuals as they apply to college. Justice O'Connor did not purport to take a

⁹⁷ See Brief of Petitioner-Appellant at 8–11, *Regents of the Univ. of Cal. v. Bakke*, No. 76-811 (June 7, 1977) (discussing both recent desegregation successes and the persistence of discrimination in education). The petitioners devoted substantial time to the necessity of their quota system in the admissions program, as well as to the specific educational inequality post-*Brown* that supported this admissions program—stemming from the lack of non-white people in medical schools and the lack of doctors in non-white communities. *Id.* at 17–28.

⁹⁸ 539 U.S. 306 (2003).

⁹⁹ However, even in reaching this conclusion, the Court relied heavily on the benefits of diversity rather than on the history of discrimination and political powerlessness of people of color. See *id.* at 327–33 (discussing the educational benefits of diversity, including "promot[ing] 'cross-racial understanding'" (citations omitted)).

¹⁰⁰ *Id.* at 332.

¹⁰¹ However, in *Adarand*, Justice O'Connor seemed to hold that the Fourteenth Amendment should be based on the anti-classification doctrine, not an anti-subordination one. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228–29 (1995) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.") (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting)); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 516–17 (1989) (Stevens, J., concurring in part and concurring in judgment) ("Although [the statute at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it actually imposes a greater stigma on its supposed beneficiaries.").

¹⁰² *Grutter*, 539 U.S. at 338 (citation omitted).

¹⁰³ *Id.* at 333.

“neutral” approach that ignores our nation’s history of racism.¹⁰⁴ Nor did she just stop the inquiry at the moment that a classification was made in the admissions program. Thus, Justice O’Connor’s opinion reveals how nuanced analysis of the policy at issue is necessary to anti-subordination.

Yet the Supreme Court dealt a significant blow to civil rights law in the plurality opinion in *Parents Involved in Community Schools v. Seattle School District 1*.¹⁰⁵ Chief Justice Roberts asserted a strong anti-classification rationale for equal protection review.¹⁰⁶ Although *Bakke* asserted that diversity was a compelling governmental interest,¹⁰⁷ a point later confirmed by *Grutter*,¹⁰⁸ Chief Justice Roberts asserted that “[t]o the extent the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally [against] . . . that end.”¹⁰⁹ Chief Justice Roberts’s strong stance against any classifications based on race failed to consider the context and history surrounding the opinion and result in *Brown*.¹¹⁰ If he had, it would have pointed to clear racial inequalities that necessitated measures by schools like the one taken by the respondents in *Parents Involved*. Instead, Chief

¹⁰⁴ See *id.* at 339 (“Petitioner and the United States argue that the Law School’s plan is not narrowly tailored because race-neutral means exist to obtain the educational benefits of student body diversity that the Law School seeks. We disagree.”).

¹⁰⁵ See 551 U.S. 701, 748 (2007) (Roberts, C.J.) (plurality opinion) (refusing to view the diversity rationale as a compelling interest in the primary school setting and arguing that “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race”).

¹⁰⁶ See, e.g., Joel K. Goldstein, *Not Hearing History: A Critique of Chief Justice Roberts’s Reinterpretation of Brown*, 69 OHIO STATE L.J. 791, 798 (2008) (“[P]rior to *Parents Involved* there were relatively few occasions when members of the Court clearly associated *Brown* with an anticlassification view in cases in which racial classifications were used to benefit racial minorities or to foster integration.”). But see generally Mary Kathryn Nagle, *Parents Involved and the Myth of the Colorblind Constitution*, 26 HARV. J. ON RACIAL & ETHNIC JUST. 211 (2010) (discussing how numerous lower courts have not applied Chief Justice Roberts’s strict colorblind approach).

¹⁰⁷ In *Bakke*, the Supreme Court held that a quota system was an unconstitutional means of using race. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (Powell, J., concurring). Yet, the Court maintained that “the interest of [racial] diversity is compelling in the context of a university’s admissions program.” *Id.* at 314.

¹⁰⁸ See *supra* notes 98–104 and accompanying text (discussing *Grutter v. Bollinger*).

¹⁰⁹ *Parents Involved*, 551 U.S. at 733; see also *id.* at 745–48 (taking a strong stance against any type of racial classifications and failing to distinguish between classifications that prohibit historically marginalized groups from gaining access to institutions or contracts and classifications that increase opportunities for historically marginalized groups).

¹¹⁰ See *id.* at 799 (Stevens, J., dissenting) (“The Chief fails to note that it was only black schoolchildren who were so ordered; indeed, the history books do not tell stories of white children struggling to attend black schools. In this and other ways, the Chief Justice rewrites the history of one of this Court’s most important decisions.”)

Justice Roberts minimized the potential gains in the schools' assignment processes. He shortsightedly neglected to confront the benefits of more fully integrating the school systems.¹¹¹ In measuring whether there is a compelling justification for classification, he overvalued the harm in the classification. A more nuanced anti-subordination inquiry would have revealed that the schools' classifications were not perpetuating racism. The people burdened by the school assignment processes were not historically marginalized groups.¹¹² By stopping short of these issues, a plurality of the Court shifted toward colorblindness and away from anti-subordination theories.

2. *Movement in Lower Courts*

Unlike the Supreme Court, opinions coming from lower courts support anti-subordination more clearly, even after *Parents Involved*. One scholar has argued that “[t]wo years after the Supreme Court’s decision in *Parents Involved* . . . , it is clear that our Constitution is anything *but* colorblind.”¹¹³ Indeed, many lower courts have chosen not to apply the strict colorblind approach of the Chief Justice Roberts plurality. Instead, these courts have relied heavily on Justice Kennedy’s concurrence.¹¹⁴ Justice Kennedy’s concurrence asserted that the plurality’s colorblind approach was “profoundly mistaken” insofar as it concludes that the Constitution requires acceptance of “the status quo of racial isolation in schools.”¹¹⁵ Moreover, Justice Kennedy sought to keep open the possibility that schools could con-

¹¹¹ See Marissa Jackson, *Neo-Colonialism, Same Old Racism: A Critical Analysis of the United States’ Shift Toward Colorblindness as a Tool for the Protection of the American Colonial Empire and White Supremacy*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 156, 186 (2009) (“The Court’s plurality decision in *Community Schools* was a nod to the preservation of oppressive, liberal societal status quos—in this case, de facto school segregation.”).

¹¹² Seattle and Louisville are two districts that have developed plans, “often with race-conscious elements, all for the sake of eradicating earlier school segregation, bringing about integration, or preventing retrogression.” *Parents Involved*, 551 U.S. at 806 (Breyer, J., dissenting). Each district’s history includes attempts to reduce the segregation in its schools. See *id.* at 806–19 (discussing the history of each district).

¹¹³ Nagle, *supra* note 106, at 212.

¹¹⁴ *Id.* at 214 (citing *Anderson v. Sch. Bd. of Madison Cnty.*, 517 F.3d 292, 306 (5th Cir. 2008) (Stewart, J., concurring) (relying on Justice Kennedy’s concurrence); *United States v. Alamance-Burlington Bd. of Educ.*, 640 F. Supp. 2d 670, 684 (M.D.N.C. 2009) (same); *D.S. ex rel. S.S. v. N.Y. City Dep’t of Educ.*, 255 F.R.D. 59, 63 (E.D.N.Y. 2008) (same); *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 957 (E.D. Mich. 2008) (same); *Hart v. Cmty. Sch. Bd. of Brooklyn*, 536 F. Supp. 2d 274, 283 (E.D.N.Y. 2008) (explicitly declining to rely on Chief Justice Roberts’s plurality opinion, and instead relying on Justice Kennedy’s concurrence)).

¹¹⁵ *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring).

sider race in an effort to increase integration.¹¹⁶ While Justice Kennedy does not want race to become a “chit valued and traded,”¹¹⁷ he also wants schools to find creative ways to “bring[] together students” from different racial and class backgrounds.¹¹⁸ In this way, it is possible to consider race, as long as it is accompanied by nuanced analysis. It is because of this nuanced approach that it is permissible to discuss classifications that perpetuate subordination and classifications that do not. It also allows for a more thoughtful conversation about race because advocates, when defending race in an admissions program like this, can (and should) discuss why race is more than a “chit.” They can talk about how race is a social identity that is constructed and then can be used to place people of color in positions of subordination. From that point, advocates can discuss how race-conscious admissions programs can challenge hierarchies—even at the primary education level.

Lower courts have also cabined Chief Justice Roberts’s opinion in *Parents Involved* by distinguishing cases based on the facts.¹¹⁹ For instance, the Eastern District of New York relied on Justice Kennedy’s *Parents Involved* concurrence and on *Brown* to discuss the nation’s obligation to provide integrated public schools in order to create equal opportunities for success.¹²⁰ The court recognized that addressing both de facto and de jure segregation is necessary in order to “eliminat[e] educational inequality” and to “assist in correct[ing]] discriminatory systems and practices.”¹²¹

¹¹⁶ See *id.* at 798 (asserting that it is still “important work” to racially integrate schools because, “[d]ue to a variety of factors—some influenced by government, some not—neighborhoods in our communities do not reflect the diversity of our Nation as a whole”).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *Native Am. Arts, Inc. v. Mangalick Enters., Inc.*, 633 F. Supp. 2d 591, 594 (N.D. Ill. 2009) (citing *Parents Involved*, 551 U.S. at 732 (Roberts, C.J.) (plurality opinion)) (distinguishing *Parents Involved*’s holding as being based on “substance, not semantics”); *Am. Civil Rights Found. v. L.A. Unified Sch. Dist.*, 169 Cal. App. 4th 436, 451 (Cal. Ct. App. 2008) (distinguishing *Parents Involved*’s holding because the school at issue both had a history of de jure segregation and had not reached unitary status, unlike the school districts in *Parents Involved*).

¹²⁰ *D.S. ex rel. S.S. v. N.Y. City Dep’t of Educ.*, 255 F.R.D. 59, 63–64 (E.D.N.Y. 2008) (citing *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

¹²¹ See *id.* at 65 (relying on Justice Kennedy’s opinion as the post-*Parents Involved* doctrinal framework); cf. Nagle, *supra* note 106, at 223 (“*Parents Involved* applied the color-blind *de jure/de facto* distinction to conclude that a school district suffering *de facto* segregation is constitutionally *prohibited* from using race to desegregate its schools . . .”).

In another case, a North Carolina court assessed whether a school district could dissolve a court order to desegregate.¹²² The court relied on Justice Kennedy's concurrence in *Parents Involved* to highlight the importance of diversity as a compelling governmental interest.¹²³ Consistent with anti-subordination, the court allowed the possibility of acknowledging and relying on race in order to maintain integrated schools, instead of ignoring it.¹²⁴ The court was also in line with anti-subordination because it recognized that segregation still needed to be addressed—regardless of whether it is de jure or de facto. Here, the court relied on Justice Kennedy's interpretation that “the Constitution does not require school districts to ‘ignore the problem of de facto resegregation in schooling’ and does not mandate that ‘state and local school authorities must accept the status quo of racial isolation in schools.’”¹²⁵ Anti-classification, which finds the classification to be the ill, would only find de jure segregation unconstitutional because de facto segregation occurs without classifications being made.¹²⁶ Anti-subordination analyses are nuanced in a way that accounts for subordination—regardless of whether it is de jure or de facto.

II

ADVOCACY IN *FISHER V. UNIVERSITY OF TEXAS* AT AUSTIN

This section will analyze the arguments used by the advocates defending race-conscious admissions in *Fisher v. University of Texas at Austin*¹²⁷ to demonstrate how advocates in the twenty-first century often fail to incorporate anti-subordination. I hope to shed light on how these advocates missed opportunities to present arguments to the Court regarding the anti-subordination principles that lie at the “heart” of equal protection doctrine.¹²⁸

¹²² *United States v. Alamance-Burlington Bd. of Educ.*, 640 F. Supp. 2d 670, 673 (M.D.N.C. 2009).

¹²³ *Id.* at 683–84.

¹²⁴ *Id.* at 683 (“[I]t is permissible to consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.” (quoting *Parents Involved*, 551 U.S. at 788–89 (Kennedy, J., concurring))).

¹²⁵ *Id.* (quoting *Parents Involved*, 551 U.S. at 788 (Kennedy, J., concurring)).

¹²⁶ For instance, de facto segregation in housing can lead to segregation in schools if school enrollment is tied to where one lives. *See, e.g.*, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2433 (2013) (Ginsburg, J., dissenting) (discussing the way that Texas exploited the existing segregation in its high schools, a result of segregation in housing, to achieve racial diversity in its universities through the Top Ten Percent Law).

¹²⁷ 133 S. Ct. 2411.

¹²⁸ Balkin & Siegel, *supra* note 14, at 13–14 (arguing that “anti-subordination values have played a key role” in American civil rights jurisprudence).

A. *The Case: Fisher v. University of Texas at Austin*

Fisher concerned a young white woman, Abigail Fisher, who was rejected from admission to the University of Texas at Austin (“the University”).¹²⁹ The University has had a complicated history of race-conscious admissions.¹³⁰ Recognizing the importance of history and context in anti-subordination arguments, this section discusses some of the University’s complicated history.

As recently as 1996, the Fifth Circuit forbade any use of race in admissions—a more stringent holding than the standard the Supreme Court had announced in *Bakke*.¹³¹

As a result, the University made many changes in its admissions program to increase the enrollment of students of color. For instance, the Top Ten Percent Law guaranteed admission to the top ten percent of each graduating high school class in Texas.¹³² Ironically, in doing so, the University relied on racial segregation in Texas: If each high school was based primarily on housing arrangements and housing arrangements were segregated, then allowing admission to the top ten percent of each high school would allow for a diverse mix of students.¹³³

¹²⁹ See, e.g., Adam Liptak, *Race and College Admissions, Facing a New Test by Justices*, N.Y. TIMES, Oct. 8, 2012, at A1 (“Ms. Fisher, 22, who is white and recently graduated from Louisiana State University, says that her race was held against her . . .”).

¹³⁰ For instance, the University was brought to the Supreme Court four years before *Brown v. Board of Education* under the accusation that the hastily constructed and understaffed law school for Black students failed to satisfy the “separate but equal” standard required by *Plessy v. Ferguson*. *Sweatt v. Painter*, 339 U.S. 629, 633–36 (1950).

¹³¹ In *Hopwood v. Texas*, the Fifth Circuit asserted that affirmative action, even outside of a quota system, was impermissible. 78 F.3d 932, 934–35 (5th Cir. 1996). This question was left open in *Bakke*, which solely assessed the race-based quota system at issue there. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316–20 (1978) (Powell, J., concurring) (stating that the quota-based admissions program was invalid under the Fourteenth Amendment, but that an admissions program in which race is one of many factors considered could be created such that a petitioner “would have no basis to complain of unequal treatment under the Fourteenth Amendment”). This case was decided almost a decade before the Supreme Court decided *Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹³² See TEX. EDUC. CODE ANN. § 51.803 (West 1997), available at <http://www.legis.state.tx.us/tlodocs/75R/billtext/html/HB00588F.htm> (stating that admission will be given to each candidate in the top ten percent of their high school class so long as they fulfill the other minimum requirements of the statute such as going to a state-accredited high school).

¹³³ See Marta Tienda & Sunny Xinchun Niu, *Capitalizing on Segregation, Pretending Neutrality: College Admissions and the Texas Top 10% Law*, 8 AM. L. & ECON. REV. 312, 314 (2006) (noting that “the success of the top 10% law in restoring ethno-racial diversity at the Texas public flagships requires segregation” at the high school level); see also *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) (explaining that Texas’s percentage plan was put in place with the understanding that segregation in high schools would create diverse university student bodies).

After the Supreme Court explicitly upheld race-conscious admissions in *Grutter*,¹³⁴ the University added a race-conscious component to its admissions process, which only applied to a small fraction of students admitted outside of the Top Ten Percent Law.¹³⁵

It was in this environment that the petitioner in *Fisher* applied for, and was denied, admission to the University.¹³⁶ The petitioner was not in the top ten percent of her graduating high school class and sought enrollment through the alternate path that considered race as one component of a holistic scheme previously permissible under *Bakke* and *Grutter*.¹³⁷

B. Critiquing the Arguments Used by the University of Texas in *Fisher*

The University failed to incorporate substantial anti-subordination arguments both in its brief and at oral argument. The thrust of the University's brief argued that its admissions program was in line with the admissions program found constitutional in *Grutter*.¹³⁸ In doing so, the advocates failed to take hold of an opportunity to

¹³⁴ 539 U.S. at 328, 334–35 (2003).

¹³⁵ The Top Ten Percent Law was capped at admitting seventy-five percent of the incoming freshman class. For the remaining twenty-five percent, the University created a "Personal Achievement Index" ("PAI") for each student and then admitted students based on this index. In the period before *Grutter*, the PAI did not include race as an element; it focused on a holistic review of an applicant's leadership qualities, extracurricular activities, awards/honors, work experience, service to school or community, and special circumstances. See THE UNIV. OF TEX. AT AUSTIN OFFICE OF ADMISSIONS, INTER-RATER RELIABILITY OF HOLISTIC MEASURES USED IN THE FRESHMAN ADMISSIONS PROCESS OF THE UNIVERSITY OF TEXAS AT AUSTIN: SUMMER/FALL 2005, at 2, 4 (2005), available at <http://www.utexas.edu/student/admissions/research/Inter-raterReliability2005.pdf> (showing that race was not added as a factor in the comprehensive scheme for admissions until Fall 2005, which was when the Court decided *Grutter*). However, one year after *Grutter*, the University did include race as a factor. See THE UNIV. OF TEX. AT AUSTIN OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSION LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN 2 (2008), available at <http://www.utexas.edu/student/admissions/research/HB588-Report11.pdf> (explaining that race was approved as a factor for the PAI in 2003 by the University of Texas Board of Regents).

¹³⁶ See *Fisher v. Texas*, 556 F. Supp. 2d 603, 605–06 (W.D. Tex. 2008) (explaining the admissions process at the University when Abigail Fisher was denied entry).

¹³⁷ Brief for Petitioner at 2, *Fisher*, 133 S. Ct. 2411 (No. 11-345). Both the district court and appellate court upheld the University's policy under *Grutter*. See *Fisher v. Texas*, 631 F.3d 213, 247 (5th Cir. 2011) (stating that the court was "satisfied that the University's decision to reintroduce race-conscious admissions was adequately supported" by the *Grutter* doctrine); *Fisher v. Texas*, 556 F. Supp. 2d 603, 608–09 (W.D. Tex. 2008) (holding that, based on Supreme Court doctrine, plaintiffs did not establish that the University's policy violated the Fourteenth Amendment). See *supra* note 135 and accompanying text for a discussion of the University's admissions program under attack in *Fisher*.

¹³⁸ Brief for Respondents at 1–3, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). For a discussion of *Bakke*, see *supra* notes 93–97 and accompanying text (explaining the Court's reasoning in the case). For a discussion of *Grutter*, see *supra* note

right the path of equal protection doctrine by using anti-subordination arguments. In addition, as discussed below, anti-subordination arguments may have made their position more defensible.

The University framed its brief by referencing discrimination in the University's history and made three key arguments to defend its race-conscious admissions program. First, it argued that the program was individualized because race was only one of many factors considered in the admissions procedure.¹³⁹ Second, it argued that the program furthered a compelling interest in diversity and benefited the entire University community.¹⁴⁰ Finally, it argued that the program was needed due to the persistent underrepresentation of and isolation felt by students of color on the University's campus.¹⁴¹ Ultimately, however, the University distanced itself from anti-subordination principles in concluding the following: "Certainly all aspire for a color-blind society in which race does not matter—and need not be considered to ensure a diverse proving ground for the Nation's future leaders."¹⁴²

This Part will discuss how each of the arguments advanced by the University failed to incorporate strong anti-subordination principles. This Part will also outline the anti-subordination arguments the University should have made in its brief and oral advocacy.¹⁴³

1. Reframing the Stakes in the Case

Although the University framed its brief by discussing its own history of discrimination, this framing was insufficient because it failed to place the University's history in the greater context that exists in the twenty-first century. The University discussed its own history of racial segregation leading up to the Supreme Court's decision in *Sweatt v. Painter*, a case about the University's law school, as well as the persistence of de jure segregation after *Sweatt*.¹⁴⁴ However,

16, 98–103 and accompanying text (explaining how the opinion's rationales were linked with anti-subordination).

¹³⁹ Brief for Respondents, *supra* note 138, at 25–28.

¹⁴⁰ *Id.* at 38–40.

¹⁴¹ *Id.* at 42–44.

¹⁴² *Id.* at 53–54; *see also supra* notes 25–31 (discussing colorblindness as integral to an anti-classification approach).

¹⁴³ These arguments are derived, in part, from arguments that civil rights advocates have advanced in past cases. My choice to include these arguments is twofold: First, they were the correct arguments, in that they allowed for an opportunity to advance the doctrine so as to bring it more in line with anti-subordination principles. Second, risk-averse attorneys, who value *stare decisis* and believe the Court will as well (even as the composition changes over time), may value knowing the occasions where these arguments were successful.

¹⁴⁴ Brief for Respondents, *supra* note 138, at 3–4. For a discussion of the University's previous entanglement with the Supreme Court as a result of race-related litigation, see

history is a vital part of anti-subordination arguments, and, as such, advocates must urge courts to take into account how this country's history is relevant to cases decided under the Equal Protection Clause.¹⁴⁵ Advocates must use history to give context to the issues that are being examined today; our current environment is informed by the past. Incorporating the historical context will help the Court analyze the harm at issue in a given case. This approach is needed to make a thorough assessment of whether there is "equal protection" under the law, as the Constitution requires.¹⁴⁶

Advocates could have discussed prior litigation surrounding the school, drawing on support from those cases where the Supreme Court considered the history of discrimination. The Court in *Brown v. Board of Education* also referenced the history of discrimination by highlighting then-recent litigation on segregation.¹⁴⁷ This prior litigation helped the *Brown* Court determine whether there was an equal protection violation in *Brown*. By reviewing the types of harm that had been addressed in previous cases, the *Brown* Court saw a pattern: Benefits were categorically denied to individuals on account of their racial identity.¹⁴⁸ The Court used this insight to evaluate the harm at issue in *Brown* to see how it compared to systematic denials on account of race in other cases.¹⁴⁹

The advocates in *Fisher* could have cited increased litigation in the voting rights context, another example of the systematic discrimination against a group of people.¹⁵⁰ The advocates in *Fisher* could

supra note 130 and accompanying text (explaining the circumstances at the University's law school at the time of the *Sweatt* decision).

¹⁴⁵ See *supra* notes 40–48 and accompanying text for a discussion of how the anti-subordination doctrine includes an analysis of historic racism.

¹⁴⁶ See U.S. CONST. amend. XIV, § 1 (mandating that no state can deny equal protection under the law to persons within its jurisdiction).

¹⁴⁷ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 490–92 (1954) (citing *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)).

¹⁴⁸ *Id.* at 491–92 (“In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications.”).

¹⁴⁹ See *Romer v. Evans*, 517 U.S. 620, 627–29 (1996) (explaining the state statute in question in the context of the history of modern antidiscrimination laws); *Loving v. Virginia*, 338 U.S. 1, 6–7, 12 (1967) (noting that antimiscegenation laws were borne out of slavery and a history of racism and holding that the state statute was unconstitutional); *cf.* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–48 (1985) (denying that the mentally disabled should get the same protections as other groups like women or people of color yet striking down the statute in question as having no legitimate government purpose in differentiating the mentally handicapped in that particular context).

¹⁵⁰ For example, Pennsylvania, Florida, and Texas enacted restrictive voting laws leading up to the 2012 election that were heavily litigated by civil rights advocates, where the newly

have argued that this litigation is relevant to a case about race-conscious admissions because the context helps evaluate potential harms. Like *Brown*, the cases reveal a trend of systematic subordination of people on account of their race. Advocates in *Fisher* should discuss how the admissions program does not have similar characteristics. It is not the case that white students are systematically denied an opportunity to compete for admission to the University. Advocates could also have highlighted historical barriers to success in the context of higher education. As discussed in Part I.B, the *Grutter* Court acknowledged both the historical discrimination and the political powerlessness of people of African descent.¹⁵¹ The University did this in its discussion of how diversity leads to increased paths to leadership, but this discussion was submerged within the brief; the advocates instead chose to illuminate the general idea that diversity benefits everyone, rather than focus on historical barriers that impact students of color.¹⁵² However, the arguments would be better suited as a clear and free-standing argument at the outset of their brief, in order to orient the argument for using race in the admissions process so that it contained stronger anti-subordination principles. This would have demonstrated more clearly for the Court what was at stake in the case. It would have called attention to what the status quo would be, absent an admissions process like the one used by the University. In this context, the program would have been more defensible, because it could be seen as both protecting from harms that have existed—and

implemented voting laws would likely impair the ability of low-income people and people of color to vote. *See, e.g., Florida v. United States*, 885 F. Supp. 2d 299, 357 (D.D.C. 2012) (holding that Florida did not meet its burden to show that reducing the number of early voting days and the number of early voting hours would not have a regressive effect on voters of color); *Texas v. Holder*, 888 F. Supp. 2d 113, 143–44 (D.D.C. 2012) (acknowledging evidence showing that Texas’s voter identification law would fall most heavily on Black and Latino voters in the state and denying Texas’s request for declaratory relief as to S.B. 14); *Applewhite v. Commonwealth*, No. 330 M.D. 2012, 2012 WL 4497211, at *3, *8 (Pa. Commw. Ct. Oct. 2, 2012) (granting a preliminary injunction against the voter restrictions in the state of Pennsylvania and planning trial for permanent injunction). *See generally* Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2182857> (discussing the voting rights evolution after *Bush v. Gore*, 531 U.S. 98 (2000), including voter restriction litigation in the 2012 election season).

¹⁵¹ *See Grutter v. Bollinger*, 539 U.S. 306, 332 (2003) (“In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”).

¹⁵² Brief for Respondents, *supra* note 138, at 22, 43–44, 46, 52–54 (discussing the underrepresentation of people of color that prompted the University’s policy and the usefulness of having diversity).

continue to exist—in universities and greater society as well as promoting the mission of the Equal Protection Clause.¹⁵³

2. *Rethinking the Diversity Argument*

The University emphasized “diversity” as a compelling government interest in and of itself, without making any connections to anti-subordination.¹⁵⁴ The University asserted that its individualized review allowed it to construct a class that is diverse in many ways, including admitting Black and Latino students who were being excluded under the Top Ten Percent Law, for example, because they were wealthy enough to go to private schools that did not rank their students.¹⁵⁵ Under this formulation, one purpose of race-conscious admissions is to admit students of color from privileged class backgrounds. As discussed at oral argument, this hypothetical is susceptible to criticism. For instance, during oral arguments for *Fisher* Justice Alito stated:

Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before.

The top 10 percent plan admits lots of African Americans—lots of Hispanics and a fair number of African Americans. But you say, well, it's—it's faulty because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds. And you specifically have the example of the child of successful professionals in Dallas.

Now, that's your—that's your argument?¹⁵⁶

Justice Alito's skepticism was an obvious pitfall to the University's claims. By taking subordination out of the picture, the

¹⁵³ See *supra* notes 63, 71–73, 78–80 and accompanying text (discussing why the group that is burdened by long-standing and historic discrimination is relevant to the inquiry); *supra* notes 33–38 and accompanying text (discussing the role that subordination plays in an anti-subordination approach to the equal protection doctrine).

¹⁵⁴ Brief for Respondents, *supra* note 138, at 25–28, 38–41 (explaining how the University accounts for race as well as other factors in its diversity analysis and how diversity is a compelling interest); see also *id.* at 5 (citations omitted) (“UT has a ‘broad vision of diversity,’ which looks to a wide variety of individual characteristics—including ‘an applicant’s culture; language; family; educational, geographic, and socioeconomic background; work, volunteer, or internship experiences; leadership experiences’; special artistic or other talents, as well as race and ethnicity.”).

¹⁵⁵ See *id.* at 32–35 (discussing the University's goals to achieve diversity within the population of its students of color by including students of color who come from relatively privileged backgrounds).

¹⁵⁶ Transcript of Oral Argument at 44, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (No. 11-345).

University was left on weak ground to defend the diversity of its applicants.¹⁵⁷

The advocates in *Fisher* should have avoided this type of argument because of the weakness that Justice Alito pointed out. If the emphasis were diversity for the sake of diversity, then presumably other markers of difference (like academic interests or family size¹⁵⁸) would be sufficient to attain “diversity” among its incoming class. Without emphasizing anti-subordination, the necessity for considering *race* (as well as other social identities) in the admissions process is lost. Thus, advocates fail to defend their program (*race*-conscious admissions) and instead are put in the awkward position of defending *privileged* Black and Latino applicants.¹⁵⁹

Instead, the University should have confronted the racial inequities head-on. Using terms like “subordination” or “oppression” would highlight that the program was consistent with the Equal Protection Clause because it did not subordinate or oppress any person based on her or his group identity.¹⁶⁰ The University could have discussed how the program fails to subordinate or oppress any one group of people on account of their race. Instead, the program creates more opportunities for people of color in the state of Texas, and considers each applicant individually. An example from the Supreme Court’s precedent is instructive. In *Loving v. Virginia*, the Court struck down Virginia’s miscegenation laws because they were “designed to maintain White Supremacy.”¹⁶¹ To make this determination, the Court assessed the historical context in which these laws were implemented,¹⁶² and determined that preventing interracial marriage could

¹⁵⁷ However, this claim could be defensible under an anti-subordination approach as envisioned by Owen Fiss: The University could have claimed that the “preference of the rich blacks may be justified in terms of improving the position of the group.” See Fiss, *supra* note 22, at 163–64. Fiss discusses the way in which admissions preferences for privileged Black students may benefit Black people as a whole. See *id.* (“Members of that group have obtained these positions of power, prestige, and influence that they otherwise might not have and to that extent the status of that group is improved.”).

¹⁵⁸ Yet, this should not be the case. See *supra* notes 34–35, 64–69 and accompanying text for a discussion of how anti-subordination is based on marginalized groups that are socially constructed and identifiable.

¹⁵⁹ This is not to say that they could not have defended preferences for wealthy Black and Latino students with anti-subordination arguments. See *supra* note 157 for a discussion of one possible defense.

¹⁶⁰ See, e.g., Colker, *supra* note 20, at 1015 (“[T]he essential inquiry in any equal protection case would be how differentiating policies or actions connect to subordination, not whether policies are phrased in race- or sex-specific terms.”).

¹⁶¹ 388 U.S. 1, 11–12 (1967).

¹⁶² See *generally id.* at 5–6 (“Penalties for miscegenation arose as an incident to slavery and have been common in Virginia since the colonial period.”).

not be held constitutional under the Equal Protection Clause.¹⁶³ In addition, the Court was unable to discern any alternative purpose for the law, other than “White Supremacy.”¹⁶⁴

The purpose of the University’s program is not to support racism or supremacy in the way that the laws in *Loving* were—it is not guided by a belief in “Black Supremacy” or “people of color Supremacy.” The mission of the University is to provide “superior and comprehensive educational opportunities” and to “contribute to the advancement of society.”¹⁶⁵ And, like all admissions policies, some individuals will be excluded.¹⁶⁶ As a result, the policy is distinguishable from policies or laws with clear racial bias and should be upheld.

In addition, the advocates in *Fisher* should have highlighted the ways in which the admissions program does not discriminate against a group that is already experiencing discrimination. As discussed in Part I.A, anti-subordination principles rest on assessing the effects of a law on social identity groups.¹⁶⁷ This type of argument was used successfully in *Frontiero v. Richardson*, a case in which the Supreme Court held a military policy unconstitutional because it provided benefits to all married men but only to married women if the wife could first prove that her husband was dependent.¹⁶⁸ The Court struck down the policy, in part, because it hurt a group that has been historically subordinated: women.¹⁶⁹

The advocates could have argued that, as applied in *Fisher*, the admissions policy at issue fails to discriminate against a group that has been historically subordinated. *Fisher* argued that the policy discrimi-

¹⁶³ *Id.* at 6–7, 12.

¹⁶⁴ *Id.* at 11 (“There [was] patently no legitimate overriding purpose independent of invidious racial discrimination which justifies th[e] classification.”); *see also id.* at 7 (stating that upholding these laws was and would be an obvious “endorsement of the doctrine of White Supremacy”).

¹⁶⁵ Brief for Respondents, *supra* note 138, at 5 (citations omitted).

¹⁶⁶ *See id.* (“UT is a highly selective institution.”).

¹⁶⁷ *See supra* notes 33–38 and accompanying text (discussing subordination in the anti-subordination approach).

¹⁶⁸ 411 U.S. 677, 690–91 (1973) (holding that the challenged statutes violate the Fifth Amendment “insofar as they require a female member to prove the dependency of her husband”). Advocates in *Frontiero* argued that the state action at issue in the case made women—a group already discriminated against—worse off. Brief for the Appellants at 32, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694) (arguing that a statute is unconstitutional when it “impose[s] further inequities in a subject matter area . . . where remedial rather than oppressive measures are concededly needed”).

¹⁶⁹ *Frontiero*, 411 U.S. at 684–87 (“There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination.”).

nated against her on the basis of her race.¹⁷⁰ However, historically, the University has not subordinated white people as a group. In fact, as discussed above, the University's history reveals quite the opposite.¹⁷¹ Moreover, the admissions data from the University reveal that white students as a group are not being excluded from the University; they have been consistently admitted to the University in high numbers.¹⁷² In fact, reports regarding campus climate from the University suggest continued deep-seated issues of racism against students of color in recent times.¹⁷³ Thus, even though Ms. Fisher was individually hurt by

¹⁷⁰ See Brief for Petitioner, *supra* note 137, at 2 (asserting that Fisher was denied enrollment even though her credentials were superior because the University used a calculus which considered race to increase Black and Latino enrollment).

¹⁷¹ See *supra* notes 144–46 and accompanying text (discussing discrimination of people of color in the University's history).

¹⁷² See THE UNIV. OF TEX. AT AUSTIN, OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT UNIVERSITY OF TEXAS AT AUSTIN 7–8 (2010), available at <http://www.utexas.edu/student/admissions/research/HB588-Report13.pdf> (showing, among other statistics, that the 2010 freshmen enrollment of white students graduating from Texas high schools consisted of forty-six percent of the entire freshman class); THE UNIV. OF TEX. AT AUSTIN, OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT UNIVERSITY OF TEXAS AT AUSTIN 6–8 (2009), available at <http://www.utexas.edu/student/admissions/research/HB588-Report12.pdf> (revealing, among other statistics, that enrollment of first-time white freshmen has been over fifty percent of the total enrolling class from 2000 to 2010); THE UNIV. OF TEX. AT AUSTIN, OFFICE OF ADMISSIONS, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT UNIVERSITY OF TEXAS AT AUSTIN 6–7 (2007), available at <http://www.utexas.edu/student/admissions/research/HB588-Report10.pdf> (displaying, among other statistics, that fifty-one percent to sixty-seven percent of the entire first-time freshman class between 1997 and 2007 has been white); THE UNIV. OF TEX. AT AUSTIN, OFFICE OF ADMISSIONS, STUDENT PROFILE: ENROLLED FRESHMAN CLASS OF 2011, at 1 (2011), available at <https://www.utexas.edu/vp/irla/Documents/EnrolledFreshmenProfile-2011.pdf> (showing that forty-eight percent of the entire freshman class for 2011 was white). In addition, white people, as a group, have not been historically subordinated in the United States. See *supra* notes 39–42 and accompanying text.

¹⁷³ See, e.g., Victoria Cavaliere, *Austin Police Investigate Reports of Racially Motivated 'Bleach Bomb' Attacks Near University of Texas*, N.Y. DAILY NEWS (Oct. 6, 2012, 12:52 PM), <http://www.nydailynews.com/news/national/texas-cops-probe-race-related-bleach-bombs-article-1.1176611> (reporting that at least four students of color report that they were hit with balloons full of bleach and believe the actions to be racially motivated); Molly Hennessy-Fiske, *Trayvon Martin Case: Texas Student's Cartoon Causes Controversy*, L.A. TIMES (Mar. 29, 2012), <http://articles.latimes.com/2012/mar/29/nation/la-na-nn-trayvon-cartoon-20120329> (discussing a racially-charged cartoon published in the University's student newspaper); Justin Pope, "Critical Mass" Key to Affirmative Action Case, YAHOO NEWS (Oct. 6, 2012, 12:14 PM), <http://news.yahoo.com/critical-mass-key-affirmative-action-case-161121763.html> (analyzing how, despite progress over the past few decades, university housing remains segregated on campus and how some academic departments remain predominantly white in composition); Dean Chides Law Students over "Ghetto" Party, NBCNEWS.COM (Oct. 13, 2006), <http://www.nbcnews.com/id/15248533/#.UmwVYWQafWw> (reporting a themed law school party at the University in which students dressed up in racially-charged outfits).

not receiving admission to the University, white applicants are not (and have not been) categorically worse off at the University or as a result of any University policies.

3. *Rethinking the Beneficiaries of Race-Conscious Admissions*

The University also argued that its race-conscious program would benefit both students of color and white students, and in doing so, it failed to fully use anti-subordination principles.¹⁷⁴ Instead, the University loosely harnessed the first prong of anti-subordination (classifications that perpetuate subordination) to discuss how the program should be permissible because it does not result in the subordination of any racial group. It would have been consistent with anti-subordination principles to also discuss whether a group was singly disadvantaged by the state action. For instance, in *Romer v. Evans*,¹⁷⁵ Justice Kennedy articulated that the law at issue was unconstitutional because it was “born of animosity toward the class of persons affected.”¹⁷⁶

The advocates in *Fisher* could easily distinguish the admissions policy at issue in their case from the statute in *Romer* because the classification in the admissions procedure does not single out and negatively impact one group on account of a social identity.¹⁷⁷ The University’s policy is structured so that each student is considered in a holistic manner, where race is only one of the factors considered.¹⁷⁸ Therefore, it is not the case that *all* students in a single racial group are burdened (or benefited). This individualized assessment of race

¹⁷⁴ See, e.g., Brief for Respondents, *supra* note 138, at 34 (explaining that diversity can create cross-racial understanding).

¹⁷⁵ 517 U.S. 620, 623–24, 633–36 (1996) (applying a “rational basis plus” standard to hold that a Colorado state constitutional amendment could not restrict cities from giving protected status to individuals based on sexual orientation).

¹⁷⁶ *Id.* at 634. Justice Kennedy, speaking for the majority, devoted many pages to discussing how the amendment classifies and subordinates individuals based on their sexual orientation. See, e.g., *id.* at 627 (“Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination, and it forbids reinstatement of these laws and policies.”); *id.* at 632 (“The search for the link between classification and objective gives substance to the Equal Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our own authority.”).

¹⁷⁷ *Cf. id.* at 631 (stating that the Colorado amendment at issue in *Romer* imposed a “special disability upon [one group of] persons alone”).

¹⁷⁸ See Brief for Respondents, *supra* note 138, at 12–15 (discussing the holistic admissions program where race is one of “seven components of a single factor” in the comprehensive score).

does not impose “a broad and undifferentiated disability on a single named group” of the sort that *Romer* found unconstitutional.¹⁷⁹

4. *Rethinking the Meaning of Isolation at the University*

Finally, to defend its race-conscious admissions program, the University argued that students of color felt isolated on campus.¹⁸⁰ The University hoped to link this argument to *Grutter*, which upheld diversity as a compelling governmental interest, in part because it allowed the University to reach a “critical mass” of students of color.¹⁸¹ However, anti-subordination arguments should have been used both for the reasons discussed in Part I.A.3 and because it may have made the University’s position more defensible. Two principles of anti-subordination could have been ushered in support: classifications that perpetuate subordination and political powerlessness.

At oral argument, the Justices seemed primed to discuss the connection between isolation and demographics, though only with the petitioner, Ms. Fisher. The Justices seemed to agree that demographics played a role in isolation on campus:

Justice Sotomayor: But you can’t seriously suggest that demographics aren’t a factor to be looked at in combination with how isolated or not isolated your student body is actually reporting itself to feel?

...

Justice Scalia: Why—why don’t you seriously suggest that? Why don’t you seriously suggest that demographic—that the demographic makeup of the state has nothing to do with whether somebody feels isolated, that if you’re in a state that is only 1 percent black that doesn’t mean that you’re not isolated, so long as there’s 1 percent in the class?

...

Chief Justice Roberts: When—how am I supposed to decide whether you have an environment within particular minorities who don’t feel isolated?¹⁸²

These excerpts suggest that the Court is searching for a coherent principle to guide the “isolation factor” that was prescribed in *Grutter*’s critical mass.¹⁸³

¹⁷⁹ *Romer*, 517 U.S. at 632.

¹⁸⁰ See Brief for Respondents, *supra* note 138, at 43 (noting evidence of racial isolation on campus and in the classroom).

¹⁸¹ *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (discussing the purpose of a “critical mass” to reduce racial isolation).

¹⁸² Transcript of Oral Argument at 14–15, 48, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 05-493).

¹⁸³ *Grutter*, 539 U.S. at 333.

Advocates could have connected “isolation” to anti-subordination in at least two ways. First, they could have shown that reducing isolation is a constitutionally permissible compelling interest because it does not perpetuate subordination or stereotypes.¹⁸⁴ Second, they could have argued that reducing isolation goes beyond failing to subordinate groups and actually fosters opportunities to break down stereotypes.¹⁸⁵

The University’s admissions program was not based on stereotypes, so it did not subordinate anyone.¹⁸⁶ In *Cleburne*, the Court struck down a law because it “rest[ed] on an irrational prejudice against the mentally retarded.”¹⁸⁷ Neither party in *Fisher* would have argued that animus against students (either white students or students of color) guided the admissions program. Thus, the program was not at risk of making any group subordinate to another group. In fact, it did the opposite by permitting groups that are generally segregated in Texas¹⁸⁸ to interact. By highlighting this, the advocates could have connected the lack of subordination to the positive goal of creating a critical mass. This could have added content to the “critical mass” concept the Court struggled with in *Fisher*.¹⁸⁹

In addition, the admissions program went beyond failing to *make* stereotypes (which is the key aspect required under an anti-subordination approach), because it creates an opportunity to go one step further: It *broke down* stereotypes.¹⁹⁰ The aim of breaking down stereotypes should be used to describe how the policy builds the political power of Black and Latino students by increasing their representation in the school, thus addressing the political powerlessness prong of anti-subordination. Advocates in *Fisher* could have argued that increasing the number of people of color on campus reduces the likelihood that these groups are isolated. As a result, the groups are less

¹⁸⁴ This relates to the first prong of anti-subordination, which speaks to the actual effects of the state action. See *supra* notes 33–38 and accompanying text.

¹⁸⁵ This relates to the third prong of anti-subordination, which speaks to the political powerlessness of a group. See *supra* notes 49–57 and accompanying text.

¹⁸⁶ Justice Ginsburg used this approach when she was a staff attorney at the ACLU. See Brief of the ACLU as Amicus Curiae Supporting Petitioners at 10, *Craig v. Boren*, 429 U.S. 190 (1976) (No. 75-628), 1976 WL 181333 (arguing that “overbroad generalization[s] as a rationalization for line-drawing by gender cannot be tolerated under the Constitution”).

¹⁸⁷ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985).

¹⁸⁸ See *supra* note 133 and accompanying text (discussing racial segregation in Texas).

¹⁸⁹ See *supra* Part II.B.2 and accompanying text (discussing an interpretation of diversity and critical mass that challenges subordination); see also notes 180–83 and accompanying text (discussing the conversation the Justices had about critical mass at the *Fisher* oral arguments).

¹⁹⁰ See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (discussing the value in breaking down stereotypes).

likely to be stereotyped or treated in discriminatory ways, including being used as scapegoats.¹⁹¹ This is a protection explicitly provided for by footnote four in *Carolene Products*.¹⁹²

C. *The Outcome*

This Subpart discusses the Court's holding in *Fisher v. University of Texas at Austin*, and highlights the resulting implications for the anti-subordination and anti-classification theories. In *Fisher*, the Court vacated and remanded the judgment of the Court of Appeals for the Fifth Circuit.¹⁹³ Justice Kennedy's opinion, which received a majority of the Court's support, concluded that the application of strict scrutiny requires a less deferential review of the University's actions.¹⁹⁴ First, a reviewing court must analyze the proffered compelling governmental interest. Although deference can be given at this stage, the Court expressed doubt that the University proved its point on diversity.¹⁹⁵ The Court seemed to suggest that the diversity goal, in and of itself, may not be enough.¹⁹⁶

By suggesting that diversity may not be sufficient on its own, the Supreme Court created an opening for advocates of anti-subordination. Anti-subordination advocates go beyond valuing diversity for the sake of diversity—they also challenge subordination and hierarchies. In this way, advocates could highlight diversity's potential to provide opportunities to historically disadvantaged groups and increase understanding across racial groups while reducing the practice of using people of color as scapegoats.¹⁹⁷ Now there is space to make the arguments about *why* diversity is necessary—the Court is asking advocates to give them a principle by requiring more substance of the “diversity” rationale.

The key area that caused the Supreme Court to overturn the Fifth Circuit lay in the second step in the equal protection analysis: assessing whether the means are narrowly tailored. The Supreme

¹⁹¹ See *supra* notes 51–53 and accompanying text (discussing the use of Black people as scapegoats in political climates, made worse in situations when there is little representation).

¹⁹² See *supra* notes 51–57 and accompanying text (connecting the use of Black people as scapegoats with footnote four of *Carolene Products*).

¹⁹³ 133 S. Ct. 2411, 2415 (2013).

¹⁹⁴ See *id.* at 2421 (“The District Court and Court of Appeals confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith . . .”).

¹⁹⁵ See *id.* at 2419 (authorizing a reviewing court to offer deference).

¹⁹⁶ See *id.* (noting that a reviewing court must find a “reasoned, principled explanation” for a university’s decision to use race in its admissions process).

¹⁹⁷ See *supra* notes 51–53 and accompanying text (discussing interpretations of political status based on a group’s status as a scapegoat and its limited ability to lobby the legislature).

Court asserted that no deference should be given to a university's assessment of whether its own means are narrowly tailored.¹⁹⁸ A reviewing judge must not apply strict scrutiny that is "fatal in fact" (as *Grutter* required) or deferential (as *Fisher* now requires), but something in between. However, the *Fisher* Court did not provide a concrete list of factors for determining how strict "strict scrutiny" should be. As a result, this standard will be difficult for judges to implement. Courts will have to explore the various ways of obtaining a racially diverse student body to determine whether any school's program is "narrowly tailored." A focus on anti-subordination theories can help by leading courts to consider race and histories of racism.¹⁹⁹ This context can challenge the suggestion that opponents to race-conscious admissions have a better alternative that is "race-neutral." Anti-subordination theories can help reveal when race-neutral admissions programs are not neutral at all.²⁰⁰

III

ANTI-CLASSIFICATION IS NOT ENOUGH

One weakness in the solutions I have offered is that, currently, taking an anti-subordination approach is unlikely to be a successful litigation strategy. However, because my approach derives from the notion of racial realism in Derrick Bell's work, I do not wish to, nor do I think it is feasible to, offer a solution that both preserves true racial equality and fits within the status quo.²⁰¹

According to Bell, "Black people will never gain full equality in this country. Even . . . herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance."²⁰² Bell encourages openness and honesty

¹⁹⁸ See *id.* at 2420 (asserting that a reviewing court must be satisfied that there are "no workable race-neutral alternatives").

¹⁹⁹ See *supra* notes 40–48 and accompanying text (discussing how the anti-subordination doctrine incorporates history of discrimination).

²⁰⁰ See *supra* note 133 and accompanying text (discussing how the University's "race-neutral" program is actually not race neutral).

²⁰¹ See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) [hereinafter Bell, *Interest-Convergence Dilemma*] (discussing racial realism); Bell, *Now What?*, *supra* note 30 (same); Derrick Bell, *The Racism Is Permanent Thesis: Courageous Revelation or Unconscious Denial of Racial Genocide*, 22 CAP. U. L. REV. 571 (1993) [hereinafter Bell, *Racism Is Permanent*] (same).

²⁰² DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 12 (1992); see also Bell, *Now What?*, *supra* note 30, at 89 (challenging advocates to recognize the way in which notions of racism and white supremacy are integral to the nation's fabric); *id.* at 80 (relying on historical movements for equality and the current

about subordination²⁰³ because only then will we acknowledge that not all members of dominant racial groups want to change the social hierarchy.²⁰⁴ Simple acts of defiance, like speaking openly and honestly about racial realism—regardless of the outcome—would engage with reality, rather than an imagined utopia.²⁰⁵ Although it may be a continuous struggle, the struggle is a full “manifestation of our humanity.”²⁰⁶

A. *Anti-subordination and Anti-classification Together*

One reason to make anti-subordination arguments in the face of what seems to be waning support for anti-subordination principles is that those arguments may inform the outcome, even if the court is primed to write an opinion through an anti-classification lens.²⁰⁷

status of Black people in the United States to make the claim that success and failure are fluid). Although Bell’s racial realism may be “a hard-to-accept fact,” he urges people to “acknowledge it, not as a sign of submission, but as an act of ultimate defiance.” BELL, *supra*, at 12.

²⁰³ In this assertion, Bell relied on the words of Martin Luther King Jr., someone who is normally considered to have advanced a colorblind approach (as King’s most famous lines may have been “I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character,” Rev. Martin Luther King Jr., *I Have a Dream . . .* (Aug. 28, 1963), available at <http://www.archives.gov/press/exhibits/dream-speech.pdf>). See Bell, *Racism Is Permanent*, *supra* note 201, at 585 (citing A TESTAMENT OF HOPE: THE ESSENTIAL SPEECHES & WRITINGS OF MARTIN LUTHER KING JR. 314 (James M. Washington ed., 1986)) (“A part of that struggle was the need to speak the truth as [Martin Luther King Jr.] viewed it even when that truth alienated rather than unified, upset minds rather than calmed hearts, and subjected the speaker to general censor rather than acclaim.”).

²⁰⁴ History reveals, in fact, that they do not. See Bell, *Interest-Convergence Dilemma*, *supra* note 201, at 523 (“[I]t is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of whites.”).

²⁰⁵ See Bell, *Now What?*, *supra* note 30, at 90 (accepting that racial realism can “lead to policy positions and campaigns that are less likely to worsen conditions for those we are trying to help and more likely to remind the powers that be that . . . there are persons like you who are not on their side and are determined to stand in their way”); see also Bell, *supra* note 17, at 377 (“[Racial realism] would free them to think and plan within a context of reality rather than idealism.”).

²⁰⁶ See Bell, *Now What?*, *supra* note 30, at 92 (“We must realize with our slave forbearers that the struggle for freedom is, at bottom, a manifestation of our humanity that survives and grows stronger through resistance to oppression even if that oppression is never overcome.”); see also Bell, *supra* note 17, at 378 (“The fight in itself has meaning and should give us hope for the future.”).

²⁰⁷ This may be due to the fact that, in applying anti-classification, “[c]ourts must make a variety of implementing decisions . . . [that are not made] in any consistent manner.” Balkin & Siegel, *supra* note 14, at 13. Balkin and Siegel argue that this “[i]nconsistency . . . suggests that the discourse of anticlassification conceals other values that do much of the work in determining which practices antidiscrimination law enjoins.” *Id.*; see also *id.* at 10 (“[A]ntisubordination values have shaped the historical development of anticlassification understandings.”).

Advocates must recognize that “the [anti-classification] principle is not inevitable.”²⁰⁸ It is neither the more moral approach nor is it naturally or logically preferred. Advocates of racial justice can, and should, encourage a more robust conversation about morality and justice, including the prongs discussed in this Note. Therefore, advocates can strategically implement anti-subordination principles, even if the court appears to be leaning toward an anti-classification approach. Moreover, the application of the “anticlassification principle shifts over time in response to social contestation.”²⁰⁹ What is occurring in the nation can impact how courts will apply the Equal Protection Clause.²¹⁰ Therefore, advocates should take advantage of the malleability in the anti-classification principle by drawing attention to the contentious backdrop of race-conscious admissions.²¹¹ In bringing attention to the subordination and oppression that anti-classification causes, advocates may be able to more effectively win with an anti-subordination argument.²¹²

B. *Anti-classification on Its Own*

Although anti-classification arguments seem to provide an easier path to victory, they are unlikely to be persuasive in the context of race-conscious admissions.²¹³ When the Court applies an anti-classification understanding to race-conscious admissions, the university is sure to lose: The Supreme Court uses the term “equality” (as opposed to “anti-subordination”) as “a tool to perpetuate discrimination *against* racial minorities.”²¹⁴ As discussed in Part I.A.3, this is a

²⁰⁸ Fiss, *supra* note 22, at 177.

²⁰⁹ Balkin & Siegel, *supra* note 14, at 13.

²¹⁰ See, e.g., *id.* at 27 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (“[The] ‘race-plus’ narrative [offered in Justice Powell’s opinion in *Bakke*] ultimately gave way in the face of sustained social movement protest by conservatives and the installation of judges hospitable to their views.”)).

²¹¹ This may be difficult to do alongside an anti-classification argument because, as discussed in Part II.B.3, anti-classification arguments seem to be opposed to contestation. See *supra* notes 174–79 and accompanying text (discussing how race-conscious admissions policies are beneficial to everyone because every application is considered in a holistic way that includes race along with other factors).

²¹² See, e.g., Balkin & Siegel, *supra* note 14, at 13–14 (“[C]ourts are often moved, consciously or unconsciously, by perceptions of status harm to find violations of the anticlassification principle where they saw none before. Considered from this historical vantage point, American civil rights jurisprudence vindicates both anticlassification and antisubordination commitments.”).

²¹³ See Bell, *Now What?*, *supra* note 30, at 79–80 (cautioning against being “comforted and consoled” by taking an easy route, because the notion that racial progress is “slow but steady” is a myth).

²¹⁴ Girardeau A. Spann, *Fisher v. Grutter*, 65 VAND. L. REV. EN BANC 45, 49 (2012) (emphasis added) (citing GIRARDEAU A. SPANN, *RACE AGAINST THE COURT: THE SUPREME COURT AND MINORITIES IN CONTEMPORARY AMERICA* (1993)); see also *supra*

necessary consequence of anti-classification's reliance on a "neutral" understanding of equality, which assumes everyone can benefit equally from the admissions process without considering the role of group identity. But because applying equal rules to unequal people does not challenge social hierarchies that exist on the basis of groups, including race, a "neutral" conception of equality destroys any hope of creating meaningful change.

This perversion of "equality" has become a method of sterilizing discrimination arguments and masking the true purpose of contested programs.²¹⁵ The Court "transforms what looks like a benign remedial measure designed to promote equality for racial minorities into an invidious discriminatory technique for promoting the oppression of whites."²¹⁶ This tactic is a result of ignoring hierarchies that operate in the background and is precisely what happened in *Fisher*. The harm felt by Ms. Fisher, caused by not getting into the University, was compared with the harm experienced by people of color who have been historically excluded from the University and consistently made subject to racism. Without the context of social stratification, it appears as if benign discrimination can only be accomplished through means that feel unequal to white people. White people become "innocent persons" who are required to bear the burden of the oppressive nature of their ancestors.²¹⁷ Only by approaching the topic as ahistorical are we able to reach a result like this, which fails to acknowledge the unearned privilege and advantages that white people have received, and continue to receive, on account of their race.²¹⁸ As a result of this dynamic, advocates must be cautious not to fall into a linguistic trap and speak of "equality" between racial groups without also referring to "subordination."²¹⁹

Moreover, without anti-subordination concepts, race-conscious admissions programs are harder to defend. As discussed in Part II.B.2, the University struggled to defend the program's ability to increase

note 73 (discussing Bell's analysis of this issue); *supra* note 63 (discussing Colker's analysis of the proper characterization of white/Black discrimination).

²¹⁵ See *supra* notes 71–80 and accompanying text (discussing why anti-subordination provides better guidance).

²¹⁶ Spann, *supra* note 214, at 49.

²¹⁷ See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 297–99 (1978) (Powell, J., concurring) ("[T]here is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.").

²¹⁸ See, e.g., *Gotanda*, *supra* note 71, at 2–3 ("A color-blind interpretation of the Constitution legitimates, and thereby maintains, the social, economic, and political advantages that whites hold over other Americans." (footnote omitted)).

²¹⁹ See Spann, *supra* note 214, at 51 ("[T]he Court's doctrinal flirtation with racial equality is designed to tease racial minorities by seductively holding out the hope of eventual equality, but then snatching it back just before it is close enough to grasp.").

the admissions of people of color who are from privileged class backgrounds. It was not clear to the Justices why the University would prefer wealthy Black and Latino applicants in their admissions process. At least one Justice inherently understood race-conscious admissions programs to advantage groups that had been disadvantaged;²²⁰ the advocates should have built on this understanding, not run from it. The program is not defensible based on anti-classification alone because, as discussed above, anti-classification requires a colorblind approach in which race, or anything else (like hobbies or interests) could be equally valued in an admissions program. As a result, an argument relating to “isolation” in classrooms, for instance, falls flat:²²¹ Under anti-classification, the idea is that race should not be considered because even its consideration causes discrimination,²²² and it will therefore be irrelevant if there are only one or two people of color in the room.

Because of the strong likelihood of losing benign discrimination claims—like the one at issue in *Fisher*—with anti-classification rationales, it is important to use anti-subordination arguments to, at minimum, appeal to Justices writing dissents and concurrences. Moreover, racial dynamics are cyclical responses to “economic and political developments” in the country.²²³ Under this theory, the current trend that disfavors anti-subordination can change. Advocates would be wise to lay the groundwork for future arguments.²²⁴ Furthermore, making anti-subordination arguments can assist judges who would like to dissent or concur so that their opinions capture the realities of sub-

²²⁰ Justice Alito: “Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don’t think I’ve ever seen before.” Transcript of Oral Argument at 43, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 05-493).

²²¹ See *supra* notes 180–91 and accompanying text (discussing ways to make the isolation argument stronger).

²²² See *supra* notes 20–30 (discussing how anti-classification purports to end discrimination).

²²³ See Bell, *Now What?*, *supra* note 30, at 80 (“[O]ur racial status in this country has been a cyclical phenomenon in which legal rights are gained, then lost, then gained again in response to economic and political developments in a country over which blacks exercise little or no control.”); see also Bell, *Racism Is Permanent*, *supra* note 201, at 578 (“[C]ivil rights gains will be temporary and setbacks inevitable.”); *supra* Part I.B (discussing movement towards anti-subordination even in the last 25 years).

²²⁴ The dissent in *Korematsu* ended up becoming more influential than the majority. See *supra* notes 43–48 and accompanying text (discussing *Korematsu*). In addition, Justice Kennedy’s concurrence in *Parents Involved* has also been persuasive to some lower courts. See *supra* Part I.B.2 (discussing the impact of Justice Kennedy’s concurrence on lower courts); see generally Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 2 (2010) (discussing the impact that dissents can have).

ordination facing individuals and groups in the United States. Judges will need assistance because all

Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.²²⁵

Thus, advocates must urge judges to grapple with the way subordination impacts these cases.

C. *Short-term and Long-term Goals*

This Note conceptualizes “winning” as realizing the purpose of race-conscious admissions programs. An anti-classification win is not a “win” because it concedes to a worldview that is not accurate.²²⁶ The purported goal of race-conscious admissions is to confront racism and institutional barriers to success, which cannot be accomplished through anti-classification. Without truly addressing subordination, we fail to grasp the complex ways that race impacts our daily lives.²²⁷

An anti-classification reading of the Equal Protection Clause is also not a win because it produces negative precedent. Such precedent fails to address the privilege and oppression that have existed in the United States (and in the education context specifically) for centuries.²²⁸ As a result, the Court may “effectively . . . [choose] to ignore historical patterns, to ignore contemporary statistics, and to ignore flexible reasoning.”²²⁹ Though this may be a positive outcome for the University in the short term, it will be detrimental in the long term.

²²⁵ Lawrence, *supra* note 75, at 322 (footnotes omitted).

²²⁶ As discussed above, anti-classification requires a “neutral” approach to the social landscape of the United States, thereby ignoring many racial (and other group) dynamics. See *supra* notes 71–73 (noting issues with an anti-classification approach).

²²⁷ This may be why the Supreme Court thought it would be appropriate to overturn a portion of the Voting Rights Act in *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612 (2013)—a lack of understanding of the way that race and racism operate in the United States.

²²⁸ Cf. Bell, *supra* note 17, at 369 (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) and asserting that anti-classification rationales “utterly ignor[e] social questions about which race in fact has power and advantages and which race has been denied entry for centuries into academia” (citations omitted)).

²²⁹ *Id.*

For instance, the state of Texas could respond by amending its constitution to prohibit the use of race-conscious admissions programs.²³⁰ On judicial review of such an amendment (or other programs promoting racial justice), an opinion written with the anti-classification principles from *Fisher* would “become an additional barrier, a new weapon.”²³¹ The type of harm would be skewed to make it harder to defend state action that protects people of color or other marginalized groups.²³² This type of opinion allows the Court to support an outcome that may help move toward justice, but is written in a way that defies this goal. It would be detrimental as a matter of guidance for future litigation. Racism and discrimination will change form over time, so it is important to have guiding principles that will assist us in determining whether there is a harm that must be protected under the Equal Protection Clause.

In addition, although anti-classification may seem to be an easier win, advocates may find their hopes “too optimistic.”²³³ A concession to anti-classification principles will not reach the purported goals of racial justice in the long run in a meaningful way. Because anti-classification fails to fully engage racism, any impact will be minimal and temporary.²³⁴ This may be because Black subordination “serves to maintain stability and solidarity among whites whose own social and economic status varies widely.”²³⁵ Failing to confront racism leaves no hope for change.

CONCLUSION

Anti-subordination principles are necessary to the vitality of equal protection jurisprudence. These principles determine when dis-

²³⁰ This is exactly what happened in Michigan: After the Supreme Court upheld race-conscious admissions in *Grutter*, a case out of Michigan, the state of Michigan passed a constitutional amendment making the use of race in admissions unconstitutional in the state. See MICH. CONST. art. I, § 26. The case challenging that amendment is pending before the Supreme Court this term. *Schuetz v. Coal. to Defend Affirmative Action*, 133 S. Ct. 1633, 1633 (2013).

²³¹ Bell, *Now What?*, *supra* note 30, at 91 (discussing *Brown*).

²³² See *supra* note 105 (discussing *Parents Involved*, a case that relied on anti-classification principles to make it difficult to defend race-conscious admissions at the elementary level); see also *supra* Part I.A.3 (discussing reasons why anti-subordination is preferable to anti-classification).

²³³ Bell, *Now What?*, *supra* note 30, at 88 (“History . . . will look at our freedom efforts as child-like, trusting, believing, and hopelessly naive. . . . [We must] confess that many of those civil rights battles we thought we won, all too frequently were transformed before our eyes into new, more sophisticated barriers for the ever elusive equality.”).

²³⁴ See *id.* at 83 (“[P]rogress in our effort to gain racial equality is so hard to achieve and so easy to lose—precisely because rights for blacks are always vulnerable to sacrifice to further the needs of whites.”).

²³⁵ *Id.* at 82–83.

crimination is benign or malign. Some may not think that courts are equipped to take on this type of discussion.²³⁶ However, racial justice advocates must show that it is possible.

In order to ensure that the rights of discrete and insular minorities are protected (and to ameliorate social stratification on account of social identities), courts must engage in the social-historical-political conversation that anti-subordination theories require (and anti-classification theories discourage).²³⁷ As such, advocates must urge courts to continue to use these principles in assessing potential violations of the Equal Protection Clause.

Using an anti-subordination approach may mean that the social groups receiving heightened scrutiny could change, depending on the context.²³⁸ But it would be proper for the coverage of the Clause to ebb and flow if an anti-subordination approach suggested this was necessary. In fact, this would make sense: Courts are in the business of providing guiding principles and recognizing when underlying assumptions change.²³⁹ Nevertheless, history has consistently demonstrated that the same social identity groups defined by class, race, gender, sexual orientation, and religion have been consistently marginalized.

Advocates must ensure that the anti-subordination tradition does not become “a stranger to American civil rights law” and instead “remains its heart, its hope, and its pride.”²⁴⁰ Advocates should not shy away from these arguments simply because they do not think they will work, since failing to do so will deprive the Court of the benefit of anti-subordination principles to guide its decisions. True antioppressive work requires an approach that makes the arguments that may

²³⁶ For instance, Justice Powell believed this to be true. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 297 (1978) (Powell, J., concurring) (“The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence . . .”).

²³⁷ In fact, courts engage these principles to determine if a group should be given heightened scrutiny under the Equal Protection Clause. Four factors are used to assess whether heightened scrutiny should apply: whether the group is politically powerless, whether the classification is relevant to a governmental interest, whether the characteristic is immutable, and whether there is a history of discrimination. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442–47 (1985) (applying the four factors).

²³⁸ It would not change the analysis if, perhaps at some time in the future, the groups who were historically subordinated changed and instead there was a history of oppression based on some other social identity.

²³⁹ Precedent can be overruled once the change is sufficient. *See Planned Parenthood v. Casey*, 505 U.S. 833, 862–64 (1992) (discussing changed circumstances as one factor in overturning precedent).

²⁴⁰ Balkin & Siegel, *supra* note 14, at 14.

lose.²⁴¹ We need to speak truth of injustice if we ever want courts to be anti-racist and anti-oppressive—even if only for a moment.

²⁴¹ Dissents are important, too. They “speak to a future age. . . . [T]he greatest dissents do become court opinions and gradually over time their views become the dominant view. So that’s the dissenter’s hope: that they are writing not for today but for tomorrow.” Interview by Nina Totenberg with Ruth Bader Ginsburg, Justice, Supreme Court of the U.S. (May 2, 2002), *available at* <http://www.npr.org/programs/morning/features/2002/may/ginsburg/>.