No. 14-981

IN THE
In the Supreme Court of the United States

ABIGAIL NOEL FISHER,
Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* PROFESSOR W. BURLETTE CARTER IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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THE INTERESTS OF *AMICUS CURIAE*[1]

Amicus Curiae, W. ("Willieta") Burlette Carter, is a Professor of Law at the George Washington University Law School in Washington, D.C. She files this brief in her individual capacity.

Amicus is a historian. She is also a descendant of slaves on both sides of her family. As a student, she benefitted directly from this Court's school desegregation decisions, including *Swann, v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). *Amicus* was eleven years old and in the fifth grade when, in 1972, her hometown public schools in South Carolina finally desegregated in response to *Swann*. Only years later, the month after she graduated from high school, the Court decided *Regents of California v. Bakke*, 438 U.S. 235 (1978). *Amicus* has practiced full time as a lawyer, served on a law school admissions committee, on a college board of trustees and on a law firm hiring committee. *Amicus* files this brief because she believes that her perspectives and expertise can offer new insights that can be useful to the Court.

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[1]Petitioners and Respondents filed a blanket consent to all *amicus briefs* pursuant to Rule 37. No counsel for a party authored the brief in whole or in part; no counsel or party made a monetary contribution; no person or entity, other than *amicus curiae,* made any monetary contribution intended to fund the preparing or submitting this brief.

SUMMARY OF THE ARGUMENT

This brief will not focus on the specifics of the University of Texas at Austin program. Instead, it will speak to affirmative action programs generally. The brief focuses upon blacks as racial minorities because that is her perspective. The arguments made herein may apply in whole or in part to other groups.

Affirmative action programs should be considered in historical perspective. While early affirmative action for whites was relatively noncontroversial, efforts to provide affirmative action to blacks have always met with resistance.

Blacks who are the descendants of slaves and/or those who family histories involve immigration but date back to segregation have overlapping and important family histories. These histories must be considered in affirmative action policies. There is also no reason why the percentage of foreign students among affirmative action applicants should be significantly greater than the percentage of them among other applicants.

Modern approaches to affirmative action are flawed in two other ways. First, they merge two different concepts: an applicant's *status* (e.g., "race") and an applicant's *perspective.* The Court can improve these programs by using the lessons of social psychology. First, as to status, social psychology affirms that absent unusual power, minority groups of any ilk are subject to disadvantage merely because they are minority groups. The more visible the minority group, the more likely the group member will be overtly

targeted for disadvantage. In considering socioeconomic condition, schools are merely considering a minority status. Excluding race as a minority status from such considerations is indefensible and unconstitutional.

Statuses of all kinds should be used only as a marker for identifying those who *might* have additional qualities that would lead to the desired diversity. As to *all* such statuses, then, schools should look further to consider whether students bring a *perspective* that adds to educational diversity or is necessary for the inclusiveness mission. Thus, "perspective" affirmative action is the second type of affirmative action needed.

The perspectives that many descendant blacks and other racial and ethnic minorities with family histories rooted in overcoming discrimination bring have been repeatedly targeted for extinction. These histories are central to the accuracy of the American[2] story and also constitute the personal narratives that those holding them have a right to protect and to have considered in admissions decisions. Without these perspectives, a college or university cannot produce meritful or relevant work. And any admissions practice that *excludes* their perspectives or assumes their irrelevancy violates the First Amendment and Equal Protection.

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[2]Unless the context otherwise indicates, I use the term "America" or "Americans" to refer to the United States or the British colonies from which it emerged.

THE ARGUMENT

I. THERE IS AN ALTERNATIVE AFFIRMATIVE ACTION NARRATIVE

A fair view of history requires that we consider affirmative action from its beginnings. There is no early American tradition of government helping people *merely* because they were in a lower socioeconomic class than others were in. Absent unusual circumstances, in colonial times and at the time of the Fourteenth Amendment, people were expected to " earn their own keep" so to speak. Aid to the slaves came because of the unique situation they faced and what it meant for the country.

Before Negro[3] slavery came to America, the main source of labor was indentured servitude. In England and early America some indentured servants were tied to long contracts that were essentially a form of "slavery." By an ironic process, the American experiment changed these approaches. The English decided to use America as extra jail space and also to rid themselves of the habitually and painfully impoverished. One royal order sent "lewd and dangerous persons, rogues, vagrants, and other idle persons, who have no way of livelihood, and refuse to work . . . to the English plantations in America." Order of the Council of State, August 15, 1756, British Nat. Archives Catalogue Ref. SP 25/77/ pp. 329-31; Calendar Ref., Item 2352, Vol. 1 (1574-

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[3]I use the term "Negro" because it is historically what blacks, slave or free, were called. I do not personally find it offensive.

1660), p. 447. But the English also took gentler approaches. The colony of Georgia was founded to provide a way for the perpetually poor in England to gain solid economic footing. *See* Charter of Georgia, 1732; *see also London, Oct.* 2, American Weekly Mercury, January 22-29, 1733, 3 (noting "about fifty more poor men, women and children embarked at Rotherhith for Georgia.") Significantly, the Georgia Act was not designed. as a redistribution of wealth scheme vis a vis whites. It dealt with a habitual problem for these persons faced: habitual poverty.

Numerous royal "bounty" acts invited people to "settle" land in "America," though it was already occupied by Indians." The primary goal was westward expansion and security from Indian attacks, but lower classes of whites benefitted. If claimants occupied land and farmed it for a period of years, they could receive title to it. After slavery emerged as a chief labor source, such bounty acts began to expressly limit such privileges by race. So it was with the 1850 Oregon statute later made famous in *Maynard v. Hill* 125 U.S. 190 (1888). Oregon Land Donation Law, 9 Stat. 496 (1850). *See also generally,* Philip Rubio, *A History of Affirmative Action, 1619-*2000 (2001); Ira Katznelson, *When Affirmative Action Was White* (2005).

Poor whites also were considered of a higher social status than persons of color, slave or free. Indeed, in 1614, before the first black slaves landed in the continental British colonies, Captain John Smith of Virginia wrote "For *Affrica*, had not the industrious Portugales ranged her unknowne parts, who would have fought for wealth among those fryed Regions of blacke brutish Negers, where notwithstanding all the wealth and admirable

adventures and endeavours more than 140 yeares, they knowe not one third of those black habitations." *Smith, IV,* **208.** Such notions underlie Justice Taney's assertions in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *i.e.*, that those of African blood could never be citizens and were inherently inferior. And in 1857, *Senator* A.G. Brown scoffed at abolitionist hopes for a coalition between poor whites and blacks, opining "They may have no pecuniary interest in slavery, but they have a social interest at stake that is worth more to them than all the wealth of all the Indies." Remarks of Sen. A.G. Brown (MS), *Cong. Globe,* 34th Cong., 3rd Sess., 94 (1857). *Compare* Cheryl Harris, *Whiteness as Property*, 105 Harv. L. Rev. 1707 (1993).

Whites who received free land through bounty act, including lower class ones, could lease or buy slaves. *Compare* Comments of Mr. Hunter (VA), 36th Cong., 1st Sess., *Cong. Globe,* 1632 (1860) (differentiating the white poor and saying that "even the nonslaveholder has the use of slave labor; that he hired just as he rented land.") In 1638, the British authorized Providence Island (e.g., Rhode Island) to purchase slaves and stated "The surplusage may be sold to the poor men who have served their apprenticeship." Letter From The Company Of Providence Island To Capt. Nat, Butler, Governor, British Nat'l Archives Ref. CO 124/1, P. 126, Calendar Ref. Item 1356, Vol 1 (1574-1660), P. 278-279, July 3, 1638. A 1638 Letter Notes That Negroes Are To Work Double. Letter From The Company Of Providence Island To The Governor And Council, British Nat'l Archives. Cat. Ref. No. CO 124/1, Pp. 123-25, Calendar Ref. No. Item 1355, Vol 1 (1574-1660), Pp. 277-278 July 3, 1638.

Apart from a labor source, indentured servitude served another role. It was also the primary form of career education for the average person in England and in the colonies. On the wave of affirmative action, in America, indentured servitude for the poor was transformed. In 1782, Benjamin Franklin encouraged parents abroad to send their children to America as indentured servants. He said American business owners were so desperate for servants they sometimes offered payment to parents (unlike England where parents usually paid the master). Thus, he opined that in America "it is easy for poor Families to get their Children instructed." He also recorded the success of indentured servants in obtaining legal protections including review of contracts by the courts. Benjamin Franklin, *Information to Those Who Would Remove to America*, Sept. 1782 *in* Albert Henry Smyth, *The Writings of Benjamin Franklin* 603-05 (1906). Although there were some free black indentured servants, the overwhelming numbers were white. Of course, Franklin's comments came before the Civil War devastated the Southern economy.

The subsequent stages of affirmative action included efforts to help racial minorities. But in contrast to efforts to aid the white poor, efforts to assist racial minorities, and especially blacks, have consistently met with strong and highly organized resistance. When some argued for blacks to be given access to property in the new territory of Texas precisely so that they could be *segregated* away from whites, there was opposition. Remarks of Mr. Doolittle, *Cong. Globe*, 36th Cong., 1st Sess. 1632 (1860). Efforts to assist blacks after the Civil War

and During Reconstruction were opposed. And since its beginnings, affirmative action has been opposed

Affirmative action debates today reflect many themes of the past. There is the refusal to acknowledge that being black in America still matters to opportunity. There are suggestions that educational opportunity at top schools is not good for blacks (while suggesting it *is* good for those of lower economic status). *See* generally Brief *Amicus Curiae* For Richard Sander In Support Of Neither Party.

And there is possible subterfuge. In 1992 Professor Kevin Brown called attention to the fact that descendant blacks who have slave and/or segregation histories on *both* sides of their family tree have been underrepresented in affirmative action plans at the most select schools. Kevin Brown, *Because of Our Success* 3-10 (2015).[4] As Professor Brown noted, a 1999 study of twenty eight selective colleges and universities demonstrated that Black Multiracials or Black immigrants made up 41% of black freshman. Brown at 7, citing Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 Vand. L. Rev. 1141, 1149 n. 27, (2007). In 2003, Professors Henry Louis Gates and Lani Guinier pointed out the trend at a gathering of black alumni at Harvard, insisting that institutions must be honest about what they are accomplishing through affirmative action. Sara Rimer and Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?* New York Times, June 24, 2004, A1. The concern was not that foreign students or biracials

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[4] Professor Brown prefers to call these blacks "ascendant blacks" and he defines the relevant class somewhat differently. Some call them "legacy blacks."

were getting into colleges, but that descendant blacks were not. The proportions that foreign students represented among those designated "racial minorities" was dramatically higher than that which foreign students represented to the larger admissions pool. Such students were also often in the majority in their home countries and some also had higher socioeconomic backgrounds and family educations than some blacks (and some whites) against whom they competed. Brown at 9. Other scholars also have written about this trend. *See also* Douglas S. Massey, et al., *The Source of the River: The Social Origins of Freshmen at America's Selective Colleges and Universities* (2003); Douglas Massey, Margarita Mooney, and Kimberly Torres, *Black Immigrant and Native College Students*, 113 American J. on Educ. 243 (2007). *See also* Brown, *supra*, at 7-8. The issue was raised in newspapers and magazines. *E.g.,* Ronald Roach, *Drawing Upon the Diaspora*, Diverse Issues in Higher Educ. (August 25, 2005); Rimer and Arenson, *supra*; *As Black Immigrants Collect College Degrees is Affirmative Action Losing Direction?* Baltimore Sun, March 20, 2007.

The descendants of slaves are not immigrants. They did not come here voluntarily. They did not come to seek a better life. They did not enter the country as families nor could they retain ties to families once they arrived. The only language tie they have is English. Although they had different African languages when they arrived, they were forced by slavery to abandon those languages. Unlike immigrant groups, then, they cannot point to another country of family origin. In other words, the slaves and their descendants are quintessentially a

product of America. And while those who immigrated long ago and whose families endured segregation have an immigrant background it is not so recent that they should be considered exactly like to those who grew up in another country under very different circumstances.

II. THE U.S. STORY OF SLAVERY IS UNIQUE AMONG SLAVERY STORIES AND UNIQUE IN TERMS OF STORIES OF ENTRY INTO THE U.S.

A. "Slavery," As In "Involuntary Servitude," Existed As A World-Wide Phenomenon Without Racial Elements

Slavery has existed all over the world. *Accord, e.g.,* Milton Meltzer, *Slavery: A World History* (1993). In ancient times, people of all skin colors were enslaved. *Id.* at 6. *Accord* John Hope Franklin, *From Slavery to Freedom* 40 (1967). People enslaved prisoners of war. The poor and helpless were enslaved. So too were those convicted of crimes. Earlier cultures differed on the extent to which they treated slaves as property (e.g., as chattel, as opposed to persons); the extent of freedom they afforded slaves; the work they required slaves to do; the length of time a slave would serve and the degree to which the slave was incorporated in or excluded from the larger society. Very often, slavery has required forced sexual service. Melzer at 23.

Slavery was recognized under the common law of England. Villeinage existed under the feudal system. *Somerset v. Stewart*, 98 Eng. Rep. 499

(1772). A poor person could sell themselves into slavery by contract to pay debts. Thus, the British called some indentured servants "slaves." *Id.* The common law recognized as well the enslavement of felons as punishment and as prisoners of war. *Id.*

B. Race-Based Slavery Also First Emerged Internationally

Slavery based on *race* alone appears to have been a relatively late and unique development. Explorers sanctioned by European powers (e.g., England, France, Spain, Portugal and the Netherlands) set up forts all along the Coast of Africa. Helpful to solidifying the Europeans sense of self was their perception of Christianity. Thus, in 1606, the First Charter of Virginia spoke of Christianizing "heathens" and going to places "which are not now actually possessed by any Christian Prince or Peoples." The First Charter of Virginia, April 10, 1606, available at Yale U. Avalon Proj., at http://avalon.law.yale.edu/subject_men-us/statech.asp

There were people of color living in Europe. One report recounts that the Catholic Spanish Kings required the Moors to either change their religion or move to the Barbary Coast. In retribution, it is claimed, the Moors joined with princes of Africa and condemned the Spanish living in Barbary who were Christians (whites) to serve them in perpetual slavery. *See From the London Magazine, for the Month of Augus*t, November 13, 1749, 1; *see also* Robert Davis, *Christian Slaves, Muslim Masters: White Slavery in the Mediterranean, the Barbary Coast, and Italy, 1500-1800* (2003), at xxvi.

Shakespeare's *Othello,* written before the establishment of the first continental colony in Virginia, establishes that race was noticed. William Shakespeare, Othello, Act 3, Scene 3 ("cursed fate that gave thee to the Moor".) Thus, noting the interracial relationship between Othello and Desdemona, his white wife, Iago tells Desdemona's father Brabantio "Even now, now, very now, an old black ram Is tupping your white ewe." Shakespeare, *Othello*, Scene 1, Act. 1.

The Portuguese are recollected as being the first white Europeans to establish an "official" presence in Africa. *E.g.*, Franklin at 45; *see also* discussion of Captain John Smith, *supra*, at 5. Relations between Europeans and tribes in Africa involved both trading relationships and war. *See London, February 27*, April 30-May 7, 1724, 2 (referring to "natives of the Kingdom of Angola" attacking and destroying a Portuguese fort there); *Bristol, Feb. 12*, Boston Newsletter, April 15-13, 1722 (reporting "Portuguieze [sic] and Natives of Gabends . . . at War); *London, August 20*, New England Weekly Journal, ("Eastern Coast of Africa . . . re-taken by Natives" which Place had long been possessed by the Portugueze" [sic]). A race-based slave trade in Negro slaves emerged out of this context.

Scholars have debated how much slavery was the result of the cooperation of some Africans (and clearly some was) and how many slaves were taken as a direct result of conquest. But the very question of whether "Africans" helped with slavery ignores the context in which slavery emerged. Those "Africans" did not see their entire continent as a single group. Instead, they identified by the tribes

and families to which they belonged. The practice of pitting one nation-tribe against another was a common war practice. *Compare, New York, September 19,* Boston News-letter, September 1-8, 1712, 2 and *New-York, February 23,* Boston Newsletter, March 2-9, 1712, 2 (both articles discussing South Carolina authorities engaging South Carolina Indians to assist them in taking on North Carolina Indians alleged to have killed North Carolina colonists).

As early as the 1500s, the Spanish held Negro slaves in Florida, Puerto Rico and South Carolina and other locations that later became a part of the United States, not to mention numerous Caribbean and Central American countries. *See, e.g.,* Luis A. Figueroa, *Sugar, Slavery and Freedom in Nineteenth Century Puerto Rico* (2005); *From the New York Evangelist, Slavery in a Spanish Colony,* The Emancipator, and Journal of Public Morals, April 14, 1835, 1. However, the continental *British colonies* first became involved in the slave trade in 1619. In 1626, Captain John Smith, in his historical record *The Generall Historie of Virginia, New England and the Summer Isles,* retrospectively noted the landing of a Dutch ship in Virginia. Smith wrote, "About the last of August came in a Dutch man of warre that sold us twenty Negars . . . ." John Smith, *The Generall Historie of Virginia* (1626), (Book IV, 126, recounting sale). (Smith was probably relying upon the account of John Rolfe who had also recorded the incident in letters.) Later sources point to the same incident as the start of British continental colonial involvement but designate the year as 1620. These sources also vary on the number of slaves. *E.g.,* 75 Niles' Nat'l Reg. 33 (1849) ("The first slaves

introduced into this country, were twenty in number, brought by a Dutch ship-o-war from the coast of Guinea." They were landed for sale, on James River, Colony of Virginia, August 1620 . . . ."); 30th Congress 1st Session, July 11, 1848, 903 (On debate over Jefferson Davis' amendment to Oregon territory bill, Senator James Mason defending Negro chattel slavery and stating "The first slaves were sold in Virginia in 1620 by a Dutch Vessel and were sold as merchandise, and this was done with the knowledge and permission of the British Crown.")

C. In America, Race-Based Slavery Became A Key Means Of Economic Production And That Fact Increased Resistance To Its Elimination.

The new colonies became exceedingly dependent on black slave labor especially as indentured servants gained more rights. As many have recognized, in the Americas generally, and the U.S. in particular, *race-based* slavery became a key element in the means of economic production. *E.g.,* Paul Finkleman, *Thomas R.R. Cobb and the Law of Negro Slavery*, 5 Roger Williams U. L. Rev. 75, 78 (1999). These facts gave it a status that imposed its indelible print on our Constitution. Slavery's economic value not only made slavery difficult to surrender, it created a bias that supported stereotype and innuendo. Alexander Hamilton recognized the bias of economic concerns when he urged that black slaves be encouraged to participate in the Revolutionary War. Hamilton was no abolitionist and his comments drip with paternalism, but he feared the British would recruit the slaves

first. He noted, "The contempt we have been taught to entertain for the blacks makes us fancy many things that are founded neither in reason or experience; and an unwillingness to part with property of so valuable a kind will furnish a thousand arguments to show the impracticability or pernicious tendency of a scheme which requires such a sacrifice." Letter from Alexander Hamilton to John Jay, March 14, 1779.

Despite their legal status as property, the slaves were, in fact, human beings. Even after states and the United States prohibited slave importation, their numbers grew. By the time of the first census in 1790, they were almost 700,000. By 1860, they had swelled to almost four million. U.S. Census, *A Century of Population Growth from the First Census of the United States to the Twelfth*, 1790-1900, 133-34 (1909). By 1860, one third of the population of the entire South were slaves. In several southern states slaves constituted a *majority* of the population. *Id.* And many slaves were multiracial in fact, though not in law. It was an open secret, even though slaveholders claimed they found interracial relationships repulsive. Thus, in 1854 in tense discussions over banning polygamy, Congressman Giddings accused those slaveholding Congressmen who supported bans of hypocrisy, saying "[T]he Mormon does not sell his wife nor does he sell his children. . . . He does not sell his own offspring to a slave dealer." *Cong. Globe*, 33rd Cong., 1st Sess., 1089 (1854).

As slavery increased, so did runaways and fears of rebellion. These circumstances, led to the emergence of "slave codes." Common provisions in states with the most slaves prevented anyone from

educating a slave. They also punished those who aided an escaped slave; provided special rules of Evidence including barring testimony against whites; limited the number of slaves who could gather in one. *E.g.*, 1 *Leslie A Thompson A Manual or Digest of the Statute of the State of Florida of a General and Public* 542-45 (1847) (Florida Slave Code Evidence rules); 4 *Statutes at Large Being a Collection of All the Laws of Virginia From the First Session of the Legislature* 126-34 (1733) (evidence rules, limits on gathering). *See also* generally, David J. McCord, *The Statutes at Large of South Carolina* (1840) (with index). Cities and towns had codes too. The Austin, Texas city ordinance of 1762 prevented slaves from occupying private houses apart from the owner and punished slave or free black persons if they started shops without having a white overseer present. *Official: An Ordinance, Pertaining to Slaves and Free Persons of Color*, Texas Almanac, December 6, 1862, 1.

The slaves were subject to unique domestic relations laws. They were legally considered members of a master's household, even though they had their own families. With a sale, a slave's name was often changed to the last name of a new master. As a slave descendant this writer automatically understood what Justice Catron meant when, in *Dred Scott*, he referred to Dred Scott's family as "parts of [slaveholder Scott's] family in name and in fact . . . ." *Dred Scott v. Sandford*, 60 U.S. 393, 527 (1857). Like Dred Scott, *amicus* too carries a slaveholder's last name. The slaves could not marry legally. Thus, Dred Scott, like other black male slaves, was denied both the privilege of patriarchy and the privilege of protecting their families from

harm. Instead, the slavemaster held all rights of defense, compensation and retribution. Legally, children of slaves were termed their "increase," reflecting both the mother and child's status as property. *E.g.*, *Jaggers v. Estes,* 2 Strob. Eq. 343, 344 (1847). Of course the sale of a family member—a spouse, a child, a loved one—also could be used as harsh punishment.

As slavery grew in economic importance, Americans also exempted black slaves from the rules of slavery in other countries. These included the rule that a child born to a free father was free and the rule that Christians could not be enslaved. Meltzer at 12; 1 Laws of New-York 457 (1752) (baptism). When biracial or "mulatto" children began to appear in large numbers, slaveholding colonies both north determined that status of a child was to be judged by the free or slave status of the mother, not the father. 2 *Statutes at Large Being a Collection of All the Laws of Virginia From the First Session of the Legislature* 170 (Act XII (1733)).

Some blacks also were chattel slave owners in early America but as race-based slavery grew, the viability of black slave ownership by those visibly black faded. They too became subject to race-based restrictions. Indians also owned black chattel slaves. Carla D. Pratt, *Tribes and Tribulations, Beyond Sovereign Immunity and Toward Reparation and Reconciliation for the Eselusti,* 11 Wash & Lee R.E.A.L. J. 61 (2005). Some Indians and Mestizos were chattel slaves and made subject to the condition of the mother rule.

North and south were involved in slavery initially. Both northern states and territories, imposed stringent requirements upon free blacks

that made them second class citizens. "Negro and Mulatto codes" that limited blacks coming into a state, required free blacks to carry papers to prove their statuses, forbade blacks to carry firearms, allowed courts to bind the children of blacks to apprenticeships without parental consent, and prevented them from serving in apprenticeships where whites served and reduced them to the lowest level jobs. *See, e.g., Revised Statutes of the State of Missouri, Revised and Digested by the Thirteenth General Assembly, during the Session of Eighteen Hundred and Forty-Four and Eighteen Hundred and Forty-Five* 753-59 (1844-1845), ch. 123 (Missouri code for "Negros and Mulattos"). Free states also froze out slaves, essentially sealing most of them in slavery.

III. THE POST CIVIL WAR SEGREGATION ERA WAS MARKED BY HARD FOUGHT SUCCESSES AND STINGING DISAPPOINTMENTS AND IT TOOK MORE THAN 100 YEARS TO END DIRECT GOVERNMENT SPONSORSHIP OF IT.

The American story of racial segregation is also uniquely tied to US laws, approaches and policies although there are clear similarities. While slave descendants suffered this period, segregation stories are also part of the personal family histories of black immigrants who were domiciled in the United States during segregation.

The history of the U.S.'s dealings with race is one of both great triumph and great

disappointments. This Court's opinions tell the story. Here is a list of only *some* of its decisions.

> **(blacks as potential citizens; fugitive slave law)** *Dred Scott v. Sandford*, 60 U.S. 393 (1857) **(Civil Rights Act of 1875);** *The Civil Rights Cases*, 109 U.S. 3 (1883); **(interracial marriage)** *Pace v. Alabama*, 106 U.S. 583 (1883); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Loving v. Virginia*, 388 U.S. 1 (1967); **(equality in education, segregation, desegregation)** *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Cumming v. Richmond County Bd. of Educ.* 175 U.S. 528 (1899); *Berea College v. Kentucky*, 2011 U.S. 45 (1908); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948) (per curiam); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Brown I); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Bd. of Educ.* 349 U.S. 394 (1955) (Brown II);*Lucy v. Adams*, 350 U.S. 1 (1955);
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> *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963); *Bradley* v. *Sch. Bd.*, 382 U.S. 103 (1965); *Rogers v. Paul*, 382 U.S. 198 (1965); *Cooper v. Aaron*, 358 U.S. 1 (1968); *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968)*; Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972); *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484 (1972); *Keyes v. School Dist.*, 413 U.S. 189 (1972); *Norwood v. Harrison*, 415 U.S. 455 (1973); *Milliken v. Bradley*, 418 U.S. 434 (1974);

(segregation/desegregation re public recreational facilities) *Holmes* v. *Atlanta,* 350 U.S. 879 (1955) (per curiam, golf courses); *Wright v. Georgia,* 373 U.S. 284 (1963) (public parks); *Watson v. Memphis,* 373 U.S. 526 (1963) public parks, recreational facilities); *Mayor and City Council of Baltimore v. Dawson,* 350 U.S. 877 (1965) (per curiam; beaches and bathhouses); *Evans* v. *Newton,* 382 U.S. 296 (1966) (public parks; racially restrictive gift in trust provisions); **(housing; zoning; racially restrictive land covenants)** *Buchanan v. Warley,* 245 U.S. 60 (1917); *Harmon v. Tyler,* 273 U.S. 668 (1927); *City of Richmond v. Deans,* 281 U.S. 704 (1930); Hansberry *v. Lee,* 311 U.S. 32 (1940); *Shelley v. Kraemer,* 334 U.S. 1 (1948); *Jones v. Alfred H. Mayer Company,* 392 U.S. 409 (1968); **(voting rights; gerrymandering)** *Guinn v. United States,* 238 U.S. 347 (1915); *Nixon v. Herndon,* 273 U.S. 536 (1927); *Nixon v. Canada,* 286 U.S. 73 (1932); *Lane v. Wilson,* 307 U.S. 268 (1939); *Smith v. Allwright,* 321 U.S. 649 (1944); *Gomillion v. Lightfoot,* 364 U.S. 339 (1960); *Anderson v. Martin,* 375 U.S. 399 (1964); **(segregation/desegregation interstate and intrastate transportation)** *Morgan v. Virginia,* 328 U.S. 373 (1946); *Henderson v. United States,* 339 U.S. 816 (1950); *Browder v. Gayle,* 352 U.S. 903 (1956); *South Carolina Electric and Gas v. Flemming,* 351 U.S. 901 (1956) (per curiam; dismissing appeal of Fourth Circuit order requiring desegregation); *Boynton v. Virginia,* 364 U.S. 454 (1960); *Bailey* v. *Patterson,* 369 U.S. 31 (1962); *Abernathy v. Alabama,* 380 U.S. 447 (1965) (*per curiam*); **(service at restaurants),**

Garner v. *Louisiana,* 368 U.S. 157 (1961); *Turner* v. *Memphis,* 369 U.S. 350 (1962); *Peterson* v. *City of Greenville,* 373 U.S. 244 (1963); *Gober* v. *City of Birmingham,* 373 U.S. 374 (1963); *Bell* v. *Maryland,* 378 U.S. 226 (1964); *Bouie* v. *City of Columbia,* 378 U.S. 347 (1964); *Barr* v. *City of Columbia,* 378 U.S. 146 (1964); *Hamm* v. *Rock Hill,* 379 U.S. 306 (1964); *Georgia* v. *Rachel,* 384 U.S. 780 (1966); **(access to hotels and other public accommodations/Civil Rights Act of 1964)** *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964); **(the right of peaceable assembly)** *Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Fields* v. *South Carolina,* 375 U.S. 44 (1963); *Henry* v. *Rock Hill,* 376 U.S. 776 (1964); **(jury discrimination/fair trial/witnesses)**; *Moore et al. v. Dempsey*, 261 U.S. 86 (1926); *Powell v. Alabama,* 287 U.S. 45 (1934); (the "Scottsboro Boys" case) *Hollins v. State of Oklahoma*, 295 U.S. 394 (1935); *Hale v. Kentucky*, 303 U.S. 613 (1938); *Patton v. Mississippi*, 322 U.S. 463 (1947); *Hamilton v. Alabama,* 376 U.S. 650 (1964); *Coleman* v. *Alabama,* 377 U.S. 129 (1964); *Batson v. Kentucky*, 476 U.S. 798 (1986)**;** **(due process/coerced confessions)** *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); **(athletic contests)** *State Athletic Commission* v. *Dorsey,* 359 U.S. 533 (1959)

This list omits later cases dealing with seniority systems, union rules and other such norms established in the context of segregation that kept blacks out of key jobs. It omits thousands of lower federal and state court cases, *three* Civil War

Constitutional amendments, other amendments and principles affected by the debate over race;[5] hundreds perhaps thousands of federal statutes, racially motivated violence, failures to protect by governmental entities, violence and unchecked private discrimination or all of the efforts of local governments and private citizens (of many different races) to stop discrimination. *Compare* NAACP, *Thirty Years of Lynching in the United States, 1889-1918* (1969) also available through Library of Congress at https://www.loc.gov /teachers /classroommaterials/primarysourcesets/naacp/pdf /lynching.pdf.

Nor do the above cases include the many in which racism played a role in the complete facts of the case, but is not mentioned by the Court. *See, e.g.*, *Chambers v. Mississippi*, 410 U.S. 284 (1973) (incident in small town rural Mississippi in which prosecutors arguably did not care whether or not they had caught the right man for an alleged murder); *Lawrence v. Texas*, 539 U.S. 558 (2003) (arrest for sodomy spurred allegedly by jealous partner calling cops and reporting a black male with a weapon.)[6]

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[5]In addition to the Civil War Amendments, s*ee* U.S. Const. amend XIII; U.S. Const. amend XIV; U.S. Const. amend XV, slavery affected the original version of the Article 1, section 2 which famously provided that slaves would be counted as three-fifths of a person. U.S. Const. art. I, § 2 (1787) (amended by Fourteenth Amendment). Slavery and racial segregation have also affected our notions of federalism and domestic relations.

[6]*See* Dale Carpenter, *The Unknown Past of Lawrence v. Texas*, 102 Mich. L. Rev. 1464, 1479 (2004).

IV. THE STORIES OF BLACK SLAVERY, SEGREGATION, AND CIVIL RIGHTS DEPRIVATIONS HAVE FREQUENTLY BEEN MISINTERPRETED, ALTERED OR IGNORED.

The trend of resistance to dealing with race in any way in college and university admissions is all the more remarkable because the history of racial minorities is *repeatedly* referenced by those claiming to tell the nation's story in histories, classrooms, scholarship and in litigation. Indeed, immediately after the Civil War, the nation witnessed both efforts to tell a broader view of the Civil War from a Southern perspective *and* efforts to conduct misinformation campaigns that denigrated blacks and minimized their accomplishments. On the latter front, a key battleground was education. *See Textbooks Spread Hate for Colored; NAACP Collects Schools Distorted History,* Washington Afro-American, June 10, 1939, 8; *Biased Civil War Picture Given in New York Textbooks; Required Histories Discredit Minority Teachers Union Charges in Report*, Baltimore Afro-American, June 1, 1946, 7; Lloyd Marcus, *Textbooks Outdated, Distorted*, Afro-American, January 21, 1961, 7; Gerald Grant, *1300 Teachers Debate Textbook Negro Image*, Washington Post, December 10, 1996, 1966, A4; *Educators to Hold Textbook Meet*, Baltimore Afro-American, March 16, 1968, A1; *Textbook Probe Ordered*, Washington Post, February 9, 1987, A8; William Trombley, *Pluralism, Unity, Vie in Textbook Battle*, Los Angeles Times, October 9, 1990, A3. Such campaigns extended to other media including film.

Foes of Klan Fight Birth of a Nation, New York Times, December 3, 1922; 9. *State Urged to Bar Birth of A* Nation, *New York* Times, January 17, 1965, 75; *See also* W. Burlette Carter, *Finding the Oscar*, 55 How. L. J. 1 (2011) (discussing racial stereotypes in film).

Even today, the battle over "perspective" rages. A major academic publishing house came under fire for producing a World History textbook for high schools that covered slaves under the topic of "immigration" and referenced them as "workers." Yanan Wang, *Workers or Slaves, Textbook Maker Backtracks After Mother's Online Complaint, Washington Post Blogs,* October 5, 2015 at http://www.washingtonpost.com/news /morning-mix/wp/2015/10/05/immigrant-workers-or-slaves-textbook-maker-backtracks-after-mothers-online-complaint/. A fifteen year old black male high school student complained to his mother, and she acted. Manny Fernandez, Christine Hauser, T*exas Mother Teaches Textbook Company a Lesson on Accuracy*, New York Times, October 5, 2015, 10. The boy's mother was a doctoral candidate at the University of Houston's Language Arts program. Yang, *supra.* A site at the Library of Congress lists slaves under "Immigration" although referring to them as slaves and captives. *See* Library of Congress site at http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/immigration/african4.html.

The young man who objected to his ancestors being called "workers" didn't have his perspective because he wanted to serve black neighborhoods or was interested in becoming a professor of black history. He didn't have it because he wanted to

educate his fellow students or call for altruism as a virtue. His challenge was directly to the *merit* of the casebook. And whether you or I agree with him, it was a valid challenge. The stories of slavery and Civil Rights struggles are not mere history stories. They are stories of family history.

Another example is offered by the current battle over the AP Advanced Placement History Exam of the College Bd. ("CB"). Lyndsey Layton, *AP History Course is Revised for this Fall*, Washington Post, July 31, 2015, A03. Note that the AP Framework says that Europeans "partnered" with some West Africans in the slave trade. The term "partnered" suggests a level of equality that some would argue was not present given the context of conquest and the fact that blacks did not see slavery as race-based or have a strict chattel model. *See* U.S. College Board, *AP United States History Framework, Revised Fall 2015*, 58 (2015).

V. THE LESSONS OF SOCIAL PSYCHOLOGY ARE ESSENTIAL TO UNDERSTANDING THE APPROPRIATE ROLE OF "RACE" IN AFFIRMATIVE ACTION POLICIES

In 1954, shortly before this court's decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), Gordon Allport produced his seminal work *The Nature of Prejudice*. *See also* Gordon Allport, *The Nature of Prejudice* (1979) (25th Anniversary Edition). While some of its themes are dated, the core of the work still provides guidance as to why affirmative action is needed and how it relates to merit.

A. Key Principles

1. Prejudice Is Natural And Often Unconscious

Allport noted that all human beings have a propensity toward prejudice. Prejudgment and categorization are normal human behaviors. *Accord e.g.,* Marilynn B. Brewer, *The Social Psychology of Intergroup Relations: Social Categorization, Ingroup Bias, and Outgroup Prejudice*, Social Psychology: Handbook of Basic Principle, 695-715 (2007); J. Dovidio *et. al., On the Nature of Prejudice: Fifty Years After Allport* (2005); Rupert Brown, *Prejudice: Its Social Psychology* (1995); Patricia Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 Journal of Personality and Soc. Psychol., 5-18, (1989) (suggesting automatic stereotyping is common for both low and high prejudice subjects).

2. The Role Of "Ingroups" And "Outgroups"

Allport explained that people naturally and consciously form "In-Groups" to which *they* belong and identify *and* "Out-groups" comprising of others who do not belong (and who they would not invite) into their group. Some have suggested that these reactions are based on survival instincts, *e.g.,* the need to identify strangers.

3. The Role Of Visibility

"Visibility" plays an important role in prejudice. Allport explained, "Unless there is some visible and conspicuous feature present in a group we have difficulty in forming categories concerning it, also in calling upon the category when we encounter a new member of this group. Visibility and identifiability aid categorization." Allport at 129. Race has historically been the most significant mark of visibility. "The simplicity of 'race' gave an immediate and visible mark, so it was thought, by which to denigrate victims of dislike. . . . It had the stamp of biological finality." Allport, Preface, xvii. Social scientists have also recognized that there are *degrees* of visibility. *E.g., id.* pp. 132-135. Allport rejected the notion that bigotry against blacks in the 1950s was based merely on their economic status. Allport at 210. Even then, people claimed it was "class," not race.

4. The Role Of Convenience

Allport did not ascribe all human behavior toward separation to prejudice. He argued that much of the initial cohesion is related to convenience. "It requires less effort to deal with people who [we assume] have similar presuppositions." *Id.* at 18.

5. The Establishment Of Groups Norms

Separation of groups leads to real conflicts as each group establishes group norms suitable to its needs. When ingroups and outgroups come together, the norms disadvantage the less dominant group for

their perspectives were not considered or were marginalized. "Those with economic, political and social power invariably have the influence to establish social definitions." Richard H. Ropers and Dan J. Pence, *American Prejudice: With Liberty and Justice for Some* (1995). Nor is malice needed.

Justice Oliver Wendell Holmes, Jr. spoke to the power of group norms in 1899. He wrote about the oddity of the "fresh complaint" doctrine being applied to rape cases. He observed that while the doctrine was said to be rooted in the notion that a virtuous woman would immediately reveal that she was raped, he could not imagine a circumstances in which the presumption of "fresh complaint" made less sense. That disconnect led him to research the origins of the rule. He concluded that the rule was rooted in concerns that had very little relevance to rape cases and that its assumptions were contrary to the evidence law of his time. Oliver Wendell Holmes, *Law in Science, Science in Law*, 12 Harvard Law Review 453 (1899). Of course, the rule was also established when women were not allowed to be involved in the making of laws much less the study of it. That disconnect moment is what racial minorities and other outgroups experience. It is sometimes the beginning of discovery.

Consider the establishment of page length requirements for law review articles. If one asked 100 white male law professors, one might find that they might choose a shorter article length than a diverse group of editors comprised of women and minorities. The white male group would have greater freedom to begin from existing assumptions. The women and minorities would first have to unpack the existing assumptions, the group norms,

research and disprove them, and then establish new norms. Their creativity is rewarded with placement in a "specialty" law review because the article is too long. Ironically then, it seems that the success of some insiders will be artificially inflated *simply because they share norms with the insider group* and have a proximity to the insiders who actually *are* smart. In contrast, the most talented outgroup members may be the least willing to go along with norms that don't make sense to them.

6. The Role Of Explanation And Justification

Once prejudices are formed, the persons holding them will adopt narratives to make the bias appear to be based on subjective principles. Thus, slaveholders adopted narratives to explain why slaves had to be enslaved. Allport at 85-86. Inevitably these narratives painted the Negro slave as dysfunctional, intellectually inferior. They painted black men as dangerous and violent and black women as promiscuous. Each separated group then forms stereotypes about each other to confirm their prejudices. One might consider here stereotypes that all Southern whites or all poor whites are racists.

7. The "Contact Thesis" And Its Requirements

The "contact thesis" holds that bringing people together can overcome prejudice. However, contact

can also *increase* prejudice. Contact has several prerequisites, including that the situation must be one that promotes real affinity, the governing structure must strongly encourage and support the contact, and the parties must meet as equals. Allport at 263-68**. Thus,** how the Court speaks about affirmative action really does matter**.**

Examples of the contact thesis at work can be found in racial integration of the military and in a family member who alters negative views about gays or lesbians after a loved one comes out of the closet.

8. The Myth Of Millennial Tolerance

Though commentators often praise youth as having no prejudices, studies suggest otherwise. Allport established that children can learn prejudice at a young age. The young child naturally reacts negatively to strangeness. Allport at 130, 301-04. *See also* Sean McElwee, *Millennials are Less Racially Tolerant Than you Think*, New York Magazine, January 8, 2015, at http://nymag.com/scienceofus/2015/01 /millennials-are- less-tolerant-than-you-think.html# (criticizing methodology of 2010 Pew Research Poll offered as evidence that Millennials more tolerant); Scott Clement, *Millennials are Just About as Racist as Their Parents*, Washington Post (Wonkblog), April 7, 2015 *at http://www.washingtonpost.com /news /wonkblog/wp/2015/04/07/white-millennials-are-just-about-as-racist-as-their-parents/ (*discuss-ing the General Social Survey conducted by the National Opinion Research Center, University of Chicago). A 2014 MTV poll of Millennials indicates

that overwhelmingly they believe affirmative action (or their conception of it) is Unfair. Yet experiences of white millennials and those of color were vastly different on specific questions about race. Whites were far more likely to report that race helped them get ahead in life and that they had not personally experienced racism. Millennials of color were far more likely to report that they it had hindered them and that they had personally experienced racism. *See* 2014 MTV David Binder Study at http://www.lookdifferent.org/about-us/research-studies/1-2014-mtv-david-binder research-study.

B. Other Disciplines Affirm the Allport Thesis

Themes related to Allport's work are also found in other disciplines including "helping theory" (the study of why people help each other or the study of altruism) and game theory. *E.g.*, John F. Dovidio & Samuel L. Gaertner, *The Effects of Race, Status, and Ability on Helping Behavior*, 44 Soc. Psychol. Q. 192, 193 (1981) (helping theory). Researchers have found that people are less willing to help when they feel the potential recipient is undeserving and will help people with whom they believe they have something in common before they help strangers. *Encyclopedia of Sociology 117* (Edgar Borgatta & Rhonda Montgomery, eds., 2d ed., 1st vol. 2000).

The law also recognizes many of the concepts reflected in social psychology. In Evidence, there are hearsay exceptions for personal and family history. The rule is based in part on the respect people have for their own families. Fed. R. Evid. 803(13).

Evidence rules recognize the notion of conscious and unconscious bias. *United States v. Abel*, 469 U.S. 45 (1984). Similarly, we limit character evidence because we worry about its stereotyping nature. It makes invisible attributes visible. Fed. R. Evid. R. 404.

VI. THE COURT SHOULD UTILIZE SOCIAL PSYCHOLOGY IN SHAPING THE FUTURE OF AFFIRMATIVE ACTION

A. Institutional Perspectives Cannot Alone Define The State's Compelling Interests

There are two compelling interests that justify affirmative action. One, *Amicus* argues, is ensuring that individuals do not face undue hurdles in their efforts to be a part of the American story and have a fair opportunity to take advantage of the opportunities the nation offers. If Equal Protection is an individual right for students claiming to be *excluded*, it is as well one for those seeking to be *included*.. A second compelling interest is ensuring that institutions receive "'the educational benefits that flow from student body diversity." Respondents Brief, 1 citing Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419 (quoting *Grutter,* 539 U.S. at 330).

A narrower view of affirmative action understates the role of the American college and university. It is not a classroom building distanced from state operations. It is a research and scholarship behemoth, a publishing house; a market-

maker for books and authors. It is a media center with radio and TV stations and a broad internet presence. It is a collector of statistics, a controller of information, the custodian of national and international archival treasures, a conductor of experiments. It decides what history is worth telling and worth preserving; what should be held in an immediately accessible form and what should be boxed away in off-site storage. It makes rules and laws through placing its actors on committees. It controls access to the professions. And state or private, it receives tens of millions of federal and state dollars in support of these operations. Not only its buildings but also its must be accessible to all and its production must reasonably reflect the perspectives that forged a great nation.

B. When Institutions Adopt "Status" Affirmative Action, They Must Include Race, But Status Alone Should Not Be The Basis for *Any* Affirmative Action

Admitting a person to a class on the basis of socioeconomic position or any other attribute without more is but recognition of a minority or underrepresented status. One has no idea of what he or she will contribute to the class. There is thus, is *no* constitutional reason to exclude race from mere minority status considerations. It is a marker to look for more. In fact, we know more about race as a minority status than class. Race (1) is highly visible; (2)immutable; (3) frequently has a cross-family *and* intergenerational impact; (4)has historically been

the subject of targeting by biased persons and (5)could never be caused by a lack of hard work or a parent's lack of hard work. People have lost their lives based merely on that visible status. *See* Matt Apuzzo, *Nine Killings Bring Charges of a Hate Crime Nine Killed in Shooting at a Black Church in Charleston*, New York Times, July 23, 2015, 12.

C. Perspective-Based Affirmative Action Is Merit-Affirming And Necessary And There Is No Constitutional Reason To Exclude Persons Who Are Racial Minorities From It.

The second basis of affirmative action, I argue, must be *perspective*. Perspective will tell us who the person actually is, not how others classify him or her. Schools can meet this approach in the typical ways, inviting students to self-designate in categories, and with essays. There is no reason why a student who is black and wishes to speak to racial history or experience should be prevented from doing so, just as there is no reason another black student cannot speak about something else. These students have a First Amendment right to tell institutions who they are and why they should be accepted. U.S. Const. amend 1.

D. The Two Step Process Identified Here Preserves Equal Protection But Excluding Blacks As Blacks From Affirmative Action Altogether While Considering

Other Non-Race Statuses Or Treating Blacks All The Same Violates Due Process, Equal Protection And The First Amendment.

The approach here does not treat blacks differently *because of* race or ethnic origin. It treats them the same as other minority or underrepresented persons of various races and conditions. It satisfies strict scrutiny. (Note that race is not something they chose to be; it is something other labeled them.) The approach gives them the same right to talk about their history and advocate for their applications as anyone else has. That advocacy right means nothing if the words are deemed irrelevant. Indeed, if the Constitution through the due process clause buttressed by the equal protection clause preserves to individuals "the right to define and express their identity," no one has a better claim to that identity right than descendant blacks. *Obergefell v. Hodges*, No. 14-556, slip op. (U.S. Sup. Ct. January 26, 2015). Their *identities* have consistently been overlooked as people have focused upon their *race. See also Romer v. Evans*, 517 U.S. 620 (1996) (laws targeting groups for lesser protections are unconstitutional). And as stated there is also no reason that the foreign student representation among affirmative action admissions should be disproportionately high when compared to other general admissions. How or whether they fit into affirmative action may depend upon a particular school's program, but they surely don't fit in merely to boost "black" numbers.

CONCLUSION

In closing, I would call the Court's attention Justice Holmes' famous comments from 1881. The Justice was criticizing the notion of law as a science but, his observations are relevant here.

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to

> which it is able to work out desired results, depend very much upon its past.

Oliver Wendell Holmes, Jr., *The Common Law* 1-2 (1881).

Respectfully Submitted,

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