

AFFIRMATIVE ACTION: MOVING BEYOND DIVERSITY

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DIVERSITY IN EDUCATION AND THE FUTURE OF AFFIRMATIVE ACTION

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INTRODUCTION

Diversity has been the prevailing justification for affirmative action for decades.¹ But if affirmative action is supposed to help remediate the effects of historical and contemporary racial discrimination by enabling race-conscious university admissions, then the diversity defense is better understood not as affirmative action’s savior but as its saboteur. Instead of addressing racism, vindicating minority rights, and facilitating universities’ efforts to increase minority enrollment, the diversity defense ignores racism, is apathetic to minority rights, and obstructs universities’ ability to take race into account. The

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1. See, e.g., Michael Selmi, *The Facts of Affirmative Action*, 85 VA. L. REV. 697, 729 (1999) (asserting diversity has clearly become the most heralded of all justifications for affirmative action). See also *id.* at 729 n.152 (citing educators justifying their affirmative action programs by recourse to diversity); *id.* at 729 n.153 (citing sources providing and defending diversity as justification for affirmative action); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 577 (2000) (describing “diversity” as the favorite catchword or mantra of those defending the use of racial or ethnic preferences); Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1905 (1997) (stating that the importance of racial diversity has become a mantra in higher education circles since Justice Powell’s opinion in *Bakke*).

diversity defense hardly justifies affirmative action. Rather, it undermines it. Advocates nevertheless maintain the diversity defense because the Supreme Court has made it so difficult for race-conscious state action to survive strict scrutiny. Since *Fisher v. University of Texas* will soon, once again, be considered by the Supreme Court,² the permissibility of race-consciousness will likely be even further constrained. Race-consciousness, however, is not essential to affirmative action. It is neither the most efficient nor the most strategic approach. Instead of holding onto the diversity defense, advocates should let go of race-conscious affirmative action and embrace facially race-neutral alternatives that identify and select for specific disadvantages—disadvantages that, as a result of systemic racism, disproportionately affect people of color. A race-neutral approach not only eludes strict scrutiny but also transforms the same precedents that make it nearly impossible to remediate facially race-neutral discrimination into legal protections for affirmative action, manipulating conservative jurisprudence against itself.

This article argues that affirmative action advocates must move beyond the diversity defense. Part I outlines the deficiencies of the diversity rationale. This Part briefly reviews the origins of the diversity defense and shows that it sacrifices affirmative action's purpose to narrowly uphold the constitutionality of race-consciousness. It argues that the diversity defense is a weak justification for a limited program of affirmative action that misconstrues the true reason for valuing racial diversity. Part II advocates for a race-neutral approach, arguing that it is strategically viable and has the potential to be more effective at increasing minority enrollment than traditional affirmative action. Such a program would be more faithful to the pursuit of racial justice than the current race-conscious approach, demanding that universities examine the ways in which racism manifests, and that they select for facially race-neutral criteria attentive to the disadvantages that disproportionately affect people of color. Part III, acknowledging the importance of fighting for race-consciousness in the face of constitutional challenges, and positing explicitly race-conscious jurisprudence as the ultimate goal, discusses how advocates might improve upon the diversity defense towards a future race-conscious jurisprudence. Part IV provides additional steps advocates can take to support antistatutory and improve educational opportunities for minorities.

I.

THE PROBLEM WITH DIVERSITY

At the heart of affirmative action is antistatutory, the principle that the constitutional and moral command of equal protection requires the elimination

2. 758 F.3d 633 (5th Cir. 2014), *cert. granted*, 83 U.S.L.W. 3682 (U.S. June 29, 2015) (No. 14-981).

of society's racism rather than mandating equal treatment as an individual right.³ Affirmative action recognizes that society systematically excludes and disadvantages people of color and therefore offers an increased opportunity to access higher education to ameliorate the injustice of opportunities denied on the basis of race.⁴ A justification for affirmative action should vindicate minorities' rights and uphold the constitutionality of rectifying racism. The diversity defense does neither. It undermines antisubordination by fortifying White supremacy and restraining universities from taking race into account. Affirmative action as undergirded by the diversity defense is weak, limited in its ability to increase minority enrollment and tenuous in its reliance on the materialization of theorized empirical evidence. The diversity defense misunderstands the true value of racial diversity. It barely salvages affirmative action's prevailing means—the explicit consideration of race in university admissions—while obstructing the end of advancing racial justice.

The diversity defense originates from Justice Powell's opinion in *Regents of the University of California v. Bakke*.⁵ Justice Powell, in an analysis joined by no other member of the Court,⁶ upheld affirmative action as constitutional for

3. The definition of the antisubordination principle used in this article is borrowed from Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 951 (2001) [hereinafter Lawrence (2001)].

4. This is an ideal description of affirmative action as conceptualized by the author. Affirmative action as currently practiced, constrained as it is by the diversity defense, falls far from this ideal.

5. 438 U.S. 265 (1978). Allen Bakke, a White male, alleged that the special admissions program operated by the UC Davis School of Medicine excluded him on the basis of race in violation of his constitutional rights guaranteed under the Equal Protection Clause of the Fourteenth Amendment. The case resulted in a plurality decision; five justices agreed that the university's special admissions program was unlawful and that Bakke should be admitted, and five agreed that the university should not be prohibited from taking race into account in its future admissions process.

6. Justices Brennan, White, Marshall, and Blackmun joined Parts I (describing the facts of the case), *id.* at 272–281, and V-C (reversing lower court's judgment enjoining any consideration of race in admissions), *id.* at 320, of Justice Powell's opinion. Justice White also joined in Part III-A (asserting that racial and ethnic distinctions of any sort are inherently suspect and call for strict scrutiny). *Id.* at 287–91. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, argued that the question of whether race can ever be used as a factor in admissions is not an issue and that discussion of that issue is inappropriate, *id.* at 411 (Stevens, J., concurring in the judgment in part and dissenting in part), and concurred in the Court's judgment only insofar as it held the special admissions program was unlawful and Bakke should be admitted, *id.* at 421. No other justice joined Justice Powell in Part III-B (interpreting the Fourteenth Amendment to protect Whites against harm from racial discrimination), *id.* at 291–300 (plurality opinion); Part III-C (distinguishing the present case from school desegregation and other discrimination cases), *id.* at 300–05; Part IV-A (denying a compelling state interest in reducing the historic deficit of minorities in medical schools and the medical profession), *id.* at 307; Part IV-B (denying a compelling state interest in countering the effects of societal discrimination), *id.* at 307–10; Part IV-C (denying a compelling state interest in increasing the number of physicians practicing in underserved communities), *id.* at 310–11; Part IV-D (upholding diversity as a compelling state interest), *id.* at 311–15; Part V-A (arguing the special admissions program is not narrowly tailored to serve the interest in diversity), *id.* at 315–19; or Part V-B (asserting that the fatal flaw of the special

-serving the compelling interest of obtaining the educational benefits that flow from an ethnically diverse student body. The diversity interest is unconcerned with ameliorating racism. It derives not from any consideration of minorities' rights but from universities' special First Amendment right to academic freedom, which includes the freedom to select students.⁷ Under the diversity defense, the relevant legal question for affirmative action is whether a university's right to curate a pedagogically desirable, heterogeneous student body can trump a White person's equal protection right against racial discrimination. The rights of minorities have no place in this constitutional calculus.

The diversity defense undermines antisubordination by fortifying the status quo and restraining universities from taking race into account. It sidesteps the issue of discrimination entirely. It primarily protects institutional speech rights and values minority representation only as an articulation of those rights, shifting the focus of affirmative action from addressing racism to endorsing universities as the most qualified arbiters of who deserves access to higher education. The diversity defense upholds the right of universities—whose faculties, administrations, and boards of trustees continue to be dominated by White males—to fashion an elite academic environment, particularly by granting them the discretion to decide who gets to study.⁸ As such, diversity reframes affirmative action as a voluntary policy implemented by institutions in their own self-interest. This reframing subordinates minorities' claims as irrelevant or subsidiary to universities' right to free speech.⁹

In fact, the diversity defense essentially endorses institutional autonomy in every way but one: it prohibits universities from using race as a determinative

admissions program is its disregard for individual rights as guaranteed by the Fourteenth Amendment), *id.* at 319–20.

7. *Id.* at 312.

8. Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 771 (1996) [hereinafter Lawrence (1996)]. Professor Lawrence points out that under the diversity defense a racially diverse student body is compelling only as long as those who run the school deem it so, and that Justice Powell's reasoning could as easily justify an all White school as one that is racially diverse. *Id.*

9. In addition to their exclusion as parties to litigation between defendant institutions that have historically denied access to minorities and White plaintiffs hostile to minority opportunity, minorities find even the mention of their rights silenced from the record. The diversity defense positions the university as the only apposite proponent of affirmative action and perversely entrusts the fulfillment of minorities' rights to institutions guilty of vitiating them. Furthermore, minority movants have been repeatedly denied the right to intervene in affirmative action cases, for failure to demonstrate a substantial legal interest in the subject matter of the litigation or for failure to overcome the doctrinal presumption that government litigants adequately represent all interested non-parties. See Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 MICH. J. RACE & L. 263, 282–83 (1989). Though minority students were granted the right to intervene in *Grutter* and *Gratz*, their arguments went largely unaddressed by the majority opinion in both cases. See Brief of Respondents Kimberly James et al., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Brief of Respondents Ebony Patterson et al., *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

factor.¹⁰ Justice Powell asserted that “a university must have wide discretion in making the sensitive judgments as to who should be admitted”¹¹ but placed limitations where classifications infringe upon individual rights. Racial classifications are distinct in this regard.¹² The consideration of nearly any other classification a university might take into account would not infringe upon individual rights precisely because, unlike race, they have not historically been or continue to be utilized as a basis for systematic oppression. Universities are authorized to give as much weight to the various factors they consider to promote “beneficial educational pluralism”¹³ as they want, with the exception of race.

As a practical matter, affirmative action as justified by the diversity defense is weak on at least two counts: it is limited in its ability to increase minority enrollment, and its constitutionality is contingent upon empirical evidence demonstrating the educational benefits of racial diversity. Precluding the use of race as a decisive factor inhibits universities from admitting students of color in meaningful numbers; consequently, minorities remain dramatically underrepresented in highly selective colleges.¹⁴ Moreover, the diversity defense rests the entire case for race-conscious admissions on the argument that ethnic diversity contributes to a “robust exchange of ideas.”¹⁵ Without a clear connection between racial diversity and intellectual development, the diversity defense provides a tenuous justification for taking race into account.¹⁶

10. The compelling interest in diversity upheld by Justice Powell is not an interest in “simple ethnic diversity” but one that “encompasses a far broader array of qualifications and characteristics.” *Bakke*, 438 U.S. at 315. Accordingly, a defensible affirmative action program must evaluate all elements of diversity “without the factor of race being decisive.” *Id.* at 317.

11. *Id.* at 314.

12. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1540 n.240 (2003) (“Within equal protection doctrine, being treated as an ‘individual’ has specialized meaning. Applicants who are valued as individuals can be categorized and valued on the basis of any trait (for example, grades, standardized test scores, parental income, residence, high school, alumni affiliations, or musical or athletic ability) *except* race.”).

13. *Bakke*, 438 U.S. at 317.

14. See generally SEAN F. REARDON, RACHEL BAKER & DANIEL KLASIK, CTR. FOR EDUC. POLICY ANALYSIS, STANFORD UNIV., RACE, INCOME, AND ENROLLMENT PATTERNS IN HIGHLY SELECTIVE COLLEGES, 1982–2004 (2012), available at <http://cepa.stanford.edu/sites/default/files/race%20income%20%26%20selective%20college%20enrollment%20august%20%202012.pdf>.

15. *Bakke*, 438 U.S. at 313. For this argument to work, race ought to be a reasonable proxy for having different thoughts and opinions, but it is not. See generally Eugene Volokh, *Diversity, Race as Proxy, Religion as Proxy*, 43 UCLA L. REV. 2059 (1995). Though race may be a proxy for having different racial experiences in America, it does not necessarily create one essential experience based on race or generate a monolithic viewpoint unique and universal to a minority group. See Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 WIS. L. REV. 105, 140.

16. These benefits are not readily apparent. The district court in *Grutter* noted: “[A] distinction should be drawn between viewpoint diversity and racial diversity. While the educational benefits of the former are clear, those of the latter are less so.” *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 849 (E.D. Mich. 2001), *rev’d en banc*, 288 F.3d 732 (6th Cir. 2002), *aff’d*,

Affirmative action advocates have consequently generated a flurry of scholarship to “provide evidence of the educational outcomes of diverse institutional environments” and “enhance the argument for diversity on campus.”¹⁷ Pursuit of this empirical work has engendered its own “area of research, now termed ‘the educational benefits of diversity.’”¹⁸ The pedagogical value of diversity is supported by study after study demonstrating how contact with students of other races encourages cross-racial understanding, leads to improvements in cognitive abilities, promotes civic engagement, and enhances classroom environments.¹⁹ Notwithstanding this prolific body of research, pinning the justification for affirmative action on the materialization of empirical conclusions makes for a utilitarian argument susceptible to contrary findings.²⁰

539 U.S. 306 (2003). *See also* Sandalow, *supra* note 1, at 1906 (asserting that the experiential differences between White and minority students are irrelevant to most of what students study in the course of their undergraduate careers).

17. Jeffrey F. Milem, *The Educational Benefits of Diversity: Evidence from Multiple Sectors*, in *COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION* Ch. 5 (Mitchell Chang, Daria Witt, James Jones & Kenji Hakuta eds., 2003). *See also generally* Jonathan R. Alger, *Unfinished Homework for Universities: Making the Case for Affirmative Action*, 54 WASH. U. J. URB. & CONTEMP. L. 73 (1998) (arguing it is the “unfinished homework” of affirmative action advocates to provide a strong evidentiary basis for the benefits of racial diversity in higher education).

18. Sylvia Hurtado, *Linking Diversity with the Educational and Civic Missions of Higher Education*, 30 REV. HIGHER EDUC. 185, 185 (2007).

19. *See* Brief for the American Educational Research Association, et al., as Amicus Curiae, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345). *See also* Brief of Social and Organizational Psychologists as Amicus Curiae, *Fisher*, 133 S. Ct. 2411 (No. 11-345); Brief of Amicus Curiae the American Psychological Association, *Fisher*, 133 S. Ct. 2411 (No. 11-345); Brief of Experimental Psychologists as Amicus Curiae, *Fisher*, 133 S. Ct. 2411 (No. 11-345); Brief of American Social Science Researchers as Amicus Curiae, *Fisher*, 133 S. Ct. 2411 (No. 11-345).

20. *See* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 34 (2002) (describing diversity as a rationale whose force depends on controvertible empirical propositions). Just as there are empirical studies proving the educational benefits of diversity, so too are there studies disproving the existence of such benefits. *See* Brief of Scholars of Economics and Statistics as Amici Curiae, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (asserting the University of Texas’ affirmative action program results in no discernable educational benefits, and citing evidence countering the “critical mass” theory). *See also* Stanley Rothman, Seymour Martin Lipset & Neil Nevitte, *Does Enrollment Diversity Improve University Education?*, 15 INT’L J. PUB. OPINION RES. 8, 15 (2003) (finding that as the proportion of Black students at an institution rose, student satisfaction with their university experience dropped, as did assessments of the quality of their education). Studies demonstrating the educational value of relative ethnic homogeneity could also be marshaled against the diversity rationale. For example, some studies suggest that Black students enjoy distinct educational benefits at historically Black colleges and universities. *See* U.S. COMM’N ON CIVIL RIGHTS, *THE EDUCATIONAL EFFECTIVENESS OF HISTORICALLY BLACK COLLEGES AND UNIVERSITIES* (2010) (reporting educational benefits for Black students attending HBCUs relative to Black students attending non-HBCUs). *See also* *Fisher*, 133 S. Ct. at 2431–432 (Thomas, J., concurring) (citing social science evidence showing negative educational consequences of affirmative action on minority students); *Grutter v. Bollinger*, 539 U.S. 306, 364–65 (2003) (Thomas, J., dissenting) (citing social science evidence that student body diversity hinders students’ perception of academic quality, and that racial heterogeneity impairs learning among Black students).

Accepting evidence demonstrating the educational value of racial diversity as sufficient to validate the use of race to promote diversity would also entail accepting evidence demonstrating that students learn more effectively in homogenous environments as sufficient to justify the use of race to eradicate diversity. The diversity defense of affirmative action relies upon precarious logic that could just as easily support segregation.²¹

Finally, the diversity defense misconstrues the value of racial diversity. Diversity is primarily desirable not for generating educational benefits but for signaling the absence of systemic barriers to attainment. In a diverse society without racism, the principle of random distribution would tend to ensure, on average, commensurate representation with respect to social goods including access to higher education.²² Though it does not work the other way around—recreating proportional racial representation without addressing underlying disparities will not transform America into a racially just society—providing an increased opportunity in university admissions could help offset the opportunities disproportionately foreclosed to people of color.

Consider the following:²³ The Black infant mortality rate is more than double the White infant mortality rate.²⁴ Black children are more than twice as

21. See Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 37–38.

22. See Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1044 (stating that in the absence of racism and its effects, society would produce a percentage of minority students matriculating at American colleges and professional schools proportional to the percentage of minorities in American society); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 346–47 (1994) (arguing that at the societal level, equal opportunity should result in equal distribution of benefits and burdens).

23. The following statistics highlight social, economic, and educational disparities that impact Blacks and Hispanics as compared to Whites. This is not to diminish the significance of disparities that exist for other minority populations. For example, though Asian Americans are often uplifted as a “model minority” and appear to match or even surpass Whites by some metrics, such measures do not fully capture the ways in which racism manifests for Asian Americans and frequently mask the disparities that exist among Asian ethnicities. For a closer look at inequities as they pertain to various Asian American groups, see FARAH Z. AHMAD & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, *READING BETWEEN THE DATA: THE INCOMPLETE STORY OF ASIAN AMERICANS, NATIVE HAWAIIANS, AND PACIFIC ISLANDERS* (2014), available at <https://www.americanprogress.org/wp-content/uploads/2014/03/AAPI-report.pdf>. See also ASIAN AM. CTR. FOR ADVANCING JUSTICE, *A COMMUNITY OF CONTRASTS: ASIAN AMERICANS IN THE UNITED STATES: 2011* (2011), available at <http://www.advancingjustice.org/sites/default/files/CoC%20National%202011.pdf>. For a collection of reports documenting socioeconomic disparities for Native American populations, see *Socioeconomic Disparities & Civic Participation*, THE LEADERSHIP CONFERENCE, <http://www.civilrights.org/indigenous/disparities/> (last visited July 25, 2015). See also Jens Manuel Krogstad, *One-in-four Native Americans and Alaskan Natives are Living in Poverty*, PEW RESEARCH CTR. (June 13, 2014), <http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/>.

24. T.J. MATTHEWS & MARIAN F. MACDORMAN, *INFANT MORTALITY STATISTICS FROM THE 2010 PERIOD LINKED BIRTH/INFANT DEATH DATA SET 3* (2013), available at http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_08.pdf.

likely as White children to be low-income, nearly four times as likely to be living in poverty, and more than four times as likely to be living in extreme poverty.²⁵ Hispanic children are also more than twice as likely as White children to be low-income, and nearly three times as likely to be living in poverty or extreme poverty.²⁶ Throughout primary and secondary education, Black students are suspended and expelled at a rate three times greater than White students.²⁷ White students are five times as likely as Black students, and almost three times as likely as Hispanic students, to enroll in a highly selective college.²⁸ Even after controlling for income, White students are two to three times as likely as Black students to gain admission.²⁹ Meanwhile, Black men are more than six times as likely as White men to be incarcerated; Hispanic men are nearly three times as likely as White men to be incarcerated.³⁰ Black unemployment is more than twice that of Whites; Hispanic unemployment is 1.5 times that of Whites.³¹ The median household income for Whites is over \$17,000 greater than for Hispanics and nearly \$24,000 greater than for Blacks.³² Income disparities persist even when educational attainment is taken into account.³³ In 2013, the median net worth of White households was ten times that of Hispanic households and thirteen times that of Black households.³⁴ Though Whites constitute 62.6% of America's population,³⁵ they account for 95.4% of all Fortune 500 CEOs³⁶ and

25. CHILD TREND DATA BANK, CHILDREN IN POVERTY: INDICATORS ON CHILDREN AND YOUTH 4 (2014), available at http://www.childtrends.org/wp-content/uploads/2014/01/04_Poverty.pdf.

26. *Id.*

27. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION DATA SNAPSHOT: SCHOOL DISCIPLINE ISSUE BRIEF NO. 1 (2014), available at <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

28. REARDON, BAKER & KLASIK, *supra* note 14, at 6.

29. *Id.* at 8.

30. MICHAEL DIMOCK, JOCELYN KILEY & ROD SULS, PEW RESEARCH CTR., KING'S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES (2013), available at http://www.pewsocialtrends.org/files/2013/08/final_full_report_racial_disparities.pdf.

31. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU LAB. STATS., http://data.bls.gov/timeseries/LNS14000003&series_id=LNS14000006&series_id=LNS14032183&%20series_id=LNS14000009 (last updated May 17, 2015).

32. CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2013 (2014), available at <http://census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf>.

33. *Median Weekly Earnings by Educational Attainment in 2014*, U.S. BUREAU LAB. STATS. (Jan. 23, 2015), <http://www.bls.gov/opub/ted/2015/median-weekly-earnings-by-education-gender-race-and-ethnicity-in-2014.htm>.

34. Rakesh Kochhar & Richard Fry, *Wealth Inequality has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), <http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/>.

35. *State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated April 29, 2015).

36. Claire Zillman, *Microsoft's New CEO: One Minority Exec in a Sea of White*, FORTUNE (Feb. 4, 2014, 8:09 PM), <http://fortune.com/2014/02/04/microsofts-new-ceo-one-minority-exec-in-a-sea-of-white/>.

hold 88.4% of the nation's wealth.³⁷ In contrast, Blacks constitute 13.2% of the population³⁸ yet account for just four of the Fortune 500 CEOs³⁹ and collectively hold only 2.7% of the nation's wealth.⁴⁰

How can we account for these egregious disparities? Either we maintain that the United States is an equal opportunity society and subscribe to the unsavory position that Blacks and other minorities are simply not as intelligent, talented, or hardworking as Whites are, or we must acknowledge that there exist systemic racial barriers to attainment that prevent a reasonable distribution of social goods. Affirmative action should be understood as an effort to address one piece of this towering and interconnected array of disparities. It could not be a parallel exchange, as the privileges of being White in America are not fungible. But while access to higher education will not congruently offset the disadvantages borne by minorities, it is a tangible benefit that accords meaningful access to social mobility.⁴¹ We should not want campuses to be diverse because of the educational benefits that flow from a diverse student body. We should want campuses to be diverse to ameliorate the continued exclusion of minorities from the mainstream of society.

The diversity rationale does more to damage affirmative action than to defend it. It turns affirmative action against antisubordination, restrains universities from taking race into account, and provides a tenuous justification for a policy limited in its ability to increase minority enrollment. The most that can be said for the diversity defense is that it narrowly upholds the constitutionality of race-consciousness, though for the pursuit of an interest

37. Matt Bruenig, *The Racial Wealth Gap*, AM. PROSPECT (Nov. 6, 2013), <http://prospect.org/article/racial-wealth-gap>.

38. *State & County QuickFacts*, *supra* note 35.

39. Jillian Berman, *Soon, Not Even 1 Percent of Fortune 500 Companies Will Have Black CEOs*, HUFFINGTON POST (Jan. 29, 2015, 3:41 PM), http://www.huffingtonpost.com/2015/01/29/black-ceos-fortune-500_n_6572074.html.

40. Bruenig, *supra* note 37.

41. Data from the Bureau of Labor Statistics shows that greater educational attainment is positively correlated with higher median weekly earnings and negatively correlated with unemployment. *Employment Projections*, U.S. BUREAU LAB. STATS., http://www.bls.gov/emp/ep_chart_001.htm (last updated April 2, 2015). *See also generally* ANTHONY P. CARNEVALE, STEPHEN J. ROSE & BAN CHEAH, THE GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, *THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS* (2011) (demonstrating that a college degree is critical to economic opportunity); EXEC. OFFICE OF THE PRESIDENT, *INCREASING COLLEGE OPPORTUNITY FOR LOW-INCOME STUDENTS: PROMISING MODELS AND A CALL TO ACTION* (2014), *available at* https://www.whitehouse.gov/sites/default/files/docs/white_house_report_on_increasing_college_opportunity_for_low-income_students_1-16-2014_final.pdf (finding that the chances of children in the lowest income quintile making it to the highest quintile nearly quadruples with a college degree); MICHAEL GREENSTONE, ADAM LOONEY, JEREMY PATASHNIK & MUXIN YU, THE HAMILTON PROJECT, *THIRTEEN ECONOMIC FACTS ABOUT SOCIAL MOBILITY AND THE ROLE OF EDUCATION* (2013) (showing that whereas a low-income individual without a college degree will very likely remain in the lower part of the earnings distribution, a low-income individual with a college degree could just as easily land in any income quintile, including the highest).

unrelated to addressing racism. The diversity defense barely preserves the prevailing means of affirmative action while eviscerating its end.

II.

RACE-NEUTRAL ALTERNATIVES

If affirmative action is to advance its antistatutory purpose, advocates need to move beyond the diversity defense. One possible route is to forego race-consciousness and embrace the use of race-neutral criteria to increase minority enrollment. As discussed, the point of anti-subordination affirmative action should be to provide an increased opportunity to help offset the opportunities foreclosed to minorities by systemic racism; while granting preferences based on race is a straightforward way of accomplishing this, the Court has curtailed the effectiveness of a race-conscious approach. Strategically, affirmative action could be better implemented by employing facially race-neutral criteria which track the disadvantages that disproportionately affect people of color.

Using race-neutral criteria to implement affirmative action would turn legal obstacles to remediating racism into protections. A compelling reason for maintaining the diversity defense is that the Court has left almost no other grounds for defending race-conscious efforts to address racism; outside of diversity, race-conscious remedies are constitutional only when narrowly tailored to rectify an identified, intentional act of racial discrimination.⁴² Societal discrimination is too amorphous a basis.⁴³ Disparate impact is insufficient to establish a constitutional violation.⁴⁴ Statistical evidence demonstrating the existence of institutional racism is too rarely enough.⁴⁵ The upshot of the Court's jurisprudence is that race-conscious efforts to address racism are automatically suspect and difficult to defend, while discriminatory policies and practices that are facially race-neutral are nearly impossible to attack. But if affirmative action were facially race-neutral, these obstructions would become safeguards. If universities were to employ race-neutral factors to implement affirmative action, opponents could not rely on statistical evidence of bias or disparate racial impact. They would have to show discriminatory intent to mount a constitutional challenge.

A race-neutral approach eschews the diversity defense. Its objective is not to generate more educational value than can be accomplished through race-

42. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 486–93 (1989) (concluding that though racial classifications are subject to strict scrutiny, states or local entities can take action to eradicate the effects of identified past discrimination).

43. *See Wygant v. Jackson*, 476 U.S. 267, 274–76 (1986) (holding that societal discrimination alone is insufficient to justify a racial classification).

44. *See Washington v. Davis*, 426 U.S. 229, 239–45 (1976) (holding that a law or other official act is not unconstitutional solely because it has a racially disproportionate impact).

45. *See McCleskey v. Kemp*, 481 U.S. 279, 292–97 (1987) (holding that a study showing racial bias in the administration of capital punishment is insufficient to support an inference of discriminatory purpose).

conscious means but to help compensate for opportunities that systemic racism has denied. It is squarely premised on antiracism and the vindication of minority rights. Race-neutral affirmative action could be more effective at increasing minority enrollment than taking race into account because race-neutral factors could be decisive. The rhetorical problem of distinguishing between a “critical mass” and a “quota” would dissipate. Affirmative action would be freed from the limitations of diversity.

This is not to suggest that advocates should pretend race does not matter or that America is a post-racial society. To the contrary, the use of race-neutral alternatives is a viable option precisely because America systematically deprives opportunities to minorities and therefore there exist strong correlations between disadvantage and race. A carefully crafted race-neutral approach attentive to real indicators of disadvantage would be more principled than a program that looks at race without regard for opportunities granted or foreclosed. Traditional affirmative action focused solely on race has no qualms about uplifting the most privileged minority applicants and producing the appearance of a more racially just society without addressing the reality of discrimination; such a program responds to the oppression of minority populations by admitting students who look like the oppressed, irrespective of actual life experiences. In contrast, a program that identifies and selects for the various ways in which racism manifests offers a more direct remedy. Though ideally this could be accomplished in a race-conscious manner that explicitly acknowledges the remediation of racism as its imperative, universities could potentially achieve the same effect by utilizing race-neutral criteria.

Race-neutral affirmative action must select for specific disadvantages that disproportionately and overwhelmingly affect minorities. Factors like socioeconomic class or policies that uniformly accept top performers from every high school are too broad to serve as effective criteria.⁴⁶ Below are three potential factors; the intent is not to make a statistical showing that selecting for these factors will result in increased minority enrollment, but to illustrate that there are race-neutral criteria tightly correlated with race that could serve this purpose.

Dropout factories. A 2004 study by Johns Hopkins University found that the America’s “dropout factories,” or high schools in which graduation is not the

46. A study by the University of California has demonstrated that neither class-based affirmative action nor a percent-based plan would increase the enrollment of underrepresented minority students. PATRICIA GÁNDARA, THE CIVIL RIGHTS PROJECT, UNIV. OF CAL., LOS ANGELES, CALIFORNIA: A CASE STUDY IN THE LOSS OF AFFIRMATIVE ACTION, 13–15 (2012), available at <http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/california-a-case-study-in-the-loss-of-affirmative-action>. See also REARDON, BAKER, & KLASIK, *supra* note 14, at 11–14 (showing that laws such as Texas’ “Top 10% Rule” are insufficient to create meaningfully diverse student bodies at selective state universities).

norm, are overwhelmingly the province of minority students.⁴⁷ Nearly half of the nation's African American students, nearly 40% of Latino students, 26% of Native American students, 19% of Asian American students, and only 11% of White students attend dropout factories.⁴⁸ A majority-minority high school is five times more likely to promote 50% or fewer freshmen to senior status on time than a majority White school.⁴⁹ Outside of the rural South, it is rare to find White students in appreciable numbers attending high schools with high dropout and low graduation rates.⁵⁰ Selecting for applicants attending dropout factories, particularly in certain geographic locations, would disproportionately benefit minorities.

Schools exhibiting factors that limit educational opportunities and outcomes. A 2012 report by UCLA's Civil Rights Project shows that segregated minority schools and schools of concentrated poverty are systematically linked to an array of factors that limit educational opportunities and outcomes such as less experienced and less qualified teachers, high levels of teacher turnover, less successful peer groups, and inadequate facilities and learning materials.⁵¹ The report describes deepening racial segregation for Black and Latino students and the prevalence of "double segregation," or segregation by both race and poverty.⁵² Across the nation, 80% of Latino students and 74% of Black students attend majority non-White schools; 43% of Latinos and 38% of Blacks attend intensely segregated schools (those with 0-10% White students), and 14% of Latino students and 15% of Black students attend "apartheid schools," where Whites make 0-1% of the enrollment.⁵³ Selecting for applicants attending schools exhibiting limiting factors would serve as a proxy for segregated minority schools, and disproportionately benefit low-income minorities.

*Neighborhood.*⁵⁴ A map of racial distribution in the United States illustrates how closely race tracks place.⁵⁵ Communities of color continue to endure

47. ROBERT BALFANZ & NETTIE LEGTERS, CTR. FOR RESEARCH ON THE EDUC. OF STUDENTS PLACED AT RISK, JOHNS HOPKINS UNIV., LOCATING THE DROPOUT CRISIS: WHICH HIGH SCHOOLS PRODUCE THE NATION'S DROPOUTS? WHERE ARE THEY LOCATED? WHO ATTENDS THEM? 5 (2004).

48. *Id.* at 17.

49. *Id.* at 5.

50. *Id.* at 23.

51. GARY ORFIELD, JOHN KUCSERA & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT, UNIV. OF CAL., LOS ANGELES, E PLURIBUS. SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS (2012), available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf. See also GARY ORFIELD & ERICA FRANKENBERG, THE CIVIL RIGHTS PROJECT, UNIV. OF CAL., LOS ANGELES, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT, AND AN UNCERTAIN FUTURE 37 (2014), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/brown-at-60-great-progress-a-long-retreat-and-an-uncertain-future/Brown-at-60-051814.pdf>.

52. ORFIELD, KUCSERA & SIEGEL-HAWLEY, *supra* note 51, at 7.

53. *Id.* at 9.

54. For a detailed exposition of place-based affirmative action, see generally SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA (2014).

residential segregation,⁵⁶ with race being a more dominant factor than class in determining exposure to neighborhood disadvantages such as poverty.⁵⁷ For the past twenty years, affluent Blacks and Hispanics have lived in neighborhoods with more average exposure to poverty than poor Whites.⁵⁸ One study demonstrates that two-thirds of Black children live in high-poverty neighborhoods, compared to only a very small percentage of White children.⁵⁹ By more comprehensive measures of neighborhood disadvantage,⁶⁰ only 1% of Black children born from 1985 through 2000 live in “low disadvantage” neighborhoods, compared to 45% of Whites; in contrast, 78% of Blacks live in “high disadvantage” neighborhoods, compared with just 5% of Whites.⁶¹ Selecting for specific locations—such as by favoring applicants from “high disadvantage” neighborhoods—would disproportionately benefit minorities. Each potential factor for implementing race-neutral affirmative action should be analyzed to determine whether selecting for them would increase minority enrollment. It would take work to figure out what combination of criteria would be the most effective, and universities would have to select particular factors which redress racism in their specific contexts. Unlike race-conscious affirmative action, race-neutral affirmative action would demand that universities examine how racism manifests and consciously select for specific deprivations to ameliorate injustice.

55. Dustin A. Cable, *The Racial Dot Map: One Dot Per Person for the Entire United States*, WELDON COOPER CENTER FOR PUB. SERVICE (July 2013), available at <http://demographics.coopercenter.org/DotMap/index.html>.

56. JOHN R. LOGAN & BRIAN J. STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS (2011) (finding that Black-White segregation remains very high, and Hispanic and Asian populations are just as or more intensely segregated as they were thirty years ago). See also JOHN ICELAND, DANIEL H. WEINBERG & ERICKA STEINMETZ, U.S. CENSUS BUREAU, RACIAL AND ETHNIC RESIDENTIAL SEGREGATION IN THE UNITED STATES: 1980-2000 (2002) (finding slowly declining but still significant residential segregation in metropolitan areas).

57. See JOHN R. LOGAN, US2010 PROJECT, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS, AND ASIANS IN METROPOLITAN AMERICA (2011) (showing that on average, Black and Hispanic households live in neighborhoods with more than one and a half times the poverty rate of neighborhoods where the average White lives, and finding that income differences have little relationship with neighborhood inequality).

58. *Id.* at 5.

59. PATRICK SHARKEY, ECON. MOBILITY PROJECT, NEIGHBORHOODS AND THE BLACK-WHITE MOBILITY GAP 2 (2009) (reporting the impact of neighborhood poverty rates experienced during childhood on social mobility).

60. The report uses a measure of neighborhood disadvantage that incorporates poverty rates, unemployment rates, rates of welfare receipt and families headed by a single mother, levels of racial segregation, and the age distribution in the neighborhood. *Id.* at 11.

61. *Id.*

III.

PRESERVING RACE-CONSCIOUSNESS: A BETTER DIVERSITY DEFENSE

Pushing for race-neutral affirmative action does not mean abandoning the fight for race-conscious affirmative action in the face of constitutional challenges like *Fisher*⁶² or the ongoing cases against Harvard⁶³ and the University of North Carolina.⁶⁴ Nor does it discount the significant impact of race-conscious admissions.⁶⁵ Though a race-neutral approach makes strategic sense given current law, the ultimate goal should be to move towards a jurisprudence that recognizes the constitutionality of race-consciousness and does not require advocates to fight surreptitiously for racial justice. To that end, the diversity defense should not be discarded, but neither should it be recited as is. Advocates should improve upon the diversity defense where they need to protect race-conscious affirmative action. The diversity defense can be made more responsive to antisubordination. One possibility, alluded to by the Court's opinion in *Grutter*,⁶⁶ is to place the value of diversity not on the educational benefits that flow from it but on another forward-looking interest: the inclusion and participation of formerly excluded groups.⁶⁷ This could be termed the interest in the democratic benefits that flow from diversity. It would recognize the role of universities as training grounds for our nation's leaders and uphold the importance of a path to leadership "visibly open to talented and qualified individuals of every race and ethnicity."⁶⁸ The interest could still derive from the institutional First Amendment right endorsed by the Court. A concept of diversity focused on inclusion and participation acknowledges race as a salient factor that has been constructed into a basis for systematic exclusion, and

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

63. Complaint, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard*, No. 1:2014cv14176 (D. Mass. filed Nov. 17, 2014), available at <https://cases.justia.com/federal/district-courts/massachusetts/madce/1:2014cv14176/165519/1/0.pdf?ts=1416728521>.

64. Complaint, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, No. 1:2014cv00954 (M.D.N.C. filed Nov. 17, 2014), available at <https://cases.justia.com/federal/district-courts/north-carolina/nmdce/1:2014cv00954/67345/1/0.pdf?ts=1416764372>.

65. As demonstrated by the experiences of public universities in states that have banned affirmative action, race-conscious admissions programs have a significant impact on minority enrollment. See Gándara, *supra* note 46, at 3–8. See also Brief Amici Curiae of 28 Undergraduate and Graduate Student Organizations Within the University of California, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (showing that the ban on affirmative action has significantly decreased the number of African American, Latino, and American Indian students at University of California schools); LILIANA M. GARCÉS, THE CIVIL RIGHTS PROJECT, UNIV. OF CAL., LOS ANGELES, THE IMPACT OF AFFIRMATIVE ACTION BANS IN GRADUATE EDUCATION (2012), available at <http://civilrightsproject.ucla.edu/research/college-access/affirmative-action/the-impact-of-affirmative-action-bans-in-graduate-education/garces-impact-affirmative-action-graduate-2012.pdf> (demonstrating significant negative effects of affirmative action bans on minority enrollment).

66. *Grutter v. Bollinger*, 539 U.S. 306, 331–32 (2003) (asserting that access to higher education must be inclusive of qualified individuals of every race so that all members of society may effectively participate in the civic life of America).

67. Foster, *supra* note 15, at 141.

68. *Grutter*, 539 U.S. at 332.

reintroduces minority interests into the discussion. Another way would be to posit the eradication of America's racism as a central educational mission of the university.⁶⁹ Included in the "four essential freedoms" that comprise universities' special First Amendment right to academic freedom is the freedom to decide what may be taught, and how it shall be taught.⁷⁰ If a university were to decide to teach antiracism, then the interest in racial diversity would be compelling in itself.⁷¹ It would resolve the difficulties of using race as a proxy and make the educational value of racial diversity self-evident. If American racism is an object of study, then the presence of minority students is educationally valuable because they have experienced White supremacy differently than White students have and therefore possess a different knowledge of American racism.⁷² This diversity rationale marries the backward-looking purpose of addressing racial discrimination with the forward-looking purpose of achieving an institution's pedagogical objectives.⁷³

Although these improvements may be able to address some of the problems with the diversity defense, they are unlikely to reach its central infirmities—its underlying treatment of Whites as a suspect class under the Fourteenth Amendment, its privileging of institutional rights, and its failure to recognize societal discrimination as a violation of minorities' equal protection rights. Affirmative action would remain the prerogative of universities and minorities would still be deprived of a constitutional claim to the continuation of race-conscious admissions. Thus, while nudging the concept of diversity closer to antisubordination is valuable as a stopgap measure, we cannot expend all of our energy here.⁷⁴ We must move beyond diversity.

IV.

ADDITIONAL STRATEGIES

Ideally, advocates would not have to skirt around race-consciousness, and could successfully bring a case compelling the Supreme Court to supplant the current precedents upholding the diversity defense with an opinion that asserts the constitutionality of remedial interests and authorizes affirmative action premised on the vindication of minority rights. Until then, advocates can take the following steps in addition to advancing race-neutral affirmative action to support antisubordination and improve educational opportunity for minority students:

69. See Lawrence (1996), *supra* note 8, at 765.

70. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (citing *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result)).

71. Lawrence (1996), *supra* note 8, at 766.

72. *Id.* at 774.

73. *Id.* at 765.

74. See Barbara Phillips Sullivan, *The Gift of Hopwood: Diversity and the Fife and Drum March Back to the Nineteenth Century*, 34 GA. L. REV. 291, 340 (1999) (arguing that efforts to repackage diversity are unsatisfactory and should be abandoned).

1. *Persuade private institutions to articulate remedial justifications for affirmative action.*

Though private colleges and universities have modeled their admissions policies in accordance with the Court's rulings, they are not required to do so. Advocates should persuade private institutions to publicly articulate that their admissions policies recognize and endeavor to remediate societal discrimination against people of color. Using a frame of broad societal harm would avoid requiring private institutions to admit to discriminatory practices of their own, evading the issue of liability. This could facilitate the popular acceptance of an antisubordination justification for affirmative action.

2. *Make findings exposing universities' histories of racially discriminatory policies and practices.*

Justice Powell's opinion in *Bakke* affirmed a single permissible remedial interest in ameliorating or eliminating the effects of identified discrimination. He faults the university for not making any findings of constitutional or statutory violations but states that "[a]fter such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated."⁷⁵ The Court has since held that remediating identified past and continuing discrimination is a compelling state interest and that narrowly tailored use of racial classifications will survive strict scrutiny.⁷⁶ Indeed, many cities and governmental agencies preemptively defended their affirmative action programs after *Croson* by commissioning "disparity studies" documenting the continuing effects of their past discriminatory practices.⁷⁷ Providing detailed evidence of past discrimination could furnish a university with a compelling state interest sufficient to justify remedial, race-conscious affirmative action.⁷⁸

As it can be expected that universities would be unwilling to make incriminating findings, independent advocates should research and identify discriminatory policies and practices on their behalf. Advocates might seek the

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

76. See *Adarand v. Peña*, 515 U.S. 200 (1995) (holding that though all racial classifications must be analyzed under strict scrutiny, government can take narrowly-tailored race-based action necessary to further a compelling interest); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (adopting strict scrutiny to invalidate a minority set-aside program, but maintaining that states or local entities are not precluded from taking action to rectify the effects of identified discrimination within its jurisdiction).

77. Lawrence (2001), *supra* note 3, at 956 n.98.

78. Circuit court treatment suggests that such findings must be very clear and particularized. See *Hopwood v. Texas*, 78 F.3d 932, 955 (5th Cir. 1996) (holding that a law school may not take race into account in admissions despite evidence of significant past and ongoing discrimination); *Podberesky v. Kirwan*, 38 F.3d 147, 161 (4th Cir. 1994) (striking down the use of race-based scholarships because evidence did not sufficiently demonstrate present effects of past discrimination).

assistance of state attorneys general or the Department of Justice to conduct a formal investigation. A campaign that identifies and publicizes such findings, urges universities to take remedial action, and offers the protection of an established legal justification has the potential to disrupt universities' articulation of the diversity defense and introduce remediation as an official rationale for affirmative action. While some universities may be averse to exposing themselves to potential liability suits, others may be willing to cooperate to shield their admissions programs from the continual threat of future lawsuits by rejected White applicants.

3. *Shape the equal protection discourse.*

Advocates should strategically identify and attack the key arguments obstructing a more widespread acceptance of equal protection jurisprudence supportive of antisubordination. We should generate literature to tip the preponderance of legal scholarship in favor of an interpretation of the Equal Protection Clause that affirmatively protects disadvantaged minority groups. For example, advocates could controvert arguments that the Fourteenth Amendment is colorblind, and demonstrate that the Court has never expressly rejected the antisubordination principle.

There is decisive evidence that the intent of the Fourteenth Amendment was to secure the constitutionality of the 1866 Civil Rights Act, Freedmen's Bureau Act, and other legislation authorizing social welfare programs directed at blacks as a disadvantaged group.⁷⁹ Moreover, the Reconstruction Congress repeatedly passed explicitly racially conscious remedial legislation awarding federal benefits to blacks.⁸⁰ Advocates might persuade originalists by highlighting this legislative history, demonstrating that the Fourteenth Amendment was framed to authorize, not prohibit, racially conscious policies like affirmative action.

Advocates should endeavor to overcome the presumption that the Court has rejected antisubordination in favor of an anticlassification concept of equal protection.⁸¹

79. See JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 183 (1951) (stating that the one point historians agree upon is that the Fourteenth Amendment was designed to place the constitutionality of the Freedmen's Bureau and civil rights bills beyond doubt). See also Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (examining eight Reconstruction measures and arguing that the legislative history of the Fourteenth Amendment demonstrates the framers could not have intended to prohibit affirmative action).

80. See Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430–31 (1997) (identifying several statutes expressly appropriating benefits for "colored" persons).

81. Siegel, *supra* note 12, at 1473 (noting that most scholars would agree that American equal protection law has embraced anticlassification, rather than antisubordination, commitments). Professor Siegel contests the popular assumption that modern equal protection tradition originates from the constitutional principle that government may not classify on the basis of race, and challenges the conventional account that affirming the anticlassification principle entails repudiating antisubordination values. *Id.* at 1533.

Reva B. Siegel, a professor at Yale Law School, argues that the Court has never embraced one understanding to the exclusion of the other.⁸² She demonstrates that antistatutory values are foundational to the modern equal protection tradition⁸³ and explains that the antistatutory principle is an artifact of political struggles over the enforcement of *Brown*.⁸⁴ In effect, antistatutory emerged as a political expedient to express, mask, and limit the antistatutory principle to appease White segregationists who refused to accept its legitimacy.⁸⁵ With respect to affirmative action, the primacy of antistatutory can similarly be attributed in part to liberal legal strategy. Defendant universities in *Grutter*, *Gratz*, and *Fisher* did not attempt any justification aside from the diversity defense; antistatutory justifications were never raised and thus never repudiated by the Court. Though these landmark affirmative action cases endorse antistatutory by upholding the diversity defense as articulated in *Bakke*, they mask—but do not reject—an antistatutory interpretation of the Fourteenth Amendment.⁸⁶

4. Litigate to establish or expand the right to education.

Affirmative action is, in truth, irrelevant to improving the life chances of the great majority of poor minority students. A significant manifestation of the subordination of low-income communities of color is an appallingly inferior K-12 public education that denies students basic literacy and numeracy, let alone the opportunity to be lifted up by affirmative action. Advocates should understand affirmative action as an important piece of a broader antistatutory effort, and work not only to defend its constitutionality but also to increase its potential by addressing underlying inequities. Advocates should bring litigation to expand the right to education where it exists, both by making it more robust and by extending its reach into higher education. Where the right to education does not exist, advocates should work to establish it. Below are examples of settled, ongoing, and potential California litigation to emulate.

The State of California recognizes a fundamental right to education.⁸⁷ From 2000 to 2004, the ACLU of California litigated *Williams v. State of California*,⁸⁸

82. *Id.* at 1537.

83. *Id.* at 1477.

84. *Id.* at 1475.

85. *Id.*

86. Professor Siegel demonstrates how the Court in *Grutter* expanded the concept of diversity to explicitly embrace antistatutory values yet deploys antistatutory discourse to disguise the expression of these values. *Id.* at 1538–40.

87. Cal Const. art. IX, §§ 1, 5. *See also* *Butt v. State*, 842 P.2d 1240 (Cal. 1992) (recognizing a fundamental right to education and holding that the State bears the ultimate responsibility to ensure basic equality of educational opportunity); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (recognizing a fundamental right to education).

88. *Williams v. State*, No. 312236 (Cal. Super. Ct. filed May 17, 2000).

a statewide education equity case asserting that all students in California deserve the basic necessities to access educational opportunity: qualified teachers, sufficient instructional materials, and clean, safe learning environments.⁸⁹ *Williams* argued that the state, by failing to establish and enforce effective baseline educational standards for what constitute minimally required learning conditions and consigning students to try to learn without provision of some or any basic essentials, denied students their right to education.⁹⁰ It resulted in a nearly one billion dollar settlement that legislated standards defining and requiring these basic necessities, implemented an accountability procedure, created a grant program to fund emergency facilities repairs, abolished the year-round school calendar, and mandated an annual monitoring process for the lowest-performing thirty percent of schools in the California. *Williams* established minimum requirements for an adequate public education and improved learning conditions for students across the state.⁹¹

Another case currently being litigated by Public Counsel and the ACLU of California seeks to further expand the right to education. *Cruz et al. v. State of California*⁹² asserts that students attending chronically underperforming, high-poverty, high-minority schools⁹³ receive less meaningful instructional time than other students in California and are thus being denied equal educational opportunity.⁹⁴ *Cruz* argues that numerous factors at plaintiffs' schools, such as widespread failure to timely schedule students into appropriate classes, frequent administrative and teacher turnover, and lockdowns due to violence on or around campus, lead to a cumulative and compounding deprivation of learning time.⁹⁵

89. The plaintiffs in *Williams* asserted that tens of thousands of students throughout the state attended schools with outdated, illegible, and insufficient textbooks; where less than half and as little as thirteen percent of teachers were qualified; and where facilities were filthy, infested with vermin, or otherwise in such disrepair as to pose an urgent threat to students' health and safety. First Amended Complaint for Injunctive and Declaratory Relief 9–10, *Williams v. State*, No. 312236 (Cal. Super. Ct. filed Aug. 14, 2000), available at <http://decentsschools.org/courtdocs/01FirstAmendedComplaint.pdf>. These standard conditions were found at overwhelmingly high-poverty, high-minority schools. *Id.* at 6.

90. *Id.* at 11.

91. See SALLY CHUNG, ACLU OF S. CAL., *WILLIAMS V. CALIFORNIA: LESSONS FROM NINE YEARS OF IMPLEMENTATION* (2013), available at <https://www.aclusocal.org/cases/williams-v-california/nineyears/> (finding significant improvement in learning conditions at the lowest-performing thirty-percent of schools since the first year of settlement implementation).

92. *Cruz v. State*, No. RG14727139 (Cal. Super. Ct. filed May 29, 2014).

93. Plaintiffs' schools are on average over 95% Black and Latino, and over 85% of the students come from low-income households. Proficiency rates in Math at plaintiffs' schools range from 3% to 8%. Proficiency rates in English range from 13% to 25%. See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Preliminary Injunction app. 1, *Cruz v. State*, No. RG14727139 (Cal. Super. Ct. filed February 5, 2015), available at <https://www.aclusocal.org/wp-content/uploads/2015/02/Memorandum-P-and-A-ISO-Motion-for-Preliminary-Injunction-Appendices.pdf>.

94. Class Action Complaint 1, *Cruz v. State*, No. RG14727139 (Cal. Super. Ct. filed May 29, 2014), available at <https://www.aclusocal.org/wp-content/uploads/2014/05/Complaint.pdf>.

95. *Id.* at 1–5.

Cruz asserts that the State's duty to ensure basic educational equality extends to adequately identifying disparate meaningful learning time in its school system and ensuring remediation when schools fall below the statewide norm.⁹⁶ If won, *Cruz* would establish a more robust right to education that explicitly entails a state responsibility to monitor and correct various deprivations of learning time. Students coming of age under *Cruz* and *Williams* would have a better chance of graduating from high school and benefiting from affirmative action.

There is also potential to extend the right to education in California to encompass higher education. In holding that the right to a community college education is not a "fundamental interest," the court in *Gurfinkel v. Los Angeles Community College District*⁹⁷ relied in part on the plaintiff's failure to produce evidence that "a high school education does not adequately prepare a young person to take a rightful place in society and compete in the job market" or indicating that "individuals with community college educations are better able to compete in the work force."⁹⁸ As a wealth of evidence has been established supporting these claims⁹⁹ since the case was decided in 1981, advocates may be able to distinguish *Gurfinkel* and argue that California should recognize a constitutional right to postsecondary education.

Finally, advocates should draw upon existing efforts and scholarship to establish a right to education where it does not yet exist, on both state¹⁰⁰ and federal¹⁰¹ levels.

96. *Id.* at 7.

97. 175 Cal. Rptr. 201 (Ct. App. 1981).

98. *Id.* at 6 n.3.

99. See, e.g., SANDY BAUM, URBAN INST., HIGHER EDUCATION EARNINGS PREMIUM: VALUE, VARIATION, AND TRENDS (2014) (concluding that all postsecondary education yields measurable economic benefits); ANTHONY P. CARNEVALE, NICOLE SMITH & JEFF STROHL, GEORGETOWN PUB. POLICY INST. CTR. ON EDUC. & THE WORKFORCE, RECOVERY: PROJECTIONS OF JOBS AND EDUCATION REQUIREMENTS THROUGH 2020 (2013) (demonstrating that there has been a 14% decrease in jobs for holders of a high school diploma or less since the Great Recession, and projecting that 65% of all jobs will require postsecondary education and training by 2020); TIFFANY JULIAN & ROBERT KAMINSKY, U.S. CENSUS BUREAU ECON. & STATISTICS ADMIN., EDUCATION AND SYNTHETIC WORK-LIFE EARNINGS ESTIMATES (2011) (recognizing a "clear and well-defined relationship between education and earnings"); Mina Dadgar & Madeline Joy Trimble, *Labor Market Returns to Sub-baccalaureate Credentials: How Much Does a Community College Degree or Certificate Pay?*, 20 Educ. & Pol'y Analysis 1 (2014) (finding that AA degrees are associated with higher earnings when compared with the average income of high school graduates); *Employment Projections*, *supra* note 41 (finding that the median weekly income is \$1,101 and unemployment rate is 3.5% for individuals with a bachelor's degree, compared to \$668 and 6.0% for high school graduates); *Remarks of President Barack Obama – As Prepared for Delivery, Address to Joint Session of Congress*, WHITE HOUSE (February 24, 2009), https://www.whitehouse.gov/the_press_office/Remarks-of-President-Barack-Obama-Address-to-Joint-Session-of-Congress/ (stating that "every American will need to get more than a high school diploma").

100. See, e.g., Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 Temple L. Rev. 1325, 1326 (1992) (reviewing efforts of state courts to determine whether education articles in state constitutions contain a legally enforceable guarantee); Josh Kagan, *A Civics Action: Interpreting "Adequacy" in State Institutions' Education Clauses*, 78

CONCLUSION

The diversity defense is unfit for the task of justifying affirmative action. Though valuable for preserving race-consciousness, it does so at a deplorable cost. Diversity subverts the antisubordination principle at the heart of affirmative action. It transforms the purpose of affirmative action from dismantling White supremacy to fortifying the status quo. Continuing to maintain the diversity defense means endorsing the colorblind interpretation of the Fourteenth Amendment articulated by Powell in *Bakke*, subordinating minorities' constitutional claims to institutional autonomy, and prohibiting universities from meaningfully increasing minority enrollment by using race as a decisive factor. Advocates must take steps to move beyond diversity and seek creative ways to reintroduce antisubordination into the fight not just to defend but also to advance affirmative action. One strategic way forward is to embrace a race-neutral approach. Using facially race-neutral criteria would turn the very precedents obstructing the remediation of racial discrimination into protections against conservative attack. Opponents of race-neutral affirmative action could not rely on disparate impact or studies showing racial bias; rather, they would have to demonstrate discriminatory intent to bring a constitutional challenge. Identifying and selecting for acutely racialized deprivations of opportunity would disproportionately benefit minority applicants and enable a more principled system of preferences attentive to disadvantage. Universities could increase minority enrollment by using these race-neutral criteria as decisive factors. At the same time, advocates should not abandon the case for race-conscious admissions. The ultimate goal should be to move towards a jurisprudence that recognizes the constitutionality of race-consciousness and does not require advocates to fight surreptitiously for racial justice. To that end, the diversity defense should not be discarded, but neither should it be left as it stands. For example, the diversity defense could be improved upon by placing the value of

N.Y.U. L. REV. 2241, 2244 (2003) (surveying means of defining and measuring adequacy and arguing for aggressive use of educational inputs).

101. See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 553–54 (1991) (examining several federal constitutional bases for recognizing an affirmative right to education); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–5 (2006) (arguing that the Citizenship Clause of the Fourteenth Amendment authorizes and obligates Congress to ensure a meaningful floor of educational opportunity throughout the nation); Jeannie Oakes, John Rogers, Gary Blasi & Martin Lipton, *Grassroots Organizing, Social Movements, and the Right to High-Quality Education*, 4 STAN. J. C.R. & C.L. 339, 341 (1998) (concluding that establishing education as a fundamental right likely requires activism outside conventional policymaking mechanisms); Michael Salerno, *Reading is Fundamental: Why the No Child Left Behind Act Necessitates Recognition of a Fundamental Right to Education*, 5 CARDOZO PUB. L. POL'Y & ETHICS J. 509, 511–12 (2006) (arguing that the creation of No Child Left Behind should entail federal recognition of the right to education); Thomas J. Walsh, *Education as a Fundamental Right Under the United States Constitution*, 29 WILLAMETTE L. REV. 279, 281 (1993) (advancing possible methods relying on the Fourteenth Amendment's Equal Protection Clause and Due Process Clause to argue the Constitution recognizes education as a fundamental right).

diversity on the inclusion and participation of formerly excluded groups, or by positing the eradication of America's racism as a central educational mission of a university. However, though these improvements are useful as a stopgap measure, they are unlikely to resolve the central infirmities of the diversity defense.

Therefore, advocates should pursue additional strategies to support antisubordination and improve educational opportunities for minority students. Advocates could persuade private institutions to articulate remedial justifications for affirmative action; make findings exposing universities' histories of racially discriminatory policies and practices; shape the equal protection discourse; and litigate to establish or expand the right to education. Only by moving beyond diversity can affirmative action be restored to its purpose of advancing racial justice.