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The Sins of Innocence in Standing Doctrine

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Should reverse discrimination plaintiffs always be able to challenge race-conscious selection policies in court? Conventional standing doctrine requires plaintiffs to show that the contested policy or practice has caused a concrete, personal harm. Yet in affirmative action cases, courts seem to have quietly dispensed with this required showing. The Supreme Court's decision in Fisher v. University of Texas is a prime example. The university illustrated that the white plaintiff would not have been admitted whatever her race. Yet the Court completely ignored the standing inquiry, reinforcing the significant confusion among courts and scholars alike about the cognizability of racial injury. Some scholars attribute these relaxed standing outcomes to inherent expressive or stigmatic harms associated with racial classifications. This

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Article contends that a more complex dynamic is at work. It identifies and critiques an “innocence paradigm” that presumes harm to white plaintiffs from affirmative action. Legal scholars have long criticized the instability of standing doctrine, but none has fully explored the role that racialized conceptions of innocence plays in structuring standing analysis. This Article fills that gap. It defines the elements of the innocence paradigm in equal protection and discusses its role as an agent of racial injury in affirmative action litigation. It then explains how innocence shifted from equal protection to the procedural realm of standing, enabling anti-affirmative action litigants to access federal courts in the absence of any concrete, personal harm. By demonstrating the substantive and procedural operation of the innocence paradigm, the Article highlights the role that standing doctrine plays as both an instrument and product of racial inequality.

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I. INTRODUCTION

When should white plaintiffs be able to challenge race-conscious selection policies? The answer is a mystery. Conventional standing doctrine requires plaintiffs to show that the contested policy or practice has caused a concrete, personal harm.¹ Yet, in affirmative action cases, courts appear to have quietly dispensed with this required showing. The Supreme Court's decision in *Fisher v. University of Texas at Austin*² is the most recent example. The white plaintiff, Abigail Fisher, challenged the constitutionality of the University of Texas at Austin's race-conscious admissions policy.³ The university illustrated that it would have rejected Fisher from its freshman class regardless of her race.⁴ Thus, Fisher's standing should have been a live question. And yet the Court simply ignored it.⁵ Remarkably, it sent the case back to the lower court to reapply the constitutional standard without any mention, much less analysis, of Fisher's supposed injury.⁶ This result was particularly notable given that, in two other critically important cases also decided that term, the Court tossed plaintiffs for failing to demonstrate that they had a sufficient stake in the outcome of a contested government policy.⁷ The Court reminded the litigants that simply having a "keen interest" in an outcome was not enough.⁸ The "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere" demanded that the Court resist the "natural urge" to resolve public debates simply for the "sake of convenience and efficiency."⁹

1. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

2. 133 S. Ct. 2411 (2013).

3. *Id.* at 2415.

4. See *infra* Part II.B.

5. See *Fisher*, 133 S. Ct. 2411.

6. See *id.* at 2422; see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2659 (2013) (holding that petitioners lacked standing and therefore declining to address their alleged injury). The Court "bear[s] an independent obligation to assure [itself] that jurisdiction is proper before proceeding to the merits" of the case. *Plains Commerce Bank v. Long Family Land & Cattle*, 554 U.S. 316, 324 (2008).

7. See *Perry*, 133 S. Ct. at 2668 (rebuffing proponents of California ballot initiative that denied same-sex couples the ability to marry after state officials declined to appeal a ruling striking down the initiative); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) (holding that plaintiffs did not have standing to enjoin government surveillance under the Foreign Intelligence Surveillance Act due to an insufficient certainty that they would be harmed in the future by the statute's operation).

8. *Clapper*, 133 S. Ct. at 1146.

9. *Perry*, 133 S. Ct. at 2661 (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

Scholars have long criticized the incoherence of standing doctrine,¹⁰ and it therefore comes as no surprise that cases challenging race-conscious selection policies suffer from the same contradictions.¹¹ So why another article about standing? As this Article makes clear, the troubles of standing doctrine are magnified when they intersect with race for two reasons.¹² First, the favored status of white litigants challenging affirmative action threatens basic constitutional commands of racial impartiality in our federal justice system.¹³ If the inconsistencies in standing doctrine undermine our faith in the logic of federal jurisdiction, then racial disparities in the doctrine undermine our faith in the courts themselves as racially neutral arbiters of the law.

The second reason is the primary focus for this Article. In the context of affirmative action, standing has served as both an agent

10. See, e.g., Daniel E. Ho & Erica L. Ross, *Did Liberal Justices Invent the Standing Doctrine? An Empirical Study of the Evolution of Standing, 1921–2006*, 62 STAN. L. REV. 591, 591 (2010) (observing that “standing doctrine is one of the most widely theorized and criticized doctrines in U.S. law”); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 309 (2002) (“Injury determinations have been marked by a breathtaking inconsistency.”); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 86–103 (2007) (discussing flawed premises of standing doctrine); Girardeau A. Spann, *Color-Coded Standing*, 80 CORNELL L. REV. 1422, 1426 (1995) (“The law of standing is in a state of notorious disarray.”); Christian B. Sundquist, *The First Principles of Standing: Privilege, System Justification, and the Predictable Incoherence of Article III*, 1 COLUM. J. RACE & L. 119, 134 (2011) (“The indeterminate nature of standing doctrine is well-documented.”).

11. A number of legal scholars have discussed the privileged status of white litigants in equal protection cases challenging state considerations of race. See generally David R. Dow, *The Equal Protection Clause and the Legislative Redistricting Cases—Some Notes Concerning the Standing of White Plaintiffs*, 81 MINN. L. REV. 1123, 1128 (1997); Samuel Issacharoff & Pamela S. Karlan, *Standing and Misunderstanding in Voting Rights Law*, 111 HARV. L. REV. 2276, 2292 (1998) (discussing confused state of standing doctrine in reapportionment in which white voters contest majority-minority districts); Pamela S. Karlan, *All over the Map: The Supreme Court’s Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 278–82 (discussing absence of injury to white litigants challenging majority-minority districts); Nichol, *supra* note 10, at 304 (observing that standing “systematically favors the powerful over the powerless”); Raj Shah, *An Article III Divided Against Itself Cannot Stand: A Critical Race Perspective on the Supreme Court’s Standing Jurisprudence*, 61 UCLA L. REV. 196, 203–14 (2013) (detailing the different outcomes of standing questions in equal protection cases based on the race of the plaintiff); Spann, *supra* note 10, at 1454–66 (discussing standing’s racially disparate application); Sundquist, *supra* note 10, at 135 (“[T]he Court adopts an unnecessarily narrow conception of injury and causation in racial claims of non-white plaintiffs . . . [and] an unnecessarily broad conception . . . in cases involving the racial claims of white plaintiffs.”).

12. Cf. Nichol, *supra* note 10, at 326–27 (critiquing “the affirmative action exception to the injury requirement” on the grounds that it “lodges standing law squarely on the side of [racial] privilege”).

13. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986) (“Discrimination within the judicial system is most pernicious because it is ‘a stimulant to that race prejudice which is an impediment to securing to [black citizens] that equal justice which the law aims to secure to all others.’” (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880))).

and product of equal protection's diminishing commitment to racial equality: when courts presume that race-conscious selection policies are inherently harmful to whites, they may also presume that white plaintiffs necessarily have standing to dispute them.¹⁴ These determinations about standing are grounded in equal protection's "colorblindness" rationale, which regards racial classifications themselves as inherently suspect. Under this colorblindness regime, the underlying systemic subordination of racial minorities—which affirmative action was originally designed to redress—is irrelevant, if not invisible.¹⁵

The principal goal of this Article is to explain and then critique the common presumption that white litigants have inherent standing to challenge race-conscious selection policies. It argues that this presumption is the handiwork of an "innocence paradigm," which assumes that whites are necessarily harmed by considerations of race that benefit racial minorities.¹⁶ Under this paradigm, courts credit white resentment of affirmative action as a cognizable injury, even though such claims would be dismissed under the conventional rules of standing.¹⁷ The innocence paradigm ratifies the view that the mere *existence* of affirmative action is itself racially unjust.¹⁸ In this respect, it shapes the very meaning of equal protection—and equality—itsself.

I should be explicit that "innocence" in this Article simultaneously embraces two different meanings. The first reflects social and cultural presumptions that whites should not be burdened by affirmative action unless they are somehow individually "guilty" of racial wrongdoing.¹⁹ These presumptions reflect equal protection

14. See *infra* Parts II.B, II.C, and III.

15. See *infra* Part II.C.

16. See *infra* Part II.C. A paradigm is a "set of assumptions, concepts, values, and practices that constitutes a way of viewing reality for the community that shares them." See *paradigm*, FREE DICTIONARY, <http://www.thefreedictionary.com/paradigm>, archived at <http://perma.cc/4569-NK9D> (last visited Oct. 11, 2014).

17. See *Hollingsworth v. Perry*, 113 S. Ct. 2652, 2662 (2013) ("[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing.").

18. See, e.g., Jennifer Gratz, *Opinion: It's Time for 'Equal' to Mean Equal*, CNN.COM (Mar. 12, 2012, 9:45 AM), <http://inamerica.blogs.cnn.com/2012/03/10/opinion-its-time-for-equal-to-mean-equal/>, archived at <http://perma.cc/JWM5-KTR4> ("My hope for Abigail Fisher is that when the justices reference the name Fisher, they don't see an ambiguous, seemingly benign affirmative action policy . . . but that they visualize a young woman whose dreams were dashed because of discrimination sanctioned by the state.").

19. See *infra* Part II.C; see also, e.g., Erin Fuchs, *How a 23-Year-Old Texan Became the Spokeswoman for People Who Hate Affirmative Action*, BUSINESS INSIDER (Jun. 19, 2013, 12:33 PM), <http://www.businessinsider.com/abigail-fisher-face-of-affirmative-action-case-2013-6>, archived at <http://perma.cc/7HVE-8VEN> ("I was taught from the time I was a little girl that any kind of discrimination was wrong . . ." (quoting Abigail Fisher)).

principles that have limited affirmative action to redressing identified discrimination. Within a remedial context, courts are more willing to burden “innocent” whites because (presumably) they have benefited, even if passively, from racial discrimination.²⁰ Innocence concerns, in other words, are less salient where predominantly white institutions practice affirmative action because they have been “caught” intentionally discriminating on the basis of race.

The second use of innocence relates to the availability of white group injury for individual white plaintiffs. Innocence here rests on the premise that affirmative action is an affront to whiteness itself.²¹ From this perspective, litigants need not be harmed personally by affirmative action because of the societal injury to whites as an undifferentiated whole.²² Early affirmative action cases explicitly acknowledged this use of innocence as a construct for managing white resentment and hostility against government considerations of race.²³ This Article contends that these cases then imported the innocence paradigm into standing determinations in affirmative action cases, leading to presumptions that unsuccessful white candidates were necessarily injured by race-conscious policies. As a result of this feedback loop, white resentment of affirmative action—even in the absence of tangible injury—became a cognizable racial harm.²⁴

Here I mean to move beyond explanations offered by some scholars that courts treat racial classifications as a wrong unto themselves because they regard them as conveying racial stereotypes or imposing stigmatic injury.²⁵ Under the innocence paradigm, the principal concern is not that racial classifications are inherently

20. *Cf.* *City of Richmond v. Croson*, 488 U.S. 469, 492 (1989) (discussing “passive participant” theory); *see also* *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–209 (1979) (upholding plan that did not “unnecessarily trammel the interests of white employees”). For a useful discussion of the role of innocence (and its corollary, sin) in a remedial context, *see* generally Kathleen M. Sullivan, *Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 84–86, 91–97 (1986).

21. *See infra* Part II.C.

22. *Infra* Part II.C.

23. *Infra* Part II.C.

24. *Infra* Part II.C.

25. *See, e.g.*, Issacharoff & Karlan, *supra* note 11, at 2285–86 (describing such claims in redistricting context); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 506 (1993) (generally noting expressive harm theory of racial classifications); *cf.* Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1527 (2013) (“Inferred [racial] classifications contradict the common assumption that the facial neutrality of legislation is sufficient to ensure that the legislation will not be reviewed under heightened scrutiny unless a discriminatory purpose is found.”); Shah, *supra* note 11, at 226 (“In short, the Court has expressed a formalistic commitment to eliminate all or nearly all express racial classifications.”).

harmful to everyone because of stereotyping or stigma, but rather that they harm whites in particular. The courts' underlying preoccupation with innocence, in other words, is not about girding general norms of nondiscrimination but rather seems acutely focused on protecting whites as a group.²⁶

My claim connects with theories advanced by scholars that standing doctrine preserves existing systems of racial hierarchy and privilege.²⁷ This scholarship has identified strains of innocence in cases challenging race-conscious selection policies,²⁸ though it has not fully mapped the doctrinal origins or constituent elements of innocence in affirmative action.²⁹ We know relatively little, for example, about how innocence unfolded or its dynamic shift from substantive equal protection doctrine to the procedural realm of standing. Nor has existing scholarship addressed the significant doctrinal confusion that the premise of white innocence has generated

26. See Spann, *supra* note 10, at 1423 (observing that the Supreme Court's standing decisions are "racially suspicious" and "embody the very sort of racial discrimination that we rely on the Court to prevent.").

27. See generally Nichol, *supra* note 10 (arguing that judges make standing determinations in ways that allow them to address harms that "strike closest to home"); Spann, *supra* note 10 (arguing that the Supreme Court's standing determinations are discriminatory to the point of violating the Equal Protection Clause); Sundquist, *supra* note 10 (using social psychology principles to demonstrate that the Court's inconsistent standing decisions can be explained by a desire to protect privilege).

28. See, e.g., Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1090 (2002) (noting "innocence" claim against affirmative action); Erin E. Byrnes, *Unmasking White Privilege to Expose the Fallacy of White Innocence: Using a Theory of Moral Correlativity to Make the Case for Affirmative Action Programs in Education*, 41 ARIZ. L. REV. 535, 554–59 (1999) (observing role of white innocence in affirmative action); Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 MICH. J. RACE & L. 477, 477 (2006) (examining Court's concern with protecting "innocent whites" in affirmative action cases); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299–308 (1990) (discussing innocence rhetoric in affirmative action cases); Sullivan, *supra* note 20, at 84–86, 91–97 (1986) (discussing "sin" and "innocence" in affirmative action cases); Sundquist, *supra* note 10, at 121, 135–36 (noting that the "law of standing has been remarkably consistent in its treatment of injuries by non-white plaintiffs in cases that implicate racial inequality" and identifying a "dogma" of "white innocence"); cf. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1529–30 (2004) [hereinafter *Equality Talk*] (noting that "judgments about the harm to white applicants in the professional school affirmative action cases seem to underlie, and partly to account for, courts' newfound willingness to interpret and apply the constitutional presumption against racial classifications in a way that they had not [previously]"). But see Reva B. Siegel, *The Supreme Court—2012 Foreword: Equality Divided*, 127 HARV. L. REV. 1, 45 (2013) ("The justifications for strict scrutiny in affirmative action cases no longer emphasize the importance of protecting innocent victims of affirmative action," but rather focus on constraining uses of race in order to "protect[] expectations of fair dealing that citizens have in interacting with the government.").

29. Cf. Shah, *supra* note 11, at 223 (decrying the lack of "wholly satisfying theories" to explain "the Court's racial double standard in standing doctrine").

in the courts and among legal scholars about how to define racial injury.³⁰

This Article fills that gap. It contends that the innocence paradigm engineered the Court's reformulation of the substantive rules of equal protection to prohibit the use of affirmative action as a tool for remedying pervasive racial inequality. This doctrinal shift was crucial, as it reconstituted equal protection's understanding of racial injury in ways that were diametrically opposed for whites and racial minorities. By downgrading systemic inequality as the basis for affirmative considerations of race, courts refused to treat pervasive racial disadvantage as a harm unto itself, making the subordination of racial minorities largely invisible as a matter of equal protection.³¹ And as affirmative action's mantle of constitutional legitimacy diminished, its perceived costs to whites increased. This led to expansive notions of racial injury that have enabled white litigants to contest even the most de minimis uses of race. As a result of the innocence paradigm, courts have come to regard white resentment and hostility to race-conscious selection policies as sufficient to confer injury, even if such policies have had no tangible, personal impact on white litigants.³² This shift in equal protection doctrine has led to otherwise unexplainable outcomes like those in *Fisher* in which the white plaintiff is not demonstrably harmed by government considerations of race but nonetheless is allowed to proceed with her claim.³³

Thus, the innocence paradigm first restructured the substantive rules of equal protection and now has affected its procedural rules by threatening to loosen official standing requirements for white litigants challenging race-conscious selection policies. The premise of white innocence helps to explain the connective tissue between substance and procedure in the realm of race and equal protection.³⁴ When activated, the innocence paradigm serves both as a substantive check on the constitutional merits of race-conscious policies and then confers a corresponding injury on any whites who are subject to them. The presumed illegitimacy of affirmative action creates the (wrong) presumption that *all* whites are

30. See *infra* Part II.C.

31. *Infra* Part II.C.

32. See *infra* Parts II.C & IV.

33. See *infra* Part II.B.

34. Alan Freeman observed the innocence problem in his discussion of the "perpetrator perspective." See Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1054-56 (1978); see also *infra* Part II.C.1.

victimized by it, both individually and as a group, because it is adverse to white interests.³⁵ Understanding this cross-fertilization between equal protection's substantive and procedural dimensions³⁶ helps us to appreciate the role that standing doctrine plays in both defining and policing the very meaning of racial equality.

The consequences of the innocence paradigm are significant. One obvious problem is that it is explicitly oriented to protecting whites, which violates equal protection's own norms of nondiscrimination.³⁷ The result is a racial asymmetry in the procedural rules of equal protection in which white plaintiffs are able to advance their claims against race-conscious selection policies, while minority litigants challenging more systemic racial injuries cannot. Some of this asymmetry can be attributed to separation-of-powers concerns and judicial capacity to redress systemic claims,³⁸ but this explanation does not fully account for the success of reverse discrimination plaintiffs who have overcome standing barriers that blocked minority litigants.

At bottom, the innocence paradigm helps to legitimate systems that disadvantage persons of color but privilege whites. It also helps to account for the curious lack of objection to other kinds of preferences in admissions systems. The University of Texas, for example, gives state residents a nearly exclusive advantage in its admissions policy, a preference that inured to Fisher's benefit as a Texas resident.³⁹ Other universities also give legacy preferences to children of alumni that predominantly benefit white applicants.⁴⁰ All of this suggests that the

35. See Spann, *supra* note 10, at 1461.

36. See Nichol, *supra* note 10, at 330–34 (discussing “covert constitutionalizing”); cf. Issacharoff & Karlan, *supra* note 11, at 2291 (observing that the “personal stake” required in standing jurisprudence “necessarily refers to the underlying substantive claims”). In a seminal article, William Fletcher contended that it is impossible to abstract standing's injury requirement from “normative judgments” about the merits of the underlying claim. See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 232, 265–276 (1988). I discuss this point further *infra* Part IV.

37. See Spann, *supra* note 10, at 1423 (“[C]lose examination suggests that the Supreme Court's standing decisions embody the very sort of racial discrimination that we rely on the Court to prevent.”).

38. See *infra* Parts II.A & III.B.2.

39. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 217 (5th Cir. 2011) (noting Fisher's Texas residency); *id.* at 227 (observing that “Texas residents are allotted 90% of all available seats” at the University of Texas).

40. See Grutter v. Bollinger, 539 U.S. 306, 368 (2003) (Thomas, J., dissenting) (noting advantage conferred by legacy preferences on children of alumni); Adrian Liu, *Affirmative Action & Negative Action: How Jian Li's Case Can Benefit Asian Americans*, 13 MICH. J. RACE & L. 391, 404 (2008) (observing that legacy preferences “primarily benefit White applicants because they are more likely to have family members who are alumni of the university”).

problem of affirmative action is not preferences per se, but any preferences that benefit racial minorities in particular.

In this respect, the innocence paradigm has both a discriminatory effect and a discriminatory purpose. It is acutely focused on race. As a result, courts that embrace innocence fail to adhere to rules that are racially impartial, leading to the perception that standing doctrine has simply become grist for advancing an agenda against any race-conscious selection policies in order to protect whites as a group.⁴¹ By exposing the latent operation of innocence, the hope is that we can increase judicial accountability and transparency and perhaps eliminate innocence's corrupting influence.⁴²

The innocence paradigm has social harms as well. Allowing plaintiffs who have not been tangibly injured by race-conscious selection policies to proceed against them in court gives the public a false impression about the scope of affirmative action. Indeed, Fisher herself did not dispute that the consideration of race in the University of Texas's policy is actually quite modest.⁴³ And yet the national public conversation that emerged around the *Fisher* litigation misses this crucial fact, reflecting misinformation about the actual costs of affirmative action to individual white applicants.⁴⁴ The assumption that affirmative action denies whites access to higher education, jobs, and government contracts is common, and yet it has been demonstrably wrong as applied to white plaintiffs in a surprising number of anti-affirmative action cases.⁴⁵ If these cases are any indication, the burden of affirmative action is not nearly as high as many people think.

This Article proceeds in three parts. Part II begins with a brief introduction to standing doctrine and explains the innocence problem through the lens of the Supreme Court's decision in *Fisher*. It then

41. See Adam D. Chandler, *How (Not) to Bring an Affirmative-Action Challenge*, 122 YALE L.J. ONLINE 85, 95 (2012) (describing *Fisher* as an "empty vehicle for ideological struggle"); Nichol, *supra* note 10; cf. Spann, *supra* note 10, at 1461 ("In virtually every affirmative action case, the white plaintiff has been accorded standing to challenge the affirmative action program at issue.").

42. See ROBERT C. POST, PREJUDICIAL APPEARANCES 42 (2001) (discussing how a "sociological account" of antidiscrimination law makes sociological reasoning more explicit in ways that enable courts to be held accountable).

43. See *infra* Part II.B.

44. After being unable to find other plaintiffs to challenge the University of Texas policy, Ed Blum, who founded the Project on Fair Representation, recruited Abigail Fisher, the daughter of a personal friend, to become the plaintiff in the case. See Joan Biskupic, *Special Report: Behind U.S. Race Cases, a Little-Known Recruiter*, REUTERS.COM (Dec. 12, 2012, 1:50 PM), <http://www.reuters.com/article/2012/12/04/us-usa-court-casemaker-idUSBRE8B30V220121204>, archived at <http://perma.cc/M6VC-DL3W>.

45. See *infra* Parts III & IV.

identifies the innocence paradigm's elements, its origins, and its application in other cases as a foundation for understanding how it threatens to reshape the very notion of racial injury in standing in diametrically opposed ways for whites and racial minorities. This Part sets the stage for my critique that the focus on white innocence leads to racially disparate applications of standing doctrine. It contends that white plaintiffs challenging racial classifications are subject to more lenient rules than minority plaintiffs challenging systemic racial injuries, which generate perceptions of racial bias in the federal judicial system.

Mapping this argument requires particular attention to Justice Powell's plurality opinion in *Regents of the University of California v. Bakke*, which laid the foundation for major doctrinal shifts in equal protection in the area of affirmative action.⁴⁶ This Part describes the undercurrents of innocence in several important doctrinal moves in Powell's opinion: his conclusions that strict scrutiny should apply to government considerations of race in voluntary affirmative action, that state efforts to redress "societal discrimination" are not a compelling interest, and that the limited use of race to pursue diversity in higher education is constitutionally acceptable.⁴⁷ It unpacks the chief elements of the innocence paradigm: that white resentment of affirmative action is itself a racial injury and the assumption that government considerations of race subordinate whites as a group. In so doing, it exposes the racial motivation that underlies the innocence paradigm.

Part III returns to the central theme of this Article: that the innocence paradigm unleashed in *Bakke* has eroded the traditional elements of standing doctrine for white plaintiffs in affirmative action cases. This connects the argument laid out in Part II regarding the reconceptualization of racial harm in equal protection to the procedural redefinition of racial injury now threatened in the context of standing. As the range of permissible justifications for affirmative action narrowed under equal protection, the perception that such policies harmed whites who were individually innocent of racial wrongdoing has intensified.⁴⁸ This in turn has magnified the assumption that affirmative action injures whites, enabling white plaintiffs to litigate their claims in federal court, despite the absence of any demonstrated personal injury. This Part explains the doctrinal consequences of the Court's heightened focus on white racial injury

46. See *infra* Part II.C.

47. *Infra* Part II.C.

48. See *infra* Part III.

under the innocence paradigm in the context of the “diminished opportunity” principle.⁴⁹ It then discusses the racially disparate application of this principle and the Court’s refusal to apply it to minority plaintiffs who challenged the racial impact of government policies that threatened them with future harm.

Part IV.A discusses the impact of the innocence paradigm as reflected in the current confusion in the courts about the cognizability of racial harm in equal protection challenges to affirmative action. I concentrate on the very puzzling Supreme Court decision in *Texas v. Lesage* which, having compounded the Court’s mistakes in *Bakke*, is a source of confusion among lower courts and scholars alike about the cognizability of racial injury in equal protection cases.⁵⁰ Part IV.B returns to a discussion of the substantive dimensions of standing doctrine as both a product and agent of racial inequality. Part IV.C concludes with a modest proposal. Here I contend that courts should align standing rules so that anti-affirmative action litigants are subject to the same requirements as minority plaintiffs who have challenged other forms of racial injury. In practical terms, this means that white litigants should have standing to claim damages only if they have in fact been denied a benefit as a result of a race-conscious selection policy. These plaintiffs should not have standing to seek either retrospective or prospective relief simply because at some point in the past they have been subjected to a policy that generally considers race. I conclude by applying this proposal to *Fisher*.

II. THE SINS OF INNOCENCE: SUBSTANCE AS PROCEDURE

Fisher v. University of Texas fits into an ongoing debate about the merits of affirmative action. But the case also raises crucial questions about how we understand racial injury for purposes of standing in equal protection cases involving state considerations of race. Before turning to these points specifically, a quick refresher on the fundamentals of standing doctrine is instructive. Section A covers that terrain. Section B briefly introduces the standing problem in *Fisher* as a prelude to Part III’s introduction of the innocence paradigm.

49. *Infra* Part III.

50. *Infra* Part IV.

A. A Brief Primer on Standing

The elements of standing doctrine are straightforward. Under Article III, federal courts may only adjudicate actual “cases” and “controversies.”⁵¹ To satisfy this requirement, a plaintiff must demonstrate that she has suffered an “injury in fact” as a result of the defendant’s conduct.⁵² To be judicially cognizable, an injury must involve infringement of a legally protected interest that is “concrete” and “particularized,”⁵³ meaning that the plaintiff is affected in a “personal and individual way,”⁵⁴ is “among the injured,”⁵⁵ and, therefore, has a “direct stake in the outcome of the case.”⁵⁶ The harm must be either “actual or imminent, not conjectural or hypothetical,” and there must be a causal connection between the harm and the challenged conduct.⁵⁷ It must be “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be redressed by a favorable decision.”⁵⁸ Finally, the plaintiff bears the burden of establishing that each of these elements is satisfied.⁵⁹

In standing doctrine, an important distinction exists between judicially cognizable injuries and “generalized grievances.”⁶⁰ A generalized grievance refers to an act that may injure the public as a

51. U.S. CONST. art. III, § 2, cl. 1.

52. *But see* F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 275 (2008) (contending that the injury-in-fact requirement is “superfluous” in cases alleging the violation of private rights).

53. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

54. *Id.* at 560 n.1.

55. *Id.* at 563.

56. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013).

57. *Lujan*, 504 U.S. at 560.

58. *Id.* at 561.

59. *Id.* (“The party invoking federal jurisdiction bears the burden of establishing [the standing] elements.”).

60. *Perry*, 133 S. Ct. at 2662:

A litigant “raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”

(quoting *Lujan*, 504 U.S. at 573–74). Generalized grievances typically, though not necessarily, involve claims against the government. *Cf., e.g.,* *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (holding that plaintiffs lacked standing to bring claim under the Elections Clause of the Constitution based on generalized grievance against government conduct). The Court has treated the ban on generalized grievances as both a constitutional and prudential limitation on standing. Edward A. Hartnett, *The Standing of the United States: How Criminal Prosecutions Show that Standing Doctrine Is Looking for Answers in All the Wrong Places*, 97 MICH. L. REV. 2239, 2240 (1999).

whole or no one in particular.⁶¹ Standing doctrine's rejection of generalized grievances rests on the premise that a plaintiff must "assert her own legal rights and interests" rather than those of third parties.⁶² Being a "concerned bystander" will not suffice, "[n]o matter how deeply committed" a plaintiff may be to her cause.⁶³ In *Diamond v. Charles*, for example, the Court refused to allow a pediatrician to intervene to defend a state's abortion law based on his "conscientious object[ion]" to abortions.⁶⁴ Similarly, in *Hollingsworth v. Perry*, the Supreme Court concluded that proponents of a statewide initiative that amended the California constitution to bar same-sex marriage did not have standing to defend the law after state officials declined to appeal an adverse ruling.⁶⁵ A simple belief in the importance of the state law and its underlying principles was not a sufficient harm by itself to justify standing.⁶⁶

These requirements are thought to reflect separation-of-powers concerns about the proper role of the federal judiciary.⁶⁷ Requiring the plaintiff to show that she is personally and causally harmed by the challenged conduct, to an extent sufficient to give her a stake in a remedy, helps cabin the reach of the federal courts.⁶⁸ Allowing plaintiffs with only generalized grievances to proceed in federal court encroaches on the democratic prerogatives of the legislative and executive branches to resolve questions of "public significance."⁶⁹ Standing, therefore, helps to ensure that the judiciary is not called

61. Siegel, *supra* note 10, at 99; *see also* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

62. *Perry*, 133 S. Ct. at 2663 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)).

63. *Id.*

64. 476 U.S. 54, 67 (1986).

65. 133 S. Ct. at 2663.

66. *Id.* at 2659 (stating that "keen interest" is not enough to confer standing in absence of "concrete and particularized injury").

67. *See* Ernest A. Young, *In Praise of Judge Fletcher—And of General Standing Principles*, 65 ALA. L. REV. 473, 483–84 (2013) (justifying injury-in-fact requirement based on separation of powers principles). *But see* Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008) (critiquing "separation of powers" rationale as oversimplified and charging that standing doctrine is ill-suited to different separation of powers concerns); Siegel, *supra* note 10, at 95–102 (challenging separation of powers theories as basis for standing). *See generally* Scalia, *supra* note 61 (arguing that the doctrine of standing is essential to maintaining separation of powers and that courts should more stringently apply the requirement of a particularized injury in order to abate the problem of "overjudicialization").

68. *See* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.>").

69. *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

upon to resolve abstract problems that would be better addressed by the political branches.⁷⁰

As discussed more fully in Part III, the generalized grievance rule should pose a major problem for anti-affirmative action plaintiffs who cannot show a specific injury from state considerations of race. Affirmative action policies do in fact benefit minority applicants, but this benefit does not invariably cause white applicants to be rejected. One gets an offer, and the other does not. It might be the case that the rejected candidate would have received the offer if the first candidate had been turned down. But it also might have made no difference whatsoever. In other words, we cannot assume that one candidate's gain is necessarily the other's loss. Some courts purport to get around this problem by presuming that all rejected white applicants have suffered an "implied injury" as a result of the consideration of race itself.⁷¹ But an implied injury is no different than a generalized grievance. Courts' application of unequal rules of standing to anti-affirmative action litigants illustrates the operation of the innocence paradigm.⁷²

There is another important distinction in standing doctrine that is crucial to understanding the problem in *Fisher* and the split among lower courts as plaintiffs challenging race-conscious selection policies push the outer boundaries of racial injury. This distinction lies in the difference between past and future harm. Attention to the nature of the actual or threatened harm matters because it determines both the causation analysis and the kind of relief that the plaintiff is eligible to seek. A plaintiff who claims a future injury must show that such injury is "imminent."⁷³ An abstract likelihood that the harm will occur is not enough to satisfy the imminence requirement.⁷⁴ Rather, there must be some concrete showing that the harm is forthcoming or ongoing.⁷⁵ Similarly, if the injury has already occurred, the plaintiff must show that the defendant's conduct caused the injury.⁷⁶ And, finally, because of standing's redressability

70. *Perry*, 133 S. Ct. at 2659.

71. *See infra* Part II.C.

72. *See infra* Part III.

73. *Lujan*, 504 U.S. at 560 (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

74. *See id.* at 564 ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 95–96 (1983))).

75. *Id.*

76. *Id.* at 560 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)).

requirement, the asserted injury must align with the requested relief.⁷⁷

Thus, a plaintiff who claims a future injury can only seek future-oriented, prospective relief.⁷⁸ A plaintiff who asserts an “actual” or past harm can only claim retrospective relief, like damages.⁷⁹ A showing of past injury is not enough by itself to demonstrate a likelihood of future injury and vice versa.⁸⁰ Accordingly, a plaintiff may not seek injunctive relief based on a showing of past harm, just as a plaintiff may not seek damages based on a showing of future harm under the conventional rules of standing.⁸¹ As we shall see, this distinction matters in *Fisher*, where the plaintiff has sought damages for the purported past harm of being evaluated for admission to the University of Texas under a race-conscious policy and has sought to bootstrap onto her claim standing principles that developed to address the possibility of future injury. Fisher’s effort to push the outer boundaries of standing doctrine reflects a highly attenuated definition of racial harm that has also surfaced in other court decisions in which courts take the plaintiff’s injury for granted. The casual assumption of racial harm and the corresponding relaxation of standing requirements illustrate both the operation and reach of the innocence paradigm.

The elements of standing doctrine reveal that the characterization of the injury is critical as the causation and redressability analysis both flow from the initial definition of the harm.⁸² As discussed in Part II.C below, this helps us to appreciate Justice Powell’s strategic turn in *Bakke*, which recalibrated the meaning of future injury to benefit affirmative action plaintiffs. *Bakke*’s broad conception of racial injury set the stage for other challenges to affirmative action by white plaintiffs, including Abigail Fisher, at the same time that the Court declined to apply the same expansive standing principles to minority plaintiffs who challenged systems of racial subordination.⁸³ Part B below turns to the standing problem in *Fisher* to illustrate this point.

77. *Id.* at 561 (citing *Simon*, 426 U.S. at 38).

78. *See Lyons*, 461 U.S. at 111.

79. *See id.*

80. *Id.*

81. *Id.*

82. *See* Cass R. Sunstein, *Standing and the Privatization of Public Law*, 88 COLUM. L. REV. 1432, 1464–65 (describing the potential effect of characterization of harm on the Court’s determination regarding causation and, therefore, standing).

83. *See infra* Part II.C.

B. Illustrating the Problem: Fisher v. University of Texas

In 2008, Abigail Fisher was denied admission to the entering class at the University of Texas at Austin.⁸⁴ She sued the university for racial discrimination under an equal protection theory based on its consideration of race in its admissions process.⁸⁵ The Supreme Court punted on the ultimate question regarding whether the university's policy was constitutional and instead remanded the case to the lower court to reconsider whether the policy was narrowly tailored.⁸⁶

The most curious aspect of the Court's decision, however, was what it omitted: why Fisher had standing to sue in the first place.⁸⁷ As a vehicle for deciding the constitutionality of race-conscious admissions, *Fisher* was riddled with problems.⁸⁸ Because she had graduated from another university, she was ineligible for prospective injunctive relief, which left only her damages claim.⁸⁹ But her standing to claim retrospective relief was also far from certain⁹⁰ given evidence that she would have been rejected even under a race-neutral system.⁹¹ At the very least, the university's showing raised questions about whether its policy had caused her denial of admission. Although the matter received some attention during oral argument,⁹² the Court avoided the question completely in its opinion.⁹³

84. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417 (2013).

85. *Id.*

86. *Id.* at 2415.

87. *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 640 (5th Cir. 2014) (observing that the university's standing arguments "carry force" and noting that the Court "did not address the issue of standing, although it was squarely presented to it").

88. *See Chandler, supra* note 41, at 41–42. It is not clear that Fisher pleaded a compensable claim in her complaint. She failed to request compensatory damages and requested the return of a fee that would not have been refunded even had she been admitted to the university. *See Appellees' Statement Concerning Further Proceedings on Remand at 5–6, Fisher*, 758 F.3d 633 (No. 09-50822), *available at* <http://www.utexas.edu/vp/irla/Documents/2013-07-23.UT.Statement.re.remand.pdf>, *archived at* <http://perma.cc/3JUM-RUEA>.

89. *See Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (5th Cir. 2011) (observing that, at the time of its opinion, Fisher had disclaimed any intention to reapply to the University of Texas and, therefore, could not seek prospective injunctive relief), *vacated*, 133 S. Ct. 2411 (2013). Note that Fisher had graduated from college by the time the case reached the Supreme Court. *See Brief for Respondents at 16–17 n.6, Fisher*, 133 S. Ct. 2411 (No. 11-345), *available at* <http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf>, *archived at* <http://perma.cc/WK2J-VPQY>.

90. *See Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587, 597–98 (W.D. Tex. 2009).

91. *Id.*

92. *See Transcript of Oral Argument at 55:5–13, Fisher*, 133 S. Ct. 2411 (No. 11-345).

93. *Fisher*, 758 F.3d at 640.

1. The Role of Race in Admissions

Appreciating the standing problem requires us first to unpack some aspects of the university's admissions process and the role that race plays in the evaluation of individual candidates. Under state law, the university is required to admit all Texas students who graduate in the top ten percent of their public high school class.⁹⁴ Students who are not admitted through the Top Ten Percent Plan are evaluated based on a whole file review of each applicant that considers academic achievement and other personal factors.⁹⁵ During this phase of the process, each applicant is assigned an Academic Index score based on academic achievement and a separate score that factors in the personal qualities of the applicant.⁹⁶ This latter score is based on two essays and another score, the Personal Achievement Score ("PAS").⁹⁷

The PAS score ranges from one to six and is based on consideration of "equally-weighted" factors, including leadership ability, extracurricular activities, work experience, awards, community service, and "special circumstances."⁹⁸ The "special circumstances" factor is further broken down into seven criteria, which include the socioeconomic profile of the applicant's family and her school; her family caretaking responsibilities; whether she comes from a single-parent home; whether English is a second language; her SAT/ACT score relative to the average score of her school; and, finally, her race.⁹⁹ Race, therefore, is "a factor of a factor of a factor of a factor"

94. *Fisher*, 133 S. Ct. at 2416. Approximately sixty percent to eighty percent of the first-year class is admitted as a result of this law, though they are not necessarily admitted to their first choice program. *Fisher*, 645 F. Supp. 2d at 595; Brief for Respondents at 8, *Fisher*, 133 S. Ct. 2411 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/Brief%20for%20Respondents.pdf>, archived at <http://perma.cc/2DCB-MWRP>. Admission is granted by individual schools or majors. Therefore, applicants technically compete for admission against other applicants who have indicated their preference for the same program. *Fisher*, 645 F. Supp. 2d at 595, 598.

95. See *Fisher*, 758 F.3d at 638 (noting that applicants not admitted as a result of Top Ten Percent Law or as a result of "an exceptionally high" Academic Index score are evaluated through holistic review).

96. *Id.*

97. One score is the Academic Index ("AI"). *Fisher*, 645 F. Supp. 2d at 596. The other is the Personal Achievement Index ("PAI"). *Id.* The AI is calculated according to high school class rank; completion of the university's required high school curriculum, with an enhancement awarded to applicants who have surpassed the required curriculum; and SAT or ACT scores. *Id.* Some applicants with a high academic achievement score are admitted solely based on their score and others with scores that are too low are presumptively denied. *Id.* However, the files of this latter group may receive a full review. *Id.*

98. Brief for Respondents, *supra* note 94, at 13.

99. *Fisher*, 645 F. Supp. 2d at 597.

of the admissions process.¹⁰⁰ At the final stage of admissions, applicants are reduced to a single number based on their combined scores and are not identified by race.¹⁰¹ Therefore, admissions officers do not know the race of the applicant at the time they make admissions decisions.¹⁰²

All of this demonstrates that race plays a highly contextualized role in the admissions process at the University of Texas. Significantly, a minority candidate does not necessarily benefit from any consideration of race:¹⁰³ it can positively enhance the admissions profile of any applicant, including white applicants, or it may not be a consideration at all.¹⁰⁴ Therefore, although race is “undisputedly a meaningful factor that can make a difference in the evaluation of a student’s application,”¹⁰⁵ it is not “scored” or assigned a numerical

100. Brief for Respondents, *supra* note 94, at 13. Race is identified on the cover of the admissions file, which means that reviewers are aware of it throughout the evaluation, but it is not known at the actual admissions stage. Nor do admissions officers monitor the racial demographics of admitted students to determine whether a particular candidate should be admitted. *Fisher*, 645 F. Supp. 2d at 597–98.

101. *Fisher*, 645 F. Supp. 2d at 597.

102. Each applicant’s AI and PAI scores are plotted on a matrix that corresponds to the particular school or major at UT Austin to which the applicant is seeking admission. The matrix contains the AI score on one axis and the PAI score on the other. Admissions officers then draw a “stair-step line on the matrix,” which “divid[es] the cells of applicants who will be admitted from those that will be denied.” Brief for Respondents, *supra* note 94, at 12. Critically, PAI scores—which, as discussed below, can include background consideration of an applicant’s race—are set long before this process occurs. *Id.* at 13. At this final stage, applicants are reduced to a singular number based on their combined AI and PAI scores and are not identified by race. When admissions officers draw the stair-step line that divides the cells (which contain the scores of applicants), the racial demographics of each cell and, therefore, of each applicant, are unknown. *Id.* at 12–13.

103. For example, race may factor into the evaluation of a white applicant who is student body president at a majority-black high school. See Brief for Respondents, *supra* note 94, at 14 (“[I]t is undisputed . . . that consideration of race may benefit *any* application (even non-minorities) . . .”). Race may also factor into the evaluation of an applicant who, for example, mentored minority youth. See Joint Appendix at 168a–70a, app. F, Exh. 5 to Plaintiff’s Motion for Summary Judgment, Deposition of Kedra Ishop, dated Oct. 6, 2008, *Fisher v. Univ. of Tex. at Austin* (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf>, archived at <http://perma.cc/JD22-WBM9>; see also *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014) (explaining the factors considered for the personal achievement score).

104. Because of the nuanced role that race plays, it is difficult to determine which, if any, minority or white applicants have been “positively or negatively affected” by it and which candidates would have been admitted or denied in its absence. Joint Appendix, *supra* note 103, at 157a, 210a–11a, 215a; see also *Fisher*, 645 F. Supp. 2d at 597 (describing the application process). Although it is not possible to know how the consideration of race in the admissions process actually affected Fisher’s application, the University showed that Fisher would have been denied admission even if she had received a perfect personal achievement score. See *infra* Part II.B.2.

105. *Fisher*, 645 F. Supp. 2d at 597–98.

value.¹⁰⁶ Instead, it is used to assess how well applicants function in racial environments that are different from their own¹⁰⁷ and to contextualize the students' achievements and personal experiences.¹⁰⁸ Indeed, the modesty of the policy is underscored by its slight impact on the number of African-American and Latino students admitted. In 2008, the year of Fisher's application, only 216 African-American and Latino students were admitted through holistic review out of 6,322 total students in the first year class.¹⁰⁹ And yet, because of the nuanced role that race plays, even this number—approximately three percent of the entering class—potentially overstates the influence of race in the admissions process.

2. Competing Conceptions of Racial Injury

Fisher's pleadings suggest several different theories of her injury, which are crucial for understanding the particular operation of the innocence paradigm.¹¹⁰ Fisher first argues that she "likely" would have been admitted into the University of Texas at Austin "but for" its "use of race-based criteria in its admissions decisions."¹¹¹ The problem with this frame is that it is inconsistent with the actual workings of the university's admissions process, as described above. That is, the argument incorrectly presumes that the precise impact of race can be determined for each candidate and, most importantly, that the school's

106. See Joint Appendix, *supra* note 103, at 169a (explaining how race is factored into the admissions process); cf. Gratz v. Bollinger, 539 U.S. 244, 255, 270–72 (2003) (striking down points-based admissions policy).

107. The Associate Director of Admissions at the University of Texas captured the goal as follows: "[F]or us racial diversity is about how does the student maneuver in their own world, how do they maneuver in someone else's world, what kind of awareness do they have of their world, what kind of awareness do they have of the other possibilities that are out there?" Joint Appendix, *supra* note 103, at 157a, 210a–11a.

108. *Fisher*, 645 F. Supp. 2d at 597; Joint Appendix, *supra* note 103, at 206a–07a.

109. *Fisher*, 758 F.3d 633, 668 (5th Cir. 2014) (Garza, J., dissenting).

110. Another plaintiff, Rachel Michalewicz, also sued. See Joint Appendix at 38a ¶ 1, app. C, Second Amended Complaint for Declaratory, Injunctive, and Other Relief, filed Aug. 13, 2008, *Fisher v. Univ. of Tex. at Austin* (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf>, archived at <http://perma.cc/JD22-WBM9> (including complaint brought by Abigail Noel Fisher and Rachel Multer Michalewicz). However, she later dropped out of the litigation. See Associated Press, *Fisher v. University of Texas at Austin Challenges Affirmative Action in Higher Education*, DAILY TEXAN, Feb. 21, 2012, <http://www.dailytexanonline.com/news/2012/02/21/fisher-v-university-of-texas-at-austin-challenges-affirmative-action-in-higher>, archived at <http://perma.cc/HD7F-QT48> ("The other woman has since dropped out of the case . . .").

111. Joint Appendix, *supra* note 110, 38a ¶ 120 (emphasis added); see also *Fisher*, 758 F.3d at 662–63 (Garza, J., dissenting) (describing Fisher's claim that her score would have exceeded the cutoff if race had been eliminated entirely from the process).

consideration of race made the difference in her particular rejection. Yet this theory does not bear out under scrutiny.¹¹²

The year that Fisher applied was a very competitive year. After the Top Ten Percent Plan seats were filled,¹¹³ Fisher became one of the 17,131 applicants vying for the 1,216 seats that remained¹¹⁴ for Texas residents.¹¹⁵ Only 186 available seats were left in the College of Liberal Arts for undeclared majors who, like Fisher, were residents of the state.¹¹⁶ As a result of her relatively low Academic Index score, combined with the shortage of remaining seats, Fisher was rejected from the fall 2008 entering class.¹¹⁷ Although she claimed that she lost her seat on account of race, the university illustrated that Fisher would not have been accepted to the first-year class for fall 2008 even with a “perfect” score of six on her Personal Achievement Index.¹¹⁸ In other words, the university would have made the same decision to reject her under a process in which race was considered as part of her application.¹¹⁹ Therefore, her claim that she would have been admitted “but for” race just does not add up.

Fisher’s second claim is that she was “injured by UT Austin’s use of racial preferences because she was not considered on an equal

112. See *Fisher*, 758 F.3d at 653–54.

113. Because of her high school rank, Fisher was ineligible for admission under the Top Ten Percent Plan. See Joint Appendix at 96a ¶ 112, app. D, Answer of Defendants to Plaintiffs’ Second Amended Complaint, (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf>, archived at <http://perma.cc/JD22-WBM9>. Fisher applied to major in business, which was considered by the university to be an “impacted” program, meaning that demand for the program was so high that the university capped the percentage of Top Ten Percent admits to seventy-five percent of available seats. See *Fisher*, 645 F. Supp. 2d 587, 595–96 (W.D. Tex. 2009) (explaining the application process for “impacted majors”).

114. *Fisher*, 758 F.3d. at 637.

115. The university’s admissions process is divided into three applicant groups: Texas residents, domestic non-Texas residents, and international students. Texas residents compete only against other Texas residents. See *Fisher*, 645 F. Supp. 2d at 595.

116. See Joint Appendix at 412a–13a ¶ 14, app. O, Affidavit of Kedra B. Ishop filed Feb. 23, 2009 (No. 11-345), available at <http://www.utexas.edu/vp/irla/Documents/Joint%20Appendix.pdf>, archived at <http://perma.cc/JD22-WBM9> (explaining that these seats were for undeclared majors in the College of Liberal Arts).

117. Fisher’s Academic Index score was 3.1, short of the 3.5 score that was necessary for admission. *Id.* at 415a–16a. She was also denied admission to the summer program. However, she continued to be eligible to enter UT Austin through the alternative Coordinated Admissions Program, which would have allowed her to transfer to the flagship campus after enrolling in another college program. Order Denying Motion for Preliminary Injunction at 5, *Fisher v. Texas*, 645 F. Supp. 2d 587 (A-08-CA-263-SS), available at <http://www.utexas.edu/vp/irla/Documents/20.Order.Denying.Motion.for.Preliminary.Injunction.pdf>, archived at <http://perma.cc/56N-H6Y8> (“The record shows both Plaintiffs’ applications were given a second reading since UT offered them both admission to [the Coordinated Admission Program]”).

118. Joint Appendix, *supra* note 116, at 416a ¶ 18.

119. *Id.*

basis with African-American and Hispanic applicants who applied for admission to the same incoming freshman class.”¹²⁰ The idea here is that the consideration of race created an uneven playing field that lowered her chances of admission. As we shall see, the Supreme Court has accepted this framing of racial harm as a cognizable injury, but only in claims for *prospective* injunctive relief, not for retrospective claims like Fisher’s that involve damages.¹²¹ The supposed injury from an uneven playing field is consistent with current doctrine if we are focused on the potential *future* impact of a continuing affirmative action policy on a white plaintiff. But under the conventional rules of standing, which require alignment of injury and remedy, it should make no difference for Fisher who has graduated from another college and, therefore, is not eligible for injunctive relief.

Finally, and most critically, Fisher claims that the “denial of a race-neutral evaluation” of her application “alone” was sufficient injury.¹²² As an initial matter, it is not necessarily evident what a “race-neutral evaluation” means in the context of admissions at UT Austin. It might mean that Fisher is arguing for the same “consideration” of race in her application as minority applicants. But, as already discussed, even if Fisher received a perfect Personal Achievement Score that factored in some theoretical consideration for race, UT Austin illustrated that she still would have been denied admission from the fall 2008 class.¹²³ More to the point, however, this conception of racial injury is inconsistent with how race is actually used in the admissions process because race is not a quantifiable, standalone criterion that necessarily applies to individual candidates.¹²⁴ Rather, race is considered in the broader context of an individual applicant’s life circumstances.¹²⁵ It measures the

120. Joint Appendix, *supra* note 110, at 68a, 75a ¶¶ 119, 155.

121. *See infra* Part II.

122. *See* Motion for Preliminary Injunction at 22 n.6, 23, *Fisher*, 645 F. Supp. 2d 587 (A-08-CA-263-SS); *see also* Transcript of Oral Argument, *supra* note 92, at 6:4–8 (argument of Bert Rein, counsel for Abigail Fisher) (“[T]he denial of her right to equal treatment is a constitutional injury in and of itself, and we had claimed certain damages on that.”).

123. *See supra* text accompanying note 118; *cf.* *Hopwood v. Texas*, 236 F.3d 256, 263–64 (5th Cir. 2000) (concluding that university need not “replicate” the challenged process “in its entirety” to satisfy its burden of proof for purposes of determining liability, but rather need only prove that plaintiff would have been denied “in the absence of unconstitutional conduct”).

124. *Fisher*, 645 F. Supp. 2d at 597:

Given [the university] guidelines and the fact [that] race, like all the other elements, is never awarded a numerical value or considered alone, it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission.

125. *Id.* (describing contextual consideration of race).

applicant's willingness to encounter a racial environment different from the one to which she is accustomed, and, therefore, it can be a positive factor for white and minority applicants alike.¹²⁶ Accordingly, for a whole range of reasons, Fisher's assertion that she was denied a "race-neutral evaluation" misconceives the nature of the admissions process. Race may be a factor as to some candidates or not at all, and whether it plays any role is a nuanced and highly individualized judgment.

To summarize, the university's showing that Fisher would have been rejected from its entering class if some racial consideration *had* "benefited" her application indicates that race did not cause her to be denied admission.¹²⁷ Thus, boiled down to its essence, Fisher's final claim is that she was injured simply by being *subjected* to a process that considered race, even if it had no discernible impact on her personally.¹²⁸ The contention is that the simple presence of race in a decisionmaking process that uses affirmative action confers an implied injury on all white candidates. The conception of white racial harm here is so broad that it nearly eviscerates the standing inquiry. This seems plainly wrong, and yet arguments like these have gained significant traction in the courts.¹²⁹ How did this happen?

The next Section locates the source of the problem in equal protection doctrine itself, which profoundly influenced conceptions of both the racial harm to white candidates as a consequence of affirmative action and the presumed racial wrongdoing by universities that practiced it. As we shall see, this process unfolded in two steps. First, the Court rejected pervasive racial disadvantage as a recognized justification for race-conscious affirmative action.¹³⁰ Second, as the constitutional legitimacy of affirmative action diminished, the assumption that whites were unjustly burdened by such policies increased.¹³¹ Therefore, as equal protection standards became less

126. See Joint Appendix, *supra* note 103, at 169a (explaining how race is factored into the admissions process); see also Joint Appendix, *supra* note 116, at 407a ¶ 4 ("[B]ecause race is a factor considered in the context of each applicant's entire file, it may be a beneficial factor for minorities or non-minorities alike, depending on the applicant's unique circumstances.").

127. See Joint Appendix, *supra* note 116, at 416a ¶ 18 ("[E]ven if Ms. Fisher and Ms. Michalewicz had each received a 'perfect' PAI score of 6, neither would have received an offer of admission to the freshman entering class of fall 2008.").

128. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 663 (2014) (Garza, J., dissenting) ("Fisher's alleged injury . . . is not her rejection, but the denial of equal protection of the laws during the admissions decision process.").

129. See *infra* Part II.C.

130. See *infra* Part II.C.

131. See *infra* Part II.C.

hospitable to affirmative action, the procedural rules of standing became more hospitable to anti-affirmative action plaintiffs.

C. The Innocence Paradigm in Equal Protection

It is common to think of innocence in the law in the context of criminal¹³² or tort law.¹³³ But we often overlook the defining role that innocence plays in affirmative action cases.¹³⁴ It surfaces repeatedly in challenges to race-conscious selection policies in higher education, contracting, employment, and school desegregation.¹³⁵ The reason has to do with two related assumptions. The first assumption is that whites are inherently harmed by affirmative action—specifically, that they are injured by the use of racial classifications to redress racial inequality for which they are not individually responsible.¹³⁶ The second assumption is that those who practice affirmative action have themselves engaged in racial wrongdoing. This is the essence of the innocence paradigm; it rests on the premise that whites are “innocent” of continuing racial inequality and that they are, thereby, “injured” by state considerations of race that seek to redress it. As a result, the use of race to identify persons for the purpose of distributing government benefits is itself regarded as harmful, even if white plaintiffs have not been specifically denied a government benefit as a result of the contested policy itself.¹³⁷

To understand this point, we have to explore the origins of innocence, which is now deeply embedded in equal protection’s operating system. Indeed, it is so engrained that we have forgotten

132. See Stuart P. Green, *Why It’s a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1551–52 (1997) (discussing “moral wrongfulness”); Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1084–91 (2011) (describing different conceptions of innocence in criminal justice).

133. See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Fraud-on-the-Market Tort*, 66 VAND. L. REV. 1755, 1781 (2013) (noting “presumption” of innocence in tort law).

134. Cf. Michelle Adams, *Causation and Responsibility in Tort and Affirmative Action*, 79 TEX. L. REV. 643, 644–48 (2001) (observing the similarities between the “causation” test in tort and the atomized treatment of the remedial justification as a defense to voluntary affirmative action program).

135. See Nichol, *supra* note 10, at 322–29; Sundquist, *supra* note 10, at 141 (noting the “much looser interpretation of injury and causation in cases brought by white ‘victims’ of race-based remedial admissions, employment, and desegregation programs”).

136. See *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 662–63 (5th Cir. 2014) (Garza, J., dissenting).

137. See Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CALIF. L. REV. 799, 803 (2003) (“[A]ffirmative action programs seem threatening to white people whether or not they result in much actual change. Affirmative action disturbs settled norms even when whites have no conscious attachment to privilege or intent to discriminate.”)

how it became lodged there in the first place. As the next sections reveal, the Supreme Court in earlier equal protection cases was very explicit about its use of the innocence paradigm. However, once the paradigm was fully baked into equal protection doctrine, it receded from public view. Innocence is still operative, but courts are no longer explicit about its role.¹³⁸ And, because it is hidden, we can neither hold courts accountable for its operation nor understand its impact. The Section below describes the origins of the innocence paradigm in substantive equal protection doctrine as a predicate for understanding its procedural turns in standing.

1. Invisible Innocence

Alan Freeman foreshadowed the explicit unveiling of the innocence paradigm in affirmative action in his early article discussing the “perpetrator perspective” in equal protection.¹³⁹ According to Freeman, equal protection adopted the perpetrator perspective to rationalize and legitimize systemic racial disadvantage.¹⁴⁰ Adopting a perpetrator viewpoint enables courts to ignore the experiences of racial minorities as members of “a perpetual underclass”¹⁴¹ that suffers from a chronic shortage of resources, opportunity, and choice.¹⁴² Under this view, the sole purpose of equal protection is to prohibit conduct that intentionally inflicts racial harm and to “neutralize” that conduct, rather than addressing the systemic, intergenerational disparities that result from it.¹⁴³

Within this framework, equal protection treats racial discrimination “not as a social phenomenon, but merely as the misguided conduct of particular actors.”¹⁴⁴ That is, law bears down on intentional discrimination caused by an identifiable party and is indifferent to societal conditions that systemically disadvantage racial minorities.¹⁴⁵ Thus, the equal protection problem disappears once the intentional conduct and the conditions that are directly traceable to

138. *See infra* Part II.C.15.

139. *See* Freeman, *supra* note 34, at 1049.

140. *Id.* at 1052–53.

141. *Id.* at 1052.

142. *Id.* at 1051 (observing role of law in “legitimiz[ing] the existing social structure and, especially, class relationships within that structure”).

143. *Id.* at 1053.

144. *Id.* at 1054.

145. *See infra* Part II.C.2 & 3.

that conduct have been redressed.¹⁴⁶ In this regard, the perpetrator perspective's frame of reference is ahistorical and divorced from social context:¹⁴⁷ it presumes that equal opportunity exists for everyone and that any disruption to the nation's basic system of fairness is episodic and the consequence of isolated individual conduct.¹⁴⁸ Once this individualized conduct is corrected, the system returns to an equilibrium of racial fairness, with any resulting disparities presumably occasioned by a lack of individual merit.¹⁴⁹

The innocence paradigm that I describe here is grounded in the moral dimensions of Freeman's perpetrator perspective. Freeman himself acknowledged the influence of white innocence in equal protection doctrine.¹⁵⁰ Because equal protection's framework focuses on principles of "fault," "guilt," and harm that is "caused" by discrete parties,¹⁵¹ blame—and the absence of blame—are its defining features. Freeman contended that equal protection's preoccupation with blame and fault leads to a "complacency about one's own moral status" and "creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination."¹⁵² Consequently, whites "feel great resentment when called upon to bear any burdens in connection with remedying violations" that are not of their own making.¹⁵³ The innocence framework, therefore, is the moral byproduct of a perspective that emphasizes individual wrongdoing.

The perpetrator perspective in equal protection, and innocence as its moral companion, surfaced in a number of early cases that foreshadowed later attacks on affirmative action and Justice Powell's decisive opinion in *Bakke*. In *Washington v. Davis*, for example, the Court rejected an equal protection challenge to a civil service exam that disadvantaged blacks applying to become police officers in the District of Columbia.¹⁵⁴ The *Davis* Court concluded that intentional discrimination, rather than disproportionate adverse racial impact,

146. See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237 (1991) (holding that school segregation that is no longer traceable to intentional discrimination lies outside federal court jurisdiction).

147. Freeman, *supra* note 34 at 1054.

148. *Id.*

149. *Id.*

150. *Id.* at 1055 ("The fault concept . . . creates a class of 'innocents,' who need not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations.").

151. *Id.* at 1054.

152. *Id.* at 1055.

153. *Id.*

154. 426 U.S. 229 (1976).

defined equal protection claims.¹⁵⁵ Significantly, this meant that the Court would not recognize racial disparities—or as Freeman put it, “the objective conditions of life”¹⁵⁶—as the basis for an equal protection challenge. In so doing, *Davis* laid the foundation for equal protection’s eventual undoing as an avenue for affirmative claims by racial minorities that sought to dismantle systemic racial disadvantage.¹⁵⁷

Still, *Davis* left open the possibility that “intent” could be defined in equal protection terms as the foreseeable consequences of one’s actions.¹⁵⁸ Pursuing policies that had a predictable racially disparate outcome, therefore, could be constitutionally cognizable. According to this interpretation of equal protection, “intent” included an “awareness” of the likelihood of adverse impact.¹⁵⁹

However, in *Personnel Administrator of Massachusetts v. Feeney*, the Court eliminated this theory of intent, defining “discriminatory purpose” as a decision to “select[] or reaffirm[] a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”¹⁶⁰ This principle would be reinforced later by the Court in *McCleskey v. Kemp*, which rejected an equal protection claim by a black capital defendant in Georgia who argued that the pervasive influence of race on death sentences in the state tainted his own death sentence.¹⁶¹ Although the study suggested a strong correlation between race and the imposition of death sentences generally, the Court concluded that the defendant had failed to establish that race played a dispositive role in his case in particular.¹⁶²

Davis, *Feeney*, and *McCleskey* joined a long list of equal protection cases that embraced, even if only implicitly, the perpetrator perspective and its “atomistic”¹⁶³ understanding of racial harm. Each of these cases can be understood to manifest a concern that innocent whites would be blamed (wrongly) for conditions for which they were

155. Freeman, *supra* note 34, at 1055.

156. *Id.* at 1052.

157. See Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1133–34 (1997) (describing *Davis*’s role in erecting barrier to actions challenging “facially neutral state action”).

158. *Id.* at 1134 (observing that it was not until *Feeney* that “the Court made clear that it had raised quite a formidable barrier to plaintiffs challenging facially neutral state action”).

159. *Id.* (describing plaintiff’s theory in *Feeney* that foreseeability of disparate impact constituted intent for purposes of equal protection).

160. 442 U.S. 256, 279 (1979).

161. 481 U.S. 279 (1987).

162. *Id.* at 292–93 (observing that *McCleskey* had “offer[ed] no evidence specific to his own case that would support an inference that racial considerations played a part in his sentence”).

163. See Freeman, *supra* note 34, at 1054.

not responsible. As a matter of equal protection, *Davis* in particular eroded the idea that whites may have benefited from intergenerational advantage and the resulting systems of racial hierarchy. The constitutional consequences were profound as the historical impact of racial discrimination was erased from the equal protection calculus. In practical terms, this meant that persistent, widespread racial disadvantage was constitutionally invisible, as were the disempowered racial minorities who suffered from it. As *Bakke* would come to demonstrate, equal protection not only failed to protect persons of color from the “objective conditions of life”¹⁶⁴ but also became a sword against the very policies that sought to redress these conditions in the absence of provable intentional discrimination.¹⁶⁵ *Bakke* instigated this shift through “colorblind” reasoning that treated racial classifications themselves as presumptively harmful under equal protection, disregarding the systemic racial disadvantage that gave rise to affirmative action in the first place.¹⁶⁶

2. White Resentment as Racial Injury

Equal protection doctrine both reflects and produces our social narratives about race, as well as our public tolerance of policies that promote racial inclusion.¹⁶⁷ The previous Section explored this idea through the lens of the perpetrator perspective. Equal protection’s focus on individual fault and blame—and innocence, as their corollary—largely placed racial disadvantage as a cognizable harm beyond the constitutional conversation. However, this doctrinal shift also mirrored social and cultural norms that were increasingly intolerant of public programs designed to alleviate racial disadvantage.¹⁶⁸

As already noted, after *Davis*, *Feeney*, and *McCleskey*, racial disparities alone were not sufficient to maintain a cause of action under the Equal Protection Clause. Nonetheless, these cases left room for the possibility that state actors could voluntarily seek to remedy widespread racial disadvantage through their own affirmative uses of race. *Regents of the University of California v. Bakke*, the first

164. *Id.*

165. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (rejecting “societal discrimination” as a constitutional justification for affirmative action).

166. See Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012).

167. See POST, *supra* note 42, at 22; Freeman, *supra* note 34, at 1051 (noting the role that law plays as “an evolving statement of acceptable public morality”).

168. See DENNIS DESLIPPE, *PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION* (2012).

Supreme Court case to address the constitutionality of voluntary race-conscious policies,¹⁶⁹ however, struck a crippling blow against affirmative action. In so doing, it put the innocence paradigm on full display. Much has been written about *Bakke*,¹⁷⁰ but its role in redefining the racial harm to white plaintiffs and presumed wrongdoing by government defendants in affirmative action cases tends to get lost.¹⁷¹

Allan Bakke challenged the University of California at Davis Medical School's two-track admissions process, one track for general admissions and a separate track for "disadvantaged" students that reserved a fixed number of seats in the entering class of one hundred.¹⁷² His application was reviewed and denied under the general admissions track.¹⁷³ The Court struck down the program, and, in so doing, determined that Bakke was entitled to an injunction directing his admission.¹⁷⁴ However, the Court concluded, critically, that the relevant injury for standing purposes was *not* Bakke's rejection from the medical school but his inability to compete for every seat in the class.¹⁷⁵ Framing his injury this way allowed the Court to duck the ongoing debate in the case about whether the university's consideration of race was in fact the reason why Bakke had been rejected.¹⁷⁶ But the Court's decision also had the effect of reformulating standing doctrine to make it easier for future white plaintiffs to challenge affirmative action.

Here it is important to understand that *Bakke* arose in the context of growing sentiment among whites that they were unjustly burdened by policies that benefited racial minorities.¹⁷⁷ As Reva Siegel

169. *DeFunis v. Odegaard*, 416 U.S. 312 (1974), was technically the first affirmative action higher-education case to reach the U.S. Supreme Court. Marco DeFunis sued the University of Washington Law School based on its consideration of race in admissions, but was subsequently admitted, and the case was later dismissed as moot. *Id.* at 319–20. However, DeFunis, like Bakke, appeared to have a questionable basis for challenging the program. The record indicated that the law school had admitted two hundred applicants and that he had been placed "in the bottom quartile of a waiting list of 155 applicants." DESLIPPE, *supra* note 168, at 111.

170. For example, a search of the "Law Reviews and Journals" database on Westlaw with *Bakke* in the title yielded sixty-eight articles.

171. *But see* Haney López, *supra* note 166 (discussing doctrinal turns in *Bakke*); Ross, *supra* note 28 (discussing role of innocence in *Bakke*); *Equality Talk*, *supra* note 28, at 1529–30 (discussing constitutional impact of shift in judgments about harm to whites).

172. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 274–79 (1978).

173. *Id.* at 277.

174. *Id.* at 320.

175. *Id.* at 280 n.14.

176. *See* Sunstein, *supra* note 82, at 1465–66.

177. *See* Freeman, *supra* note 34, at 1055 (observing "the ferocity surrounding the debate about so-called 'reverse' discrimination," which resulted from "resentment . . . for being called on

has observed, the burgeoning contest over affirmative action was itself rooted in “racial conflict”¹⁷⁸ about the very meaning of equality, which could be traced in turn to debates over the implementation of *Brown v. Board of Education*.¹⁷⁹ This conflict “shaped the path and form” of Justice Powell’s opinion,¹⁸⁰ which created a presumption that racial considerations victimized innocent whites as a matter of constitutional doctrine. In so doing, Powell’s opinion obscured the historical subordination of African Americans.¹⁸¹ Although earlier equal protection cases had planted the seeds of the innocence paradigm,¹⁸² Powell’s analysis set the stage for even more consequential shifts in equal protection that reflected and reinforced an expansive interpretation of white racial injury.¹⁸³ The assumption that innocent whites were unfairly disadvantaged by—and, therefore, resentful of—affirmative uses of race by the state (arguably) was as pernicious as the constitutional rule that had disadvantaged minority litigants in *Washington v. Davis*, among other cases. After Powell’s opinion in *Bakke* took root, equal protection shed any pretense of shielding people of color against racial disadvantage and became a sword against state efforts to promote minority opportunity.¹⁸⁴ Equal protection doctrine achieved this outcome by explicitly seeking to protect white litigants against affirmative action, including, as discussed further below, through broad interpretations of standing

to bear burdens ordinarily imposed only upon the guilty”). See generally DESLIPPE, *supra* note 168.

178. See *Equality Talk*, *supra* note 28, at 1477.

179. *Id.* at 1514 (observing that the “presumption against racial classifications began to shift by the end of the 1960s, in response to escalating national conflicts over race and the rise of a new generation of desegregation initiatives aimed at post-secondary and professional education”).

180. *Id.* at 1477.

181. Compare *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291–92 (1978) (dismissing the Court’s initial ant子subordination understanding of the Fourteenth Amendment, which was focused on guarding “the freedom of the slave race” (quoting *Slaughter-House Cases*, 83 U.S. 36, 71 (1873))), with *id.* at 294 (observing that although the “landmark [equal protection] decisions arose in response to the continued exclusion of Negroes from the mainstream of American society,” they need not be confined to that initial reading).

182. See generally Freeman, *supra* note 34, at 1054–57 (discussing the perpetrator perspective in Supreme Court equal protection decisions).

183. Powell’s opinion did not command a majority, but it would eventually become the “law of the land.” Paul R. Baier, *Of Bakke’s Balance, Gratz, and Grutter: The Voice of Justice Powell*, 78 TUL. L. REV. 1955, 2007 (2004); see also *Grutter v. Bollinger*, 539 U.S. 306, 323 (2003) (“Since this Court’s splintered decision in *Bakke*, Justice Powell’s opinion . . . has served as the touchstone for constitutional analysis of race-conscious admissions policies.”); Dow, *supra* note 11, at 1130–34 (discussing the “equal protection doctrine’s wrong turn” in *Bakke* and the decision’s lasting influence).

184. 438 U.S. at 289–311.

that opened the federal courts to litigants challenging race-conscious selection policies.

The first doctrinal turn was Powell's conclusion that strict scrutiny should apply to the university's admissions policy,¹⁸⁵ which required the university to show that its use of race in admissions was narrowly tailored to a compelling state interest.¹⁸⁶ The university had urged the Court to adopt a more lenient standard of judicial review given that one purpose of its admissions program was to address the effects of "societal discrimination on historically disadvantaged racial and ethnic minorities."¹⁸⁷ Powell rejected the argument, concluding that "racial and ethnic distinctions of any sort are inherently suspect" and "call for the most exacting judicial examination."¹⁸⁸ He justified the more rigorous standard on the grounds that the state's consideration of race was itself presumptively harmful.¹⁸⁹ In this respect, Powell's reasoning was critical. It revealed that his primary concern was the "deep resentment," discomfort, and "outrage" among "innocent" whites that resulted from affirmative action.¹⁹⁰ This drove his conclusion that strict scrutiny should apply to the university's explicit consideration of race:

*All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others.*¹⁹¹

The theme that the university's affirmative action policy harmed innocent whites surfaced repeatedly throughout Powell's opinion. Affirmative action burdened whites because the historical wrongs it sought to address were "not of their making,"¹⁹² which in turn led to a "perception of mistreatment."¹⁹³ Powell refused to apply a lower

185. *Id.* at 288, 291 ("Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.").

186. *Id.* at 305.

187. See Brief for Petitioner at 3, 12, *Bakke*, 438 U.S. 265 (1977) (No. 76-811), 1977 WL 189474, at *3, *12; see also *Bakke*, 438 U.S. at 287–88.

188. 438 U.S. at 291.

189. *Id.* at 299 ("When [admissions policies] touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.").

190. *Id.* at 294 n.34.

191. *Id.*

192. *Id.* at 298.

193. *Id.* at 294 n.34.

standard of scrutiny for affirmative action policies given the risk that it would “exacerbate racial and ethnic antagonisms rather than alleviate them.”¹⁹⁴

Powell’s determination to frame Bakke as an innocent white victim of the university’s policy was also pivotal to another important question before the Court: whether the university’s goal of remedying “the enduring effects of racial discrimination” against racial minorities was a constitutionally compelling interest.¹⁹⁵ The difficulty was that this objective could not be easily reconciled with Powell’s premise that affirmative action unfairly harmed whites, since doing so would make it easier to justify the university’s policy.¹⁹⁶ Therefore, Powell once again redirected the constitutional narrative to emphasize affirmative action’s encumbrances on whites.¹⁹⁷ Remedying “societal discrimination” was too amorphous to justify the burden on persons like Bakke who bore “no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered.”¹⁹⁸ The justification for such a program required more from the university than some abstract goal of redressing racial inequality. Instead, it had to be based upon “judicial, legislative, or administrative findings of constitutional or statutory violations.”¹⁹⁹ Only an interest in vindicating “the legal rights” of racial minorities based on intentional racial wrongdoing by whites could rationalize remedial considerations in admissions.²⁰⁰ Limiting the use of racial classifications to a narrow remedial context would “assure” “the least harm possible to other innocent persons.”²⁰¹ Thus, white guilt, culpability, and innocence were central to Powell’s analysis.

And yet, Powell’s analysis depended on a racial asymmetry of innocence. He dismissed the possibility that “innocent” racial minorities were burdened by the effects of longstanding racial

194. *Id.* at 298–99.

195. Brief for Petitioner, *supra* note 187, at 32.

196. 438 U.S. at 307 (“We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”).

197. *Id.*

198. *Id.* at 310. Ironically, Powell rejected the de jure–de facto distinction in *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 232 (1973) (Powell, J., concurring). In *Keyes*, Powell called for a national constitutional standard that would impose an “affirmative duty” on school districts to address segregated conditions, regardless of their origin. *Id.* at 224.

199. 438 U.S. at 307.

200. *Id.*

201. *Id.* at 308.

discrimination.²⁰² Powell's refusal to acknowledge these racial disparities, of course, was facilitated by *Washington v. Davis*, which made pervasive racial disadvantage virtually invisible to the equal protection calculus.²⁰³ Notably, he also sidestepped the possibility that Bakke and his white peers may have benefited from prior systems of de jure discrimination, including artificially limited applicant pools that included relatively few minorities due to the intergenerational effects of segregated schooling.²⁰⁴ Hence, Powell's focus on innocence pointedly prioritized *white* innocence, while denying racial minorities the same presumption. As discussed in Part III below, this asymmetry of innocence would surface later as white plaintiffs in equal protection cases enjoyed expansive interpretations of standing that would be denied to minority plaintiffs.

Powell's tighter remedial standard made it harder for institutions that practiced affirmative action to justify their policies.²⁰⁵ But it also created a paradigm in which the presumed burdens of affirmative action on innocent whites became a primary focus of equal protection. Powell accomplished this in part by couching equal protection's guarantee in "personal" terms that focused on "individuals," rather than groups.²⁰⁶ With its rejection of group-based racial disadvantage as a legitimate constitutional concern,²⁰⁷ equal protection shifted to a thinner and more formalistic conception of racial equality.²⁰⁸ The relevant harm was not the underlying systemic disadvantage to racial minorities as a result of longstanding discrimination.²⁰⁹ Rather what mattered was the injury to whites that ostensibly resulted from the explicit use of race to make admissions decisions.²¹⁰ This reframing of the relevant injury focused the

202. *Id.* at 310.

203. See *Washington v. Davis*, 426 U.S. 229 (1976); cf. *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (noting that adverse racial impact is "starting point" for an intent analysis).

204. *Bakke*, 438 U.S. at 307.

205. See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 934 (5th Cir. 1996) (rejecting the University of Texas's remedial rationale as justification for its consideration of race in admissions); see also Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 179 n.22 (2005) (discussing challenges of remedial rationale in higher education).

206. *Bakke*, 438 U.S. at 289 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)).

207. See *Davis*, 426 U.S. at 240–41.

208. See generally Freeman, *supra* note 34, at 1054–57 (introducing this shift in Supreme Court jurisprudence).

209. *Bakke*, 438 U.S. at 310; Freeman, *supra* note 34, at 1054–57.

210. *Bakke*, 438 U.S. at 310:

[T]he purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons like [Bakke], who bear no responsibility for

constitutional inquiry on the presumed harm of racial classifications themselves, leading to the “colorblindness” rationale that has become so prevalent in equal protection doctrine.²¹¹ By embracing a framework that emphasized individual treatment rather than group-based inequality,²¹² Powell eliminated the historical context that gave life and meaning to the university’s admissions policy. Thus, Allan Bakke shifted from being a beneficiary of accumulated white racial status and advantage, as the university had argued, to being an innocent victim.

Ironically, the very group formulation that Powell had rejected on behalf of racial minorities (i.e., that their systemic disadvantage justified the explicit use of race in higher education admissions) had come to roost in equal protection doctrine in another form. Powell’s reframing of the equal protection inquiry allowed him to generalize Bakke’s experience, as a white person individually burdened by affirmative action, to whites as a group.²¹³ Indeed, Powell couched his concern explicitly in group terms.²¹⁴ His conclusion that white “outrage” and “resentment” undermined the university policy itself rested on a racial stereotype that contradicted his professed concern about treating people as individuals.²¹⁵ Yet it enabled Powell to reformulate equal protection in a way that could vindicate whites who were generally aggrieved by affirmative action. This reformulation included the application of strict scrutiny to race-conscious policies, the rejection of the university’s broad remedial goals, and, as we shall see in Part III below, an aggressive interpretation of standing for Bakke himself that broadened standing doctrine for white litigants more generally.

3. Whites as a Subordinated Group

As discussed in the previous section, *Bakke* cultivated a narrative of white victimhood that has become the default framework for equal protection and race.²¹⁶ This narrative starts with the

whatever harm the beneficiaries of the special admissions program are thought to have suffered.

211. See generally Haney López, *supra* note 166, at 1825–33 (discussing Powell’s introduction of “contemporary colorblind reasoning” in *Bakke* and its continuance in the cases that followed).

212. *Id.* at 1827.

213. *Bakke*, 438 U.S. at 294 n.34.

214. *Id.*

215. *Id.*

216. See Gratz, *supra* note 18 (illustrating the mentality of white victimhood). *But see* Steven Mazie, *Why Affirmative Action Isn’t to Blame for Your College Rejection Letter*,

presumption that race-conscious policies unjustly injure whites as a group.²¹⁷ Yet Powell's ability to elevate "white innocence" as a constitutional concern depended on complicating the very notion of "whiteness."²¹⁸ This, in turn, involved disrupting assumptions about the dominant majority status of whites and the corresponding socially diminished status of racial minorities.²¹⁹ Under Powell's reformulated equal protection framework, whites were also a subordinated "minority" group.²²⁰

This move was crucial to Powell's conclusion that strict scrutiny should apply to government considerations of race that benefited, as well as burdened, historically subordinated racial minority groups.²²¹ As Ian Haney López has observed, to achieve this, Powell needed to blur the distinction between social legislation that burdened "vulnerable minorities"—and, therefore, required more rigorous judicial review—and "ordinary" legislation that called for judicial deference.²²² But to accomplish this, Powell first had to challenge the premise that racial minorities alone were burdened by historical wrongs and to debunk the notion that the primary purpose of the Fourteenth Amendment was to protect them as a group.²²³

BIGTHINK.COM (April 17, 2013, 12:00 AM), <http://bigthink.com/praxis/why-affirmative-action-isnt-to-blame-for-your-rejection-letter>, archived at <http://perma.cc/G4NS-FUDQ> (explaining that eliminating affirmative action would have little to no effect on "white candidates' chances of admission"); Krystie Yandolie, *An Open Letter to Affirmative Action Reject Abigail Fisher*, JEZEBEL.COM (June 25, 2013, 3:00 PM), <http://jezebel.com/an-open-letter-to-affirmative-action-reject-abigail-fis-570774253>, archived at <http://perma.cc/K4R3-FK6M> (criticizing the plaintiff in *Fisher v. Univ. of Texas* for challenging affirmative action and ignoring her "white privilege").

217. See Cheryl I. Harris & Kimberly West-Faulcon, *Reading Ricci: Whitening Discrimination, Racing Test Fairness*, 58 UCLA L. REV. 73, 118–20 (2010) (discussing innocence claims of white reverse discrimination plaintiff in Title VII case and his efforts to "reposition[] whites as racially subordinated and disempowered").

218. See *Bakke*, 438 U.S. at 295 ("[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.").

219. *Id.* (observing that "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments").

220. *Id.*

221. See Ian F. Haney López, "A Nation of Minorities": *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 1034–35 (2007).

222. *Id.* This has also been described as a principle of "equivalence." *Id.* at 985, 987, 1016; see also Michelle Adams, *Is Integration a Discriminatory Purpose?*, 96 IOWA L. REV. 837, 841–44 (2011) (discussing "equivalence" rationale).

223. See *Bakke*, 438 U.S. at 291–95 (discussing Fourteenth Amendment's original focus on the protection of the "slave race" and the shift away from a tiered theory of equal protection); *id.* at 295 ("It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."); *id.* ("The clock of our liberties . . . cannot be turned back to 1868.").

As López has explained, “[e]thnicity provided Powell’s answer.”²²⁴ Powell introduced a “revised narrative” that shifted from the historical origins and context of the Fourteenth Amendment, with its focus on African Americans, to the “nation of minorities” that had emerged during the twentieth century.²²⁵ Powell argued that equal protection long had been applied equally to white ethnic and religious groups, including “Celtic Irishmen,” “Austrian resident aliens,”²²⁶ people of “Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic Groups.”²²⁷ By scrupulously avoiding any mention of blacks and by referencing other nonwhites by their country of origin,²²⁸ Powell unraveled equal protection’s historical focus on African Americans and other racial minorities.²²⁹ In so doing, he also sought to unravel the very understanding of “minority” itself.²³⁰ As Powell observed, many groups, including white ethnics, had been subjected to discrimination:

Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a “majority” composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups.²³¹

In essence, because so many groups could claim minority status and historical disadvantage, these criteria alone contributed little to the equal protection framework.²³² This redefinition of “minority” allowed Powell to contest the significance of the minority status of racially marginalized groups.²³³ If there was no dominant white majority, then there could be no disadvantaged racial minority.²³⁴

For Powell, the *mélange* of racial and ethnic groups that could claim minority status pointed to a judicial quandary.²³⁵ The Court

224. Haney López, *supra* note 221, at 1035; *see also id.* at 1029–43 (discussing Powell’s use of ethnicity in *Bakke*).

225. *Id.* at 1035.

226. *Bakke*, 438 U.S. at 292.

227. *Id.* at 292 n.32 (quoting 41 C.F.R. § 60–50.1(b) (1977)).

228. *Id.*

229. *Id.* at 292.

230. *Id.* at 292, 295 (observing that “[t]he concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments” and describing the “white ‘majority’” as being “composed of various minority groups”).

231. *Id.* at 292.

232. *Id.* at 295–96.

233. *Id.* at 295–97.

234. *Id.*; *see also* Freeman, *supra* note 34, at 1066 (discussing equal protection’s role in “abstracting racial discrimination into a myth-world where all problems of race or ethnicity are fungible”).

235. *Bakke*, 438 U.S. at 296–97 (discussing lack of a “principled basis for deciding which groups would merit ‘heightened judicial solicitude’ and which would not”).

would be unable to properly distinguish between majority and minority groups.²³⁶ Having put white ethnic groups and racial minorities on an equal constitutional plane, because each had suffered their own brand of prejudice and discrimination, the terms “majority” and “minority” were divested of racial meaning and associated connotations of power and dominance.²³⁷ Because “the white ‘majority’ itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals,” Powell reasoned that it would be impossible to draw principled distinctions to determine which group “merit[ed] heightened judicial solicitude and which would not.”²³⁸ Powell concluded that the very notion of majority and minority groups “necessarily reflect[ed] temporary arrangements and political judgments,” which were subject to change based on shifting political alliances.²³⁹ Accordingly, Powell rejected any notion that racial minorities were burdened by systemic disadvantage of an entirely different kind and degree.²⁴⁰

By bringing white ethnic groups into a constitutional narrative that had centered previously on the experiences of racial minorities, Powell changed the terms of the constitutional debate.²⁴¹ But the shift in equal protection doctrine also helped fuel a social and cultural narrative of white victimhood that laid the blame for minorities’ depressed status at their feet.²⁴² The history, experience, and assimilationist success of white ethnic groups suggested to Powell that “race” itself was less of a social problem than racial minorities’ “group culture.”²⁴³ Indeed, Powell leveraged the achievements of white ethnic groups to suggest that the bigger threat posed to racial minorities by affirmative action was that it could “reinforce common

236. *Id.* at 295–97.

237. *Id.* at 296, 297 & n.37.

238. *Id.* at 295–96; Haney López, *supra* note 221, at 1037–38.

239. *See Bakke*, 438 U.S. at 295.

240. *See* Haney López, *supra* note 221, at 1038.

241. *See id.* at 1029–43.

242. *See id.* at 1022–25 (noting the symbiotic relationship between the Court’s equal protection jurisprudence and the advent of race-as-ethnicity theory in the late 1970s and early 1980s); Reva B. Siegel, *Discrimination in the Eyes of the Law: How ‘Color Blindness’ Discourse Disrupts and Rationalizes Social Stratification*, 88 CALIF. L. REV. 77, 103 & n.92 (2000) (describing the use of a “race-as-ethnicity” narrative that combined “individualism” and “culturally potent narratives about the immigrant’s struggle from rags-to-riches that played an important role in redefining the sociopolitical salience of color blindness discourse in politics and law”); *see also* DESLIPPE, *supra* note 168, at 180–208 (describing cultural and political reactions of the white majority to affirmative action).

243. *Bakke*, 438 U.S. at 294–96; *see* Siegel, *supra* note 242 and accompanying text.

stereotypes” that they “are unable to achieve success without special protection based on a factor having no relationship to individual worth.”²⁴⁴ Coupled with a framework of individualism, Powell’s focus on white ethnic groups facilitated his conclusion that the same level of scrutiny should apply to policies that both benefited racial minorities and disadvantaged whites.²⁴⁵ Innocence again operated as a subtext. Because different white ethnic groups too had been subjected to discrimination, they were all in some measure “innocent” victims.²⁴⁶ It was not possible, therefore, to distinguish the level of judicial scrutiny that applied to white applicants like Bakke from the level of scrutiny that applied to racial minorities.²⁴⁷ Any consideration of race was subject to strict scrutiny regardless of whose “ox [was being] gored.”²⁴⁸

Powell’s move was clever.²⁴⁹ By elevating a constitutional narrative of discrimination that “disaggregate[d] whites” into individual ethnic groups, he could deny that whites enjoyed “group” power and status.²⁵⁰ However, he then used this same narrative to cast whites collectively as victims of affirmative action, applying a standard of heightened judicial review that disemboweled the remedial objectives of the university’s admissions policy²⁵¹ and set the stage for consequential turns in equal protection that embraced “colorblindness” as a core, animating principle.²⁵² The presumptive illegitimacy of affirmative action was that it failed to acknowledge the varied ethnic subtexts of whiteness and, in so doing, unjustly subordinated whites as a group.²⁵³ By sleight of hand, Powell had created a narrative that whites suffered “group-based disadvantage” from affirmative action, while erasing from the equal protection

244. *Bakke*, 438 U.S. at 298.

245. See Siegel, *supra* note 242, at 103 (observing the role that the “race-as-ethnicity story” played in “redefining the sociopolitical salience of color blindness discourse in politics and law”). This laid the foundation for the majority opinion in *City of Richmond v. Croson*, which determined that strict scrutiny applies regardless whether the racial classification burdens or benefits racial minorities. 488 U.S. 469, 493–94 (1989).

246. See DESLIPPE, *supra* note 168, at 206–08.

247. *Bakke*, 438 U.S. at 295–96.

248. *Id.* at 295 n.35 (quoting ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975)); see also Haney López, *supra* note 221, at 1036 (criticizing Justice Powell’s use of this language as reflecting a lack of both understanding and sympathy for the “iniquitous reality confronting blacks”).

249. Powell’s turn here was even more remarkable given that in earlier parts of his opinion he had elaborated on the historical “evils of segregation” in addressing the history and purpose of the 1964 Civil Rights Act. *Bakke*, 438 U.S. at 284–87.

250. Haney López, *supra* note 221, at 1039.

251. *Bakke*, 438 U.S. at 307–11.

252. See Haney López, *supra* note 221, at 1021–47.

253. *Id.*

framework the persistent group subordination of racial minorities that affirmative action sought to address.²⁵⁴ This reformulated narrative placed aggrieved whites as a group at the center of the equal protection inquiry while diminishing the significance of continuing disadvantage of racial minorities as a constitutional concern. Powell formally couched his equality narrative in individualistic terms,²⁵⁵ but he deployed innocence norms to protect the group status of whites.²⁵⁶

4. The Acceptability of Diversity

One interest asserted by the university, however, was consistent with Powell's project of managing white anxiety about affirmative action. Powell concluded that the "attainment of a diverse student body" was "clearly" a "constitutionally permissible goal for an institution of higher education."²⁵⁷ Diversity satisfied his innocence concerns because it expressly contemplated that the race of white applicants could be favorably considered under a diversity-oriented admissions policy.²⁵⁸ Diversity also would produce educational benefits that could help white students. The fact that race would be one of many different factors based on an individualized evaluation of each applicant was consistent with Powell's interpretation of the equal protection guarantee²⁵⁹ and his selective brand of individualism.²⁶⁰ Further, it aligned with the innocence paradigm because it did not depend on historical evidence of past or continuing discrimination by whites against marginalized racial groups.²⁶¹

Powell's rejection of the university's remedial objective and acceptance of diversity as a rationale weaves together the elements that define the innocence paradigm. Both emphasized the burdens on

254. *See id.* at 1039–40 ("But in considering the position of the 'white "majority," Powell moved back toward a concern with specifically group-based disadvantage.").

255. *Bakke*, 438 U.S. at 299 ("If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently.").

256. *See id.* at 294 n.34 (suggesting "state-imposed classifications that rearrange burdens and benefits on the basis of race" would elicit "deep resentment" and "outrage" among "innocent persons"); *id.* at 298 (referring to "a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making").

257. *Id.* at 311–12.

258. Justice Powell contemplated that a black student could contribute to the experience of diversity, just like a "farm boy from Idaho" or an Italian-American. *Id.* at 316–17 (quoting Appendix to the Brief for Columbia University et al. as *Amici Curiae* 2–3, *id.* (No. 76-811)).

259. *Id.* at 318.

260. *Id.* at 315–20.

261. *Id.*

individual white applicants as a constitutional concern that eclipsed broader remedial social goals. Both also allowed Powell to avoid a historical framework that would contextualize racial disadvantage as a system that has existed across time. Powell's remedial frame rejected a broad historical vantage point and instead focused on identifiable discrimination that could be traced to a government actor.²⁶² "Societal discrimination," by definition was too amorphous and diffuse to justify racial considerations, and Powell disparaged the university policy as being "ageless in its reach into the past."²⁶³ Diversity, on the other hand, had a limited historical valence. The practical power of diversity, of course, lay in its acknowledgement of the racial exclusion that had led to isolated, all-white institutions.²⁶⁴ But it quite clearly disclaimed a remedial objective²⁶⁵ and tended to focus instead on the educational advantages that inured to the benefit of all students, including whites.²⁶⁶ As a result, it satisfied the terms of the innocence paradigm.

5. Innocence as a Racial Motivation

As discussed in the previous sections, Powell's use of innocence was explicitly racially motivated. His *Bakke* opinion created a constitutional architecture that was oriented toward managing white resentment of affirmative action and instantiated white victimization as a primary focus of equal protection in affirmative action cases.²⁶⁷ Powell's explicit invocation of white innocence set the stage for a series of cataclysmic shifts in equal protection that privileged white plaintiffs challenging race-conscious government policies. As a result, it imposed a strict standard of review even for policies that had a benign, inclusionary motive and rejected state efforts to redress pervasive racial disadvantage as being constitutionally illegitimate.²⁶⁸ Only more narrowly circumscribed remedial justifications that were traceable to intentional discrimination—and could be judicially managed to ensure the least encumbrance on white interests—would

262. *Id.* at 307–09.

263. *Id.* at 307.

264. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003) (observing that "our Nation's struggle with racial inequality" increases the importance of diversity in educational settings).

265. *Bakke*, 438 U.S. at 307–10.

266. *Id.* at 311–15.

267. *See Haney López, supra* note 166, at 1826–27; *Haney López, supra* note 221, at 1034–37.

268. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507–08 (1989).

suffice.²⁶⁹ His primary concern was to mitigate white resentment of affirmative action policies and the threat they posed to whites as a group.²⁷⁰

Powell's doctrinal moves gave not only white persons but also whiteness itself normative power. His constitutional framework elevated whiteness to a special favored status in equal protection,²⁷¹ contradicting equal protection's own professed norms of nondiscrimination.²⁷² Since *Bakke*, equal protection has operated pursuant to a racial double standard: it calls for racial neutrality but for reasons that are explicitly racially motivated.²⁷³ It is highly attentive to white racial attitudes²⁷⁴ but disregards pervasive discrimination that disadvantages racial minorities.²⁷⁵ If the innocence paradigm itself was subject to constitutional scrutiny, it likely would fail as it favors whites "for no reason other than race," simply for "its own sake."²⁷⁶

And yet innocence is an enduring feature of equal protection and surfaces repeatedly in challenges to affirmative action.²⁷⁷

269. *Bakke*, 438 U.S. at 307–08 (observing that "the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit").

270. *See id.* at 318–20 (finding that the admissions policy at issue involved "the use of an explicit racial classification never before countenanced by [the] Court" because it denied nonminority applicants "the chance to compete with applicants from the preferred groups for the special admissions seats").

271. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1770–73 (1993) (noting *Bakke*'s expectation "that he would never be disfavored when competing with minority candidates, although he might be disfavored with respect to other more privileged whites"); *cf.* GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 37 (1998) (arguing that Powell's opinion was rooted in a concern that "white individuals might be so upset by what they viewed as preferential treatment for Chicanos and blacks that they might *perceive* a denial of equal rights amounting to invidious discrimination").

272. *See* Spann, *supra* note 10, at 1424 ("[T]he racially correlated outcomes of the [standing] cases suggest that if the Supreme Court's racial discrimination standards were applicable to the Court's treatment of standing, the Supreme Court's standing decisions would violate its own nondiscrimination norms."); *cf.* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427 (1997) ("Current affirmative action law may be the first instance in our jurisprudence of a constitutional doctrine unconstitutional under itself.").

273. *Bakke*, 438 U.S. at 294 n.34 (discussing white "resentment" and "outrage" resulting from affirmative action); *id.* at 298 (observing the "measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making.").

274. *Id.* at 298.

275. *Id.* at 310 (rejecting "societal discrimination" as constitutionally legitimate basis for affirmative action).

276. *See* *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2424 (2013) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." (quoting *Bakke*, 438 U.S. at 307)).

277. The innocence paradigm is not limited to equal protection. In a Title VII case, *United Steelworkers v. Weber*, the Supreme Court upheld a collective bargaining agreement that

Following *Bakke*, the Court invoked innocence concerns in expressly racial terms in evaluating the constitutionality of race-conscious policies. In *Wygant v. Jackson Board of Education*, for example, the Court struck down a layoff provision in a collective bargaining agreement that provided advantages for minority teachers ahead of more senior whites.²⁷⁸ Even though the provision had been negotiated by a predominantly white union, Powell asserted that the layoffs imposed too costly a burden on “innocent” white employees.²⁷⁹ Conversely, in *Fullilove v. Klutznick*, the Court upheld a minority contracting program after determining that its impact on whites was tolerably low.²⁸⁰

In more recent cases, innocence has surfaced less directly, but it is still part of equal protection’s operating system. In particular, innocence frames constitutional determinations that a policy is narrowly tailored by ensuring that it does not “unduly burden” innocent “third parties.”²⁸¹ As indicated in *Wygant* and *Fullilove*, courts evaluate whether race-conscious policies exact too high a cost on whites—if not, they are upheld²⁸²; if so, they are struck down.²⁸³ Indeed, even policies that affect relatively few whites are at risk. In

considered race in order to eradicate “old patterns of racial segregation and hierarchy” in job categories that had been “traditionally segregated.” 443 U.S. 193, 208–09. Although the agreement reserved a certain percentage of slots for black employees in a new training program in order to “eliminate conspicuous racial imbalances in [the defendant’s] almost exclusively white [workforce],” *id.* at 198, the Court determined that it did not “unnecessarily trammel the interests of white employees,” *id.* at 208. The key was that the plan did not require layoffs of white workers. Further it did not absolutely bar the advancement of white workers “since half of those trained in the program” would be white. *Id.*

278. 476 U.S. 267, 283–84 (1986).

279. *Id.* at 270, 283 (“[L]ayoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive.”); *see also* Sullivan, *supra* note 20, at 86–96 (discussing innocence themes in Supreme Court cases, including *Wygant*).

280. 448 U.S. 448, 484 (1980) (“When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such ‘a sharing of the burden’ by innocent parties is not impermissible.”), *overruled in part by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995).

281. The goal of narrow tailoring is to ensure that persons who are “disfavored” by racial considerations are not “unduly burden[ed].” *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (“Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group.”). Innocence figures prominently in this analysis. For example, racial classifications that are used to remedy past discrimination must be narrowly drawn to ensure that they impose the “least harm possible to other innocent persons competing for the benefit.” *Id.*; *see also* *United States v. Paradise*, 480 U.S. 149, 182–83 (1987) (invoking themes of white innocence). University admissions programs that rely on race must be similarly tailored for the same reason. *See Bollinger*, 539 U.S. 306.

282. *Fullilove*, 448 U.S. at 484.

283. *Wygant*, 476 U.S. at 283–84; *see also* Sullivan, *supra* note 20, at 86–96 (discussing innocence themes in Supreme Court cases, including *Wygant*).

Parents Involved in Community Schools v. Seattle, for example, the Court struck down the use of race in school district assignment policies in part because of their “minimal effect” on white students.²⁸⁴ Perversely, the Court concluded that the policies’ slight impact showed that race was not “necessary” to achieve the districts’ goal of having racially integrated and diverse student bodies.²⁸⁵ The cost of white resentment was too high to justify even de minimis racial considerations.²⁸⁶

Innocence concerns also underlie the constitutional inquiry into the legitimacy of state interests that support affirmative action. In *City of Richmond v. J.A. Croson Co.*, the Supreme Court rejected a minority contracting program that sought to remedy racial disparities in Richmond’s local contracting industry that were not traceable to intentional discrimination.²⁸⁷ Following Powell’s lead in *Bakke*, the Court concluded that affirmative action was permissible if used to redress specific racial wrongdoing by whites but could not be deployed to remedy general racial disadvantage.²⁸⁸ This echoed Powell’s concern that whites as a group would be denied government benefits as a result of widespread racial disparities for which they were not individually responsible.²⁸⁹ Similarly, in *Adarand Constructors, Inc. v. Peña*, the Court concluded that strict scrutiny applied to federal, as well as state and local, affirmative action policies.²⁹⁰ Again, as in *Bakke*, the Court dismissed any notion that racially inclusionary motives justified a lower standard of review.²⁹¹ Finally, the acceptance of diversity, most prominently reflected in the Supreme Court’s decision in *Grutter v. Bollinger*²⁹² and even, most recently, in *Fisher* itself, also bears the imprint of Powell’s handiwork.²⁹³ Thus, white

284. 551 U.S. 701, 733 (2007).

285. *Id.*

286. *See id.* at 759 (Thomas, J., concurring).

287. 488 U.S. 469, 510–11 (1989).

288. *Id.* at 496–97, 506.

289. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 308–09 (1978) (observing that a “remedial action” based on “identified discrimination” is more likely to “work the least harm possible to other innocent persons”).

290. 515 U.S. 200, 235 (1995).

291. *Id.* at 226. Innocence also surfaced in school desegregation cases in which the Court rejected the use of racial classifications to redress racial imbalance that originated in “innocent private decisions, involving voluntary housing choices.” *Parents Involved*, 551 U.S. at 750 (Thomas, J., concurring).

292. 539 U.S. 306 (2003).

293. *Fisher v. Univ. of Tex.* 133 S. Ct. 2411, 2417–18 (embracing Powell’s conception of diversity).

guilt, culpability, and innocence dominate the equal protection query.²⁹⁴

The innocence paradigm has informed the constitutional structure of affirmative action for decades.²⁹⁵ The substantive and procedural impact of this paradigm is evident throughout equal protection, with rules that are now familiar staples of the doctrine. As discussed, these rules include the application of strict scrutiny even to benign considerations of race and the severely constrained range of constitutional interests that justify racial classifications.²⁹⁶ As elaborated below, the innocence paradigm also explains the expansive turns in standing rules that have privileged white plaintiffs contesting race-conscious government policies.

III. THE ASYMMETRIES OF INNOCENCE

A. The “Diminished Opportunity” Principle

In *Bakke*, there were good reasons to question whether the university’s consideration of race had caused Allan Bakke’s rejection. The program explicitly limited applicants on the basis of class, rather than race,²⁹⁷ and the special admissions program did not exclude disadvantaged whites from consideration.²⁹⁸ Bakke had not applied to the program as a disadvantaged applicant,²⁹⁹ a point that led the trial court judge to question the strength of his injury and whether he was the right candidate to challenge the UC Davis policy.³⁰⁰ Powell, however, was not persuaded.³⁰¹ Disadvantaged whites had applied to the program “in large numbers,” but none had been admitted through

294. See Freeman, *supra* note 34, at 1054–57.

295. See Dow, *supra* note 11, at 1131 (“The standard of review debate begun in *Bakke* continued through the major affirmative action cases of the 1980s.”). As already discussed, *Bakke*’s influence is evident throughout modern affirmative action cases. See, e.g., *Fisher*, 133 S. Ct. at 2415 (discussing the standard of review for race-conscious admissions established in *Bakke*).

296. See *supra* Part II.C.

297. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 272 & n.1 (1978).

298. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1055 (2002) (“[T]here is . . . no basis for believing that Bakke was excluded from the special program based on his race as opposed to his lack of disadvantage.”).

299. 438 U.S. at 280 n.14.

300. See Liu, *supra* note 298, at 1055.

301. 438 U.S. at 276 (“Although disadvantaged whites applied to the special program in large numbers, none received an offer of admission through that process.”); *id.* (noting that the special admissions committee convened at one point “considered only ‘disadvantaged’ special applicants who were members of one of the designated minority groups”).

that process,³⁰² which suggested to him that the “disadvantage” criterion was really a pretext for race.³⁰³ Indeed, Powell remarked that in the second year that Bakke was considered, the admissions committee for the special program “explicitly considered only ‘disadvantaged’ special applicants who were members of one of the designated minority groups.”³⁰⁴

Still, the notion that considerations of race affected Bakke’s rejection suffers from what Goodwin Liu has described as the “causation fallacy” in affirmative action cases.³⁰⁵ Bakke assumed that the special admissions program caused his rejection because racial minorities with grade point averages, standardized test scores, and overall ratings lower than his had been admitted.³⁰⁶ But this assumption was based on a mathematical error that attributed his rejection to the magnitude of minority applicants’ advantage under the special admissions process.³⁰⁷ In fact, the relatively small size of the minority applicant pool, combined with the use of subjective criteria to weed out the large numbers of applicants, meant that race itself had very little to do with Bakke’s outcome.³⁰⁸ Indeed, putting to one side his distinguishing characteristics, the special program increased the chances of his rejection by an infinitesimally small amount, from 96.8% to 97.3%.³⁰⁹

But there were even more fundamental problems with Bakke’s standing to litigate the constitutionality of the special admissions program, reflecting critical defects in Bakke’s assumption that the university’s use of race was the reason for his rejection. For instance, there were strong indications that race had made no difference in Bakke’s denial of admission.³¹⁰ In the trial court, the university

302. *Id.*

303. *Id.*

304. *Id.*

305. Liu, *supra* note 298, at 1046.

306. 438 U.S. at 277.

307. See Liu, *supra* note 298, at 1074 (observing that “the smallness of the pool of minority applicants and the relevance of nonobjective criteria in selecting among large numbers of white applicants conspire to limit the effect on white applicants of substantial preferences for minority applicants”).

308. *Id.*

309. *Id.* at 1053–54; see also *id.* at 1055–56 (“Bakke’s exclusion from the special program was no more a consequence of racial discrimination than it was a consequence of discrimination on the basis of disadvantage.”).

310. *Id.*; see Maxwell L. Stearns, *Grains of Sand or Butterfly Effect: Standing, the Legitimacy of Precedent, and Reflections on Hollingsworth and Windsor*, 65 ALA. L. REV. 349, 368 (2013) (“[J]ust as the Regents could not prove Bakke would be rejected without the program in place, Bakke could not prove he would have been admitted without it in place. Even without the program, there was no guarantee that Bakke would have been among the students admitted.”).

contended that Bakke would not have been admitted even if there had been no special admissions program, suggesting in the strongest possible terms that race had nothing to do with his rejection.³¹¹ The trial court's findings of fact accepted the university's conclusion.³¹² These findings indicated that Bakke had not been put on the alternate admissions list in either of the years he applied and that few on the list had even been admitted.³¹³ Moreover, in the second year Bakke applied, thirty-two applicants who had been judged more qualified than him—twenty of whom were alternates—had also been denied admission.³¹⁴ Indeed, the chair of the admissions committee testified that Bakke would have been rejected both years he applied in the absence of the special program.³¹⁵ In light of the record before the trial court, it seemed plain that Bakke lacked standing. Why then did the case proceed?

The outcome turned in part on an idiosyncrasy in the litigation process and what amounted to a decision by the university to concede standing in order to secure judicial review of its program before the U.S. Supreme Court.³¹⁶ The problem started when the state supreme court concluded that the trial court had erred in assigning Bakke the burden of proving that he would have been admitted under a race-neutral process³¹⁷ and initially remanded for further proceedings consistent with the new allocation of the burden of proof.³¹⁸ In a move that would be critically important for the outcome of the case, the university did not challenge the state supreme court's ruling.³¹⁹ Instead, in a surprising about-face, the university stipulated in a petition for rehearing that it would not seek to satisfy the burden of proof.³²⁰ Explaining its decision, the university stated that it had a "strong interest in obtaining review by the United States Supreme Court" on the constitutionality of its program and preferred "to obtain the most authoritative decision possible on the legality of its admissions process than to argue over whether Mr. Bakke would or

311. Liu, *supra* note 298, at 1056.

312. *Id.* at 1056–57 ("The trial court's findings of fact state that in both 1973 and 1974 '[p]laintiff would not have been accepted for admission . . . even if there had been no special admissions program.'").

313. *Id.*

314. *Id.* at 1057.

315. *Id.*

316. *Id.* at 1057–58.

317. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 279–80 (1978).

318. *Id.* at 280.

319. *Id.* at 280–81.

320. *Id.* at 280.

would not have been admitted” under a race-neutral policy.³²¹ In other words, the university sought to concede standing because it preferred certainty to ongoing litigation.³²²

With the university having abdicated standing by stipulating its unwillingness to meet its burden of proof, it was left to interested amici to press the issue.³²³ They argued that Bakke lacked standing because he had “never show[n] that his injury—exclusion from the Medical School—[would] be redressed by a favorable decision.”³²⁴ As a doctrinal matter, there was good reason to suppose that it should have been Bakke’s burden initially to demonstrate that race had been a motivating factor in the university’s decision to reject him.³²⁵ This has been the rule in other contexts, where the Court has required plaintiffs to show a causal link between the defendant’s conduct and the challenged decision.³²⁶ Moreover, as amici already knew from the trial record, Bakke would have had difficulty making this showing.³²⁷

The standing issue placed Powell in an awkward position. Although the university had declined to advance a standing argument, the Court still needed jurisdiction to resolve the case, so simply ignoring the trial court record (and the hotly contested litigation around standing up to that point) was not a real option.³²⁸ Powell, therefore, chose to redefine the injury in a critically important doctrinal move that would significantly benefit white plaintiffs in later affirmative action cases for decades to come.³²⁹ Bakke’s injury was not the “failure to be admitted,”³³⁰ he concluded, but the inability to “*compete* for all 100 places in the class.”³³¹ Framing the relevant harm

321. Liu, *supra* note 298, at 1056 (quoting Petition for Rehearing at 11, *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (Cal. 1976) (No. 23311)).

322. See *Bakke*, 438 U.S. at 280 n.14 (stating that “[s]everal amici suggest . . . that the petitioner ‘fabricated’ jurisdiction”).

323. *Id.*

324. *Id.*

325. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing cases); *cf.* *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977) (“In other areas of constitutional law, this Court has found it necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused.”).

326. *Id.*

327. See Liu, *supra* note 298, at 1058 (“As [the amici’s] brief makes clear, ample facts were available to the university to show that Bakke would have been denied admission in 1973 and 1974 even if all sixteen seats in the special program had been available.”).

328. *Bakke*, 438 U.S. at 280 n.14 (observing that insofar as the amici’s “charge” that the university “‘fabricated’ jurisdiction” under Article III, that charge “must be considered and rejected”).

329. See *infra* Part IV.B.

330. *Bakke*, 438 U.S. at 410; see *infra* Part IV.B.

331. *Bakke*, 438 U.S. at 281 n.14 (emphasis added).

this way enabled Powell to dodge the potentially fatal defect in Bakke's claim.³³²

This move also helped the Court resolve another problem. If the relevant injury was Bakke's rejection from the university, then under the causation prong Bakke would have had to show that his rejection was traceable to the special admissions program. Yet (once again) this injury would contradict the trial court's findings.³³³ Reframing the injury, however, neutralized the causation requirement. Because the harm was the inability to compete for all spaces in the entering class, an injunction that required Bakke's admission would necessarily rectify that injury.³³⁴ This maneuver simultaneously satisfied injury, causation, and redressability and enabled Bakke to litigate the merits of his constitutional claim.³³⁵

For many reasons, Bakke's case was a bad vehicle for deciding the constitutionality of affirmative action; thus, it is ironic that the case has had such a critical impact on affirmative action litigation.³³⁶ The university opened the door for the Court by refusing to argue standing.³³⁷ But the Court's presumption that affirmative action unjustifiably burdened innocent white applicants undoubtedly amplified its perception of Bakke's injury.³³⁸ This presumption again illustrates the relationship between the substance of equal protection doctrine and its procedural standards in the standing realm. As explored more fully in Section B below, the *Bakke* Court's "diminished opportunity" principle unleashed an expansive interpretation of standing that would benefit white plaintiffs in future affirmative

332. See Nichol, *supra* note 10, at 325 ("[I]f he would not have gained admission anyway, Bakke's loss was theoretical, like being deprived of an illusion. All he really could assert was the abstract interest in a government that complied with his vision of equality.").

333. See Liu, *supra* note 298, at 1056–57.

334. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 203 (1992) (citing *Bakke*, 438 U.S. at 280–81 n.14, and observing that the Court in *Bakke* concluded that each standing prong was satisfied "by the simple doctrinal device of *recharacterizing the injury* . . . as involving not admission to medical school but the opportunity to compete on equal terms"); see also Sunstein, *supra* note 82, at 1465–66 (observing the dispositive role that the characterization of the injury played in the Court's standing determination in *Bakke*).

335. See 438 U.S. at 280 n.14; Sunstein, *supra* note 334, at 203.

336. See, e.g., Haney López, *supra* note 221, at 985, 1043–51 (discussing Powell's opinion in *Bakke* as a "cornerstone for contemporary colorblind reasoning" evident in subsequent affirmative action litigation).

337. *Bakke*, 438 U.S. at 280 (noting that the university "conceded its inability" to carry the standing burden).

338. See William A. Fletcher, *Standing: Who Can Sue to Enforce a Legal Duty?*, 65 ALA. L. REV. 277, 284 (2013) (discussing role that Powell's relaxation of redressability requirement played in finding that Bakke had standing).

action cases.³³⁹ However, the Court would refuse to apply it in cases involving claims of racial injury by minority litigants.³⁴⁰

B. Racially Disparate Standing

The cases discussed below explore the racially disparate standing outcomes for minority and white plaintiffs. These cases arose during a period in which the Court narrowed standing doctrine, which may partly explain the different results.³⁴¹ The affirmative action policies challenged by the white plaintiffs in these cases, of course, also explicitly relied on racial classifications, which made them more susceptible to judicial redress than the systemic injuries asserted by minority litigants.³⁴² Nonetheless, the differences in these outcomes illustrate important features of the innocence paradigm. The Court's presumption that racial classifications are inherently harmful stems from the "colorblind" reasoning embedded in the paradigm.³⁴³ The result is an asymmetry of innocence, in which white plaintiffs who contest race-conscious policies benefit from presumptions of racial harm that are not afforded to minority litigants who challenge systems that have a racially discriminatory impact.³⁴⁴ The sections below explore these points further.

1. Minority Plaintiffs

As indicated below, the Court denied standing to minority plaintiffs based on narrow interpretations of their asserted injury. In so doing, the Court rejected the framing of global racial injury that it had relied upon to presume harm from the use of racial classifications in *Bakke*.³⁴⁵ Instead, the Court insisted on a showing of particularized

339. *Id.* (describing impact of Powell's standing recalibration in relation to *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 666 (1993)); *see also* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995) (concluding that plaintiff "need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" (quoting *Ne. Fla.*, 508 U.S. at 667)).

340. *See infra* Part III.B.

341. *See* Ryan Guilds, Comment, *A Jurisprudence of Doubt: Generalized Grievances as a Limitation to Federal Court Access*, 74 N.C. L. REV. 1863, 1864–65 (1996) (observing the "new and important role" that "generalized grievances" assumed in later years and that "[o]f the seventeen references to generalized grievances in the Court's history, almost half have come after 1980").

342. *Id.* at 1892–98.

343. *See supra* Part II.C.

344. *See infra* Part III.B.1–2.

345. *See supra* Part II.C.3.

injury. Indeed, precisely because the asserted harms rested on *systemic* subordination and disadvantage, the Court concluded that the claimed injuries were not sufficiently individualized to allow the plaintiffs to proceed.³⁴⁶ This was the case even though there was no question that the minority plaintiffs themselves had been subject to the very systems that they sought to challenge.³⁴⁷

In *Warth v. Seldin*, for example, the Court dismissed on standing grounds a claim by low-income minority residents³⁴⁸ of Rochester, New York, against the exclusionary zoning practices of the adjacent town of Penfield.³⁴⁹ Plaintiffs argued that Penfield's zoning laws, which reserved most of its vacant land for single-family homes, had the "purpose and effect" of excluding low- and moderate-income persons from the town and sought declaratory and injunctive relief and damages against members of the zoning, planning, and town boards.³⁵⁰

The Court found, based on a narrow interpretation of their injury, that plaintiffs lacked standing to seek either damages, injunctive, or declaratory relief. Specifically, plaintiffs had failed to allege facts that tied their inability to purchase or lease in Penfield to the defendants' zoning practices,³⁵¹ even assuming that defendants had "contributed, perhaps substantially, to the cost of housing in [the town]."³⁵² Further, there was no indication that plaintiffs had a "present interest in any Penfield property," were "subject to the [Penfield] ordinance's strictures," or had been "denied a variance or permit by respondent officials."³⁵³ Plaintiffs failed to satisfy the standing inquiry because they had "rel[ie]d on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief."³⁵⁴ The Court concluded that "a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that such

346. See Spann, *supra* note 10, at 1461–62 (observing racially disparate application of standing).

347. See *id.*

348. Plaintiffs also included taxpayers and an affordable housing organization.

349. 422 U.S. 490, 502–08 (1975).

350. *Id.* at 495, 515.

351. *Id.* at 503–04.

352. *Id.* at 504.

353. *Id.*

354. *Id.* at 507.

practices harm him, and that he personally would benefit in a tangible way from the court's intervention."³⁵⁵

Warth was decided before *Bakke*, but the Court could have conceptualized the plaintiffs' injury based on the same "diminished opportunity" principle.³⁵⁶ The plaintiffs' injury boiled down to a simple premise that the town's policy of reserving most of its land for more expensive single-family homes made it harder for low-income minorities to rent or buy locally.³⁵⁷ The town's exclusionary zoning policy, in other words, denied plaintiffs the opportunity to rent or buy, which (under the logic of *Bakke*)³⁵⁸ caused a tangible and personal harm to them. The Court's requirement that plaintiffs show that they already had a "concrete" interest in the town's housing from this perspective was misguided.³⁵⁹ Plaintiffs had not been able to move into the town because its housing was expensive,³⁶⁰ but an injunction against the policy plausibly could lower housing costs. Moreover, the Court's conclusion that the dynamics of the local housing market were the more likely cause of the plaintiffs' inability to lease or purchase in the town was itself a merits determination. The Court may ultimately have been correct, but that could not explain why plaintiffs were not allowed to prove that the town's zoning policy had distorted the local housing market in ways that appreciably reduced the supply of low-income units and undermined their ability to reside in the town.

Two additional cases brought by minority plaintiffs—*City of Los Angeles v. Lyons*³⁶¹ and *Allen v. Wright*³⁶²—illustrate a similarly narrow interpretation of standing.³⁶³ Once again, the Court in both of these cases could have relied on the same concept of diminished opportunity to frame the minority plaintiffs' injury. Instead the Court relied on an artificially narrow conception of racial injury that denied

355. *Id.* at 508. *But see* Fletcher, *supra* note 36, at 275–76 (explaining inconsistency between *Warth* and *Arlington Heights* and arguing that real problem with *Warth* plaintiffs was that they could not identify a concrete project, which made their zoning claim more difficult to resolve).

356. As Gene Nichol has observed, Justice Powell's conclusion that *Bakke* had standing was particularly surprising given that Powell had authored the majority decision in *Warth*. Nichol, *supra* note 10, at 325 n.117.

357. *The Supreme Court, 1974 Term—Standing to Challenge Exclusionary Zoning Ordinances*, 89 HARV. L. REV. 189, 189–90 (1975).

358. *See supra* Part III.A.

359. *Id.*

360. *Warth*, 422 U.S. at 496.

361. 461 U.S. 95 (1983).

362. 468 U.S. 737 (1984), *abrogated on other grounds by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014).

363. *See* Karlan, *supra* note 11, at 280 (describing the inconsistency between the Court's conception of injury in *Allen v. Wright* and an equal protection action filed by a white voter in *Shaw v. Reno*).

minority litigants who challenged systemic racial harms access to the federal courts.

The Court's decision in *Los Angeles v. Lyons* is a good example. Plaintiff Adolph Lyons was a twenty-four-year-old black male who sought to enjoin the city of Los Angeles from using chokeholds by its police officers in nonthreatening situations.³⁶⁴ Los Angeles police had used the chokehold against Lyons on a vehicle stop, even though he had neither resisted nor provoked the officers.³⁶⁵ In his request for injunctive relief, Lyons alleged that the police "regularly and routinely" used unjustified chokeholds and that he feared that any future contact with the Los Angeles police could "result in his being choked and strangled to death without provocation, justification or other legal excuse."³⁶⁶

The Court concluded that Lyons lacked standing to press his claim for injunctive relief because the threat of future injury was too abstract and conjectural.³⁶⁷ The past unlawful use of the chokehold against Lyons was not enough to show that he was at risk of direct, immediate harm.³⁶⁸ Rather, to sustain a claim for injunctive relief, Lyons had to allege (implausibly) that not only would he encounter the police again but that either "*all* police officers in Los Angeles *always* choke any citizen with whom they happen[ed] to have an encounter" or "that the City ordered or authorized police officers to act in such manner."³⁶⁹ As framed by the Court, Lyons had an imminence problem. He had failed to demonstrate substantial certainty that he would have to endure another Los Angeles Police Department ("LAPD") chokehold.

Still, ample evidence in the record suggested that the LAPD chokehold did actually threaten ongoing harm to City residents and that an injunction would have more than a theoretical benefit. For example, the district court's findings indicated that the city authorized its police officers to use "life-threatening chokeholds to [sic] citizens who pose[d] no threat of violence."³⁷⁰ Further evidence suggested that

364. *Lyons*, 461 U.S. at 98.

365. *Id.* at 97. They applied such pressure that they damaged his larynx. *Id.* at 98. He blacked out. *Id.* at 114 (Marshall, J., dissenting). When he regained consciousness, he was lying face down and spitting up blood and dirt. *Id.* at 115. He had urinated and defecated. *Id.*

366. *Id.* at 98 (majority opinion).

367. *Id.* at 105; *see also* O'Shea v. Littleton, 414 U.S. 488, 497 (1974) (dismissing charges of racial discrimination in bail and sentencing as being too speculative).

368. 461 U.S. at 105.

369. *Id.* at 105–06.

370. *Id.* at 113 (Marshall, J., dissenting).

it had been the city's official policy for years to allow their use³⁷¹ and that training guidelines permitted officers to rely on them to subdue suspects.³⁷² In the period before and after Lyons's injury, the LAPD applied chokeholds at least 975 times.³⁷³ At least sixteen persons had died as result of chokeholds used by LAPD officers, a disproportionate number of whom (twelve) had been black males.³⁷⁴ As a matter of standing, therefore, the Court should have had a more than sufficient factual basis to conclude that an injunction against the LAPD would reduce the chance that Adolph Lyons would be subjected to a chokehold in the future.

The Court also had another avenue available to it. Similar to Powell's strategic turn in *Bakke*, the *Lyons* Court could have framed Adolph Lyons's injury in terms of an increased likelihood that he would be subjected to the chokehold again, just as the diminished opportunity to be admitted to UC Davis Medical School was sufficient injury for standing purposes in *Bakke*.³⁷⁵ From this perspective, the continued use of the chokehold was causally related to Lyons's ongoing injury. An order enjoining its use would satisfy redressability because it would reduce the chance that Lyons would be subjected to the chokehold again. A few years before, the Court had applied this same concept to Allan Bakke,³⁷⁶ but it refused to apply it to Adolph Lyons. Its failure to conclude as much illustrates the asymmetry of innocence in standing in ways that privilege white litigants. Adolph Lyons apparently had neither resisted nor provoked the police.³⁷⁷ Thus, he too was "innocent," and yet the Court refused to find that he had standing to pursue his claim.³⁷⁸

Allen v. Wright provides another example of the racially disparate rules of standing. In *Allen*, the Court addressed whether parents of black children who attended public schools undergoing desegregation could enjoin the Internal Revenue Service from

371. *Id.* at 116.

372. *Id.* at 118–19.

373. *Id.* at 116.

374. *Id.* at 115–16.

375. See Jonathan Remy Nash, *Standing's Expected Value*, 111 MICH. L. REV. 1283, 1310 (2013) (critiquing, as to *Lyons*, "[t]he notion that standing requires absolute certainty" as being "entirely at odds with . . . most understandings of standing doctrine"); Christina B. Whitman, *An Essay on Texas v. Lesage*, 51 MERCER L. REV. 621, 630 (2000) (observing that a "broader definition of the injury" in affirmative action cases allowed plaintiff to avoid the "causal problem" in *Lyons*).

376. See *supra* Part III.A.

377. 461 U.S. at 97.

378. *Id.* at 111–12.

providing tax exemptions to racially discriminatory private schools.³⁷⁹ Plaintiffs alleged that the federal government undermined the integration of local public schools by giving tax exempt status to all-white private schools in their communities.³⁸⁰ This problem manifested most starkly in the South, where many public schools were operating under court orders to integrate in the face of significant public resistance.³⁸¹ The opening of these private schools was not coincidental but rather was timed to give white students who did not want to attend desegregated public schools the option of attending a segregated private school instead.³⁸² Indeed, the *Allen* litigation began with efforts by black parents in Mississippi to limit white flight from integrated public schools to segregated private schools.³⁸³

The *Allen* plaintiffs claimed two types of harm. They alleged that they had been “harmed directly by the mere fact of Government financial aid to discriminatory private schools”³⁸⁴ and that the private schools’ tax exempt status diminished their children’s opportunity to attend local public schools that were racially integrated.³⁸⁵

The Court concluded that plaintiffs lacked standing.³⁸⁶ As usual, its interpretation of plaintiffs’ injury was pivotal because, as already noted,³⁸⁷ the Court’s standing analysis flows from the defined harm. Plaintiffs were required to allege “personal injury” that was “fairly traceable to the defendant’s purportedly unlawful conduct” and that such injury was “likely to be redressed by the requested relief.”³⁸⁸ Standing, therefore, would be denied if the relationship between the injury and the defendants’ actions was too attenuated or if the requested relief would not clearly remedy the harm.³⁸⁹ Thus, plaintiffs’ ability to satisfy the causation and redressability requirements hinged on how the Court conceptualized the injury.

379. 468 U.S. 737, 743–45 (1984).

380. *Id.* at 745, 752.

381. See generally Gabriel Chin, *Jim Crow’s Long Goodbye*, 21 CONST. COMMENT. 107, 111–21 (2004) (detailing efforts in a number of southern states to avoid integration).

382. *Allen*, 468 U.S. at 737, 743–44; see also *Cannon v. Green*, 398 U.S. 956 (1970) (describing vast numbers of private schools that were established in Mississippi to avoid public school integration); *Green v. Kennedy*, 309 F. Supp. 1127, 1133–34 (D.D.C. 1970) (discussing the opening of private, segregated schools “in districts where desegregation was imminent”).

383. See *Wright v. Regan*, 656 F.2d 820, 823 (D.C. Cir. 1981) (discussing history of litigation).

384. *Id.* at 752.

385. *Id.* at 745, 752–54.

386. *Id.* at 753.

387. See *supra* Part II.A.

388. *Allen*, 468 U.S. at 751.

389. *Id.* at 752.

As to the first claim, the Court observed that “an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court.”³⁹⁰ Nor did plaintiffs have standing “to litigate their claims based on the stigmatizing injury often caused by racial discrimination.”³⁹¹ The problem here was that plaintiffs had disclaimed any interest in enrolling their children in the tax-exempt private schools.³⁹² Had their children applied to these schools and been denied on racial grounds, the standing issue would have been resolved in their favor.³⁹³ In other words, only stigma that resulted from being “personally denied equal treatment” counted as a cognizable harm.³⁹⁴ As to the plaintiffs’ claim that their children suffered a diminished opportunity to attend integrated public schools, the Court acknowledged that such a loss was “one of the most serious injuries recognized in our legal system.”³⁹⁵ But it determined that this harm was not “fairly traceable” to the IRS’s failure to enforce its guidelines because the “line of causation” was too attenuated between the government’s inaction and the desired integration of plaintiffs’ schools.³⁹⁶ The Court posited that intervening actions by “third parties” could disrupt school desegregation, which would compromise the redressability of any relief. For instance, it was “entirely speculative” whether withdrawing the tax exemption from a given private school (1) would lead the school to adjust its discriminatory practices and the parents of children attending private schools to return to integrating public schools, and (2) would generate a “large enough” contingent of school officials and parents to embrace school desegregation in ways that would make an appreciable difference.³⁹⁷

The Court’s reasoning laid bare a central (and cruel) irony—that a pervasive system of racial discrimination itself precluded plaintiffs from challenging a pervasive system of racial discrimination. Indeed, the entire point of the *Allen* plaintiffs’ claim was that the IRS’s failure to deny tax exemptions to racially discriminatory schools bolstered pervasive private opposition to integration mandates.³⁹⁸ The notion that private parties would resist integration was hardly

390. *Id.* at 754.

391. *Id.* at 755.

392. *Id.* at 746.

393. *See id.* at 755.

394. *Id.*

395. *Id.* at 756.

396. *Id.* at 757.

397. *Id.* at 758.

398. *Id.* at 743–45.

surprising. But plaintiffs' claim was that enhanced IRS enforcement would at least increase the opportunity for realizing school integration.³⁹⁹ Yet the *Allen* Court required some showing that reversing the chain of causation would have a positive effect on plaintiffs' ability to attend racially integrated public schools.⁴⁰⁰ This suggested that the ability to achieve the desired benefit factored into standing analysis,⁴⁰¹ even though the Court had not required Allan Bakke to demonstrate that he in fact would have been admitted in the absence of the special program.⁴⁰² As we shall see, such certainty has not been required of other white plaintiffs challenging affirmative action either.⁴⁰³ In these later cases, the Court would disclaim a requirement that the ability to secure the desired benefit was an element of standing doctrine.⁴⁰⁴

The *Allen* Court's reasoning, as in *Warth* and *Lyons*, had all the hallmarks of the innocence paradigm. It echoed Powell's rejection of "societal discrimination" as a constitutional basis for affirmative action in *Bakke*.⁴⁰⁵ Systemic discrimination, regardless of its personal impact on minorities, was not a harm that the federal courts would address.⁴⁰⁶ Like *Bakke*, *Allen* emphasized that the relevant harm was the individual denial of equal treatment, rather than general racial subordination that personally affected minorities.⁴⁰⁷ The required "directness" of the injury as a practical matter meant that plaintiffs could not challenge systems that effectuated broad racial disadvantage unless it was tied to purposeful racial discrimination by whites against plaintiffs personally.⁴⁰⁸ This frame continued *Bakke*'s trajectory of shifting the Court's normative conception of

399. *Cf. id.* at 774 (Brennan, J., dissenting) ("Common sense alone would recognize that the elimination of tax-exempt status for racially discriminatory private schools would serve to lessen the impact that those institutions have in defeating efforts to desegregate the public schools."); *see also* Nash, *supra* note 375, at 1292 (noting "increased probability" of white flight resulting from IRS tax exemption was "hardly valueless"); Stearns, *supra* note 310, at 368 (observing that the claim in *Allen* could just as easily be cast in "opportunity/injury terms, thus justifying conferring standing there on the logic of *Bakke*").

400. 468 U.S. at 758.

401. *Id.* at 759.

402. *See* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (describing relevant injury as "the University's decision not to permit Bakke to compete for all 100 places in the class").

403. *See infra* Part III.B.2.

404. *See infra* Part III.B.2.

405. *Bakke*, 438 U.S. at 310.

406. *See* *Allen v. Wright*, 468 U.S. 737, 751–53 (1984).

407. *Id.* at 755.

408. *See* Spann, *supra* note 10, at 1455–58 (discussing other challenges by minority litigants that were dismissed on standing grounds).

discrimination away from subordinative systems and toward individualized discriminatory treatment.⁴⁰⁹ It erased the pervasive subjugation of racial minorities from the equal protection narrative and, as discussed below, reinforced that white victimization by affirmative action would be the Court's primary focus. This shift not only transformed equal protection's substantive standards but also its procedural determinations about the standing of white litigants to challenge affirmative action.

2. White Plaintiffs

The previous Section discussed the Court's refusal to apply *Bakke's* "diminished opportunity" principle to racial minorities in cases that challenged systems of racial subordination. This Section explores the expansive conception of racial injury for white litigants that emerged in the affirmative action case, *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*.⁴¹⁰ In *Northeastern Florida*, an association of mostly white general contractors sought to enjoin a local law that set aside a certain percentage of Jacksonville's budget to fund construction work by minority-owned businesses.⁴¹¹ The goal of the ordinance was to enhance minority participation in government contracting.⁴¹²

The court of appeals concluded that the plaintiff did not have standing because it failed to demonstrate that any of its members "would have bid successfully" on any of the contracts allocated to minority businesses "but for" the set-aside program.⁴¹³ This reasoning sounded like an imminence problem: without a likely future injury, the association's complaint for prospective injunctive relief was simply a generalized grievance against the ordinance.⁴¹⁴ Indeed, the court's ruling was consistent with the Supreme Court's decisions in *Warth*, *Lyons*, and *Allen*, which had dismissed cases brought by minority litigants on similar grounds.

The Supreme Court reversed, holding that a plaintiff need not show that it would have received the desired benefit "but for" the use

409. See *Equality Talk*, *supra* note 28, at 1531–44 (analyzing the impact of *Bakke* on affirmative action cases).

410. 508 U.S. 656 (1993).

411. *Id.* at 658.

412. See Brief of Respondents at 1, *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993) (No. 91-1721), 1993 WL 289843, at *1.

413. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, Fla., 951 F.2d 1217, 1219–20 (11th Cir. 1992).

414. See Brief of Respondents, *supra* note 412, at 4.

of race in a contested policy.⁴¹⁵ It determined that the “injury in fact” in the context of a challenge to a minority set-aside program is the “inability to compete on an equal footing in the bidding process, not the loss of a contract,”⁴¹⁶ an analogue of *Bakke’s* diminished opportunity to compete.⁴¹⁷ A plaintiff who contests a set-aside program is required only to demonstrate that it is “able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.”⁴¹⁸ The harm was the imposition of the barrier that made it harder for some groups than for others to secure the government benefit.⁴¹⁹

But this rationale did not fully address the inconsistency with the Court’s prior decisions. Recall that in *Warth* the Court rejected a challenge by minority plaintiffs against an exclusionary zoning ordinance that prevented low- and moderate-income persons from residing in the town.⁴²⁰ The Court concluded that the complaint’s failure to identify a “specific project” that was “currently precluded,” “delayed,” or “thwarted” by the ordinance was fatal to the standing claim.⁴²¹ As in *Northeastern Florida*, the *Warth* plaintiffs had failed to demonstrate the existence of an injury “of sufficient immediacy and ripeness” to justify their request for prospective injunctive relief.⁴²² Finding for the *Northeastern Florida* plaintiffs seemed to require that the Court overrule *Warth*. But the Court declined to take this approach. Instead it asserted that *Warth* was distinguishable on the grounds that it did not involve a “discriminatory classification” that purportedly “prevented the plaintiff from competing on an equal footing in its quest for a benefit.”⁴²³

This distinction was perplexing. The *Warth* plaintiffs had argued that the town’s exclusionary zoning ordinance had effectively denied them the ability to live in the town.⁴²⁴ If anything, they seemed to have a stronger claimed injury than the *Northeastern Florida* plaintiffs who were not prepared to allege any concrete, threatened

415. 508 U.S. at 666–69.

416. *Id.* at 666.

417. *Id.* at 665 (describing UC Davis’s “decision not to permit Bakke to *compete* for all 100 places in the class” as “most closely analogous” to the contractor’s injury (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280–81 (1978))).

418. *Id.* at 666.

419. *Id.*

420. 422 U.S. 490, 508 (1975).

421. *Id.* at 516.

422. *Id.*

423. *Ne. Fla.*, 508 U.S. at 667.

424. 422 U.S. at 496.

harm, beyond the explicit use of race itself, as a result of the city's minority set-aside program. But the Court curiously relied on this fact to bolster its conclusion that the *Northeastern Florida* plaintiffs had standing.⁴²⁵ The *Warth* complaint, the Court wrote, was "not that they could not compete equally; it was that they did not win."⁴²⁶ This reasoning was odd to say the least, and the Court admitted that there was undeniable "tension" between the cases but discounted it as "minimal."⁴²⁷ Even if the *Warth* injury was an "inability to compete for variances and permits on an equal basis," the Court stated, it was still distinguishable.⁴²⁸ The crucial difference was that the *Warth* plaintiffs never alleged that they had in fact applied for a permit or variance for a "current project," while the *Northeastern Florida* association alleged that it bid regularly on the city's contracts and would bid on those that were "unavailable" as a result of the set-aside.⁴²⁹ This seemed to be a non sequitur. A complaint about the inability to compete for a benefit—even on a regular basis—was plainly a less substantial harm than an inability to secure the benefit. But the Court treated this framing of plaintiff's claim as if it was a virtue.

The Court also failed to address another obvious parallel between *Warth* and *Northeastern Florida*. To the extent that the alleged harm of the exclusionary zoning ordinances in *Warth* was that it diminished the plaintiffs' ability to secure housing in the town, it was hard to discern why the *Northeastern Florida* plaintiff had standing but the *Warth* plaintiffs did not. Notwithstanding the Court's somewhat strange assertion that the quest for a "win" was distinguishable from a process injury, there was no real principled basis to distinguish the two cases, other than that the claimed source of injury in *Northeastern Florida* rested on the city's use of racial classifications⁴³⁰ and (as in *Bakke*)⁴³¹ their presumed harm to the white plaintiffs.⁴³²

425. See 508 U.S. at 668 ("In its complaint, petitioner alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able.").

426. *Id.*

427. *Id.*

428. *Id.*

429. *Id.* at 667–68.

430. *Id.* at 667.

431. See *supra* Part I.C.

432. 508 U.S. at 667 ("Unlike the other cases that we have discussed, *Warth* did not involve an allegation that some discriminatory classification prevented the plaintiff from competing on an equal footing in its quest for a benefit.").

Thus, *Northeastern Florida* illustrates the expansive conception of standing for white plaintiffs challenging affirmative action. In *Warth*, *Lyons*, and *Allen*, each of which involved minority litigants, the Court had rejected similar interpretations based on the “speculative” nature of the asserted injury and the plaintiffs’ purported inability to show that they would be threatened with imminent harm for purposes of prospective injunctive relief.⁴³³ By contrast, in *Northeastern Florida*, the Court concluded that plaintiffs’ failure to demonstrate a concrete future harm was not fatal to their standing to litigate. The differences between these cases again reveal the operation of the innocence paradigm: whites who were innocent of racial wrongdoing were deemed to be presumptively burdened by the use of racial classifications in affirmative action, even if they could not demonstrate any likelihood of an actual or threatened injury from the challenged policy itself.⁴³⁴

The Court would apply the lessons of *Northeastern Florida* in a future affirmative case, *Adarand Constructors v. Pena*.⁴³⁵ The *Adarand* Court found that white litigants had standing to challenge a federal program that offered financial incentives to prime contractors to hire minority subcontractors,⁴³⁶ even though the plaintiff had not shown how the program had affected its loss of the federal contract or the actual impact that the requested relief would have had on its future business.⁴³⁷ Following its decision in *Northeastern Florida*, the Court emphasized that the relevant injury is the “discriminatory classification [that] prevent[s] the plaintiff from competing on an equal footing,” rather than the actual inability to obtain the desired benefit.⁴³⁸

Northeastern Florida and its progeny lend support to the views of legal scholars that the “expressive” or “stigmatic” harms commonly associated with racial classifications explain the Court’s expansive interpretations of standing for white litigants.⁴³⁹ The idea is that racial classifications convey “notions of racial inferiority,” and

433. See *supra* notes 349, 364, and 379 and accompanying text.

434. See *supra* note 425 and accompanying text.

435. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995).

436. *Id.* at 210–12.

437. See Brief for the Respondents at 28, *Adarand*, 515 U.S. 200 (No. 93-1841), 1994 WL 694992, at *28–29 (“Petitioner has failed to show that the presumption affected the award of the subcontract in this case to another bidder, and petitioner has also failed to allege or prove that the future relief it seeks would affect its business opportunities.”).

438. *Adarand*, 515 U.S. at 211 (citing *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 667 (1993)).

439. See Issacharoff & Karlan, *supra* note 11, at 2288–91 (discussing expressive harms theory).

“stigmatize” and “demean the dignity and worth of individuals to be “judged” by their race “instead of by [their] own merit and essential qualities.”⁴⁴⁰ Indeed, the Court has pointed to these social “costs” repeatedly to justify its application of strict scrutiny to express considerations of race.⁴⁴¹ It is plausible that this is what is driving the standing problem in affirmative action cases.

The Court frequently justifies strict scrutiny on the grounds that racial classifications can “lead to a politics of racial hostility.”⁴⁴² But *who* precisely is “hostile”? This concern, which is also often cited by the Court in its substantive treatment of affirmative action cases, does not fit squarely into the expressive harm theory. The Court never specifies because it is obvious that the Justices are not referring to the beneficiaries of affirmative action. With the exception of the remedial and diversity justifications, innocent whites are presumed to resent affirmative action policies that do not benefit them. The assumption is that remedial uses of race incite less hostility because, under these circumstances, whites are not “innocent” of racial wrongdoing; rather, race is being used to restore racial minorities to the position they would have had absent identified intentional discrimination by a (presumably) white perpetrator.⁴⁴³ Similarly, diversity justifications were acceptable to Justice Powell in *Bakke*⁴⁴⁴ and to the Court in *Grutter*⁴⁴⁵ and even in *Fisher*⁴⁴⁶ because white applicants could also benefit from them.

Thus, the innocence paradigm complements and builds upon the expressive harm theory. It demonstrates that equal protection’s hostility to racial classifications varies according to the perceived burden on innocent whites. As in the diversity context, equal protection has been more tolerant of racial classifications that potentially benefit whites as a group. On the other hand, the Court infers white resentment and hostility against racial classifications that are perceived as helping only racial minorities and, therefore,

440. *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”); *Adarand*, 515 U.S. at 226 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)); *see also* Issacharoff & Karlan, *supra* note 11, at 2288–91 (discussing expressive harms theory).

441. *See Adarand*, 515 U.S. at 218–27.

442. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007); *Shaw v. Reno*, 509 U.S. 630, 643 (1993); *Croson*, 488 U.S. at 493.

443. *See generally* Freeman, *supra* note 34 (discussing antidiscrimination law).

444. *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265, 311–19 (1978).

445. *Grutter v. Bollinger*, 539 U.S. 306, 324–25 (2003).

446. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2417–18 (2013) (embracing Justice Powell’s conception of diversity).

subordinating whites as a group.⁴⁴⁷ In this context, equal protection has low tolerance for affirmative action, even where it does not identifiably injure individual white plaintiffs.

IV. CONTESTING RACIAL INJURY

I have described innocence as the connective tissue between the substantive rules of equal protection laid down in Powell's opinion in *Bakke*, which treated racial classifications as inherently "suspect," regardless of whether they were intended for benign or malevolent purposes,⁴⁴⁸ and the apparent presumption of standing in *Fisher*.⁴⁴⁹ Section A shifts the conversation to the current confusion over the outer reaches of racial injury in standing doctrine. Although this Section focuses on technical questions about the cognizability of racial harm, we cannot overlook its substantive significance. As discussed in Section B, the debate about the scope of standing for white plaintiffs challenging affirmative action is part of a broader struggle over the very meaning of equal protection, and of equality itself. The cases discussed below illustrate the consequences of the innocence paradigm as it developed in *Bakke*. But they also reveal new fronts in the contest to define racial injury and to cabin the reach of the innocence paradigm.

A. Confusion in the Courts: Texas v. Lesage

As white plaintiffs have pushed to expand the cognizability of injury in affirmative action cases, courts and legal scholars alike have reached conflicting conclusions about the cognizability of racial harm.⁴⁵⁰ This conflict is part of an unacknowledged debate about the

447. As Pamela Karlan and others have amply demonstrated, the Court has similarly expanded standing determinations for white voters to contest "majority-minority" districts, although these reapportionment claims are analytically distinct from "affirmative action." See generally Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201, 1202-05 (1996) (describing Court's "misguided and incoherent" attempts "to integrate voting rights law into its more general approach to affirmative action").

448. 438 U.S. at 291 (describing "[r]acial and ethnic distinctions of any sort" as being "inherently suspect" and, thus, subject to "the most exacting judicial examination").

449. See *supra* Part II.B.

450. See Whitman, *supra* note 375, at 632-33 ("The troubling question after *Lesage* is whether plaintiffs are also entitled to damages that do not represent the reversal of the government decision but do compensate for the personal injury (that is, loss of opportunity to be considered under a fair program) that they suffered."). Compare Sheldon Nahmod, *Mt. Healthy and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 610 (2000) (describing *Lesage* as a liability case), with *Cotter v. City of Boston*, 323 F.3d 160, 167 (1st Cir. 2003) (stating *Lesage* did not address standing "for this type of immediate injunctive relief"),

reach of the innocence paradigm and how far courts should go in presuming harm from the mere existence of race-conscious selection policies. The next section explores these points through the lens of the Supreme Court's decision in *Texas v. Lesage*⁴⁵¹ and lower court cases that have interpreted it. Understanding these cases requires some technical and nuanced attention to the distinctions in standing doctrine between prospective and retrospective forms of relief as they relate to the asserted injury in fact. *Fisher* and other affirmative action cases appear to have collapsed this distinction and, in so doing, have silently broadened standing for anti-affirmative action litigants in ways that have escaped the attention of legal scholars and of courts.

The Supreme Court's per curiam decision in *Texas v. Lesage* illustrates how hidden assumptions about racial harm influence, and even subvert, standing determinations.⁴⁵² Given evidence (albeit contested) that race had no tangible impact on the white plaintiff,⁴⁵³ the *Lesage* Court's failure even to examine standing as a threshold issue is perplexing.

Lesage involved a white, African immigrant who applied to a doctoral program in counseling psychology at the University of Texas and was rejected.⁴⁵⁴ Claiming that he had been denied admission because of his race, he sued the university for damages and to enjoin it from further use of race-conscious selection policies in admissions.⁴⁵⁵ The university contended that Lesage had been eliminated from the applicant pool in the early stages of the process, before race was taken into consideration, and that it would have made the same decision to deny him even if "racial preferences had not been employed" in the admissions process.⁴⁵⁶ It produced affidavits from the chair of the admissions committee that twenty-two "much stronger" candidates,

Wooden v. Bd. of Regents of the Univ. Sys. of Ga., 247 F.3d 1262, 1277 (11th Cir. 2001) (concluding that *Lesage* "plainly bears on" the standing inquiry), and Ashutosh Bhagwat, *Injury Without Harm: Texas v. Lesage and the Strange World of Article III Injuries*, 28 HASTINGS CONST. L.Q. 445, 451–55 (2001) (analyzing *Lesage* in standing terms).

451. 528 U.S. 18 (1999).

452. At the time that *Lesage* was denied admission, the university apparently still considered race for purposes of diversity, which the Court of Appeals for the Fifth Circuit later determined was unconstitutional in *Hopwood v. Texas*, 78 F.3d 932, 945–46 (5th Cir. 1996). Although the Supreme Court would come to a different conclusion in *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), some years later, by the time the *Lesage* case emerged, the Court of Appeals's ruling in *Hopwood* effectively meant that the University of Texas's graduate admissions program was also unconstitutional. This likely made it difficult as a practical matter for the university to defend its program on substantive equal protection grounds.

453. *Lesage v. Texas*, 158 F.3d 213, 220–22 (5th Cir. 1998).

454. 528 U.S. at 19.

455. *Id.*

456. *Lesage*, 158 F.3d at 219.

who had also been denied, would have been admitted ahead of Lesage under a race-neutral system.⁴⁵⁷ The university submitted evidence that “[a]t least 80 applicants had higher undergraduate grade point averages (GPA’s [sic]) than Lesage, 152 applicants had higher Graduate Record Examination (GRE) scores, and 73 applicants had both higher GPA’s and higher GRE scores.”⁴⁵⁸ Given that only twenty applicants had been offered admission, there was good reason to believe that Lesage had not been a competitive applicant and that the university had race-neutral reasons for rejecting him.⁴⁵⁹

Lesage argued differently. Citing testimony from the chair of admissions, he asserted that racial considerations had indeed been a factor at the first stage of the admissions process, when he had been eliminated from the applicant pool.⁴⁶⁰ The admissions committee had expressed interest in diversifying its student body and in identifying “qualified people of Hispanic and African American background.”⁴⁶¹ Further, the psychology department was “very sensitive to [diversity] issues and very concerned to get qualified minority students.”⁴⁶²

The district court found for the university on summary judgment, concluding that there was “no evidence that race was a factor in the decision to deny Plaintiff’s admission to the counseling psychology program” and thus, the plaintiff had failed to present sufficient evidence of disparate treatment.⁴⁶³ The court of appeals, however, reversed.⁴⁶⁴ It concluded that there was a genuine factual dispute regarding the stage at which race had been a consideration in the admissions process, which precluded summary judgment.⁴⁶⁵

More importantly for our purposes, however, the court of appeals determined that the university’s showing that it would have made the same decision to reject Lesage, regardless of racial considerations, was “simply irrelevant.”⁴⁶⁶ Rather, the crucial question was whether the university had “violated Lesage’s constitutional rights by rejecting his application in the course of operating a racially

457. *Id.* at 222.

458. 528 U.S. at 19.

459. *Cf. id.* at 21 (concluding that summary judgment was proper given the university’s showing that Lesage “would have been denied admission under a race-neutral policy”).

460. *Lesage*, 158 F.3d at 220.

461. *Id.* at 220–21.

462. *Id.* at 220.

463. *Id.* at 221.

464. *Id.* at 221–22.

465. *Id.*

466. *Id.* at 222.

discriminatory admissions program.”⁴⁶⁷ Applicants “who had not yet been eliminated from consideration at the time racially preferential criteria were applied” had sustained an “*implied* injury—even if their applications ultimately would not have resulted in admission under a nondiscriminatory admissions regime.”⁴⁶⁸ Echoing *Bakke* and *Northeastern Florida*, the court determined that the injury occurs when a “discriminatory classification prevent[s] the plaintiff from competing on an equal footing.”⁴⁶⁹ But the court treated this as a matter of liability, not standing.⁴⁷⁰ The only matter that was left to be decided was the extent of the remedy or damages award.⁴⁷¹

Before turning to the Supreme Court’s opinion, we have to explore the crucial differences between how the district court and the court of appeals conceptualized Lesage’s injury. For the district court, Lesage’s harm was his rejection from the graduate counseling program, which it determined was not causally related to the university’s consideration of race.⁴⁷² The question of when race was considered—either during a phase when Lesage was still in the applicant pool or after he was eliminated—was immaterial for the district court because, in the end, race had not been a dispositive factor.⁴⁷³ The court of appeals saw it differently: the harm was the diminished opportunity to compete for a slot in the incoming class, which was as appropriate for a damages claim as it was for prospective injunctive relief.⁴⁷⁴

The implications of the court of appeals’s interpretive shift are important, as it conflated what has been an important distinction in standing doctrine between backward- and forward-looking claims for

467. *Id.*

468. *Id.* (emphasis added).

469. *Id.* at 222 (quoting *Adarand v. Peña*, 515 U.S. 200, 211 (1995)).

470. *Id.*; *cf. id.* at 221 (“If race was considered before Lesage’s application was rejected, Lesage has standing to challenge the admissions policy because his application may have been affected by the use of racial preferences.”).

471. *Id.* at 222:

Thus, even though the district court may have correctly predicted that Lesage suffered no direct injury and therefore incurred no compensatory damages, this scenario does not foreclose the availability of some other relief to which he may be entitled. The futility of Lesage’s application was, therefore, an improper grounds for summary judgment.

472. *See id.* at 220–21 (citing district court’s conclusion that it could “find[] no evidence that race was a factor in the decision to deny Plaintiff’s admission to the counseling psychology program”).

473. *See id.*

474. *See also id.* at 222 (observing that “the possibility that . . . Lesage [] would not have been offered admission is relevant only to the quantum of damages available—not to the pure question of the state’s liability, which is the issue on summary judgment”).

relief. Under conventional standing rules, the nature of the asserted injury determines whether the plaintiff is eligible for her claimed relief.⁴⁷⁵ If she claims past harm, she is entitled to retrospective relief in the form of damages.⁴⁷⁶ If her asserted injury is prospective, then she may seek future-oriented relief such as an injunction prohibiting defendants from future considerations of race.⁴⁷⁷ By concluding that the relevant injury was Lesage's inability to "compet[e] on an equal footing,"⁴⁷⁸ the court of appeals imported the future-oriented concept from *Bakke* and *Northeastern Florida* and applied it to a backward-looking claim for retrospective relief.⁴⁷⁹ Because of this move, the court was able to treat the consideration of race during a part of the admissions process in which Lesage was evaluated as an "implied injury,"⁴⁸⁰ regardless of its actual impact on the admissions outcome.⁴⁸¹

The Supreme Court reversed in a cursory per curiam opinion.⁴⁸² It determined that the court of appeals erred in concluding that the university was not entitled to summary judgment on Lesage's damages claim based on its undisputed "same decision" showing that he "would have been rejected under a race-neutral policy."⁴⁸³ The Court's opinion actually focused on Lesage's claim for damages,⁴⁸⁴ but because it was unclear whether he had abandoned his request for prospective injunctive relief, the Court remanded for further proceedings.⁴⁸⁵ In so doing, it noted that a plaintiff who challenged an

475. See *supra* Part II.A (citing cases).

476. See *supra* Part II.A.

477. See *supra* Part II.A.

478. 158 F.3d at 222 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)).

479. *Id.* (observing that the "relevant" question was the "quantum of damages available").

480. *Id.*

481. The court of appeals also hinted at another theory: that his rejection under an admissions policy that was effectively unconstitutional, following its decision in *Hopwood*, was a cognizable harm. See *id.* (suggesting that "the state violated Lesage's constitutional rights by rejecting his application in the course of operating a racially discriminatory admissions program").

482. *Texas v. Lesage*, 528 U.S. 18, 22 (1999).

483. *Id.* at 20. The Court concluded that the court of appeals's opinion was inconsistent with the liability framework set forth in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Lesage*, 528 U.S. at 20. *Mt. Healthy* was a First Amendment case, 429 U.S. at 276, but the Court determined that the same principles applied under equal protection. 528 U.S. at 20–21. The *Lesage* Court declared that "government can avoid liability by proving that it would have made the same decision without the impermissible motive." 528 U.S. at 21. Under *Mt. Healthy*, "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Id.* at 20–21.

484. 528 U.S. at 20.

485. *Id.* at 22.

“ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered.”⁴⁸⁶ But then it added, in language that has confused courts and scholars alike, that the harm was the “inability to compete on an equal footing.”⁴⁸⁷

As discussed below, the lower courts are split on whether this “inability to compete” language can be read as having eliminated the distinction between retrospective and prospective forms of racial injury as a matter of standing.⁴⁸⁸ This distinction matters. Recall that in *Northeastern Florida* the Court held that a plaintiff seeking prospective relief need only show that she remains “able and ready” to compete for the desired benefit, not that she would definitely win it in the absence of the contested policy.⁴⁸⁹ This is because prospective relief, by its very nature, contemplates the possibility of a future injury. Therefore, as long as a plaintiff remains “able and ready”⁴⁹⁰ to apply, she should have standing to seek an injunction. In the context of university admissions, this means that a plaintiff need only show that she is still eligible for admission.⁴⁹¹ Evidence of her prior rejection—even a justified rejection—is not material because her previous denial of admission has nothing to do (technically speaking) with her future prospects.⁴⁹²

But a claim for damages against a showing that the plaintiff would have been rejected regardless of race is quite different. Notably, neither the question of the plaintiff’s standing to seek damages nor the significance of a same-decision showing was before the Court in *Bakke*⁴⁹³ or in *Northeastern Florida*.⁴⁹⁴ But the logic of the “able and

486. *Id.* at 21.

487. *Id.* (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)).

488. *See infra* Part IV.B.

489. 508 U.S. at 666.

490. *Id.*

491. *See Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 217 (5th Cir. 2011) (concluding that Fisher and her coplaintiff at the time lacked standing to seek injunctive relief because they had no intent to reapply to the University of Texas), *vacated on other grounds*, 133 S. Ct. 2411 (2013).

492. *See supra* Part II.A (discussing distinction between prospective and retrospective relief).

493. Because the university had conceded standing, it did not pursue the matter. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 (1978). However, likely because the issue had been raised below, Justice Powell took the opportunity to clarify that the relevant injury was the inability “to compete for all 100 places in the class.” *Id.* at 280 n.14.

494. In both *Bakke* and *Northeastern Florida*—both cases involving claims for prospective injunctive relief—the Court was asked to decide whether plaintiff had to show that she would in fact receive the desired benefit in the absence of race, as a condition of satisfying the standing inquiry. The Court in both cases rejected this as a prerequisite for standing, finding that the

ready” criterion illustrates why the same-decision showing should defeat standing in a claim for damages. Once it is known that a plaintiff would not have been admitted in the absence of racial considerations, there is no “injury in fact” that is causally related to the defendant’s past consideration of race.

Indeed, this is the critical distinction in *Fisher*, which involves a retrospective or backward-looking claim for damages. As noted above, the University of Texas illustrated that race did not preclude Abigail Fisher from being “able” to compete on an equal footing because she would have been denied even if her application had received some racial consideration.⁴⁹⁵ Because she has now graduated from another college,⁴⁹⁶ she is no longer eligible for prospective injunctive relief.⁴⁹⁷ All *Fisher* has left is a damages claim that involves an assessment, not of her future prospects under another admissions cycle, but of the record that existed in 2008 at the time that she was denied.⁴⁹⁸ Assuming the university was correct that she would have been rejected even if race had factored into her evaluation, she cannot demonstrate that her rejection to the entering class was caused by racial considerations.⁴⁹⁹ This is a technical question, but its resolution reveals the extent of the Court’s continuing investment in the innocence paradigm and the rules of adjudication that privilege white litigants.

B. *The Split in the Lower Courts*

Lower courts have split on whether *Lesage* can be read to suggest that the diminished opportunity principle originally set forth in *Bakke* applies only to standing determinations in the context of claims for prospective, forward-looking relief or whether it should be applied to backward-looking, damages claims where a defendant has demonstrated that the outcome would be the same under a race neutral process. This Section explores two competing approaches by lower courts in *Wooden v. University of Georgia*⁵⁰⁰ and *Donahue v. City*

critical injury for purposes of an *ongoing* harm was the (future) inability to compete on an equal footing. Neither case involved an actual same decision showing in the context of retrospective relief, which would have changed the analysis.

495. *See supra* Part II.B.

496. *See Fisher*, 631 F.3d at 217 n.3.

497. *Id.*

498. *Id.* at 217.

499. *See supra* Part II.B.

500. 247 F.3d 1262 (11th Cir. 2001).

of *Boston*.⁵⁰¹ I turn first to *Wooden*, which broadly interpreted the plaintiff's injury for standing purposes by conflating the standards for retrospective and prospective injury. I will then discuss *Donahue*, which offers a narrower and more plausible reading of *Lesage*. I suggest that, as a doctrinal matter, *Donahue* represents the best approach for cabining the reach of the innocence paradigm.

1. *Wooden v. University of Georgia*

Wooden v. University of Georgia involved an affirmative action challenge by white plaintiffs who were denied admission to the University of Georgia and sued for compensatory damages based on the university's use of race in its undergraduate admissions policy.⁵⁰² The university defended in part on standing grounds, arguing that some of the plaintiffs still would have been denied under a race-neutral system.⁵⁰³ *Wooden* is useful for understanding the reach of the innocence paradigm. It illustrates a court's willingness to presume an implied racial injury to a white plaintiff simply because his application was threaded through a process in which race was a factor, even if race ultimately had nothing to do with his rejection.⁵⁰⁴

The University of Georgia's admissions process operated in three parts.⁵⁰⁵ The first stage evaluated only the applicant's academic record and involved no consideration of race.⁵⁰⁶ Applicants at this stage received an Academic Index ("AI") score.⁵⁰⁷ They were admitted if their AI scores were sufficiently high but rejected if their AI scores fell below a threshold cutoff.⁵⁰⁸ Applicants whose AI score fell into a middle band were then evaluated at a second stage based on a Total Student Index ("TSI").⁵⁰⁹ A student's TSI score was calculated based on a point system that considered a range of factors, including demographic criteria.⁵¹⁰ At the TSI stage, students could receive points for their Georgia residence, gender, and socioeconomic factors, in addition to race.⁵¹¹ Students who self-identified as nonwhite

501. 304 F.3d 110, 116 (1st Cir. 2002), *aff'g in part, rev'g in part*, No. Civ. A.00-10884-JLT, 2001 WL 1688904183, at *1 (D. Mass. Dec. 13, 2001).

502. 247 F.3d at 1264.

503. *Id.* at 1264, 1281.

504. *Id.* at 1278–81.

505. *Id.* at 1266–67.

506. *Id.* at 1266.

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.*

511. *Id.* at 1267.

received 0.5 points.⁵¹² Applicants who achieved a prescribed score at the TSI stage were admitted; those who fell below a certain minimum score were denied.⁵¹³ The third group of applicants proceeded to another Edge Read (“ER”) stage, where they were reevaluated based on an individual read of their files by members of the university’s admissions office. Once again, candidates were admitted or rejected based on their scores. Race was not a factor at this last stage.⁵¹⁴

Craig Green challenged the admissions policy. His AI score fell within the middle band, which meant that his application was evaluated at the TSI stage.⁵¹⁵ As a white applicant, his TSI score did not include the 0.5 points for race.⁵¹⁶ However, he received credit for other demographic factors based on his parents’ educational level, his gender, and his Georgia residence.⁵¹⁷ Because his TSI score still was not high enough for him to be admitted at the second stage or low enough to be denied, he proceeded to the Edge Read stage where his individual reviewers gave him the lowest possible score.⁵¹⁸ At this point, he was rejected.⁵¹⁹

There are two critical facts here. The first is that race was only a factor in the TSI stage. The second, even more important, point is that the consideration of race at the TSI stage made no difference to Green’s outcome in the admissions process.⁵²⁰ Even if he had received the additional 0.5 point for race, his score still would not have been high enough for admission; he would have proceeded to the final stage where his application was ultimately rejected based on race-neutral criteria.⁵²¹

512. *Id.* at 1266–67.

513. *Id.* at 1267.

514. *Id.* at 1278–79 (“It is also established, on this record, that race was a factor only at the TSI stage, and was not an express consideration at . . . the final ER stage.”). *But see id.* at 1279 n.15 (noting that Green maintained that race was an “unstated” factor at the final stage and concluding that “[b]ecause we find that Green has standing regardless of whether race was considered . . . during the ER stage, we do not resolve that debate, and leave the issue for . . . remand.”).

515. *Id.* at 1266.

516. *Id.* at 1267.

517. *Id.*

518. *Id.*

519. *Id.*

520. *Id.*:

If Green had designated himself as non-white, his TSI score would have been 4.39—0.5 points higher than it was, but still just barely below the 4.40 threshold for automatic admission. Accordingly, Green would have proceeded to the ER stage regardless of whether he received a 0.5 point credit due to his race.

521. *Id.*

The question then was whether Green had standing to contest the university's policy. Both the district court on remand and the Eleventh Circuit in the subsequent appeal evaluated the standing question under *Lesage*, but they differed in their analysis of the diminished opportunity principle. The district court found that Green lacked standing to sue because race made no difference either to his rejection or to his treatment in the admissions process itself.⁵²² Further, his TSI score, which had been calculated at a race-conscious stage of admissions, did not carry over to the Edge Read stage, where his application was denied.⁵²³ The district court rejected Green's argument that he had standing simply from having been subjected to a race-conscious admissions process.⁵²⁴ Green could not show that the system had diminished his opportunity to "compet[e] on an equal footing" because he had not "shown that he was otherwise qualified" for admission and that his application was "tainted" by the consideration of race in the process.⁵²⁵

The court of appeals reversed, concluding that Green had standing.⁵²⁶ It acknowledged the difficulty of the question but ultimately determined that the district court had construed Green's injury too narrowly. Although *Lesage* did not specifically address standing, the appeals court observed that the Supreme Court decision had clarified the standing requirements for affirmative action plaintiffs⁵²⁷ by "defin[ing] the kind of injury that would support relief."⁵²⁸ It was persuaded that under *Lesage* the "relevant injury" *in all circumstances* was the denial of an opportunity to compete on an equal footing.⁵²⁹ Accordingly, Green had been injured because his application had been "denied equal treatment at the TSI stage" where he did not receive the 0.5 "bonus" offered to minority candidates.⁵³⁰ The bonus had no bearing ultimately on Green's rejection, but the court dismissed this fact as irrelevant.⁵³¹ It asserted that focusing on the outcome conflated the merits determination with the standing

522. See *Tracy v. Bd. of Regents of the Univ. Sys. of Ga.*, No. CV 497-45, 2000 WL 1123268 *10-12 (S.D. Ga. June 16, 2000)

523. *Wooden v. Bd. Of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1279-80 (11th Cir. 2001).

524. *Tracy*, 2000 WL 1123268, at *11.

525. *Id.* at *10.

526. *Wooden*, 247 F.3d at 1289.

527. *Id.* at 1277 (quoting *Tracy v. Bd. of Regents of the Univ. Sys. of Ga.*, 208 F.3d 1313, 1313-14 (11th Cir. 2000)).

528. *Id.*

529. *Id.* at 1280.

530. *Id.* at 1279.

531. *Id.*

inquiry.⁵³² What mattered was that Green had “not [been] allowed to compete on an equal footing with non-white candidates at the TSI stage.”⁵³³ This was consistent with the Supreme Court’s standing jurisprudence, which had turned away from a “*result-oriented*,” toward a “*process-oriented*,” analysis.⁵³⁴ Green’s simple “exposure” to unequal treatment was, therefore, sufficient.⁵³⁵

The court of appeals accurately described the language in *Lesage* regarding “the relevant injury.” But it overlooked two critical distinctions. First, the court failed to appreciate that the cases cited by the Supreme Court in support of its declaration each involved allegations of *future* injury to a policy that would continue to apply to the plaintiff.⁵³⁶ Second, the court of appeals did not take into account the context of the Supreme Court’s emphasis on the “relevant injury” language in *Lesage*, which was to rebut an argument by defendants that plaintiffs were required to show, as a condition of satisfying standing for purposes of injunctive relief, that it would win the desired benefit in the absence of race.⁵³⁷ In other words, the Supreme Court had not distinguished the application of the diminished opportunity doctrine to claims for prospective, versus retrospective, relief, because it was not confronted with that issue.⁵³⁸ Had the court of appeals in *Wooden* focused on these distinguishing features, it might have agreed with the district court that Green lacked standing.

2. *Donahue v. City of Boston*

This Section discusses *Donahue v. City of Boston*, which offers a more plausible reading of racial injury under current standing doctrine and thus avoids expanding the innocence paradigm beyond its current reach.⁵³⁹

532. *Id.* at 1281.

533. *Id.* at 1279.

534. *Id.*

535. *Id.*

536. Indeed, the court of appeals’s opinion itself cited *Northeastern Florida* and *Adarand*, *id.* at 1280, both of which were focused on prospective relief. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) (observing that in order for plaintiff “to maintain its claim for forward-looking relief . . . [it] need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a ‘discriminatory classification prevent[s] the plaintiff from competing on an equal footing.’ ” (quoting *Ne. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 667 (1993))).

537. *Texas v. Lesage*, 528 U.S. 18, 21 (1999).

538. *Id.*

539. *Donahue v. City of Boston*, 304 F.3d 110, 116 (1st Cir. 2002).

Donahue is an employment case, but it offers a useful alternative interpretation of the same decision analysis under *Lesage* and a narrower understanding of racial injury.⁵⁴⁰ The case involved a claim against the city of Boston for its use of race in hiring procedures for its police force.⁵⁴¹ The city hired from an eligibility list that was compiled based on the results of a statewide civil service examination.⁵⁴² A consent decree required that the city alternate minority and white candidates on the list.⁵⁴³ Under its hiring procedures, the city identified the number of available positions that it had to fill.⁵⁴⁴ Its personnel office would then certify twice the number of persons, starting from the top of the list in strict rank order.⁵⁴⁵ In addition to the consent decree, one's rank on the list could also be affected by certain statutory preferences for veterans and their relatives or for the child of a firefighter or police officer killed in the line of duty.⁵⁴⁶

Donahue was a white candidate who passed the required civil service examination, but he was never hired during three separate hiring periods because he ranked too far down the list.⁵⁴⁷ Donahue sued the city for retroactive appointment as a police officer, along with damages associated with his lost employment.⁵⁴⁸ He also sued to enjoin the city from using race in future hiring processes that would involve him.⁵⁴⁹

On a motion for summary judgment, the district court concluded that Donahue lacked standing.⁵⁵⁰ As required by the consent decree, the city had alternated minority and white names on the list.⁵⁵¹ But, critically, the presence of the minority candidates on the list had no impact on Donahue. The district court found that even if the minority candidates had been removed, Donahue still would have been ranked too low to have been hired based on the number of

540. *Id.*

541. *Donahue v. City of Boston*, No. Civ.A.00-10884-JLT, 2001 WL 1688904, at *1 (D. Mass. Dec. 13, 2001).

542. 304 F.3d at 112.

543. *Id.*

544. *Id.*

545. *Id.*

546. *Id.*

547. *Id.* at 113–14.

548. *Id.* at 114.

549. *Id.* at 119–21.

550. *Donahue v. City of Boston*, No. Civ.A.00-10884-JLT, 2001 WL 1688904, at *6 (D. Mass. Dec. 13, 2001).

551. *See* 304 F.3d at 113–14.

available positions.⁵⁵² In fact, his ranking was so low that he appeared to have had no reasonable chance of being hired even without the requirements of the consent decree.⁵⁵³ Relying on *Lesage*, the district court, therefore, concluded that Donahue lacked standing for all purposes. However, like the court of appeals in *Wooden*, it failed to distinguish between Donahue's claims for damages and prospective relief.⁵⁵⁴

The court of appeals affirmed the district court's judgment as to Donahue's claim for damages but determined that fact questions precluded the grant of summary judgment on his claim for prospective injunctive relief. Significantly, the court of appeals stated that it "perceive[d] crucial analytical differences between the two claims."⁵⁵⁵ His request for damages was "doomed to fail" because he plainly had been situated "too far down the list to be even remotely considered for hiring in any of the three instances of which he complains."⁵⁵⁶ This interpretation of standing was sensible. Its thrust was that plaintiffs do not suffer a racial injury simply because race is part of a general decisionmaking process. Rather, standing exists only if racial considerations caused the plaintiff himself to be rejected. The court, therefore, rejected the notion that the mere presence of race under an affirmative action policy is enough to confer injury on a white plaintiff.⁵⁵⁷

On the other hand, prospective relief had to be "viewed through a different prism,"⁵⁵⁸ given fact questions about how race had been used during one of the hiring cycles and how it might be factored into a future process.⁵⁵⁹ The court's analysis of *Lesage* is instructive. Like the court of appeals in *Wooden*, it also determined that *Lesage* was relevant to standing analysis.⁵⁶⁰ But it differed from the Eleventh Circuit's conclusion that the "relevant injury" in all circumstances was the inability to compete on an equal footing. Rather, it interpreted the Supreme Court's opinion in *Lesage* to provide a "clear cue" that standing analysis differs based on the nature of the relief—

552. 2001 WL 1688904, at *5.

553. *Id.* For example, the court found that the city "would have had to consider 586 applicants ahead of Donahue for thirteen spots," independent of the consent decree. *Id.*

554. 304 F.3d at 116.

555. *Id.*; see also *Aiken v. Hackett*, 281 F.3d 516, 519 (6th Cir. 2002) (distinguishing between retrospective and prospective claims).

556. 304 F.3d at 117.

557. *Id.*

558. *Id.* at 119.

559. *Id.* at 119–20.

560. *Id.* at 117–18.

retrospective versus prospective—and that the equal footing doctrine applies only to the latter.⁵⁶¹ Again, the important difference here lies in the forward-looking nature of the asserted injury. Under *Northeastern Florida*, an ongoing race-conscious program could plausibly cause a white plaintiff to “lose” an opportunity to compete with a minority candidate.⁵⁶² Therefore, a plaintiff seeking prospective relief need not show that she would necessarily win the desired benefit for purposes of standing. The harm again is the diminished opportunity to compete.⁵⁶³ A claim for damages, however, is different. There the plaintiff should be required to show that racial considerations contributed to her loss. In the absence of such a showing, it follows under current standing rules that a plaintiff should not have standing when she cannot show that she was in fact injured by the contested policy.⁵⁶⁴

By rejecting the notion that the mere presence of race in a contested government process necessarily confers an injury on otherwise unsuccessful applicants, *Donahue* more narrowly interprets racial injury than *Wooden*. Unlike *Wooden*, it usefully avoids expanding the reach of the innocence premise.⁵⁶⁵ Once again, the resolution of this question shows how far courts will go to push the outer boundaries of standing doctrine to accommodate the interests of litigants who challenge race-conscious selection policies.

The innocence paradigm has continued to manifest itself in a variety of other challenges to affirmative action. In these cases, courts have determined either that white plaintiffs have standing or have overlooked standing entirely despite evidence that they would have been denied under a race-neutral selection system. In *Farmer v. Ramsay*, for example, a district court concluded that the University of Maryland School of Medicine’s consideration of race had not caused plaintiff’s denial of admission but neglected the threshold question of whether he had standing to sue.⁵⁶⁶ In *Price v. City of Charlotte*, the court determined that white plaintiffs had standing to seek compensatory damages based on the consideration of race in the city’s

561. *Id.* at 118.

562. *See supra* Part III.B.2.

563. *Supra* Part III.B.2.

564. *See supra* Part II.A.

565. *See also* *Cotter v. City of Boston*, 323 F.3d 160, 166–67 (1st Cir. 2003) (applying *Lesage* to defeat standing for purposes of damages but concluding that plaintiffs had standing to seek injunctive relief).

566. *See* 159 F. Supp. 2d 873, 888 (D. Md. 2001).

promotion process even though race was not a factor in its decision.⁵⁶⁷ In *Hopwood v. Texas*, Cheryl Hopwood sued the University of Texas School of Law for considering race in admissions in order to remedy past discrimination in the state's system of primary and secondary education and to promote a more racially diverse campus.⁵⁶⁸ Following a court of appeals ruling that declared the policy unconstitutional and enjoined the university from considering race in admissions,⁵⁶⁹ the district court determined that Cheryl Hopwood would not have been accepted under a race-neutral system.⁵⁷⁰ Because the case was decided on liability grounds and not on the basis of standing, the injunction against the university remained.⁵⁷¹ As with the other cases discussed in this Part, *Hopwood* illustrates the reach of the innocence paradigm and the willingness of some courts to infer racial injury simply because a white plaintiff was subjected to a race-conscious selection process, even if race ultimately had nothing to do with her rejection.

The expansive interpretations of standing for white litigants in *Hopwood* and the other cases discussed in this Section leave the judiciary vulnerable to the impression that it is racially partial—that it bends over backwards for white plaintiffs challenging race-conscious selection policies but holds minority litigants to a higher standard. This selective interpretation of standing allows white litigants challenging affirmative action to proceed with their claims despite the lack of any demonstrable injury, for reasons that appear to be acutely race-conscious and designed to protect whites as a group.

567. See 93 F.3d 1241, 1248 (4th Cir. 1996); see also 42 U.S.C. § 1983 (2012) (providing that anyone who deprives another of “any rights, privileges, or immunities secured by the Constitution and laws” based on “any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia” shall be liable to the injured party).

568. See 78 F.3d 932, 934 (5th Cir. 1996).

569. See *id.* at 962 (holding “that the University of Texas School of Law may not use race as a factor in deciding which applicants to admit”).

570. See *Hopwood v. Texas*, 999 F. Supp. 872, 894–900 (W.D. Tex. 1998) (noting that the *Hopwood* plaintiffs were not academically competitive and were “among over 3,500 individuals, including approximately 1,500 Texas residents, who were denied admission”), *aff'd in relevant part*, 236 F.3d 256, 272 (5th Cir. 2000) (“We conclude that the district court’s ultimate finding that the Plaintiffs would have had no reasonable chance of being admitted to the Law School under a race-blind admission system was not merely free of reversible error but was eminently correct.”).

571. See *id.* at 901–02 (“To the extent the Fifth Circuit concludes the plaintiffs were denied admission as a result of the law school’s unconstitutional admissions procedures, an injunction . . . would be the most appropriate and equitable remedy the Court could fashion.”). The Fifth Circuit later reversed the district court’s permanent injunction against any consideration of race by the university. See *Hopwood*, 236 F.3d at 276–77.

C. Standing as a Product and Agent of Inequality

The previous Section discussed cases that threaten to expand standing doctrine on behalf of reverse discrimination litigants, beyond the already very broad interpretations sanctioned by the Court in *Bakke* and subsequent cases.⁵⁷² The Court's apparent disregard of the standing question most recently in *Fisher*⁵⁷³ is another example of the innocence paradigm at work. This paradigm tracks the underlying "colorblindness" rationale that has come to define equal protection.⁵⁷⁴ Under this rationale, racial classifications are presumptively harmful (and presumptively unconstitutional), even if they are being instrumentally used, as was the case in the era of *Bakke*, to improve opportunities for disadvantaged racial minority groups,⁵⁷⁵ and even if, as now in *Fisher*, these classifications are part of racially inclusive programs that promote student diversity.⁵⁷⁶

Bakke and its progeny suggest that standing doctrine is inversely related to equal protection: it broadens as the equal protection guarantee narrows;⁵⁷⁷ therefore, it is both a product and agent of racial inequality. Like equal protection, standing doctrine ratifies racial hierarchy and inequality⁵⁷⁸ by legitimizing white grievances that affirmative action is harmful unto itself. The failure of the Supreme Court even to address standing in *Lesage*⁵⁷⁹ or *Fisher*,⁵⁸⁰ given evidence that race made no difference to the rejection of white plaintiffs in those cases, is troubling. It indicates that innocence is so baked into equal protection's operating system that courts do not take the apparent lack of injury seriously enough to address it as a jurisdictional problem.

572. See *supra* Part III.

573. See *supra* Part II.B.

574. See *supra* Part II.C.

575. See *generally Equality Talk*, *supra* note 28, at 1475 (exploring the ways in which the Constitution can be interpreted to mandate intervention on behalf of a disadvantaged social group).

576. See *supra* Part I.B.

577. See *Equality Talk*, *supra* note 28, at 1531–32 (“[Justice Powell’s *Bakke*] opinion protected whites by . . . charging federal judges with responsibility for protecting whites from race discrimination in the political process, a role judges had previously played only for racial minorities.”)

578. See Siegel, *supra* note 242, at 82. See *generally Freeman*, *supra* note 34 (arguing that Supreme Court decisions of the last twenty-five years have highlighted a dissonance between normative antidiscrimination laws and a persistent and dominant social inequity).

579. See *supra* Part IV.A.1.

580. See *supra* Part II.B.

In his influential⁵⁸¹ article “The Structure of Standing,” William Fletcher contended that standing determinations reflect judgments about the meaning of the underlying substantive right.⁵⁸² Fletcher’s point that substantive law is integrally tied to procedural determinations about who has standing to sue is consistent with this Article’s thesis: the embrace of racial innocence in equal protection led to a parallel framework in standing doctrine, which appears to presume that white litigants have suffered racial injury from the race-conscious selection policies they oppose.⁵⁸³

Fletcher proposed to resolve the inconsistencies in standing by eliminating standing as a jurisdictional requirement.⁵⁸⁴ Under his proposed framework, courts would look to the equal protection clause to define the universe of litigants eligible to sue.⁵⁸⁵ In the context of challenges to affirmative action, the standing inquiry presumably would be satisfied as long as the plaintiff has alleged a denial of equal protection by the state because of race.⁵⁸⁶ According to Fletcher, a

581. A generation of legal scholars have come to embrace Fletcher’s understanding of standing doctrine. *See, e.g.*, Young, *supra* note 67, at 498–99.

582. *See* Fletcher, *supra* note 36, at 265–76.

583. *See supra* Parts II.C, III.A.

584. *See* Fletcher, *supra* note 36, at 223 (arguing that standing should rest solely on the merits of a plaintiff’s claim instead of preliminary jurisdictional requirements).

585. *See id.* at 243 (“The question is whether, under the statutory or constitutional provision at issue, the particular provision should be read to protect against the injury asserted by the kind of person who is seeking to bring suit.”).

586. Fletcher’s proposal (and the standing problems I have identified here) dovetail with longstanding normative debates about the proper boundaries of standing itself. I do not resolve these broader questions but only touch on them briefly here. Legal scholars, for example, disagree about whether standing should follow a “private-rights” model of adjudication that focuses on dispute resolution between private parties or whether it should instead track a “public” litigation model as a vehicle for “articulating and enforcing legal norms.” *See* Stearns, *supra* note 310, at 353 (“The central dispute that I believe continues to pervade the standing literature . . . is whether standing is best understood as furthering a ‘private-rights’ or ‘public rights’ model of judicial decisionmaking.”); *see also* Siegel, *supra* note 10, at 77–78 (“The private rights view of the federal courts competes with the ‘public rights’ or ‘special function’ view, which regards articulating and enforcing legal norms, and policing the other branches of government . . . as primary roles of the courts.”); *id.* at 78 (observing that “the battle” between these two views “serves as a proxy for a larger debate over the judicial role in our society”). Requiring injury-in-fact—as I have suggested here—is conventionally more consistent with the private rights adjudicatory paradigm. *See* Sunstein, *supra* note 82, at 1447–48 (observing that the “injury-in-fact requirement” has been “criticized as a holdover from private-law ideas”); *see also* Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1165–69 (1993) (suggesting that private model of standing arose to curb “public law” litigation and “sought the vindication of constitutional or statutory interests”). As described by Maxwell Stearns, the distinction between the private- and public-rights models turns on the purpose of the litigation: The private model is defined by “efforts to win suits even if the result is to make law,” while under the public model the goal is “to make law even if doing so requires devising a suit.” Stearns, *supra* note 310, at 369.

defendant could not legitimately object to standing on the grounds that the plaintiff “who is otherwise entitled to enforce the clause wants something beyond that which is provided directly by the clause, or that enforcement of the clause is unlikely to provide it in her particular case.”⁵⁸⁷ In this respect, his proposal would address one of the problems of the innocence paradigm that I have identified: lowering the standing bar for everyone would necessarily align the standing rules that apply to white and minority litigants alike.

Fletcher’s proposal has appeal, but it is not well-suited to disputes over affirmative action, which implicate socially charged matters of race that reverberate well beyond the courts. His proposal in this context invites more problems than it solves. All litigants could more easily access the federal courts, but because the innocence paradigm remains deeply embedded in equal protection, minority litigants challenging systemic racial subordination would have more difficulty maintaining a cause of action once they were in the door.⁵⁸⁸ White reverse discrimination litigants, on the other hand, could more readily proceed under equal protection’s “colorblindness” regime, which regards race-conscious selection policies as presumptively unconstitutional.⁵⁸⁹

Thus, if the inability to find plaintiffs who are tangibly harmed by affirmative action is any guide,⁵⁹⁰ then a lower standing bar simply provides a forum both inside and outside the courts for unsuccessful applicants to propagate a narrative of white victimization.⁵⁹¹ This narrative has its own social costs. Providing a forum for aggrieved applicants ratifies the assumption that whites are inherently harmed by affirmative action;⁵⁹² accordingly, it is problematic as a matter of principle. But allowing such litigation to proceed also misrepresents the equality “costs” of affirmative action to the courts and to a broader

587. Fletcher, *supra* note 36, at 242.

588. See *infra* Part II.C. (discussing *Bakke*’s application of strict scrutiny to race-conscious selection policies).

589. See *infra* Part II.C.

590. See Biskupic, *supra* note 44 (observing difficulty that Fisher’s patron, Ed Blum, had finding plaintiffs and noting that Fisher was the daughter of a personal friend); see also Bhagwat, *supra* note 450, at 449:

[I]n the leading cases challenging [affirmative action programs and race-conscious selection policies], the plaintiff is typically unable to prove that he or she would have received the benefits being dispensed by the challenged program if the government had not considered race, and thus has been unable to prove that the use of race in these programs actually deprived the plaintiff of some tangible benefit.

591. Cf. Mazie, *supra* note 216 (highlighting the frustrations of one Pennsylvania student who broadcasted her outrage to the *Wall Street Journal* and the *Today Show*).

592. See *id.* (“[T]he actual impact of ending affirmative action on white candidates’ chances of admission to Harvard would be virtually nil, and well under a one-percent boost.”).

public⁵⁹³ that is often quick to blame a white applicant's lack of success on racial "preferences."⁵⁹⁴ For example, in the effort to assert global white injury for purposes of standing, Fisher's complaint glosses over both the competitiveness of the University of Texas's admissions policy and how the policy actually works.⁵⁹⁵ The policy's modesty—both in terms of its highly calibrated and nuanced consideration of race and its limited impact on white applicants—not only got lost in the case⁵⁹⁶ but was also largely overlooked in the public conversation that emerged around it.⁵⁹⁷

Relaxing the rules of standing as Fletcher has suggested creates opportunities to further distort our already highly charged conversations about race and racial equality.⁵⁹⁸ The result is a racial gulf between the perceived and actual costs of race-conscious selection policies, which corrupts the public calculus about whether the benefits of racial inclusion are worth the impact they might have on individually displaced white applicants.⁵⁹⁹ Dispensing with the injury requirement gives the claims of uninjured plaintiffs the patina of constitutional legitimacy and injects them into our public conversation, at the potential cost of binding court decisions striking down policies that emerged from a longstanding historical struggle to promote racial inclusion.⁶⁰⁰ Because standing implicates broader judgments about the legitimacy of racial harm and about who is and isn't injured by racially inclusive policies, it also reflects a deeper struggle over the meaning of equality itself. This struggle originated in equal protection, but it has spread into standing and now embraces

593. See Gratz, *supra* note 18.

594. See Mazie, *supra* note 216. See generally Mahoney, *supra* note 137, at 813 ("The rhetoric that poses 'preferences' against 'merit' helps to affirm merit as an attribute of whiteness.").

595. See *supra* Part II.B.

596. See Mahoney, *supra* note 137, at 803 (discussing affirmative action's perceived threat to whites even where it has limited impact).

597. See, e.g., Gratz, *supra* note 18 (discussing broadly the *Fisher* case, but failing to detail the particulars of the university's admissions policy); cf. Nikole Hannah-Jones, *What Abigail Fisher's Case Against Affirmative Action Is Really About*, HUFFINGTON POST (Mar. 19, 2013, 2:21 PM), http://www.huffingtonpost.com/2013/03/18/abigail-fisher-case-affirmative-action_n_2901888.html, archived at <http://perma.cc/NF6P-MTRA> (noting that it is likely Fisher would have been denied admission even if she had received "points for her race").

598. See Hannah-Jones, *supra* note 597 (noting how Fisher's case has the potential to change public discourse and the legal system, despite plaintiff's admission that she sought "a grand total of \$100 in damages").

599. Cf. Issacharoff & Karlan, *supra* note 11, at 2276–77 (describing the "escalating spiral" of voting rights litigation as a result of the Court's expansive definition of the standing of white voters to challenge the consideration of race in reapportionment and calling for a "limiting principle on court involvement").

600. See *Equality Talk*, *supra* note 28.

the costly narrative that enhancing opportunity for people of color is a zero-sum game that is by definition harmful to whites.

D. A Modest Proposal: Returning to Fisher

This Section stakes out a modest approach to *Fisher*: it calls, quite simply, for litigants challenging affirmative action to show that they have sustained a tangible, personal harm as a result of a race-conscious selection policy. Plaintiffs would have standing where race is determined to be a contributing factor to the denial of the desired benefit. Injury would not be presumed because of an underlying grievance with affirmative action itself. The mere use of racial classifications in a selection policy, in other words, would not be sufficient alone to establish standing.

This proposal tracks the court of appeals's approach in *Donahue*. There, the court determined that the relevant constitutional harm in affirmative action cases is the rejection itself, not an implied racial injury that stems from the very consideration of race.⁶⁰¹ For damages claims, a defendant could defeat plaintiff's standing if it could show that racial considerations did not in fact cause the plaintiff's rejection. The plaintiff's simple resentment or personal offense would not be enough to overcome the defendant's same-decision showing. Also, the diminished opportunity principle should not be applied to retrospective relief where the defendant has shown that race was not a contributing factor to the plaintiff's rejection. This argument rests on the inherent differences between prospective and retrospective relief and also seeks to cabin the destructive reach of the innocence paradigm upon which the diminished opportunity principle is based.

How would this proposal apply to *Fisher* and litigants like her? To answer this question, first recall where we are. *Fisher*'s pleadings suggested several different theories of her injury.⁶⁰² The first is that she "likely" would have been admitted into the University of Texas at Austin "but for" its "use of race-based criteria in its admissions decisions."⁶⁰³ Her second claim is that she was "injured by UT Austin's use of racial preferences because she was not considered on an equal basis with African-American and Hispanic applicants who applied for admission to the same incoming freshman class."⁶⁰⁴ The idea here is

601. See *Donahue v. City of Boston*, 304 F.3d 110, 116 (1st Cir. 2002).

602. See Joint Appendix, *supra* note 110, at 73a–78a ¶¶ 142–64

603. *Id.* at 68a–69a ¶ 120 (emphasis added).

604. *Id.* at 68a, 75a ¶¶ 119, 155 (emphasis added).

that the consideration of race created an uneven playing field that lowered her chances of admission.⁶⁰⁵ As we know from *Bakke* and *Northeastern Florida*, this framing of racial harm has been accepted by the Supreme Court as a cognizable injury. But there is a critically important technical distinction. Both of those cases involved prospective injunctive relief, not retrospective claims for damages. The “diminished opportunity” injury is consistent with current doctrine as it focuses on the potential future impact of a continuing affirmative action policy on a white plaintiff. But it should have no significance for a plaintiff like Fisher, who has already graduated from college and thus, under the Court’s prior standing decisions, should not be eligible for injunctive relief.⁶⁰⁶

Finally, and most critically, Fisher claims that the “denial of a race-neutral evaluation” of her application “alone” was sufficient injury.⁶⁰⁷ This frame is the most troubling because it suggests that Fisher has standing simply because she was subjected to a race-conscious admissions process, regardless of its actual impact on her candidacy.⁶⁰⁸ Once again, however, it is not clear what a “race-neutral evaluation” means in the context of admissions at UT Austin. It might mean that Fisher is arguing for the same “consideration” of race in her application as minority applicants. But, as already discussed, this is inconsistent with how race is actually used in the admissions process because it is not a quantifiable, standalone criterion that necessarily applies to all candidates.⁶⁰⁹

605. In her complaint, Fisher declared that she was “injured by UT Austin’s use of racial preferences because she was not considered on an equal basis with African-American and Hispanic applicants who applied for admission to the same incoming freshman class.” Plaintiffs’ Second Amended Complaint, *supra* note 110, at 68a ¶ 119.

606. *See supra* Part II.A.

607. *See* Motion for Preliminary Injunction at 22 n.6, *Fisher v. Univ. of Texas*, 645 F.Supp.2d 587 (2008) (No. 1:08-cv-00263-SS), 2008 WL 7318505; *see also* Transcript of Oral Argument, *supra* note 92, at 6 (argument of Bert Rein, counsel for Abigail Fisher) (“[T]he denial of her right to equal treatment is a Constitutional injury in and of itself, and we had claimed certain damages on that.”).

608. Kimberly West-Faulcon refers to this form of manufactured injury as “race blindness entitlement.” *See* Kimberly West-Faulcon, *Forsaking Claims of Merit: The Advance of Race-Blindness Entitlement in Fisher v. Texas*, in 29 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 335 (Steven Saltzman ed., 2013).

609. *See* Order Denying Motion for Preliminary Injunction, *supra* note 117, at 11. The flexible and contextualized use of race also creates some practical problems in identifying who was “helped” and who was not by racial considerations. Indeed, the district court expressed the same difficulty—and skepticism—in considering Fisher’s earlier request to enjoin the university from further consideration of race:

Nor is it clear from the record to what extent race was a factor in the admission of minority students. Although race is one of many factors taken into consideration when

Fisher's effort to reframe her injury as the consideration of race "alone" in the admissions process reflects the same strategic shift that Justice Powell made in *Bakke*. Recall that Powell was able to show both causation and redressability by broadly defining the injury to Allan Bakke as the diminished opportunity to compete for all seats in the incoming class at UC Davis Medical School.⁶¹⁰ Similarly in *Fisher*, if the consideration of race alone is the relevant harm, then the University of Texas's policy necessarily "caused" that harm and would, in turn, be redressed by retrospective relief. Once again, the framing of the injury is critical to the causation and redressability inquiry. As in *Bakke* and *Northeastern Florida*, a broad articulation of the injury makes it easier to satisfy standing, thereby privileging white plaintiffs.⁶¹¹ Such an expansive conception of injury reinforces the innocence narrative because the mere presence of race is itself enough to confer injury even if race had no tangible, personal impact on the plaintiff.

Under my proposal, Fisher (and other litigants like her) would not have standing. Assuming the university was correct that she would have been rejected with a "perfect" score in the admissions process, Fisher cannot claim that she suffered past injury. Accordingly, she should not be eligible for retrospective relief in the form of damages. Nor does she qualify for prospective relief, as she has already graduated from college. Allowing her claim to proceed, therefore, simply reflects the work of the innocence paradigm and the presumption of racial injury based on the existence of a race-conscious affirmative action policy.

V. CONCLUSION

This Article has explored the innocence paradigm, its origins in the rules of equal protection, and its consequential impact on the procedural realm of standing. The "sins" of innocence lie in its corrupting influence on our constitutional vision, its power to distract us from the lived realities of race, and its perpetuation of racial inequality under the guise of equal protection and standing doctrine. I have focused on the technical dimensions of this problem, but in so doing I also mean to make a broader point: our preoccupation with

determining an applicants [sic] PAI score, the Court cannot begin to guess which minority students actually benefited from this consideration and which did not.

Id. at 4.

610. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 280 n.14 (1978).

611. *See supra* Part III.A.

innocence has undermined our collective ability to engage more thoughtfully in the project of racial equality. By moving beyond innocence perhaps we can come to embrace affirmative action, not simply as a burden borne by whites who are “innocent” of individual wrongdoing, but as a tool for promoting racial inclusion and shared opportunity.