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I. INTRODUCTION

Because he was white, Allan Bakke was not considered for any of the sixteen spots reserved exclusively for minority applicants at UC–Davis's Medical School.[1] When the Supreme Court heard Bakke's case in *Regents of the University of California v. Bakke*, it concluded that this "minority set-aside program" was unconstitutional.[2] Yet, before reaching the merits, the Court held that Bakke had standing to challenge the university's decision.[3] This Article analyzes *Bakke*'s standing analysis and examines how recent decisions—namely *Northeastern Chapter of the Associated General Contractors v. Jacksonville*[4] and its progeny—have not been faithful to it.

Inter alia, standing requires plaintiffs to meet an "irreducible constitutional minimum" whereby they demonstrate: (1) an "injury in fact;" (2) that is redressable; and, (3) that was caused by a defendant.[5] Several *amici* conceded Bakke was injured based on his rejection from

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1. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1978).
2. *Id.* at 320.
3. *Id.* at 280 n.14.
4. 508 U.S. 656 (1993).
5. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted).

medical school but argued his case should have been remanded because proof of causation and redressability were absent.[6] The Court rejected this argument:

> [E]ven if Bakke had been unable to prove that he would have been admitted in the absence of the [racial set-aside program], it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of *any* injury to himself that is likely to be redressed by favorable decision of his claim. The trial court found such an injury, apart from failure to be admitted, in *the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race*. Hence, the constitutional requirements of Art. III were met.[7]

With this footnote, the *Bakke* Court recognized—for the first time—two discrete injuries, either of which was sufficient to satisfy Article III's constitutional minimums: (1) the denial of a benefit (e.g., admission to a university, the award of a government contract) (a "Rejection Injury"); and (2) the denial of *consideration* for a benefit (a "Consideration Injury").

Fast-forward a generation. Unlike Allan Bakke, Abigail Fisher's race did not preclude UT–Austin from considering her for a single spot in the university's incoming class. Instead, UT–Austin automatically admitted all in-state students in the top ten percent of their high school classes.[8] The University then considered all of the remaining applicants for all of the remaining spots in the incoming class, holistically reviewing many factors for each applicant, including race.[9]

Fisher was not in the top ten percent of her high school class and ultimately was rejected from UT–Austin.[10] Consequently, she challenged the admissions program's constitutionality, alleging that the University's consideration of her race violated the Equal Protection Clause.[11] However, by the time Fisher's case reached the Supreme Court in *Fisher v. University of Texas at Austin*, no lower court had

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6. *See, e.g.*, Brief for The National Conference of Black Lawyers as *Amicus Curiae*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

7. *Bakke*, 438 U.S. at 280 n.14 (citations omitted) (emphasis added).

8. Fisher v. Univ. of Tex. at Austin, No. 11-345, slip op. at 3 (U.S. June 24, 2013) (citing TEX. EDUC. CODE ANN. § 51.803 (West 2009)).

9. *Id.* at 4.

10. *Cf. id.* at 4–5 (had Petitioner been in the top ten percent of her high school class, she would not have been rejected).

11. *Id.* at 5.

found that she would have been admitted to UT–Austin but for her race,[12] despite the fact that this was plainly contested in the pleadings.[13]

In light of Fisher's case, consider the two injuries recognized in *Bakke*. If Fisher had suffered only a Rejection Injury, she would have lacked standing because she had not proved causation and redressability by demonstrating that she would have been admitted to UT–Austin but for her race. Therefore, standing *must* have been grounded in a Consideration Injury. Yet, Fisher was considered for every spot in UT–Austin's incoming class, thereby precluding a Consideration Injury. There being no proven injury, the Court should have remanded Fisher's case for further fact finding. Unfortunately, the *Fisher* Court presumed Article III was satisfied and ruled on the merits of the case without mentioning the word "standing" once. In so doing, the Court perpetuated a long line of cases that have distorted *Bakke*'s standing analysis.

This Essay examines the Court's standing jurisprudence in the context of affirmative action cases from *Bakke* to *Fisher*. Specifically, it identifies flawed language in *Jacksonville* as the reason the standing analyses in *Adarand Constructors, Inc. v. Peña*,[14] *Gratz v. Bollinger*,[15] *Grutter v. Bollinger*,[16] and *Fisher* cannot be reconciled with *Bakke*. As such, this Essay concludes that the Court should overturn *Jacksonville* and return to *Bakke*'s well-reasoned standing analysis.[17]

Notably, some scholars dismiss the idea that the Court adheres to any uniform standing doctrine, believing instead that the Court *intentionally* avoids cases it does not want to hear under the guise of Article III.[18] While I do not necessarily disagree with their view, this Essay is not proof of it. Rather, this Essay addresses an alleged, *unintentional* abdication of Article III—namely, the *Jacksonville* Court's unintentional distortion of *Bakke*'s standing analysis.

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12. *See* Fisher v. Univ. of Tex. at Austin, 631 F.3d 213 (5th Cir. 2011); Fisher v. Univ. of Tex. at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009).

13. *Compare Fisher v. Univ. of Tex. at Austin*, No. 11-345 (U.S. June 24, 2013), Joint Appendix at 68a-69a, ¶ 121 [hereinafter "*Fisher* Second Amended Complaint"], *with id.* at 97a, ¶ 121.

14. 515 U.S. 200 (1995).

15. 539 U.S. 244 (2003).

16. *Id.* at 306.

17. This essay does not address the tangential issues implicated by *Texas v. Lesage*, 528 U.S. 18 (1999). *See* Vikram David Amar, *An Update on the* Fisher v. University of Texas *Affirmative Action Case, and the Procedural Issue That Might, But That Need Not, Complicate Things For the Supreme Court*, VERDICT, Oct. 28, 2011, http://verdict.justia.com/2011/10/28/an-update-on-the-fisher-v-university-of-texas-affirmative-action-case.

18. *See, e.g.*, Gene R. Nichol, Jr., *Abusing Standing: A Comment on* Allen v. Wright, 133 U. PA. L. REV. 635, 653–55 (1985); Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 663 (1977).

II. *TURNER* AND ITS PROGENY: THE GENESIS OF THE "CONSIDERATION INJURY"

In *Turner v. Fouche*, a non-freeholder challenged the constitutionality of a statute reserving for freeholders the right to serve on a school board.[19] The Supreme Court did not require a showing that the plaintiff would have been elected to the school board had he been a freeholder (i.e., Rejection Injury).[20] Instead, the plaintiff's preclusion from consideration (i.e., Consideration Injury) served as sufficient grounds for standing.[21]

Eight years later, the *Bakke* Court imported *Turner*'s holding into affirmative action jurisprudence.[22] Subsequently, the sufficiency of the Consideration Injury was explicitly endorsed in *Richmond v. J.A. Croson Co.*[23] and *Quinn v. Millsap*,[24] and impliedly endorsed in *Fullilove v. Klutznick*[25] and *Metro Broadcasting, Inc. v. FCC*.[26] This line of cases[27] can be synthesized into a single proposition: standing exists

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19. 396 U.S. 346, 363–64 (1970).

20. *See id.*

21. *Id.* at 361 n.2; 362 ("[T]he appellants . . . have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.") (internal citations omitted).

22. *See supra* note 7 & accompanying text.

23. 488 U.S. 469, 493 (1989) ("The [set-aside program] denies certain citizens *the opportunity to compete* for a fixed percentage of public contracts based solely upon their race.") (emphasis added).

24. 491 U.S. 95, 103 (1989) (standing existed for non-freeholder plaintiff who could not be considered for membership on a board of freeholders because of a law reserving membership for property owners).

25. 448 U.S. 448 (1980). In *Fullilove*, contractors claimed that a federal law setting aside ten percent of federal funds granted for certain public works programs for obtaining goods or services from minority-owned businesses was unconstitutional. *Id.* at 455. However, plaintiffs sought only declaratory and injunctive relief on the grounds that they imminently would not be considered for the set-aside funds. *Id.* at 480 n.71. *Sub silentio*, the Court found this imminent injury sufficient. The only explanation for this holding is that the plaintiffs were going to suffer a Consideration Injury.

26. 497 U.S. 547 (1990). In *Metro Broadcasting*, under a policy reserving for minority-controlled firms the right to purchase certain distressed broadcasters, the Federal Communications Commission ("FCC") transferred a distressed broadcaster to a minority-controlled firm without considering the bid of a non-minority owned firm—Shurberg Broadcasting of Hartford, Inc. *Id.* at 562. The Court did not undertake a standing analysis and instead proceeded directly to the merits. *Id.* at 563. The only explanation for this merits inquiry is the Court's understanding that Shurberg suffered a Consideration Injury.

27. The remainder of the Court's pre-*Jacksonville* affirmative action jurisprudence involves claims implicating a Rejection Injury as opposed to a Consideration Injury. In *Metro Broadcasting*, the FCC denied the eponymous plaintiff a license to operate a television station because its minority ownership was inferior to a competitor's. 497 U.S. at 558–59. In *Wygant v. Jackson Bd. of Ed.*, non-minority teachers were laid off because of a provision in their collective bargaining agreement requiring race-conscious layoffs in certain circumstances. 476 U.S. 267, 270–72 (1986). In *United Steelworkers v. Weber*, a class of white employees was denied entry into a training program because of their race. 443 U.S. 193, 199–200 (1979); *Weber v. Kaiser Aluminum & Chem.*

when a government, because of a minority set-aside program, refuses to consider an individual for a benefit.[28]

III. *JACKSONVILLE*: THE TRAIN GOES OFF THE RAILS

Nearly three decades after *Turner*, the Court hit a major bump in the road. In *Northeastern Chapter of the Associated General Contractors v. Jacksonville*, the City of Jacksonville enacted an ordinance that set aside ten percent of funds spent on city contracts for minority-owned businesses ("MBEs"), which the City defined as businesses whose ownership was at least fifty-one percent minority or female.[29] Pursuant to this ordinance, the City of Jacksonville did not consider the Northeastern Chapter of the Associated General Contractors ("AGC") for the ten percent of city funds set aside for MBEs because most of AGC's member-businesses were not minority-owned.[30] AGC sued the City, alleging that the ordinance violated the Equal Protection Clause.[31] The Supreme Court granted certiorari, not on the merits of the case, but on the threshold question of whether AGC had standing.[32]

Like the *amici* in *Bakke*, the City of Jacksonville (incorrectly) argued that AGC lacked standing because its sole injury was a Rejection Injury for which causation and redressability were absent.[33] The Court (correctly) rejected this argument, holding that AGC had standing by virtue of its Consideration Injury.[34] So far, so good. However, the Court cited approvingly four decisions that ostensibly supported this holding: *Turner*, *Quinn*, *Croson*, and *Clements v.*

Corp., 415 F. Supp. 761, 763 (E.D. La. 1976) (The class consisted of employees "who are not members of a minority group, and who have applied for or were eligible to apply for on-the-job training programs.").

28. While *Bakke*, *Fullilove*, and *Croson* are tried-and-true examples of set-aside programs, the programs challenged in *Turner*, *Quinn*, and by Shurberg in *Metro Broadcasting* traditionally have not been characterized as set-aside programs. Yet, the label is warranted given the absence of a relevant distinction between the two sets of cases. In the former, the government set aside a percent (less than one-hundred percent) of goods or services for a class of persons. In the latter, the government did the same thing—it set aside a percent (one-hundred percent) of goods or services for a class of persons.

29. City of Jacksonville Purchasing Code §§ 126.604(a); 126.605(a) (1988); *see also id.* § 126.603(a) (defining the term "minority").

30. 508 U.S. at 659.

31. *Id.*

32. *Cf. id.* at 663 ("[W]e now turn to the question on which we granted certiorari: whether petitioner has standing to challenge Jacksonville's ordinance.").

33. *Id.* at 664 (stating Jacksonville did not prove that "one or more of its members would have been awarded a contract but for the challenged ordinance").

34. *See id.* at 669.

Fashing.[35] As explained above, *Turner*, *Quinn*, and *Croson* definitely support this conclusion, as would *Fullilove* or *Metro Broadcasting*. *Clements*, however, does not.

In *Clements*, the Supreme Court considered the constitutionality of a Texas law requiring state officeholders to resign automatically if they announced their candidacy for another state office.[36] A group of state officeholders who had not yet announced their candidacy for another state office sued, claiming the law was unconstitutional.[37] The defendants argued that the plaintiffs' injury was "hypothetical and therefore not a justiciable controversy within the meaning of Art. III" because the plaintiffs had not yet announced their candidacy.[38] In other words, the defendants argued that one essential component of the "injury in fact" requirement—that the injury be "actual or imminent, not conjectural or hypothetical"[39]—was lacking.

This argument is wholly different from *Bakke*, *Turner*, *Quinn*, and *Croson* wherein the defendants conceded there was an injury (i.e., a Rejection Injury), but argued that causation and redressability were lacking with respect to that injury. Therefore, when the *Clements* Court concluded that "it cannot be said that [the Texas law at issue] presents only a speculative or hypothetical obstacle to appellees' candidacy for higher judicial office,"[40] the Court was concluding only that plaintiffs' Rejection Injury was sufficiently imminent to constitute an "injury in fact." This issue was not before the Court in *Bakke*, *Turner*, *Quinn*, or *Croson*. Yet, the *Jacksonville* Court cited to *Clements* as follows:

> Noting that the plaintiffs [in *Clements*] had alleged that they would have announced their candidacy were it not for the consequences of doing so, we rejected the claim that the dispute was "merely hypothetical," and that the allegations were insufficient to create an "actual case or controversy." . . . [W]e emphasized that the plaintiffs' injury was the "obstacle to [their] candidacy;" *we did not require any allegation that the plaintiffs would actually have been elected but for the prohibition*.[41]

35. 457 U.S. 957 (1982).
36. *Id.* at 962.
37. *Id.* at 957.
38. *Id.*
39. *Lujan*, 504 U.S. at 560 (internal citations omitted).
40. 457 U.S. at 972.
41. 508 U.S. at 664–65 (quoting *Turner*, 457 U.S. at 962).

While it is true that the *Clements* Court "did not require any allegation that the plaintiffs would actually have been elected but for the prohibition," such a showing would have been necessary only if causation and redressability were in dispute with respect to a Rejection Injury. They were not. What was contested in *Clements* was whether the allegedly hypothetical injury constituted an "injury in fact." Thus, the Court's citation to *Clements* was nonresponsive to the issue in *Jacksonville* (i.e., whether AGC had standing given its failure to prove causation and redressability with respect to its Rejection Injury). And, as I will show, the *Jacksonville* Court's citation to *Clements* is precisely where the train went off the rails.

The *Jacksonville* Court characterized the *Clements* plaintiff's injury as the "obstacle to their candidacy."[42] To the contrary, the injury in *Clements* was the plaintiffs' *imminent rejection* from their post as soon as they were to announce their candidacy for another post.[43] In contrast, *Turner* and its progeny categorized the plaintiffs' injuries as the denial of their "right to be considered" for a public benefit.[44] These phrases are similar in that, if a government denies your right to be *considered* for a benefit, it has necessarily erected an *obstacle* to your receiving that benefit. However, the opposite is not true. If a government erects an obstacle to your reception of a benefit, it has not necessarily denied your right to be considered for that benefit. This distinction will prove relevant shortly.

The *Jacksonville* Court further muddied the waters when it attempted to distill and summarize the holdings of *Turner*, *Bakke*, *Quinn*, *Croson*, and *Clements*. The Court's beastly summary begins, appropriately, on page 666:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. And in the context of a challenge to a set-aside program,

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42. *Id.*

43. *See* 457 U.S. at 962.

44. *Turner*, 396 U.S. at 362; *accord. Bakke*, 438 U.S. at 280 n.14; *Quinn*, 491 U.S. at 103; *Croson*, 488 U.S. at 493; *see also Fullilove*, 448 U.S. at 480 n.71; *Metro Broadcasting*, 497 U.S. at 563.

> *the "injury in fact" is the inability to compete on an equal footing in the bidding process*, not the loss of a contract.[45]

Nowhere in any of the cited cases does the phrase "inability to compete on equal footing" appear. Quite the contrary, in every case except *Clements* (which should not have been cited), the Court rightly adhered to *Bakke*'s recognition that a Rejection Injury and a Consideration Injury are equally sufficient to trigger Article III.[46] The *Jacksonville* Court imprudently cited *Clements* and, in so doing, invented an injury in fact (the "Equal Footing Injury"). The Court's reliance on the novel "equal footing" language is especially odd given that it would have reached the same result with a simple cite to *Bakke* (e.g., AGC had standing because the City did not consider AGC for ten percent of its funds).[47]

Moreover, the idea that an Equal Footing Injury is sufficient to meet Article III's constitutional minimum is illogical. Imagine a white student applying for admission to a university that considers race in its admissions decisions. Nevertheless, the student is considered (foreclosing a Consideration Injury) and accepted (foreclosing a Rejection Injury). Are we to believe that the student suffered a constitutionally sufficient injury based on the race-conscious decisionmaking process, even though its effect on the student was nil? I should think not.[48] The university's failure to put the student on equal footing was not an injury at all. The student was not damaged or hurt.[49] Rather, the student was admitted to the university. The absence of equal footing during the admissions process is irrelevant. This purported "injury" sounds eerily reminiscent of a psychic injury, the likes of which the Supreme Court flatly rejected as grounds for standing in *Hein v. Freedom From Religion Foundation, Inc.*[50]

Finally, even assuming that an Equal Footing Injury constitutes an "injury in fact," the *Jacksonville* Court's conclusion that AGC suffered an Equal Footing Injury was mere dictum because AGC had suffered a Consideration Injury that was an independently sufficient ground for standing.[51] Had the Equal Footing Injury been necessary to

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45. 508 U.S. at 666–67.

46. *See supra* note 44.

47. *See Bakke*, 438 U.S. at 280 n.14.

48. I am likewise skeptical that this "injury" would be redressable. However, whether a plaintiff was injured and whether that injury is redressable are independent inquiries. *Lujan*, 504 U.S. at 555.

49. *Cf.* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 644 (11th Ed. 2004) (defining an injury as "an act that damages or hurts").

50. 127 S. Ct. 2553, 2584 (2007) (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803)).

51. *See* 508 U.S. at 659.

reach the merits, this might have been proof of the Court warping Article III to hear only those cases it wanted to hear.[52] However, the fact that the Court's conclusion was *dictum* belies such an argument.

In sum, the Court threw the train off the rails when it deemed the Equal Footing Injury a sufficient injury in fact. It was only a matter of time before a case would arise where the distinction between the Consideration Injury and the Equal Footing Injury would prove material.

IV. *ADARAND, GRATZ,* & *GRUTTER*: THE TRAIN WRECKS

The effect of *Jacksonville* was seen almost immediately. In *Adarand,* the government awarded a highway construction contract to Mountain Gravel & Construction Co., which in turn solicited bids from subcontractors for discrete projects.[53] Adarand Constructors, Inc., a business owned by non-minorities, and Gonzales Construction Company, an MBE, submitted bids.[54] After considering both Adarand and Gonzales, Mountain Gravel awarded the subcontract to Gonzales, allegedly because the Small Business Act gave contractors additional compensation for hiring MBEs.[55]

Adarand challenged the Act's constitutionality.[56] However, by the time the case reached the Supreme Court, no lower court had found that Adarand would have received the subcontract but for the race-conscious policy.[57] Thus, Article III standing could not have been premised on a Rejection Injury. Moreover, because Adarand was considered for the subcontract, Article III standing could not have been premised on a Consideration Injury. Nevertheless, with a citation to *Jacksonville,* the Court concluded that Adarand had standing: "Adarand 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*.' "[58] This was the first instance of the Court propagating the legal fiction that an Equal Footing Injury is sufficient for Article III standing. Yet *Jacksonville*'s ill effects were not limited to claims concerning minority set-aside programs in awarding government contracts.

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52. *See supra* note 18 & accompanying text.
53. 515 U.S. at 205.
54. *Id.*
55. *Id.* (citing 15 U.S.C. §§ 637(d)(2)–(3)).
56. *Id.* at 210.
57. *Id.* at 211.
58. *Id.* at 211 (quoting *Jacksonville*, 508 U.S. at 665–66) (emphasis added).

Gratz and *Grutter* dealt with race-conscious admissions policies at the University of Michigan and the University of Michigan Law School, respectively.[59] In both cases, a white plaintiff or group of white plaintiffs applied for admission to the defendant-institution and were rejected.[60] In neither case did any lower court determine that the plaintiffs would have been admitted but for their race.[61] Therefore, in both cases, Article III standing could not have been premised upon a Rejection Injury. Moreover, in both cases, no spots in the incoming class were set aside for minorities; every plaintiff was considered for 100% of the spots in the institutions' incoming classes.[62] Therefore, Article III standing could not have been premised upon a Consideration Injury. Instead, in both cases, the Court found jurisdiction over the plaintiffs' claims based solely on the legal fiction of an Equal Footing Injury.

Citing *Jacksonville*, *Grutter* disposed of the standing issue in one sentence: "Petitioner clearly has standing to bring this lawsuit."[63] *Gratz*, on the other hand, addressed a pair of unrelated standing issues raised by Justice Stevens's dissent: the "real and immediate" nature of petitioner Hamacher's injury and the adequacy of Hamacher's representation of the class.[64] Then, with another citation to *Jacksonville*, the *Gratz* Court accepted that an Equal Footing Injury was sufficient to trigger Article III standing.[65]

V. POST-*FISHER*: HOW TO GET BACK ON TRACK

In light of the foregoing, it should be no surprise that Abigail Fisher pleaded all three conceivable injuries to ensure the merits of her case would be heard.[66] Yet, as mentioned above, no lower court concluded that Fisher would have been admitted to UT–Austin but for her race; therefore, she had not sufficiently proved her Rejection Injury. Moreover, because she was considered for every position in the incoming class at UT–Austin, Fisher had not suffered a Consideration Injury. Nevertheless, the Court further entrenched *Jacksonville*'s

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59. 539 U.S. at 244, 306.

60. *Id.* at 244, 316.

61. *See Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000); *Gratz v. Bollinger*, 135 F. Supp. 2d 790 (E.D. Mich. 2001); *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001); *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002) (en banc).

62. *See generally Gratz*, 539 U.S. at 244; *Grutter*, 539 U.S. at 306.

63. *Grutter*, 539 U.S. at 317 (citing *Jacksonville*, 508 U.S. at 666).

64. *Gratz*, 539 U.S. 260–68; *see also id.* at 282–91 (Stevens, J. and Souter, J. dissenting).

65. *Id.* at 262 (citing *Jacksonville*, 508 U.S. at 666).

66. *Fisher* Second Amended Complaint, *supra* note 13, at 68a, ¶ 120 (pleading a Rejection Injury); 68a–69a, ¶ 121(pleading a Consideration Injury); 69a, ¶ 119 (pleading an Equal Footing Injury).

flawed analysis by presuming—*sub silentio*—that Fisher had standing based on the Equal Footing Injury.

The Court must recognize the Equal Footing Injury as legal fiction by clarifying the offending language in *Jacksonville* and reversing *Adarand*, *Grutter*, *Gratz*, and *Fisher* in as much as they held that an Equal Footing Injury is sufficient for standing. Not surprisingly, judges, constitutional scholars, and laymen are anxious to debate affirmative action. This debate is important not only in a theoretical sense, but in a day-to-day, practical sense because its implications will affect at least two of the bedrocks of our society: the educational system and small businesses. I do not mean to discourage that debate, nor do I mean to disparage the well-reasoned arguments on either side of it. I mean only to call attention to the fact that, in the most high-profile affirmative action cases in decades (i.e., *Adarand*, *Grutter*, *Gratz*, and *Fisher*), the Supreme Court engaged in that debate prematurely.