Affirmative action has resisted multiple attempts on its life. But this week, opponents will take another whack at it. Nine years after the Supreme Court last affirmed universities’ rights to consider race in their admissions work, the Court is set to consider again the constitutionality of affirmative action today when it hears oral arguments in Fisher v. University of Texas. Many supporters of the initiative are skeptical it’ll survive.

As Colorlines.com’s Victor Goode wrote, the legal arguments buttressing affirmative action have been steadily whittled away, bringing it to a precarious place before a conservative court that’s openly hostile to race-based considerations in public policy. Since its inception, proponents of affirmative action have been forced to trade arguments of equity for a rationale favoring diversity, and in so doing, they may have silenced the most salient argument for the policy: Racial inequity persists, and proactive measures of racial justice are needed to address it.

Today, there are just two legally permissible arguments for affirmative action, says Jeff Milem, professor of educational policy at the University of Arizona. And the primary rationale—equity—has never been a real part of universities’ calculus. In order to argue that affirmative action is necessary to remedy past discrimination, schools would have to present evidence showing that they’ve previously discriminated against the groups they’re now going to great lengths to admit. Doing so would open them up to litigation from students of color who’d been denied.

The second legal argument, often called the diversity rationale, posits that racial diversity in the classroom serves a larger social and pedagogical purpose, improving the learning outcomes of students who get to take part in integrated classrooms. When the Supreme Court upheld the constitutionality of affirmative action in the defining case of Bakke v. UC Regents in 1978, the justices rejected all but the diversity rationale.

This legal reality, Milem says, has left “a very narrow little window” through which supporters can make their case for the use of race as a factor in admissions. A strikingly broad group of experts and stakeholders have nonetheless made it.

Among those who’ve lined up to extol the economic, social and educational benefits of racial diversity this time around are whole organizations of social scientists, Fortune 100 companies from Starbucks to Halliburton, and universities like Harvard and Yale, who’ve all filed amicus briefs in support of the University of Texas. Social science researchers have indeed found links showing that racial diversity improves student attitudes about people of other races; leads to stronger cognitive outcomes and is even linked to greater job placement.
But the diversity rationale, sufficient as it’s so far been for the Supreme Court, is a nonetheless limited line. “Every decision since Bakke has constrained the use of race more,” says Mitchell Chang, a professor of education at UCLA. Meanwhile in the court of public opinion, affirmative action does not enjoy wide support. A Rasmussen poll done earlier this year found that 55 percent of respondents disagree with the use of race-conscious admissions policies.

Lost in the shuffle of the legal strategy is the reality beyond the courtroom or the classroom—which is to say, race 101, basics, not about diversity but about the inequity that race-conscious admissions policies aim to address.

If affirmative action was designed as a form of redress for historical and contemporary racism, the evidence for its ongoing demand is unfortunately all around us. According to the 2010 Census, nearly 40 percent of black children and 35 percent of Latino kids live in poverty, compared to 12 percent of white children. Meanwhile, African Americans have an unemployment rate double that of the general population, a gap which holds even for college graduates. At the end of 2011, white median wealth was 44.5 times higher than black median wealth, according to the Economic Policy Institute. School districts spend roughly $773 million more for students in schools that are more than 90 percent white than they do in schools where more than 90 percent of the student population is of color. Race continues to be the top motivation for hate crimes in the country.

“It’s like a major collective trauma,” says Oiyan Poon, assistant professor of education at Loyola University Chicago, of people’s reluctance to accept the reality of racial inequity. “People don’t want to acknowledge racism.”

Part of the reluctance, Poon reasons, is that acknowledging racism also requires that people who’ve been shielded from it recognize their corresponding racial privilege. That conflicts with the most enduring of American narratives—that the U.S. functions as a meritocracy, where rewards are the product of individual achievement, and achievement is the outcome of one’s own effort. “It’s a nice notion but it’s just false. How have any of us been able to, out of the womb, up and advance on our own?” Poon asks.

This tension puts affirmative action and meritocratic ideals in opposition with each other, even though the most selective, elite colleges have never functioned as pure meritocracies. Elite private schools like Harvard, Yale and Princeton traditionally favored graduates of private prep schools, as well as the children of alumni and wealthy donors, setting aside their academic standards to welcome students they thought served their larger educational missions—which for much of their history has meant protecting the aristocracy.

As society changed, and societal demands changed, so too did the admissions policies. Yet to this day, “legacy admissions privilege white kids because they have a much longer history of access to colleges and universities than do students of color,” argues Milem, noting that athletic and legacy admittees escape the same hostility that trails those who have been admitted because of race-conscious admissions policies.
In the zero-sum game and politically fraught world of highly selective college admissions, there simply is not a seat for every highly qualified applicant. Rejected white students overestimate the degree to which the elimination of affirmative action would have helped their chances, scholars have argued. Back in 1998, former Harvard presidents William Bowen and Derek Bok found that eliminating race-conscious admissions policies at selective schools would have bumped up a white undergrad applicant’s chances for admission from 25 percent to 26.5 percent. And the college application process has become only more cutthroat since then.

This year Harvard turned away roughly 94 percent of the more than 34,000 students who applied for admission for its fall 2012 term, the Harvard Gazette reported. Among those who applied, half scored over 700 out of a possible 800 on the math portion of the SAT. To give that number some perspective, in 2011 the national mean score for college-going seniors for that same test was 514, according to the Department of Education. And at UCLA, ranked 24th in the nation by U.S. News and World Report, nearly 73,000 students applied for this fall’s first-year class of around 5,400 students. The average GPA of those admitted was 4.38, according to UCLA, weighted because students pack on Advanced Placement classes. Indeed, the University of Texas has argued that plaintiff Abigail Fisher would not have been admitted even if race had been taken out of their admissions process.

So talented and exemplary are the pools of applicants that the question, experts say, is not whether a less qualified student ought to be admitted over a qualified one but rather how, among the qualified, a class should be designed.

Increasing selectivity has been the trend in recent decades, especially as the numbers of students headed to college have multiplied. In 1967, just over six million undergrads were enrolled in U.S. colleges. By 2010, that number was 18 million. Some of that growth was enabled at the outset by the baby boom and by the benefits of the GI Bill and the Higher Education Act of 1965. However, the opening of the doors hasn’t always been voluntary. Today’s students of color owe a great deal to the black community’s steady hammering away at the doors of segregated colleges in the late 1940s and 1950s. It wasn’t until well into the 1960s—when Watts, then Newark and Detroit burned, and Martin Luther King, Jr. was gunned down—that elite universities started waking up to the social unrest which was making its way onto their own campuses. It was then that they started proactively recruiting and accepting students of color to answer demands that colleges better reflect the country’s demographics. While college presidents at the time spoke eloquently about meeting the societal need for “Negro leadership,” and righting the wrongs of past discrimination, the motivation was also undeniably one of self-preservation.

Simultaneously, colleges started to become more demanding of their applicants. “While we were diversifying we were also trying to be more selective and over-relying on very narrow definitions of what merit is,” said Milem, of the tension highly selective colleges have found themselves negotiating. “Those very narrow definitions of merit, like test scores and grades, tend to privilege some folks over other folks.”

What admissions officers have had to balance is the knowledge that test scores are not by themselves sufficient predictors of a student’s potential or future ability, alongside their
institutional commitment to diverse student bodies. Universities have come together to protect their right to design their student bodies with those complexities in mind.

Back in the 1980s, Supreme Court Justice Sonia Sotomayor proudly proclaimed the mantle of “affirmative action baby.” Her story is a perfect illustration of the tension the Supreme Court will consider this week. “My test scores were not comparable to my colleagues at Princeton and Yale,” she has said. “Not so far off so that I wasn’t able to succeed at those institutions.”

Sotomayor, who graduated at the top of her class at Princeton, will be part of the eight-justice panel that decides the fate of affirmative action this week.