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## White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation

Osamudia James

University of North Carolina School of Law, [ojames@unc.edu](mailto:ojames@unc.edu)

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## ARTICLES

### WHITE LIKE ME: THE NEGATIVE IMPACT OF THE DIVERSITY RATIONALE ON WHITE IDENTITY FORMATION

OSAMUDIA R. JAMES\*

*In several cases addressing the constitutionality of affirmative action admissions policies, the Supreme Court has recognized a compelling state interest in schools with diverse student populations. According to the Court and affirmative action proponents, the pursuit of diversity does not only benefit minority students who gain expanded access to elite institutions through affirmative action. Rather, diversity also benefits white students who grow through encounters with minority students, it contributes to social and intellectual life on campus, and it serves society at large by aiding the development of citizens equipped for employment and citizenship in an increasingly diverse country.*

*Recent scholarship has nevertheless thoughtfully examined the negative effect of the “diversity rationale”—the defense of affirmative action policies based on a compelling interest in diversity—on minority identity when that identity is traded on by majority-white institutions seeking to maximize the social and economic benefits that diversity brings. By contrast, little has been said about whether and how the diversity rationale impacts white identity. Consideration of how the diversity rationale influences white identity formation is particularly timely in light of the*

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*Supreme Court’s most recent pronouncement on affirmative action in Fisher v. University of Texas at Austin.*

*This Article begins to fill that gap, ultimately concluding that the diversity rationale reaffirms notions of racial superiority among Whites. Unlike the jurisprudence of seminal civil rights cases, such as Brown v. Board of Education, that rejected old narratives about the legitimacy of subordinating Blacks, the diversity rationale does not promote progressive thinking about race and identity. Rather, it perpetuates an old story—a story about using black and brown bodies for white purposes on white terms, a story about the expendability of those bodies once they are no longer needed. Moreover, by reinforcing the “transparency” and “innocence” of white racial identity, as well as by emphasizing hyperindividualism, the diversity rationale stunts the development of antiracist white identity.*

*By cultivating white identities grounded in a sense of entitlement and victimhood relative to people of color, the diversity rationale, ironically, perpetuates the subordination of people of color by prompting the elimination of affirmative action programs. It also distracts Whites from addressing the ways in which their own presence at elite institutions of higher education is genuinely undermined, especially in the case of working-class Whites who are consistently underrepresented at such institutions. Given this reality, institutions of higher education committed to diversity must account for the diversity rationale’s effect on Whites through more honest and substantive explanations of the value placed on diversity in admissions.*

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## INTRODUCTION

In an interview about her decision to challenge the University of Texas's (UT) consideration of applicant diversity in its admissions process, Abigail Fisher explained that she was "devastated" by her own rejection from the institution<sup>1</sup>: "I had dreamt of going to UT since the second grade."<sup>2</sup> Although the university insisted that Fisher's application would not have merited admission even if the University did not consider race among some of its applications,<sup>3</sup> Fisher was certain that the sole attribute distinguishing her from her peers of color who were accepted was their skin.<sup>4</sup> Reflecting on the potential outcome of her case, Fisher said she "hop[ed] that [the Supreme Court would] take race out of the issue in terms of admissions and that everyone will be able to get into any school that they want no matter what race they are but solely based on their merit and if they work hard for it."<sup>5</sup>

Fisher insisted that she was cheated out of a seat. She felt that she had done all the work she considered necessary to gain admission to UT.<sup>6</sup> She seemed certain that, unlike the minority student she assumed had taken her place, she genuinely deserved admission, not having benefited from any unearned advantage or privilege in her own life. She seemed never to have considered that her skin color likely ensured a childhood filled with positive representations of people of her own race, a benefit that has been shown to aid children's psychological and emotional development;<sup>7</sup> that subjective assessments made of her intellectual or emotional capacities in school were

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<sup>1</sup> Adam Liptak, *Race and College Admissions, Facing a New Test by Justices*, N.Y. TIMES, Oct. 9, 2012, at A1.

<sup>2</sup> Mike Tolson, *Supreme Court to Take Up UT Admission Case*, HOUS. CHRON. (Oct. 7, 2012), <http://www.chron.com/news/houston-texas/article/Supreme-Court-to-take-up-UT-admission-case-3927014.php>; see also *infra* notes 86–105 and accompanying text (discussing Fisher's suit against UT).

<sup>3</sup> See *infra* notes 47–48, 91–95 and accompanying text (describing UT's admissions process, its consideration of diversity, and Fisher's application).

<sup>4</sup> See Tolson, *supra* note 2 (quoting Fisher as stating that "[t]he only difference between" Fisher and high school classmates who had been admitted to UT with "less polished" résumés "was the color of our skin").

<sup>5</sup> Liptak, *supra* note 1.

<sup>6</sup> Tolson, *supra* note 2.

<sup>7</sup> See Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 291, 293–94, 298 (Richard Delgado & Jean Stefancic eds., 1997) (including in a list of the daily effects of white privilege: "When I am told about our national heritage or about 'civilization,' I am shown that people of my color made it what it is"; "I can be sure that my children will be given curricular materials that testify to the existence of their race"; "I can easily find academic courses and institutions which give attention only to people of my race"; "My children are given texts and classes which implicitly support our kind of family unit").

likely interpreted in ways that enhanced, rather than undermined, her intellectual development;<sup>8</sup> or that skin color likely aided her family's financial stability.<sup>9</sup> She even seemed unaware that the very things she identified as examples of her hard work also demonstrated privilege bestowed on her through no effort of her own. For instance, Fisher was able to participate in extracurricular activities because her family's financial stability likely freed her from the necessity of an afterschool job; she could become a cellist because she had free time for instruction, possibly paid for by her parents; and she could enroll in AP classes because, even though many schools throughout the United States do not offer such courses, the one that she attended did.<sup>10</sup>

Instead, Fisher seemed confident that somebody was erroneously granted the spot in UT's entering class that *belonged to her*. Moreover, to the extent that evaluation of that interloper's application included consideration of racial or ethnic heritage, he or she was admitted unfairly.<sup>11</sup> In media interviews, Fisher presented herself as

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<sup>8</sup> Racial minorities are subject to over-identification for special education, independent of their disproportionate representation among the poor. See Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 415 (2001) (noting that "distortions in the representation of racial groups [in special education programs] cannot be explained simply because minority groups are disproportionately represented among the poor" and that "as factors associated with *wealth increased*, contrary to the expected trend, African American children were *more likely to be labeled 'mentally retarded'*"). Moreover, black school children are underrepresented in "hard" disability categories like deafness or blindness, which are less stigmatizing and most objectively assessed, while overrepresented in disability categories like educable mentally retarded (EMR) or emotionally disturbed, which are more stigmatizing and are assessed more subjectively. See Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1250–52 (surveying statistics relating to the overrepresentation of African American students in special education); Losen & Welner, *supra*, at 416 (discussing how African American children are much more likely to be underidentified in "hard" disability categories than in cognitive disability categories).

<sup>9</sup> See *infra* note 226 (exploring the relative impermanence of minority middle-class status); see also DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 9 (1993) (arguing that racial segregation, particularly residential segregation, is responsible for perpetuating black poverty in the United States); Tara Siegel Bernard, *Blacks Face Bias in Bankruptcy, Study Suggests*, N.Y. TIMES, Jan. 21, 2012, at A1 (describing a study that found Blacks are twice as likely as Whites to end up in the "more onerous and costly form of consumer bankruptcy").

<sup>10</sup> See Tolson, *supra* note 2 (quoting Fisher's description of her academic and extracurricular activities).

<sup>11</sup> The "undeserving minority receives benefits properly belonging to a white person" trope is by no means limited to higher education and has popped up in various contexts, including political campaigns. Consider the 1990 reelection campaign of Senator Jesse Helms, featuring a television commercial in which a white man's hands crumpled up a letter while a voice-over lamented, "You needed that job. And you were the best qualified.

an innocent victim: Some undeserving nonwhite applicant had stolen her seat.<sup>12</sup>

Moreover, Fisher's statements to the media demonstrated neither understanding of why a person of color's academic excellence might convey character or perseverance lacking from her own admission profile, nor insight into the larger societal structures and social phenomena that would justify a university's choice to consider race when assembling an entering class. To quote Peggy McIntosh's insightful recollection of her own racial education, Fisher was taught to see racism "only in individual acts of meanness . . . , never in invisible systems conferring . . . dominance on [her] group from birth."<sup>13</sup> UT offers the product of elite education and, according to Fisher, race and ethnicity should play no part in decisions about how to distribute that commodity.

Even assuming, for argument's sake, a problem with the consideration of race in college and university admissions, Fisher's sense of entitlement to admission at a flagship state university that receives thousands of applications every year might be considered unreasonable.<sup>14</sup> Yet her reaction to her rejection from UT is not surprising. Although characterizations of affirmative action as "reverse discrimination" have intensified in recent years,<sup>15</sup> even the earliest legal chal-

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But they had to give it to a minority because of a racial quota. Is that really fair?" SnakesOnABlog, *Jesse Helms "Hands" Ad*, YOUTUBE (Oct. 16, 2006), <http://www.youtube.com/watch?v=KIyewCdXMzk>; see also Peter Applebome, *The 1990 Campaign: Subtly and Not, Race Bubbles Up as Issue in North Carolina Contest*, N.Y. TIMES, Nov. 2, 1990, at A1 (describing Helms's ad as one in "a blistering, explicitly racial series").

<sup>12</sup> See *infra* notes 94, 259, 289 and accompanying text (discussing Fisher's reaction to her rejection and her portrayal of herself as an innocent victim of racial discrimination).

<sup>13</sup> McIntosh, *supra* note 7, at 298.

<sup>14</sup> In its 2014 survey of undergraduate programs, *U.S. News & World Report* ranked UT forty-sixth in academic reputation among national universities, and sixteenth among public schools. *Rankings & Kudos*, U. TEX. AUSTIN, <http://www.utexas.edu/about-ut/rankings-kudos> (last visited Mar. 13, 2014). With an acceptance rate of less than fifty percent, the school is one of the nation's more selective public institutions. See *University of Texas--Austin*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/university-of-texas-austin-3658> (last visited Mar. 13, 2014) (reporting UT's acceptance rate as 46.8%).

<sup>15</sup> See FRED L. PINCUS, *REVERSE DISCRIMINATION: DISMANTLING THE MYTH*, at x-xi, 3-9 (2003) (describing the widespread perception amongst the white population that affirmative action policies constitute reverse discrimination); William D. Evans, Jr., *Reverse Discrimination Claims: Growing Like Kudzu*, MD. B.J., Jan./Feb. 2004, at 48, 48 (noting that between 1991 and 1996, the percentage of discrimination claims filed with the Equal Employment Opportunity Commission that involved allegations of reverse discrimination almost doubled to 17.1%, and predicting that the trend will continue); *Does Affirmative Action Punish Whites?*, NBCNEWS.COM (Apr. 28, 2009), [http://www.nbcnews.com/id/30462129/ns/us\\_news-life/t/does-affirmative-action-punish-whites](http://www.nbcnews.com/id/30462129/ns/us_news-life/t/does-affirmative-action-punish-whites) (detailing a string of cases in which Whites claimed they were discriminated against in favor of Blacks and Hispanics).

lenges to affirmative action policies demonstrated entitled thinking like Fisher's: If an unqualified nonwhite person had not been unjustly awarded my spot, I surely would have successfully claimed what was rightfully mine.<sup>16</sup>

I argue that this kind of entitled thinking demonstrates a particular, antiprogressive form of white identity development and performance.<sup>17</sup> While identity often refers to a "person's interior sense of self[,] . . . when the context is law and the subject is race . . . the term typically refers to a social relationship, an 'identification with,' a role the person is seen to play in society."<sup>18</sup> Thus, racial identity is also performed: Maintaining an identity requires performances corresponding to symbolic representations evocative of a particular racial or ethnic identity.<sup>19</sup> Identity performance, however, need not always be conscious. The white identity to which I refer above entails the phenomenon of "transparency" naïveté about one's whiteness and its

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<sup>16</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 713 (2007) (providing the example of a high school student who was accepted into a selective program but denied assignment to the school where the program was located because of a "racial tiebreaker"); *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003) (noting the petitioner's argument "that her application was rejected because the [University of Michigan] Law School uses race as a predominant factor," which benefits certain minority applicants to the detriment of "students with similar credentials from disfavored racial groups" (internal quotation marks omitted)); *Gratz v. Bollinger*, 539 U.S. 244, 249–51 (2003) (considering an equal protection challenge to the University of Michigan's use of racial preferences in its undergraduate admissions process); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 277–78 (1978) (recounting the petitioner's allegation that the University of California at Davis Medical School's special admissions policy had the effect of "exclud[ing] him from the school on the basis of his race"). Mathematically, of course, this is not the case. See Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781, 807 n.112 (2006) (noting that affirmative action programs lead to only a modest decrease in white students' chances of being admitted); see also Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002) (exposing the "causation fallacy," the "common yet mistaken notion that when white applicants . . . fail to gain admission ahead of minority applicants with equal or lesser qualifications, the likely cause is affirmative action").

<sup>17</sup> Every individual has "a personal identity and multiple social identities—all of which contribute to one's sense of self." LOUISE DERMAN-SPARKS & JULIE OLSEN EDWARDS, *ANTI-BIAS EDUCATION FOR YOUNG CHILDREN AND OURSELVES* 12 (2010). Personal identity includes factors such as name, age, or talents. Social identity refers to the significant group categorizations assigned to us by the society in which we live. "These include our racial, ethnic/cultural, gender, and religious identities, as well as economic class, geographic identities, and so on." *Id.* Racial identity, in particular, is performed, as identity maintenance requires repetition of culturally intelligible symbolic acts that can evoke a particular racial group. See *infra* notes 182–93 and accompanying text (describing the performance of racial identity).

<sup>18</sup> Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 282–83 (1995).

<sup>19</sup> See *infra* notes 182–93 and accompanying text (discussing and providing examples of racial identity performance).

attendant privileges accompanied by an understanding of race as something that happens to other people<sup>20</sup>—and a perception of Whites as innocent victims in an unfair system that awards handouts to undeserving non-Whites. It also entails a belief that achievement—academic and otherwise—is solely the product of individual work and perseverance and is not also influenced by societal power structures informed by race and ethnicity.

Racial diversity in educational settings imparts important civic and attitudinal lessons that undermine problematic white racial identity performance and enable us to sustain a healthier and more successful democracy.<sup>21</sup> The diversity rationale—the defense of affirmative action policies based on a compelling interest in diversity—thus justifies the use of race-conscious policies in pursuit of this

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<sup>20</sup> See Barbara J. Flagg, “*Was Blind, but Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957, 970 (1993) (“For most whites, . . . to think or speak about race is to think or speak about people of color, or perhaps, . . . to reflect on oneself (or other whites) in relation to people of color. But we tend not to think of ourselves or our racial cohort as racially distinctive.”).

<sup>21</sup> See CATHERINE L. HORN & MICHAL KURLAENDER, *THE END OF KEYES—RESEGREGATION TRENDS AND ACHIEVEMENT IN DENVER PUBLIC SCHOOLS 5* (2006) (observing that students who attend diverse schools report greater levels of comfort with members of racial groups other than their own, and that “White students in integrated settings exhibit more racial tolerance and less fear of their Black peers” than their segregated counterparts); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 745 (1998) (identifying studies “find[ing] that interracial contact in desegregated schools leads to an increase in interracial sociability and friendship”); Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 FORDHAM L. REV. 791, 797 (2005) (observing that black and white students who graduate from desegregated schools are more likely “to attend college, work, and live in desegregated settings”); Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1548 (2003) (discussing research demonstrating that diverse classrooms thwart students’ tendency to rely on learned thinking routines and instead promote more critical thinking); Sharon E. Rush, *Protecting the Dignity and Equality of Children: The Importance of Integrated Schools*, 20 TEMP. POL. & CIV. RTS. L. REV. 73, 76 (2010) (arguing that “integrated schools protect children’s dignity by invalidating the myth of black inferiority and white superiority”). The proper function and purpose of democracy is subject to debate. For the purposes of this Article, however, a healthy and successful democracy is one that is committed to genuine racial equality and shared decisionmaking, and is free from interracial distrust, subordination, and racial disparities in the distribution of societal resources. When the experience of marginalization converges around a particular group, it can “illuminate[ ] imperfections in the democratic structure that were formerly only dimly perceived, and . . . force[ ] a . . . reexamination of the true meaning of American democracy.” LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* 14 (2002) (quoting MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY?* 146 (1968)). For a more detailed analysis of American democracy as being plagued by these three characteristics, see generally DANIELLE S. ALLEN, *TALKING TO STRANGERS: ANXIETIES OF CITIZENSHIP SINCE BROWN V. BOARD OF EDUCATION* (2004) (discussing race, citizenship, and democracy); GUINIER & TORRES, *supra* (discussing a novel approach to racial identity and politics).

worthy goal. What if, however, this legal doctrine, invoked to promote a more vital democracy, ultimately undermines that mission by stunting the formation of antiracist white identity? The plaintiffs in *Fisher v. University of Texas at Austin* did not explicitly ask the Supreme Court to reject the diversity rationale, the legal basis for UT's ability to consider race during its admissions process.<sup>22</sup> Nonetheless, the diversity rationale may be responsible for perpetuating the exact type of white identity performance that inspires such lawsuits and may ultimately undermine the rationale itself.

Substantial literature exists on the impact of law and legal doctrine on racial identity. Indeed, critical legal scholars have examined the impact—both positive and negative—of jurisprudential framing of affirmative action on people of color.<sup>23</sup> What demands further consideration is how this same affirmative action jurisprudence impacts Whites. Other than assertions that affirmative action spurs balkanization or suspicion,<sup>24</sup> critical scholarship considering how this doctrine

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<sup>22</sup> Indeed, if they had, the outcome of the case may very well have been different. Several justices who joined the majority opinion that kept *Grutter* intact nonetheless expressed opposition to the diversity rationale. See *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2422 (2013) (Scalia, J., concurring) (“‘The Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.’ The petitioner . . . did not ask us to overrule *Grutter*’s holding that a ‘compelling interest’ in . . . diversity can justify racial preferences in university admissions. I therefore join the Court’s opinion in full.” (citation omitted)); *id.* (Thomas, J., concurring) (“I write separately to explain that I would overrule *Grutter v. Bollinger*, and hold that a State’s use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause.” (citation omitted)).

<sup>23</sup> See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 258–69 (1998) (challenging arguments about affirmative action programs actually harming the students they purport to help and summarizing reports from beneficiaries of affirmative action programs); STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 50 (1991) (“[T]he durable and demeaning stereotype of black people as unable to compete with white ones is reinforced by advocates of certain forms of affirmative action.”); CHARLES R. LAWRENCE III & MARI J. MATSUDA, *WE WON’T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION* 129–30 (1997) (arguing that “the stigma of racial inferiority predates affirmative action,” and that minorities should recognize white supremacy as “the real source of the stigma and confront it directly”).

<sup>24</sup> See Richard Delgado, *1998 Hugo L. Black Lecture: Ten Arguments Against Affirmative Action—How Valid?*, 50 ALA. L. REV. 135, 147 (1998) (describing and refuting the argument that “affirmative action balkanizes, encouraging people to regard themselves as members of small groups, jealously guarding their positions vis-à-vis each other, rather than simply being Americans”); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1301 (2011) (explaining that “[p]roponents of antibalkanization are concerned that the pursuit of racial justice” through race-conscious remedies “poses threats to community and are prepared to subordinate the pursuit of racial justice to the preservation of social cohesion”); Bruce Goldner, Book Note, 90 MICH. L. REV. 1291, 1294 (1992) (reviewing DINESH D’SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991)) (referring to

impacts white identity development and performance has been scarce. Instead of considering how diversity impacts people of color, or whether diversity benefits white people, this Article asks whether the diversity rationale is bad for white people by undermining the development of antiracist white identity.

Of course, one could ask this same question as it pertains to various strands of equal protection jurisprudence, much of which has resulted in formal, but not substantive, equality.<sup>25</sup> This Article considers the question as applied to the diversity rationale, one of the most widely recognized and commonly invoked justifications for the use of race-conscious measures. Given the Supreme Court's recent reaffirmation of the diversity rationale in *Fisher*, educational institutions will likely continue to invoke diversity as they craft admissions policies.

Furthermore, despite the Supreme Court's current resistance—beyond instances of intentional discrimination—to remedial measures aimed at addressing past and present racial injustices, conscious and unconscious racism persists. More substantive justifications for the use of race in nonremedial contexts should be considered, if only to deepen national dialogue about racism and discrimination in the United States. Accordingly, it is important to examine how institutions of higher education<sup>26</sup> deploy the diversity rationale and how the diversity rationale perpetuates racial subordination through racist white identity, while considering whether it can be utilized in ways

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D'Souza's argument that affirmative action breeds balkanization as minority students seek "to find 'a haven from the anxieties that spring from sharp differences in academic preparation among various racial groups'").

<sup>25</sup> Like the difference between the principles of anticlassification and antisubordination, the difference between formal and substantive equality refers to how the Fourteenth Amendment should be interpreted. An anticlassification or "formal equality" perspective suggests that the Constitution merely prevents the government from reducing an individual to an assigned racial identity for differential treatment. As such, government action that is facially neutral but has a disparate impact on minorities is tolerated. In contrast, an antisubordination or "substantive equality" perspective focuses on protecting members of historically disadvantaged groups from injuries stemming from unjust social stratification. As such, even those government actions that impart a negative impact but are facially neutral must be condemned unless "justified by a weighty public purpose." Siegel, *supra* note 24, at 1287–89; see also Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1063–64 (2011) (noting scholarly debate regarding "whether the Equal Protection Clause should be interpreted to require universal treatment of individuals or guarantee commensurate outcomes for certain subordinate minority groups," and how "[t]his dichotomy . . . has also been historically represented as the difference between the principles of antisubordination and anticlassification, or between the concepts of formal and substantive equality").

<sup>26</sup> Although this Article focuses primarily on the context of public education, this examination is equally important in any context in which a public or private actor pursues diversity.

that advance, rather than retard, racial justice. Ultimately, this Article asks: How can we promote diversity in ways that are not subordinating, but empowering?

In an effort to answer this question, this Article proceeds in three parts. Part I presents the diversity rationale, discussing the genuine importance of racial diversity, explaining how the diversity rationale has successfully expanded access to higher education, and exploring criticisms to which the diversity rationale has been subjected. Part II contemplates how the diversity rationale, as constructed by the Supreme Court, may influence individual identity formation. This Part considers how the Court's affirmative action jurisprudence inspires and perpetuates a destructive form of white "identity performance" that is itself counterproductive to the cause of racial justice. Part III offers preliminary thoughts about how the diversity rationale might be remediated and deployed in ways that encourage the development of antiracist white identities, while preserving a commitment to the compelling goal of racial inclusion in our national institutions.

## I

### THE DIVERSITY RATIONALE

The Supreme Court articulated its diversity rationale for affirmative action policies in a line of cases beginning with *Regents of the University of California v. Bakke*. The Court's pronouncements have relied primarily on utilitarian justifications, rather than social and racial justice arguments, for diversity in higher education. As applied, the diversity rationale has yielded social and political benefits both for minority students admitted after the adoption of race-conscious policies and for the institutions whose student bodies have consequently diversified. Yet the diversity rationale has not been immune to critique. Some scholars have noted that the Court—by recognizing a compelling state interest in diversity rather than a compelling interest in remedying societal discrimination—has allowed policymakers to ignore difficult truths about the nature of enduring racial bias in the United States. Others have questioned whether the diversity rationale's principal beneficiaries are white people and institutions rather than people of color.

#### A. *The Court's Diversity Jurisprudence: Plaintiffs and Problems*

The Supreme Court first discussed diversity as a compelling interest justifying race-conscious admissions policies in higher educa-

tion in 1978.<sup>27</sup> In *Regents of the University of California v. Bakke*, a five-Justice majority held that the University of California at Davis Medical School's admissions policy, which reserved sixteen out of 100 seats in its entering class for disadvantaged and/or minority students,<sup>28</sup> was unconstitutional.<sup>29</sup> Justice Lewis Powell, however, wrote separately to maintain that the state had a legitimate interest in diversity that could be served by considering race or ethnic origin as one of many factors in a competitive admissions process.<sup>30</sup> He explained that a college or university's interest in promoting broad diversity, of which racial diversity is merely one subset, is grounded partly in the academic freedoms that have historically been afforded to institutions of higher education.<sup>31</sup> Yet, in *Bakke*, the diversity rationale was not adopted by a majority of the Court and diversity was not decisively established as a compelling interest justifying consideration of race by institutions of higher education. Fourteen years after *Bakke*, the Fifth Circuit addressed this diversity rationale in *Hopwood v. Texas*.<sup>32</sup>

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<sup>27</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Court struck down the school's race-conscious policy but reversed a lower court ruling that race could never be considered as a factor in admissions. *Id.* at 271–72.

<sup>28</sup> *See id.* at 274–75 (describing the university's "special admissions" procedure for disadvantaged or minority candidates).

<sup>29</sup> Justice Powell provided the fifth vote necessary to hold the admissions program unconstitutional on the basis that it used a quota system, which prevented nonminorities from competing for seats reserved exclusively for minorities, but allowed minorities to compete for every seat in the class. *Id.* at 319–20.

<sup>30</sup> As an example, Powell referenced the Harvard College admissions program, in which race was weighted as a "plus factor" but all applicants were free to compete for all available spots. *Id.* at 316–18.

<sup>31</sup> *See id.* at 311–12 ("[T]he attainment of a diverse student body . . . is a constitutionally permissible goal for an institution of higher education. Academic freedom . . . long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body."). Justice Powell listed several characteristics a school could consider to diversify its class, including "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [and the] ability to communicate with the poor . . ." *Id.* at 317. In the context of equal protection, however, such a broad definition of diversity is meaningless. That is, diversity is meaningful in equal protection analysis only to the extent that suspect or quasi-suspect classifications, such as race, are involved. *See Sharon E. Rush, Beyond Admissions: Racial Equality in Law Schools*, 48 FLA. L. REV. 373, 384–85 (1996) (arguing that an applicant who is diverse under Justice Powell's definition—but who is not a member of a suspect or quasi-suspect class—will be unsuccessful in bringing an equal protection suit because, in such a case, the university's decision will be subject to less rigid scrutiny by the court, and such a decision will almost always be rational). Accordingly, although other types of diversity are important, the focus of this Article is racial diversity because of the strong psychological response race and racial diversity prompts among students and would-be challengers, as well as the author's commitment in this Article to an inquiry framed by current equal protection jurisprudence.

<sup>32</sup> 78 F.3d 932 (5th Cir. 1996), *abrogated by Grutter v. Bollinger*, 539 U.S. 306 (2003).

In the early 1990s, the University of Texas School of Law based its initial admissions decisions on an applicant's "Texas Index" (TI) number—a composite of undergraduate GPA and LSAT scores—which was used to rank candidates and predict law school performance.<sup>33</sup> Yet admissions officers were also permitted to exercise discretion in interpreting the TI scores and to consider factors like the strength of an applicant's undergraduate education, the difficulty of an applicant's major, particular qualities an applicant might bring to the classroom, and an applicant's life experiences and outlook.<sup>34</sup> In an initial sorting based on applicants' TI scores and consideration of these additional factors, the school placed each applicant in one of three categories: "presumptive admit," "presumptive deny," or a "discretionary zone."<sup>35</sup>

After having been rejected from the University of Texas School of Law in 1992, Cheryl Hopwood filed suit claiming that she had been discriminated against in the application process because the "presumptive admit," "discretionary admit," and "presumptive denial" category cut-offs to which her application had been subjected differed according to race.<sup>36</sup> Specifically, the TI ranges used to place black and Mexican American applicants "into the three admissions categories were lowered to allow the law school to consider and admit more of them."<sup>37</sup>

A white mother who hailed from a working-class background,<sup>38</sup> Hopwood had earned a degree in accounting from Montgomery County Community College and a bachelor's degree from California State University-Sacramento.<sup>39</sup> Hopwood's file was downgraded from a presumptive admit to the discretionary zone because the admissions committee believed that her 3.8/4.0 GPA overstated her educational background.<sup>40</sup> According to admissions officials, Hopwood did not attend schools that were academically competitive with those of a majority of other applicants, and she completed the majority of her

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<sup>33</sup> *Id.* at 935.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See Brief for Plaintiffs-Appellants Hopwood and Carvell at 6–7, *Hopwood*, 78 F.3d 932 (No. 94-50664), 1994 WL 16173330 [hereinafter Hopwood Brief] (listing the Index scores of Texas residents for each racial group).

<sup>37</sup> *Hopwood*, 78 F.3d at 936.

<sup>38</sup> Hopwood Brief, *supra* note 36, at 4 & n.4.

<sup>39</sup> Albert H. Kauffman & Roger Gonzalez, *The Hopwood Case: What It Says and What It Doesn't*, in *AFFIRMATIVE ACTION'S TESTAMENT OF HOPE: STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION* 227, 234 (Mildred García ed., 1997).

<sup>40</sup> See Hopwood Brief, *supra* note 36, at 8 n.7 (noting Defendants' testimony that the basis for this downgrade was that Hopwood had attended less academically competitive institutions, including junior colleges, than many of her peer applicants).

work at a junior college.<sup>41</sup> Furthermore, Hopwood filed no letters of recommendation, provided no personal statement, and did not elaborate on her background or skill in response to application questions.<sup>42</sup>

The Fifth Circuit ultimately struck down UT's race-conscious admissions policy in *Hopwood v. Texas*, writing that *Bakke* had not established diversity as a compelling state interest under the Fourteenth Amendment because Justice Powell's opinion in that case had not garnered a majority.<sup>43</sup> Nonetheless, in striking down the UT policy, the court of appeals emphasized the fact that Hopwood was raising a severely disabled child and was married to a member of the Armed Forces,<sup>44</sup> ostensibly to explain how she might contribute to diversity on campus.<sup>45</sup>

Following the Fifth Circuit's decision in *Hopwood*, the Texas Attorney General required all admissions and scholarship policies in the state university system to conform to the appellate court's reasoning.<sup>46</sup> As a result, UT adopted an undergraduate admissions policy that featured a "Personal Achievement Index" (PAI), a number reflecting a "holistic" review of each applicant's "leadership and work experience, awards, extracurricular activities, community service, and other special circumstances . . . ."<sup>47</sup> The PAI was considered in conjunction with the "Academic Index," a number reflecting an applicant's high school class rank, standardized test scores, and high school curriculum.<sup>48</sup>

Despite devoting efforts to several race-neutral initiatives intended to increase enrollment of underrepresented minorities under the new system,<sup>49</sup> minority enrollment nevertheless plummeted. In 1997, for example, African American enrollment dropped almost 40%

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<sup>41</sup> Kauffman & Gonzalez, *supra* note 39, at 234.

<sup>42</sup> *Id.*

<sup>43</sup> See *Hopwood v. Texas*, 78 F.3d 932, 944–45 (5th Cir. 1996) ("Justice Powell's [diversity] argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."), *abrogated by* *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>44</sup> *Id.* at 946.

<sup>45</sup> Indeed, Powell's definition of diversity was broad, encompassing "unique work or service experience" and "a history of overcoming disadvantage." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978).

<sup>46</sup> See Daren Bakst, *Race-Targeted Financial Aid: Untangling the Legal Web*, STUDENT AID TRANSCRIPT, Winter 2000, at 4, 7 (discussing the Texas Attorney General's various interpretations of *Hopwood*); see also *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2415 (2013) (explaining that the new program "was adopted to comply with the *Hopwood* decision").

<sup>47</sup> *Id.* at 2415.

<sup>48</sup> *Id.*

<sup>49</sup> These efforts included an increase in the school's annual recruitment budget and the development of several scholarship programs aimed at recruiting first-generation students

campus-wide.<sup>50</sup> In the law school, black enrollment in the first-year class dropped from thirty-eight students to only four students, while enrollment of Mexican-American students dropped from sixty-four to twenty-six.<sup>51</sup> In response, the Texas Legislature adopted the “Texas Top Ten Percent Plan” (TTP Plan), a policy guaranteeing admission to the state’s flagship public universities for any Texas student who graduated in the top ten percent of their high school class.<sup>52</sup>

During the same year that Hopwood filed suit, the University of Michigan Law School faculty unanimously approved a new admissions policy. Under this policy, each application would undergo individual, “whole-file review,” in which race could serve as one factor in a process that also considered standardized test scores, life experience, and personal background.<sup>53</sup> This review would focus on LSAT score and undergraduate GPA as the general measure of predicted student performance.<sup>54</sup> However, the policy also articulated a commitment to diversity, specifically emphasizing “the inclusion of students from groups which have been historically discriminated against, like African Americans, Hispanics and Native Americans, who without this commitment might not be represented in [the] student body in meaningful numbers.”<sup>55</sup> The policy described the law school’s goal of achieving diversity in terms of attaining a “critical mass” of underrepresented minorities.<sup>56</sup> The school did not specify what number of minority students would constitute a “critical mass,” but it sought to admit enough to create a diverse entering class.<sup>57</sup> Ultimately, in

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and applicants from lower socioeconomic backgrounds. Brief for Respondents at 7, *Fisher*, 133 S. Ct. 2411 (No. 11345), 2012 WL 3245488.

<sup>50</sup> *Id.* at 7–8.

<sup>51</sup> Gerald Torres, *Fisher v. University of Texas: Living in the Dwindling Shadow of LBJ’s America*, 65 VAND. L. REV. EN BANC. 97, 97 (2012).

<sup>52</sup> TEX. EDUC. CODE ANN. § 51.803 (West 2012); *see also* Torres, *supra* note 51, at 98 (describing the creation of the TTP Plan).

<sup>53</sup> THE CIVIL RIGHTS PROJECT, REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES: A JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS 11 (2003), available at <http://civilrightsproject.ucla.edu/legal-developments/legal-memos/reaffirming-diversity-a-legal-analysis-of-the-university-of-michigan-affirmative-action-cases/law-scholars-reaffirming-diversity-2003.pdf>.

<sup>54</sup> Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, in EDUCATION LAW STORIES 83, 86 (Michael A. Olivas & Ronna Greff Schneider eds., 2008).

<sup>55</sup> *Id.* at 87 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 316 (2003)) (internal quotation marks omitted).

<sup>56</sup> *Grutter*, 539 U.S. at 330. Defined by the law school as “meaningful numbers,” “meaningful representation,” and enough so “that underrepresented minority students do not feel isolated or like spokespersons for their race,” Justice O’Connor understood “critical mass” by reference to the educational benefits that diversity is designed to produce, including cross-racial understanding and the breakdown of racial stereotypes. *Id.* at 318–19.

<sup>57</sup> THE CIVIL RIGHTS PROJECT, *supra* note 53, at 11.

keeping with Justice Powell's *Bakke* concurrence,<sup>58</sup> the policy underscored the value of diversity in the classroom, eschewed numerical goals or quotas, and endorsed individual review of each application.<sup>59</sup>

Barbara Grutter applied to the University of Michigan Law School in April 1996, four years after the faculty adopted this new admissions policy.<sup>60</sup> She was placed on the waiting list and ultimately rejected.<sup>61</sup> Grutter concluded that her civil rights had been violated; in her own words, she "truly believed there was discrimination in the U-M process."<sup>62</sup> With the help of the Center for Individual Rights, Barbara Grutter sued the law school, alleging that she had been denied admission because she was white.<sup>63</sup> She explained in a later interview, "I think that I was discriminated against in the admission process, very specifically, because I believe they have different criteria based on race."<sup>64</sup>

A working mother who owned a health care information technology consulting company, Grutter applied to the law school with a 3.81 GPA and high LSAT scores.<sup>65</sup> Hailing from a blue-collar background,<sup>66</sup> Grutter believed she would have added diversity to the entering class and likened her rejection to her earlier encounters with sexism in the workplace.<sup>67</sup> In the complaint she filed in the United States District Court for the Eastern District of Michigan, Grutter claimed that, as a result of the school's racially discriminatory procedures, she had suffered "humiliation, emotional distress, and pain and

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<sup>58</sup> See *supra* notes 29–31 and accompanying text (discussing Justice Powell's concurrence identifying racial diversity as a compelling interest).

<sup>59</sup> Parker, *supra* note 54, at 87.

<sup>60</sup> Liz Cobbs, *Woman in the U-M Bias Suit Holds on to Normalcy*, GRAND RAPIDS PRESS, Apr. 29, 2001, at A25.

<sup>61</sup> *Id.* In May 1997, after being placed on the waitlist, Grutter read a Detroit newspaper article about Republican Michigan state legislators who had been approached by constituents alleging reverse discrimination on account of affirmative action at the university. She recalled this article after her rejection in June 1997, and thus decided to bring suit. *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Complaint at 8, Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928), 1997 WL 34642450.

<sup>64</sup> Elizabeth Brackett, *Admitting Diversity: University of Michigan's Law School*, PBS NEWSHOUR (Aug. 21, 2001), [http://www.pbs.org/newshour/bb/education-july-dec01-diversity\\_8-21](http://www.pbs.org/newshour/bb/education-july-dec01-diversity_8-21).

<sup>65</sup> See Parker, *supra* note 54, at 83 (noting that her LSAT score placed her in the eighty-sixth percentile).

<sup>66</sup> See June Kronholz, *Does a White Mom Add Diversity?—Barbara Grutter Believed She Was a Prime Candidate for Michigan's Law School*, WALL ST. J., June 25, 2003, at B.3 ("She is one of nine children, . . . worked in an inner-city clinic for two years to save money for community college . . . [and] didn't have a college counselor in high school.").

<sup>67</sup> Brackett, *supra* note 64.

suffering,” as well as “economic damages resulting from her inability to proceed with her planned career as a lawyer.”<sup>68</sup>

In deciding her case, *Grutter v. Bollinger*,<sup>69</sup> the Supreme Court formally acknowledged the significance of the academic freedoms that Justice Powell had championed twenty-five years earlier in his *Bakke* concurrence before moving on to assess the Michigan Law School’s admissions policy.<sup>70</sup> Writing for a five-to-four majority, Justice O’Connor endorsed Justice Powell’s view that diversity is a compelling state interest justifying the consideration of race in admissions decisions.<sup>71</sup> The *Grutter* majority further determined that the law school’s policy was acceptable because it was sufficiently narrowly tailored to the purpose of seeking a diverse student body<sup>72</sup>: It allowed for individualized, holistic review of each applicant, considered both racial and nonracial factors, and did not unduly burden nonminority students.<sup>73</sup> The majority also deemed the school’s pursuit of a “critical mass” unproblematic, characterizing it not as a quota, but instead as a goal

<sup>68</sup> Complaint, *supra* note 63, at 8–9.

<sup>69</sup> 539 U.S. 306 (2003).

<sup>70</sup> *Id.* at 330 (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”).

<sup>71</sup> *Id.* at 325.

<sup>72</sup> Under the equal protection framework, heightened scrutiny, in the form of strict scrutiny, is reserved for government action that discriminates on the basis of protected classifications like race and national origin. *See* *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”); *Johnson v. California*, 543 U.S. 499, 505–07 (2005) (holding that both benign and invidious uses of race are subject to strict scrutiny); *Grutter*, 539 U.S. at 326 (observing that all governmental classifications based on race are subject to strict scrutiny); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 223–26 (1995) (same). Under strict scrutiny, governmental action must be narrowly tailored and necessary to achieve a compelling state interest. *See, e.g., Parents Involved*, 551 U.S. at 725–31 (concluding that the school districts’ use of racial classifications in their school assignments was not narrowly tailored because it was tied to racial demographics rather than a particular pedagogic principle); *Grutter*, 539 U.S. at 326 (upholding the pursuit of diversity in higher education as a compelling interest that justifies the consideration of race in the admissions process).

<sup>73</sup> *See Grutter*, 539 U.S. at 341 (explaining that race-conscious admissions programs must not “unduly burden individuals who are not members of the favored racial and ethnic groups” (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 546, 630 (1990) (O’Connor, J., dissenting))). Individualized review proved instrumental to the law school’s success before the Court. The same day that the Court found the law school’s policy sufficiently narrowly tailored to its goal of promoting diversity, the Court heard a companion case, *Gratz v. Bollinger*, in which a young woman named Jennifer Gratz challenged the University of Michigan’s undergraduate admissions policy. 539 U.S. 244, 251–53 (2003). In *Gratz*, the Court struck down the undergraduate admissions policy, which assigned twenty out of an available 150 application points to every minority applicant. *Id.* at 272, 275. Chief Justice Rehnquist explained that this automatic point allocation was inflexible and precluded individualized, holistic assessment. *Id.* at 271–72.

related to the educational benefits of diversity.<sup>74</sup> Finally, in dictum that opponents have aggressively framed as a time-limit for the legitimacy of affirmative action policies in higher education,<sup>75</sup> Justice O'Connor wrote, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."<sup>76</sup>

Representatives from the education and business sectors had filed numerous amicus briefs in *Grutter* encouraging the Court to find a compelling state interest in diversity. Deemed the "[u]tilitarian strand of the coalition" by Tomiko Brown-Nagin, professional and educational institutions—including sixty-six Fortune 500 companies and 3900 colleges and universities—filed briefs in support of the University of Michigan's use of race in pursuit of diversity.<sup>77</sup> The coalition of amici also included prominent individuals, including twenty-nine retired military officers.<sup>78</sup>

These amici remained silent, however, on questions of discrimination or social justice and instead articulated their support for diversity in light of its benefits for American society. General Motors, for example, argued in its brief that the prosperity of the company and American business in general depended on the development of a diverse and well-educated workforce that could compete in a pluralistic and increasingly globalized marketplace.<sup>79</sup> Amicus briefs filed by retired military officers advanced similar claims, arguing that a diverse officer corps served the national interest because diversity reduces racial and ethnic hostilities among officers that otherwise undercut morale and impede military preparedness and effectiveness.<sup>80</sup> Colleges and universities filed briefs arguing that the use of race in pursuit of diversity allowed them to better fulfill their missions.<sup>81</sup> Selective institutions, in particular, argued that diversity allowed them

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<sup>74</sup> *Grutter*, 539 U.S. at 330.

<sup>75</sup> See, e.g., *id.* at 351 (Thomas, J., dissenting) ("I agree with the Court's holding that racial discrimination in higher education admissions will be illegal in 25 years."); Adam Liptak, *Justices Take Up Race as a Factor in College Entry*, N.Y. TIMES, Feb. 22, 2012, at A1 (noting that the Supreme Court expected *Grutter* to last for 25 years).

<sup>76</sup> *Grutter*, 539 U.S. at 343.

<sup>77</sup> Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1463–64 (2005).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1464 (citing Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 12–19, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399096).

<sup>80</sup> *Id.* at 1465 (citing Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 13–18, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 1787554).

<sup>81</sup> E.g., Brief of Amici Curiae Columbia University et al. in Support of Respondents at 2, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 399094.

to train students to become productive members of a pluralist society and multi-racial economy.<sup>82</sup> The Association of American Law Schools argued that a diverse student body produces lawyers who can better serve their clients and the public.<sup>83</sup>

In embracing the diversity rationale and affirming diversity as a compelling state interest, the *Grutter* Court relied heavily on the benefits touted by these amici. Justice O'Connor reasoned that diversity in higher education promotes cross-racial understanding and improves classroom discussions, while also enhancing preparation for work and society, training for the nation's leaders and military, and preparation for citizenship.<sup>84</sup> Yet Justice O'Connor ignored arguments advanced by other amici: social justice intervenors whose briefs explained how universities' reliance on admissions criteria that disproportionately disadvantage people of color necessitated race-conscious policies to ensure that people of color were admitted to those institutions.<sup>85</sup>

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<sup>82</sup> *E.g.*, Brief for Indiana University as Amicus Curiae Supporting Respondents at 7, *Grutter*, 539 U.S. 306 (No. 02-241).

<sup>83</sup> Brown-Nagin, *supra* note 77, at 1465 (citing Brief of Ass'n of American Law Schools in Support of Respondents at 10–14, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399076).

<sup>84</sup> *Grutter*, 539 U.S. at 331.

<sup>85</sup> A coalition of intervenors—including United for Equality and Affirmative Action (UEAA), Law Students for Affirmative Action (LSAA), and the Coalition to Defend Affirmative Action, Integration & Immigrant Rights and Equality by Any Means Necessary (BAMN)—argued that admissions officers' excessive reliance on standardized tests (like the ACT and the SAT) was the linchpin in a racial caste system that relegated Blacks and Hispanics to inferior schools and jobs, and that perpetuated de facto segregation and discrimination in public schools and the workforce. *See* Brown-Nagin, *supra* note 77, at 1458–61 (citing Brief for Respondents Kimberly James et al. at 40–42, *Grutter*, 539 U.S. 306 (No. 02-241), 2003 WL 716302). The reason for Justice O'Connor's failure to respond to their arguments and instead remain silent on racial and social justice matters remains unclear. Her silence, however, in the face of these concerns may have resulted from her *own* white privilege and insulation from the effects of institutional racism and discrimination. *See, e.g.*, Herman Schwartz, *O'Connor as a 'Centrist'? Not When Minorities Are Involved*, L.A. TIMES, Apr. 12, 1998, at 2, available at <http://articles.latimes.com/1998/apr/12/opinion/op-38686> (noting that outside of cases decided unanimously, or by a margin of eight to one or seven to two, between 1981 and 1998, O'Connor voted against the minority litigant in all but two of the forty-one close cases implicating race). Indeed, the only member of the Court to address social justice concerns in *Grutter* was Justice Thomas. In his dissent, Thomas characterized the University of Michigan Law School's admissions system as “an exclusionary admissions system that it knows produces racially disproportionate results,” and noted that standardized tests are a “poor substitute for a system that gives every applicant a chance to prove he can succeed in the study of law.” *Grutter*, 539 U.S. at 350, 367 (Thomas, J., dissenting). Thomas further explained that universities realize that Blacks as a group perform poorly on standardized tests and still insist on using them, only to have to “correct” for black underrepresentation in the pool of applicants singled out for high test scores via affirmative action policies. *Id.* at 369–70. He characterized merit admission at the nation's elite institutions as, ultimately, a lie. *See id.* at 367–68 (“The rallying cry that in the absence of racial discrimination in admissions there would be a true

Following *Grutter*, the state now has a compelling interest in pursuing diversity that justifies narrowly-tailored race-conscious remedies, at least in the context of public higher education. The Court's ruling in *Grutter* also seemed to insulate from judicial challenge higher education admissions policies that consider race as just one factor of many in reviewing applications for admission.<sup>86</sup> Nevertheless, in 2012, just nine years after *Grutter*, Abigail Fisher filed her lawsuit directly challenging the consideration of race in admissions decisions at the University of Texas, yielding the Court's latest pronouncement on the diversity rationale. The University of Texas had developed the admissions policy to which Fisher's application was subject in the years following Cheryl Hopwood's challenge and UT's adoption of the TTP Plan. Although the Plan had helped prevent complete retrenchment in terms of diversity on campus, racial isolation still plagued the campus: A University study found that ninety percent of classes with five to twenty-four students had one or zero African American students enrolled.<sup>87</sup>

Accordingly, after the *Grutter* Court sanctioned the pursuit of diversity as a compelling interest justifying the consideration of race in admissions, UT adopted a new policy allowing consideration of race for students not admitted under the TTP Plan.<sup>88</sup> Like the University of Michigan Law School policy upheld in *Grutter*, the UT policy maintained a commitment to individualized review—an applicant's race was only one of several factors considered.<sup>89</sup> The policy also called for periodic evaluation of this race-conscious admissions practice.<sup>90</sup>

This is where UT's admissions policy stood when Abigail Fisher entered her senior year of high school. Fisher applied to UT in 2008 with a 3.59 GPA (on a 4.0 scale) and a score of 1180 (out of 1600) on the SAT.<sup>91</sup> Based on Fisher's profile, her application was given a PAI score of less than six (out of six) and an Academic Index (AI) of 3.1

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meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to 'merit.'").

<sup>86</sup> *Grutter* is also thought to extend to other policies in higher education, including minority-targeted aid and college preparation programs, although the programs have nevertheless been subject to litigation alleging noncompliance with the dictates of *Grutter*. For a more detailed discussion of the extension of the *Grutter* ruling to minority-targeted aid, see generally Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851 (2010).

<sup>87</sup> Torres, *supra* note 51, at 98–99.

<sup>88</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2416 (2013).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 2434 (Ginsburg, J., dissenting); see also Torres, *supra* note 51, at 100 (noting that UT subjected its admissions program to “systematic periodic review to ensure that it was still fitted to the ends for which it was designed”).

<sup>91</sup> Brief for Respondents, *supra* note 49, at 15.

(on a 4.0 scale).<sup>92</sup> Ultimately rejected by the University, and having missed the cut-off for the TTP Plan,<sup>93</sup> Fisher matriculated at Louisiana State University.<sup>94</sup> University of Texas officials noted that Fisher would have been rejected even if race had played no role in the process: Even if she had received a “perfect” PAI score of 6, her combined PAI/AI score was simply too low for admission.<sup>95</sup>

Fisher, however, argued that UT’s focus on diversity was not tied to “enhanc[ing] the educational value” of the campus, but was instead unconstitutionally focused on racial balancing.<sup>96</sup> She also claimed that UT’s pre-*Grutter* admissions policy had generated “substantial and growing levels of Hispanic and African-American enrollment,”<sup>97</sup> rendering a race-conscious policy unnecessary and thus violating the Court’s strict-scrutiny standard.<sup>98</sup>

The Supreme Court could have used Fisher’s challenge to significantly curtail, or overrule altogether, the pursuit of diversity as a compelling interest that justifies the narrowly tailored use of race in

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<sup>92</sup> *Id.* at 15. Fisher’s actual PAI score is contained in a sealed brief. *Id.* The PAI score is based on two essays and a Personal Achievement Score (PAS). *Id.* at 13. Trained readers review the essays on a race-blind basis, but the PAS score “is based on holistic consideration of six equally-weighted factors: leadership potential, extracurricular activities, honors and awards, work experience, community service, and special circumstances.” *Id.* The “special circumstances” factor is measured by consideration of seven different attributes, including the applicant’s socioeconomic status and race. *Id.* As articulated by the University, race is “a factor of a factor of a factor of a factor” in this holistic review. *Id.* (internal quotation marks omitted). The University does not assign any “automatic advantage or value” to race or any other PAS factor. *Id.* at 14. Rather, “[e]ach applicant is considered as a whole person,” and race, like all other factors considered, is examined contextually. *Id.* (citations omitted).

<sup>93</sup> See Second Amended Complaint For Declaratory, Injunctive, and Other Relief ¶ 10, *Fisher v. Univ. of Tex. at Austin*, 645 F. Supp. 2d 587 (W.D. Tex. 2009) (No. 1:08-cv-00263-SS), 2008 WL 7318510 (describing how Fisher ranked eighty-two out of 674 students, putting her approximately at the top twelve percent of her graduating high school class).

<sup>94</sup> Tolson, *supra* note 2. Fisher noted that she was “devastated” by a rejection from the university on which she had her heart set—the university that her father and sister had also attended. Liptak, *supra* note 1. Although she successfully graduated from Louisiana State University and currently works as a financial analyst, she nevertheless maintains that she was injured by exclusion from the UT network of graduates, which “would have been a really nice thing to be in.” *Id.*

<sup>95</sup> Brief for Respondents, *supra* note 49, at 15–16 (noting that because of “stiff competition” in the admissions process and her “relatively low AI score,” Fisher “would not have been admitted to the Fall 2008 freshman class even if she had received a perfect PAI score of 6” (citations omitted) (internal quotation marks omitted)); Liptak, *supra* note 1; Tolson, *supra* note 2.

<sup>96</sup> Brief for Petitioner at 27, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2012 WL 1882759.

<sup>97</sup> *Id.* at 35.

<sup>98</sup> *Id.* at 35–36.

admissions.<sup>99</sup> The Court, however, left the diversity rationale undisturbed,<sup>100</sup> and instead emphasized that courts should pay no deference to universities' assertions regarding their use of race in admissions decisions.<sup>101</sup> Rather, courts themselves must subject race-conscious admissions policies to strict scrutiny and ensure that quota systems are not used,<sup>102</sup> that race is not the defining justification for a particular applicant's admission,<sup>103</sup> that consideration of race is "necessary,"<sup>104</sup> and that there are no "workable race-neutral alternatives" that could "produce the educational benefits of diversity."<sup>105</sup>

Uncertainty remains, however, about the extension of the diversity rationale to other educational settings. In the elementary and secondary school context, for example, it is unclear whether the diversity rationale justifies race-conscious school assignments intended to integrate public schools. The Court circumvented this question in the 2008 case *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>106</sup> At issue were the Seattle, Washington, and Louisville, Kentucky, school districts' decisions to implement controlled-choice school assignment plans designed to maintain integrated schools and promote equal access to the cities' competitive schools.<sup>107</sup>

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<sup>99</sup> Indeed, it is arguable that a desire to overrule *Grutter* is what motivated the Court to grant certiorari in *Fisher*, given how carefully the UT policy seemed to mirror the University of Michigan's admissions policy upheld in *Grutter*, and given the standing issues in the case. See Torres, *supra* note 51, at 100 ("Viewed from a purely legal perspective, it is difficult to understand why the Supreme Court decided to hear the [*Fisher*] case . . . . The holistic review process put in place by the University of Texas is clearly within the University of Michigan Law School admissions framework . . . approved . . . in *Grutter v. Bollinger*."). Not only had Fisher already graduated from another university, making unavailable any type of redress from the University of Texas, but UT officials noted that she was unlikely to have been granted admission, even if race were not considered. See *supra* note 92 and accompanying text (discussing the limited influence of race in the admissions process). Although the standing question remains unresolved (the Court declined to address it at all in its opinion), the Court may have been concerned with the university's use of a race-conscious initiative in addition to the TTP Plan (which had yielded high levels of diversity) on the grounds that it was unnecessary and thus ran afoul of the narrow tailoring requirements. See *Fisher*, 133 S. Ct. at 2416 (describing the change to the university's admissions program leading to the decision); see also *id.* at 2419–20 (discussing the requirement of narrow tailoring set forth in *Bakke*).

<sup>100</sup> See *Fisher*, 133 S. Ct. at 2418 ("To be narrowly tailored, a race-conscious admissions program' . . . must 'remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" (quoting *Grutter v. Bollinger*, 539 U.S. 306, 334, 337 (2003)).

<sup>101</sup> *Id.* at 2420.

<sup>102</sup> *Id.* at 2418.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 2420 (citations omitted) (internal quotation marks omitted).

<sup>105</sup> *Id.* (citations omitted) (internal quotation marks omitted).

<sup>106</sup> 551 U.S. 701 (2007).

<sup>107</sup> *Id.* at 710, 715–16, 725. Once schools became oversubscribed by a particular race, the school districts considered race, along with other factors—such as sibling attendance and

In an opinion striking down both plans as unconstitutional, the Court declined to directly address the presence of a compelling interest in pursuing diversity, holding instead that—given the goals and details of the controlled choice plans—the case was not actually governed by *Grutter*.<sup>108</sup> Moreover, the Court carefully qualified its description of the *Grutter* holding, noting that “[t]he specific interest found compelling in *Grutter* was student body diversity ‘in the context of higher education.’”<sup>109</sup>

### B. *The Importance of Diversity*

Notwithstanding the Supreme Court’s failure to recognize the remediation of societal discrimination or the pursuit of social justice as compelling interests that justify race-conscious admissions policies, its commendation of diversity is not entirely misplaced. To the contrary, the pursuit of diversity not only benefits the students for whom it expands access to institutions of higher education, but also has the potential to improve classroom interactions on college and university campuses.

It is undeniable that the diversity rationale benefits the minorities who, as a result of its deployment and legitimacy, enjoy broadened access to elite institutions. In *The Shape of the River*, William Bowen

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distance from home—when making final school assignments. *See id.* at 711–12 (describing how the Seattle school district uses these factors as “tiebreakers”); *see also* Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 278 (2007) (same).

<sup>108</sup> *See Parents Involved*, 551 U.S. at 723, 725 (“The present cases are not governed by *Grutter*.”). A plurality of the Court, consisting of Justices Roberts, Scalia, Thomas, and Alito, also declined to consider whether reducing racial isolation in the K–12 context is a compelling interest that can justify race-conscious school assignment plans, explaining that even if states had a compelling interest in combatting isolation, the controlled choice plans were an insufficiently narrowly tailored response. *Id.* at 723, 727 (plurality opinion).

<sup>109</sup> *Id.* at 722 (emphasis added) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003)). Justice Kennedy, however, wrote separately in *Parents Involved* to note that it was permissible for state and local school authorities to “consider the racial makeup of schools and to adopt general policies to encourage a diverse student body, one aspect of which is its racial composition.” *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment). In doing so, he agreed with four dissenting justices who recognized diversity as a compelling interest in the K–12 context. *Id.* at 842 (Breyer, J., dissenting). This position was followed by the U.S. Department of Justice, which has provided guidelines for school districts attempting to achieve diversity and decrease racial isolation in schools. *See* U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 6 (2011), available at <http://www.justice.gov/crt/about/edu/documents/guidanceelem.pdf> (outlining approaches to diversity that do not rely on racial classification, including strategic school site selection, grade realignment and feeder patterns, zoning, and inter- and intra-district transfers). Whether Kennedy and the four dissenting justices, however, will ever produce a unified majority opinion on this question remains to be seen.

and Derek Bok documented the benefit to minorities of access to academically selective colleges and universities as facilitated by race-conscious admission policies.<sup>110</sup> Their list of such benefits includes high graduation rates;<sup>111</sup> the emergence of a black and Hispanic middle class that has not only diversified major businesses, but also improved services and representation for traditionally underserved communities;<sup>112</sup> higher employment rates and representation in professions such as law and medicine;<sup>113</sup> an earnings premium in whatever sector of employment they have chosen;<sup>114</sup> and a high degree of satisfaction with their college experiences.<sup>115</sup> Bowen and Bok's research demonstrates that the *Grutter* amici were right to conclude that racial diversity in the military, in police forces, and in federal, state, and local leadership is in the public interest because it helps ensure the right of minorities to participate in, and be served by, their democracy.<sup>116</sup>

Furthermore, in education, as in other contexts, minority students are not the sole beneficiaries of diversity. As Justice O'Connor explained in *Grutter*, racial diversity improves the overall atmosphere of a college campus, positively impacting classroom interactions and academic outcomes for all students.<sup>117</sup> Similarly, in an amicus brief filed in *Fisher*, the American Educational Research Association (AERA), a sociological research group, explained that diversity in the student body promotes cross-racial understanding and reduces prejudice; leads to improvements in students' cognitive abilities, critical thinking, and self-confidence; promotes civic engagement and leadership; and improves classroom discussion.<sup>118</sup> Not surprisingly,

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<sup>110</sup> BOWEN & BOK, *supra* note 23. *The Shape of the River* draws on a forty-year longitudinal study of more than "eighty thousand undergraduate students who matriculated at twenty-eight academically selective colleges and universities in the fall of 1951, the fall of 1976, and the fall of 1989." *Id.* at xxvii–xxviii. The book, which is empirical in nature, has been described as "perhaps the most influential volume on the subject" and has been lauded for "the standards of breadth and statistical professionalism . . . achieved." Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 935 & n.26, 940 (2001) (internal quotation marks omitted).

<sup>111</sup> BOWEN & BOK, *supra* note 23, at 88.

<sup>112</sup> *Id.* at 116.

<sup>113</sup> *Id.* at 152–53.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 216.

<sup>116</sup> See *supra* notes 79–83 (citing amici in *Grutter* who outlined the positive impacts of racial diversity).

<sup>117</sup> *Grutter v. Bollinger*, 539 U.S. 306, 330–31 (2003).

<sup>118</sup> Brief of the American Educational Research Association et al. as Amici Curiae in Support of Respondents at 6–17, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345), 2003 WL 398292 [hereinafter AERA Brief].

“[s]tudents in diverse classrooms . . . benefit from the experience of incongruity or dissonance, which . . . [encourages] them to seek new information and create new thought patterns in order to make sense of their surroundings. This experience leads to enhanced intellectual stimulation and increases cognitive growth.”<sup>119</sup>

In the absence of racial diversity, people of color on predominantly white campuses often experience racial isolation,<sup>120</sup> which typically results in both overt discrimination and “microaggressions”—the “brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative . . . slights and insults to [a minority] person or group.”<sup>121</sup> Indeed, there is a distinct benefit to combating racial isolation by enrolling a “critical mass” of minority students. Black and Latino students enrolled in institutions where they are not significantly underrepresented and do not feel alone are more likely to feel welcome and respected as members of the school community.<sup>122</sup>

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<sup>119</sup> UNIV. OF N.C. CTR. FOR CIVIL RIGHTS, THE SOCIOECONOMIC COMPOSITION OF THE PUBLIC SCHOOLS: A CRUCIAL CONSIDERATION IN STUDENT ASSIGNMENT POLICY 14 (2005).

<sup>120</sup> As defined by the American Educational Research Association in their amicus briefs to the Supreme Court in the *Fisher* case, racial isolation occurs when universities have “large numbers of classes in which there are no students—or only a single student—of a given underrepresented race or ethnicity.” AERA Brief, *supra* note 118, at 18.

<sup>121</sup> *Id.* at 20–21 (alteration in original) (quoting DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION 5 (2010)) (internal quotation marks omitted); see also Janice McCabe, *Racial and Gender Microaggressions on a Predominantly-White Campus: Experiences of Black, Latina/o and White Undergraduates*, 16 RACE, GENDER & CLASS J. 133, 134–35 (2009) (explaining “microaggressions” as “brief, subtle and stunning encounters that are a frequent occurrence in the lives of subordinated groups and that impact views of the self” (internal quotation marks omitted)). Take, for example, a video produced by black students at UCLA School of Law in February of 2014. Titled “33,” the video describes the racial hostility and isolation black students experience in being one of only thirty-three black students out of a law school population of 1100. One student noted that she was “so tired of being on . . . campus everyday and having to plead [for her] humanity.” Rhonesha Byng, *Video Shines Light on the ‘Disturbing Emotional Toll’ of Being Black at UCLA Law School*, HUFFINGTON POST (Feb. 14, 2014, 12:20 PM), [http://www.huffingtonpost.com/2014/02/14/ucla-law-school-diversity\\_n\\_4789763.html](http://www.huffingtonpost.com/2014/02/14/ucla-law-school-diversity_n_4789763.html). Similarly, in March 2014, students of color at Harvard presented a play titled *I, Too, Am Harvard*, detailing the often difficult experience of being a person of color on Harvard’s campus. Promotional images for the play included students pictured with the racially insensitive and humiliating remarks often made to them by their peers, including, “Don’t you wish you were white like the rest of us?” and, “Can you read?” Bethonie Butler, *‘I, Too, Am Harvard’: Black Students Show They Belong*, WASH. POST (Mar. 5, 2014, 4:00 PM), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/03/05/i-too-am-harvard-black-students-show-they-belong/>.

<sup>122</sup> See William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the Fisher Case*, 39 J.C. & U.L. 53, 55–56 (2013) (analyzing data from the University of California to show that lesser diversity causes African American and Latino students to

Of course, as the *Grutter* amici made clear, the benefits from diversity extend beyond just students<sup>123</sup>: The diversity rationale has great utility for institutions as well. To the extent that institutions implement remedial efforts to address underrepresentation based on demographics, the diversity rationale's focus on inclusion potentially frees institutions from the demographic caps that can accompany remedial interests.<sup>124</sup> Accordingly, an institution is not forced to suspend focus on a minority group just because proportional representation of that group in an institution implies that prior discrimination has been remedied.<sup>125</sup> In addition, the diversity rationale *does* allow—indeed it encourages—institutions not only to consider racial minorities, but any historically disadvantaged group in the admissions process; these broader policies are politically palatable to the public.

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feel less respected by their peers, and observing that the threat of racial isolation should not be minimized or overlooked). Interestingly, diversity can also decrease intragroup minority bias, which cultivates social equality not because it challenges the attitudes of Whites, but because it enhances solidarity and cohesion among minority groups. See Nicholas A. Bowman & Tiffany M. Griffin, *Secondary Transfer Effects of Interracial Contact: The Moderating Role of Social Status*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 35, 42 (2012) (positing that, while more research is necessary, minority group cohesion most likely stems from in-group pride rather than from out-group bias).

<sup>123</sup> See *supra* notes 79–83 and accompanying text (describing the positive professional and societal benefits that stem from the diversity rationale).

<sup>124</sup> As illustrated by oral argument before the Supreme Court in *Fisher*, however, diversity has subjected institutions to entirely new lines of challenges and questioning regarding the empirical parameters of “critical mass,” and how, if not by demographic caps, an institution concludes it has enrolled a critical mass of minorities at its campus. Transcript of Oral Argument at 34–46, *Fisher*, 133 S. Ct. 2411 (No. 11-345) (documenting questions posed by the Justices about the idea of a critical mass, including: “How do they figure out that particular classes don’t have enough?”; “What is that number? What is the critical mass of African Americans and Hispanics at the University that you are working toward?”; “Does critical mass vary from group to group? Does it vary from state to state?”; “[M]y job . . . [is] to determine if your use of race is narrowly tailored to a compelling interest. The compelling interest . . . is attaining a critical mass of minority students at [UT], but you won’t tell me what the critical mass is. How am I supposed to do the job . . . ?”; “What is the logical end point? When will I know that you’ve reached a critical mass?”).

<sup>125</sup> Nevertheless, the *Fisher* challenge centered in part on the very question of whether “enough” minorities had already been admitted under UT’s race-neutral admissions policy such that the policy was no longer significantly narrowly-tailored. See *supra* note 97 and accompanying text (claiming the race-neutral policy had created “substantial and growing levels of” minority enrollment). Similarly, finding that voter turnout and registration rates were approaching “parity,” that blatantly discriminatory evasions of federal decrees are rare, and that “minority candidates hold office at unprecedented levels,” the Supreme Court in 2013 struck down Section 4 of the Voting Rights Act as unconstitutional because the formula used as a basis for subjecting jurisdictions to preclearance did not adequately reflect changes in state voting procedures. *Shelby County v. Holder*, 133 S. Ct. 2612, 2625–28 (2013) (quoting *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009)) (internal quotation marks omitted).

### C. Critiques of the Diversity Rationale

Even though diversity does provide such clear benefits for students, schools, and society, the diversity rationale, rightly, has not been immune to criticism. It has been challenged for failing to genuinely advance racial justice, for primarily benefiting white institutions instead of students of color, for legitimizing admissions policies that favor the privileged, and for potentially pitting minority groups against each other.

Consider, for example, what the Court ignored in *Grutter* and its companion case, *Gratz*,<sup>126</sup> by sanctioning diversity as a compelling state interest while failing to recognize the remediation of societal and de facto discrimination as similarly compelling. In those cases, the Court eschewed remedial interests in an attempt to mitigate the burden that remedial policies might impose on a white majority,<sup>127</sup> while ignoring the continuing societal bias faced by minorities.<sup>128</sup> This failure prompted the late Professor Derrick Bell to note that a focus on diversity allows courts and policymakers to avoid truths about past and enduring racial discrimination. As Bell explained, rather than accept these truths as justification for a remedial interest in affirmative action that would benefit minorities, policymakers tout and courts uphold diversity as a compelling interest because of diversity's benefit to *Whites*.<sup>129</sup> As such, minorities are merely "fortuitous beneficiaries" of a policy goal that is subject to change when the majority asserts different priorities.<sup>130</sup>

A related but distinct critique of the diversity rationale questions who the ultimate beneficiaries of diversity actually are. Although General Motors, in its amicus brief in *Grutter*, based its interest in

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<sup>126</sup> See *supra* note 73 (discussing *Gratz v. Bollinger*, which found that the University of Michigan undergraduate admissions policy was not narrowly tailored enough in promoting the compelling state interest in diversity).

<sup>127</sup> See *infra* notes 279–88 and accompanying text. The Court has repeatedly characterized remedial remedies as unfair, given their impact on "innocent" Whites. *E.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978).

<sup>128</sup> This willful ignorance is well illustrated by the fact that only two Justices were willing to concur with Justice Ginsburg's account of enduring societal racial bias in *Gratz*. See *Gratz v. Bollinger*, 539 U.S. 244, 298–302 (2003) (Ginsburg, J., dissenting) (describing the racial disparities in poverty, employment, education, and healthcare).

<sup>129</sup> Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1625 (2003).

<sup>130</sup> *Id.* Bell describes the rationale underlying Justice O'Connor's vote as a "prime example" of his interest-convergence theory, which posits that, regardless of the harm Blacks suffer due to racial hostility and discrimination, they will not obtain meaningful relief until the consequences or the interests served by that relief furthers the interests of the dominant sector of society—that is, until the interests of the minority and the majority align. *Id.*; see also Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980) (describing Interest-Convergence theory).

diversity in part on the purchasing powers of the minority populations to which it needed to be responsive, the continuing existence of workplace discrimination and segregation<sup>131</sup> make it arguable that the economic benefits of diversity inure primarily to Whites in the United States.<sup>132</sup> That is, diversity brings minorities into predominantly white institutions primarily for white benefit and not necessarily for the benefit of minorities themselves.<sup>133</sup> In the education context, others have similarly argued that diversity is heralded primarily to benefit white institutions so that white institutions can be successfully promoted as

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<sup>131</sup> See, e.g., Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 92–93 (2003) (laying the groundwork for a legal theory that accounts for discrimination in the modern workplace, where discrimination is no longer overt racism and segregation, but rather takes the form of social interaction, perception, evaluation, and disbursement of opportunity); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 460–61 (2001) (documenting the existence of overt as well as subtle forms of workplace inequity and proposing a structural regulatory solution to address the problems of the latter).

<sup>132</sup> Like institutions of higher education, companies that adopt diversity policies often enjoy enhanced institutional reputation, social capital, and cultural capital. See Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 425–27 (2008) (noting, in addition to the social argument in favor of diversity, that “[t]he market arguments in favor of diversity are compelling,” including improved stock performance, corporate reputation, employee recruitment, and employee retention); Patrick S. Shin & Mitu Gulati, *Showcasing Diversity*, 89 N.C. L. REV. 1017, 1053 (2011) (documenting how diversity has become a matter of corporate strategy, even as negative attitudes toward minority groups remain pervasive and persistent); Kathleen B. Nalty, *Achieving Sustainable Diversity: Colorado’s Approach to the Inclusion Dilemma*, LAW PRAC., June 2008, at 50, 51 (considering the benefits of inclusiveness, including increased productivity and enhanced competitiveness, more competitive client development and retention, and enhanced reputation in the market). Ultimately, workplace diversity and inclusiveness are important and worthy labor goals. Given, however, the continuing psychological and economic toll of workplace segregation and discrimination on minorities, it is reasonable to wonder whether companies ultimately enjoy the better end of the bargain.

<sup>133</sup> In this sense, corporate support for diversity is reminiscent of corporate support for Blacks in *The Space Traders*, Derrick Bell’s science-fiction fable in which extraterrestrial visitors to the United States offer to solve the country’s economic, energy, and environmental problems in exchange for the country’s black population. In Bell’s story, America’s corporate leaders publicly oppose the trade because Blacks represent a disproportionate segment of the market relative to their income and because businesses that profit from the incarceration of Blacks would lose money. These corporate leaders also oppose the trade because Blacks were crucial to stabilizing the economy in spite of continued economic disparities: Potential opposition from those on the bottom was deflected by the continuing efforts of poor Whites to ensure that they at least remained ahead of Blacks. Although Blacks in Bell’s fable surely benefitted from corporate advocacy in their favor, their long-term interests were nevertheless discounted. DERRICK BELL, *The Space Traders*, in *FACES AT THE BOTTOM OF THE WELL* 158 (1992); Werocknetwork, *Space Traders (Derrick Bell’s Movie)*, YOUTUBE (Mar. 8, 2012), <http://www.youtube.com/watch?v=K0BtFWwH0mQ>; see also Adrien Katherine Wing, *Space Traders for the Twenty-First Century*, 11 BERKELEY J. AFR.-AM. L. & POL’Y 49 (2009) (examining Derrick Bell’s parable and using a similar framework to assess contemporary race relations and Barack Obama’s election).

diverse, thus enhancing their institutional reputation, social capital, and cultural capital.<sup>134</sup>

Critiques of the diversity rationale also focus on the standardized testing regime to which the pursuit of diversity, at least in part, is meant to be responsive. As Justice Thomas has observed, diversity-based affirmative action policies allow colleges and universities to mitigate the exclusionary impact that standardized tests have on minority applicants.<sup>135</sup> Accordingly, focusing on diversity permits these institutions to broaden access to minority students while continuing to bestow undeserved legitimacy on grades and test scores that favor the privileged, instead of considering novel, fairer alternative standards by which to universally screen applicants.<sup>136</sup> As long as admissions criteria like standardized tests are legitimized despite their disparate negative impact on minority applicants,<sup>137</sup> the diversity rationale cannot completely justify institutional admissions programs that deviate from standard patterns of selection in order to compensate for the disparate impact.<sup>138</sup>

Finally, the diversity rationale potentially undermines collaborative efforts among minority groups. By placing value on students' backgrounds, the diversity rationale is made politically unpalatable to groups like Jews and Asians who may eventually be rejected because they are overrepresented at institutions of higher education.<sup>139</sup> This

<sup>134</sup> Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151, 2155, 2175–83 (2013).

<sup>135</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 367–70 (Thomas, J., dissenting) (arguing that the Equal Protection Clause allows for legacy preference in admissions but does not allow for the use of race as a means to get around standardized tests that hurt minorities).

<sup>136</sup> Bell, *supra* note 129, at 1629–30 (criticizing the reliance on standardized tests as “notoriously poor predictors of performance either in school or after, but they measure quite accurately the incomes of the applicants’ parents”). In recent years, more and more institutions of higher education, acknowledging that “test scores do not equal merit,” have either begun making admissions decisions without considering the SAT or ACT, or making the submission of standardized test scores optional for applicants. CHARLES ROONEY & BOB SCHAEFFER, FAIRTEST, TEST SCORES DO NOT EQUAL MERIT: ENHANCING EQUITY & EXCELLENCE IN COLLEGE ADMISSIONS BY DEEMPHASIZING SAT AND ACT RESULTS 3 (1998), available at <http://www.fairtest.org/sites/default/files/optrept.pdf>; *Test Scores Do Not Equal Merit: Executive Summary*, FAIRTEST (Aug. 22, 2007, 2:32 PM), <http://www.fairtest.org/test-scores-do-not-equal-merit-executive-summary> (listing over 815 four-year colleges that admit a substantial number of applicants without regard to their SAT or ACT scores).

<sup>137</sup> See William C. Kidder & Jay Rosner, *How the SAT Creates “Built-In Headwinds”: An Educational and Legal Analysis of Disparate Impact*, 43 SANTA CLARA L. REV. 131 (2002) (analyzing the SAT’s disparate impact on African American and Chicano test-takers).

<sup>138</sup> Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 961 (1997).

<sup>139</sup> See *id.* at 965 (detailing the problem of instituting preferences against “over-achieving” or “model” minorities like Jews and Asians).

outcome is antithetical to genuine social justice movements, which should encourage minority groups to support one another regardless of their varying levels of societal success, thereby creating broader and more effective coalitions.<sup>140</sup>

## II

### THE IMPACT OF THE DIVERSITY RATIONALE ON WHITE IDENTITY

Assessments of the diversity rationale that solely address political or doctrinal inadequacies tell only part of the story. Judicial decision-making is constitutive: Court opinions—particularly when answering controversial and far-reaching legal questions—often create social narratives that accompany legal mandates and have the power to shape identities as well as the relationships among those individuals whose identities are impacted.

Now ubiquitous in American legal, political, and popular culture, the diversity rationale is one such judicial doctrine that warrants scholarly exploration of its impact on individual identity formation. As part of a broader progressive effort to address inequality by examining social structures that fuel racial bias and discrimination, this Part considers the impact of the diversity rationale on identity formation and performance. Ultimately, the diversity rationale as currently deployed stunts the development of antiracist white identities—illustrated by case studies of the lead plaintiffs in landmark cases involving race and diversity in public education, including *Hopwood v. Texas*,<sup>141</sup> *Grutter v. Bollinger*,<sup>142</sup> *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>143</sup> and *Fisher v. University of Texas at Austin*.<sup>144</sup>

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<sup>140</sup> See *id.* at 966 (arguing that the diversity-based rationale has negative consequences for interminority relations). Of course, minority groups do not all have the same exact interests by virtue of their minority status. Rather, interests diverge not just between different minority groups but also within minority groups, as marginalization is contextual and often exacerbated or mitigated by other factors like class or education. See Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991) (considering the intersectional identities of women of color to explore both race and gender dimensions of violence against women of color). That said, differences among minority groups based on race, ethnicity, and language consistently trigger discrimination and bias, forming a commonality of experience that would ideally form the basis for broad-based social justice movements and coalitions.

<sup>141</sup> 78 F.3d 932 (5th Cir. 1996).

<sup>142</sup> 539 U.S. 306 (2003).

<sup>143</sup> 551 U.S. 701 (2007).

<sup>144</sup> 133 S. Ct. 2411 (2013).

### A. *How Law Shapes Identity*

In all litigation, parties seek particular outcomes. Yet it is not always clear whether or how these outcomes impact the identities of individual litigants, as well as those who merely observe these cases. The Supreme Court decides dozens of cases each year, most of which go unnoticed by the general public.<sup>145</sup> Nevertheless, as many scholars have described, law does have the potential to create and shape identities, as well as to influence the way individuals understand their identities in relation to others in society.<sup>146</sup> Critical race scholars have long noted that racial identity is socially constructed,<sup>147</sup> and the law certainly impacts that construction.

Moreover, constitutive theories of law have encouraged study of the ways in which laws and legal rationales operate in daily life by “shaping interpersonal relations, influencing daily habits, and helping define civic identity,”<sup>148</sup> while also acknowledging that “law interacts with other forms of discourse and sources of cultural meaning to construct and to contest identities, communities, and authorities.”<sup>149</sup> Accordingly, the law not only shapes identities, but also has the potential to empower or disempower its subjects.<sup>150</sup>

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<sup>145</sup> See *Frequently Asked Questions*, SUPREME CT. U.S., <http://www.supremecourt.gov/faq.aspx#faqgi9> (last visited Mar. 13, 2014) (explaining that the Court grants certiorari and hears oral arguments in about seventy-five to eighty cases each year).

<sup>146</sup> See, e.g., MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 9 (1987) (arguing that laws influence the ways citizens generally “perceive reality”); TAMARA METZ, *UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE* 92 (2010) (describing how the state, through marriage laws, “influence[s] the self-understandings of individuals and the political community”). Moreover, participation or exclusion from participation in particular legal institutions like marriage also shapes identity (for example, in the case of gays and lesbians who are denied marriage equality in many states). E.g., Robert Leckey, *Harmonizing Family Law’s Identities*, 28 *QUEEN’S L.J.* 221, 249 (2002).

<sup>147</sup> See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *YALE L.J.* 1757, 1759 (2003) (presenting critical race theory as “committed to the idea of race as a social construction”).

<sup>148</sup> Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 *CALIF. L. REV.* 643, 666 (2001); see also *id.* (building on constitutive theories of law to examine—in the context of sodomy laws—how patterns of behavior and individual expectations are consciously and unconsciously influenced by the sanction of law in the background).

<sup>149</sup> Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 *AM. U. J. INT’L L. & POL’Y* 793, 794 (1995); see also *id.* at 793 n.6 (citing scholarship considering constitutive theories of law).

<sup>150</sup> See, e.g., Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 *LAW & SOC’Y REV.* 1149 (1994) (chronicling how an attempt by the EPA to comply with the NEPA while representing the interests of the Yavapai Indians resulted in Yavapai resistance that inspired a new understanding of their collective identity, a new sense of their history, and a sense of empowerment); John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP*

Cases implicating the Equal Protection Clause of the Fourteenth Amendment are no exception. The Amendment's guarantee of "equal protection of the laws"<sup>151</sup> resonates in a country where freedom, liberty, choice, and autonomy—however unattainable<sup>152</sup>—are idealized.<sup>153</sup> Indeed, equality before the law seems like a prerequisite to the ability to make true choices. In legal challenges to race-conscious policies that impact the distribution of valuable goods, like employment<sup>154</sup> or access to elite education,<sup>155</sup> equal protection cases also implicate American beliefs about meritocracy and bias, as well as lingering resentments and anxieties about racial remediation.

Resentments and anxieties only intensify in the context of public education. Even though public schools no longer serve as visible manifestations of racist "separate but equal" government policies, they

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(*Identity Politics*) of *IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 18 (2011) (recognizing how patent laws "shape identity development [of users] through their regulation, propertization, and monopolization of cultural content," before going on to advance a theory of intellectual property that recognizes the link between identity actualization and intellectual property legal regimes).

<sup>151</sup> The Equal Protection Clause provides: "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

<sup>152</sup> See KENT GREENFIELD, *THE MYTH OF CHOICE: PERSONAL RESPONSIBILITY IN A WORLD OF LIMITS* 1–3 (2011) (describing the tension between the celebration of choice in "our political and legal rhetoric" and "the reality of pervasive constraints" that narrow "the scope of our choices"). In response to this tendency of Americans to idealize contract and reify individual choice in ways that mask inequality, Professor Martha Fineman advocates for an understanding of vulnerability: "[T]he realization that many [mildly adverse to catastrophically devastating] events are ultimately beyond human control." Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008).

<sup>153</sup> See, e.g., Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 915 (1987) (reviewing DAVID KIRP ET AL., *GENDER JUSTICE* (1986)) (discussing the authors' individual-centric, process-oriented approach to freedom of choice and how this approach values self-determination of gender roles while rejecting the idea that government should be active in this area); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1562–63 (1991) (discussing the central role of individual freedom of choice in modern legal discourse). The role of exercising "rational" choice is also central to economic analysis of law, and is defined by law and economics scholars as "choosing the best means to the chooser's ends." Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998).

<sup>154</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (equal protection challenge to promotion procedures with racially disparate impact); *Washington v. Davis*, 426 U.S. 229 (1976) (equal protection challenge to recruiting procedures with racially disparate impact).

<sup>155</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (plaintiff challenged university's undergraduate admission policy involving minority quota); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (plaintiff challenged law school's admission policy on equal protection grounds); *Gratz v. Bollinger*, 539 U.S. 244 (2003) (plaintiff challenged university's undergraduate admission policy); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (plaintiff challenged medical school's admission policy); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (plaintiff challenged law school's admission policy).

continue to have significant political and social meaning because of the function they perform.<sup>156</sup> For many citizens, public schools serve as one of few interfaces with government and operate as a primary site for regular community interaction.<sup>157</sup> In the K–12 context, race-conscious policies tend to provoke particularly passionate reactions, perhaps because parents and caregivers are invested in ensuring the best possible educational outcomes for their children. As a result, public schools remain the site of intense social, political, and legal conflict,<sup>158</sup> triggering anxieties about race and racism whenever affirmative action policies are employed.

The same is true in public institutions of higher education. *Bakke* and *Grutter*, for example, not only spawned case law on how race-conscious policies may be used at such public institutions, but also helped transform the concept of diversity into a social phenomenon.<sup>159</sup> Still, today, college and university affirmative action policies are among the most contested legal frameworks in the United States. The pursuit of diversity as a justification for affirmative action policies has captured the imagination of Americans—instigating both fierce

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<sup>156</sup> Cf. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 350–51 (1987) (noting that segregation of Blacks in schools “generates a feeling of inferiority as to their status in the community” (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954)) (internal quotation marks omitted)).

<sup>157</sup> See Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1376–78 (2005) (arguing that public education both defines and creates community).

<sup>158</sup> Consider, for example, the strong and passionate opposition to race-conscious busing policies during the 1960s and 70s, or the support for affirmative action galvanized in response to the *Grutter* and *Gratz* challenges to affirmative action. See *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974) (holding that school districts could not be held responsible for *de facto* segregation across district lines); DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW 3 (1995) (noting that, despite the absence of “riots, bus burnings, and school boycotts” like those in opposition to busing that received national attention in earlier decades, school segregation and the methods used to achieve it remain unresolved dilemmas); Brown-Nagin, *supra* note 77, at 1513–14 (describing protests staged at pivotal points in the Michigan *Grutter* and *Gratz* litigation, organized by By Any Means Necessary—a political coalition formed in response to the affirmative action challenges); James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2052–55 (2002) (detailing opposition to busing policies implemented to promote integration, including President Nixon’s antibusing statements on the campaign trail, legislation proposed to prohibit cross-district busing, “unprecedented” antibusing protests in middle-class communities, and poll results revealing consistent, strong opposition to busing in both white and black communities).

<sup>159</sup> See *infra* notes 170–74 and accompanying text (discussing the prevalence of diversity policies in educational and other social institutions and how they have impacted the racial identities of both white and nonwhite individuals).

opposition and fierce support—since this rationale was first articulated in *Bakke*, and later affirmed in *Grutter*.

For example, college students are frequently surveyed about their opinions on their institutions' affirmative action programs; they are consistently capable of and interested in discussing the pros and cons of these programs, with white students often concluding that their schools' affirmative action policies should be abolished.<sup>160</sup> Adding to this public debate, prominent scholars—such as Douglas Massey, Camille Charles, Garvey Lundy, William Bowen, and Derek Bok—have penned books that chronicle the justifications and benefits of race-conscious admissions policies in American colleges and universities.<sup>161</sup>

When affirmative action was challenged in *Grutter* and *Gratz*, public galvanization in support of the policies was impressive.<sup>162</sup> Yet more than a decade after the Court decided those cases, affirmative action policies still encounter opposition, not only through litigation, but also via state ballot initiatives—like the successful Proposition 209 in California<sup>163</sup> and Proposition 2 in Michigan,<sup>164</sup> both of which banned consideration of race and gender in public university admissions and government hiring. As recently as November 2012, the United States Court of Appeals for the Sixth Circuit deemed the Michigan ban unconstitutional in a case brought by *By Any Means Necessary* (BAMN), one of the most visible student interveners in

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<sup>160</sup> See Mark A. Chesler, Melissa Peet & Todd Sevig, *Blinded by Whiteness: The Development of White College Students' Racial Awareness*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM* 215, 228 (Ashley “Woody” Doane & Eduardo Bonilla-Silva eds., 2003) (canvassing surveys on the topic of affirmative action, which reveal that 52.4% of students feel that affirmative action should be abolished and 21.8% feel that “[r]acial discrimination is no longer a problem in America” (citation omitted) (internal quotation marks omitted)). Research suggests that these issues loom large for white college students, many of whom are not only confronted with their own racial identity for the first time when away from home, but who are also in a developmental stage in which their “identities as racial beings, as well as their racial attitudes, are subject to challenge and change.” *Id.* at 216.

<sup>161</sup> For a sample of this literature, see BOWEN & BOK, *supra* note 23, and DOUGLAS S. MASSEY ET AL., *THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA'S SELECTIVE COLLEGES AND UNIVERSITIES* (2003).

<sup>162</sup> See *supra* notes 77–83 and accompanying text (describing how nearly 4000 colleges and universities, sixty-six Fortune 500 companies, and dozens of prominent individuals filed amicus briefs in support of the University of Michigan's admissions policies).

<sup>163</sup> CAL. CONST. art. I, § 31 (codifying Proposition 209).

<sup>164</sup> MICH. CONST. art. I, § 26 (codifying California Civil Rights Initiative), *invalidated by* Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich., 701 F.3d 466 (6th Cir. 2012), *cert granted sub nom.* Schuette v. Coal. to Defend Affirmative Action, 133 S. Ct. 1633 (2013).

*Grutter*.<sup>165</sup> Debate persists about whether minority groups are helped or harmed by race-conscious admissions policies in higher education,<sup>166</sup> and, at a time in United States history increasingly characterized as post-racial,<sup>167</sup> some have contested affirmative action policies as “reverse-discrimination.”<sup>168</sup>

Debate notwithstanding, colleges and universities have aggressively employed the diversity rationale in service of creating more heterogeneous student bodies. Diversity programs and policies at educational institutions are numerous and varied, including policies that consider race in admissions (like those challenged in *Grutter*, *Gratz*, and *Fisher*),<sup>169</sup> minority prospective/admit weekends to

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<sup>165</sup> *Coal. to Defend Affirmative Action*, 701 F.3d at 483–85; Tamar Lewin, *Affirmative Action Ban in Michigan Is Rejected*, N.Y. TIMES, Nov. 16, 2012, at A25. The court ruled that the ban “unfairly placed a special burden on supporters of race-conscious admissions policies” in the political process. *Id.*

<sup>166</sup> See, e.g., ELIZABETH ARIES, RACE AND CLASS MATTERS AT AN ELITE COLLEGE (2008) (researching and cataloguing Amherst College’s return on its upfront investment in diversity and emphasizing the need for further progress); BOWEN & BOK, *supra* note 23 (chronicling the long-term positive consequences of race-conscious admission policies for Whites and minorities); D’SOUZA, *supra* note 24, at 21 (arguing that American universities’ pursuit of diversity, proportional representation, and multicultural progress ultimately falls short when it comes to the very groups they seek to protect).

<sup>167</sup> Sumi Cho, *Post-Racialism*, 94 IOWA L. REV. 1589, 1594–96 & n.13 (2009) (providing a detailed sampling of the “racial transcendence” narrative in mainstream media, including editorial columns featured in the *Philadelphia Daily News*, the *Boston Globe*, *USA Today*, the *Chicago Tribune*, and the *New York Times*); Gregory S. Parks & Jeffrey J. Rachlinski, *Implicit Bias, Election ’08, and the Myth of a Post-Racial America*, 37 FLA. ST. U. L. REV. 659, 659–60 & n.1 (2010) (canvassing analysis by politicians, policymakers, and media outlets like Ward Connerly, Abigail Thernstrom, and *The American Prospect* suggesting that the Obama presidency signals a “post-racial country,” before concluding that unconscious racism is nevertheless “alive and well”).

<sup>168</sup> Chesler et al., *supra* note 160, at 229 (“[S]ome white students feel their personal or group self-interest challenged and themselves systematically placed at a disadvantage because of the presence of students of color. . . . [This view] articulates the emerging white ‘victim’ identity that is supported and reified through the discourse of ‘reverse discrimination’ in the affirmative action debate.”); Woody Doane, *Rethinking Whiteness Studies, in WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 160, at 3, 16 (“[I]f white privilege is invisible and racial barriers are claimed to be a relic of the past, then race-based claims or challenges to the existing system of racial stratification . . . can be framed as ‘reverse discrimination’ or racism against whites.”).

<sup>169</sup> Considered just one element of a “holistic” evaluation, it can be difficult to locate an admissions policy that explicitly references race or ethnicity as a factor for consideration. Such consideration may, however, fall under “personal background.” See, e.g., *What Does Columbia Look For?*, COLUMBIA U., <https://undergrad.admissions.columbia.edu/apply/first-year/holistic> (last visited Mar. 3, 2014) (listing factors Columbia University uses to evaluate undergraduate applicants, including “context of a particular candidate”); Lee Bollinger, *Seven Myths About Affirmative Action in Universities*, 38 WILLAMETTE L. REV. 535, 542–44 (2002) (describing the consideration of race and ethnicity in university admissions procedures).

encourage minority students to apply and enroll,<sup>170</sup> housing programs that celebrate minority culture,<sup>171</sup> and the dissemination of statistics and data signaling the diversity of student bodies and faculties.<sup>172</sup>

Pursuit of diversity, however, is not limited to higher education. Rather, K–12 public schools, corporations, government agencies, non-profits, and countless other institutions increasingly promote and tout diversity programs at their institutions as well.<sup>173</sup> The cultivation and

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<sup>170</sup> For example, Amherst College hosts “diversity open houses” during which the office of admissions invites prospective applicants to Amherst’s campus. Although the open houses are available to all prospective students, the selection committee “prioritizes the invitation of students from traditionally under-represented groups, such as African-American, Hispanic/Latino American, Native American, and Asian-American backgrounds, as well as first-generation students.” *Diversity Open Houses (DIVOH)*, AMHERST C., <https://www.amherst.edu/admission/diversity/divoh> (last visited Oct. 21, 2013); see also Christina M. Hand Gonzalez, *Diversity Fly-In Visit Program List: Seniors to Visit This Fall!*, COLLEGE-PATH.COM (Sept. 3, 2013, 3:51 AM), <http://www.college-path.com/2011-diversity-flyin-list-colleges-pay-seniors-visit-fall> (listing colleges that host diversity college fly-in programs, some of which are provided at no cost to the student); *Multicultural Open House*, COLO. C., <http://www.coloradocollege.edu/admission/introduceyourself/visit/multiculturalopenhouse/> (last visited Mar. 13, 2014) (encouraging “members of American Ethnic Minority groups, students who are the first in their families to attend college and students from low income families to apply”).

<sup>171</sup> Take, for example, the W.E.B. DuBois College House at the University of Pennsylvania, which was “[c]reated in response to the needs voiced by African American students” and provides programming “based upon the history and culture of people of the African diaspora.” *W.E.B. DuBois College House*, U. PA., <http://dubois.house.upenn.edu/frontpage> (last visited Mar. 13, 2014); see also *Glass/Lenox House*, COLO. C., <http://www.coloradocollege.edu/offices/residentiaallife/housing-facilities-information/small-houses/lennox.dot> (last visited Mar. 13, 2014) (promoting a residence hall focused on providing an environment for “multi-cultural awareness, support, and programming”); *Special Interest Housing Program: Multicultural Learning Experience Floors*, Bos. C., <http://www.bc.edu/offices/reslife/lifeinhalls/programs/specialinterest.html> (last visited Mar. 13, 2014) (describing a residential experience through which students will work to “further define and promote diversity . . . throughout the University through programmatic methods”).

<sup>172</sup> See, e.g., *Consumer Information for Prospective and Current Georgetown University Students (HEOA Disclosures)*, GEORGETOWN U., <http://compliance.georgetown.edu/student-consumer-information/heoa> (last visited Mar. 26, 2014) (providing diversity statistics for students enrolled as of Fall 2012); *Multicultural Open House*, *supra* note 170 (providing demographic data for the percentage of students who identify as American Ethnic Minorities).

<sup>173</sup> See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (lawsuit brought, in part, as a challenge to the measures used by the Seattle, Washington, and Louisville, Kentucky, school districts to maximize racial diversity in the cities’ public schools); Anjali Chavan, *The “Charles Morgan Letter” and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 525 (2010) (discussing supplier diversity initiatives in which corporations set diversity and inclusion criteria even for the companies with which they do business); Stacy L. Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75, 87–88 (2012) (describing the embrace of diversity initiatives among federal agencies, as well as among hospitals, not-for-profit agencies, and even professional associations); Levit, *supra* note 132 (describing the proliferation of diversity initiatives at large corporations after the

maintenance of diversity has become an industry of its own and, as one scholar noted, Americans “have internalized the idea that racial diversity is a social good, and . . . assign value to the inclusion of non-white individuals in our social milieu, our educational institutions, and our workplaces.”<sup>174</sup> It is likely that the diversity rationale has not only shaped race-conscious policies at public institutions, but also impacted the racial identities of and relationships among white and nonwhite individuals—and not necessarily in positive ways.

Focusing on individuals and identity formation can be risky. Indeed, scholars have raised important concerns about the manner in which America’s struggle to eradicate racism has focused too much on individual actors rather than on larger social structures.<sup>175</sup> Examining societal structures rather than individual racists is essential: If segregation is understood to be a collective social responsibility rather than the aggregation of private transgressions, it can be recognized as official policy and ultimately remedied through collective action. Because racism arises not only in isolated interactions, but also in wider social, political, and cultural fora, we must examine the ways in which racial segregation and privilege are embedded in and perpetuated by the social and political construction of racially identifiable space.<sup>176</sup> Accordingly, there is some tension inherent in acknowledging the structural and societal manifestations of racism and discrimination while also inquiring into the impact of the diversity rationale on the identity development and performance of white individuals.

Yet examining identity in this context is crucial precisely because Whites often engage in identity formation and performance that may preclude them from understanding structural impediments to racial equality. In this way, problematic white identity formation—marked by a belief in white racial transparency and ignorance about white privilege—presents a structural barrier in and of itself. Moreover, as a

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settlement of law suits alleging employment discrimination); David B. Wilkins, *From “Separate Is Inherently Unequal” to “Diversity Is Good for Business”: The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar*, 117 HARV. L. REV. 1548, 1556 (2004) (documenting the proliferation of diversity initiatives at law firms).

<sup>174</sup> Leong, *supra* note 134, at 2155; see also WALTER BENN MICHAELS, *THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY* 12 (2006) (“[D]iversity has become virtually a sacred concept in American life today.”).

<sup>175</sup> For an example of this argument, see Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1845 (1994) (arguing, in the context of housing segregation and discrimination, that “racially identified space results from public policy and legal sanctions—in short, from state action—rather than being the unfortunate but irremediable consequences of purely private or individual choices”).

<sup>176</sup> See *id.* at 1849–52 (explaining how racial segregation can occur despite a lack of intentional racism or legally condoned racial discrimination).

public policy goal with social and political consequences, diversity entrenches this problematic and obstructionist white identity, ultimately undermining, if not totally blocking, progress toward racial justice. As such, critiques of diversity rationale deployments are justified as explorations of how the diversity rationale warps identity formation and performance, which ultimately results in the creation of laws and public policies that undermine the antisubordination goals animating the Fourteenth Amendment.<sup>177</sup>

### B. Racial Identity Formation

For purposes of this exploration, “identity” can be understood as a person’s internal sense of self as well as an association of that self with a particular group or groups.<sup>178</sup> Although there is no biological basis for race,<sup>179</sup> race exists as a social construct and has been developed according to both social meanings and physical attributes.<sup>180</sup> In addition to being signaled through phenotypic characteristics like skin color, facial features, or hair texture, race can be signaled by an individual’s social characteristics like class, geography, or politics.<sup>181</sup>

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<sup>177</sup> See Barnes & Chemerinsky, *supra* note 25, at 1074–76 (noting that the current equal protection framework undermines the goals of antisubordination and true integration); see also Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 622–23, 637–55 (discussing first the antisubordination approach to equal protection, in which “a law unlawfully discriminates if it reinforces the marginalized social, economic, or political status of historically disadvantaged classes,” and then arguing, through analysis of equal protection jurisprudence, that “courts now reserve their most exacting level of scrutiny for laws that ‘burden’ historically privileged groups but assume the constitutionality of enactments that harm historically disadvantaged groups”); Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 770 (noting the Supreme Court’s focus on the intent to abolish subordinating institutions such as the Black Codes and correspondent refusal to institute an “equal-birth principle,” resulting in its failure to “address any inequities operating outside the context of identity groups”).

<sup>178</sup> See Karst, *supra* note 18, at 266, 282–83 (examining how peoples’ identities—metaphors that reflect social groupings in life—are often determined as an issue of “fact,” reflecting the status ordering of social groups and reinforcing that social order).

<sup>179</sup> See Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 11 (1994) (explaining that “[t]here are no genetic characteristics possessed by all Blacks but not by non-Blacks; similarly, there is no gene or cluster of genes common to all Whites but not to non-Whites”).

<sup>180</sup> Cf. Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 883 (2006) (“[R]ace, while often signaled by phenotype, is not biologically defined. . . . Instead, race is socially constructed; it is formed through human interactions and commonly held notions of what it means to be a person of a certain race.”).

<sup>181</sup> See Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being “Regarded as” Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283, 1296 (proposing a new method for recognizing discrimination claims based on the use of proxies for race, even when those proxies mistakenly identify someone as belonging to a particular race).

Racial categories yield racial identities. Externally, society imposes identities on people, often through positive or negative stereotypes that attach to them as a result of their physical appearance or the ways in which they “choose to perform” their identities.<sup>182</sup> For example, the “Good Black Man,” who distances himself from blackness and embraces white norms, and the “Bad Black Man,” who is crime-prone and hypersexual, are two stereotypical racial identities imposed on black men.<sup>183</sup> Internally, racial identity is navigated by people with varying levels of freedom<sup>184</sup> or choice<sup>185</sup> about identity, and is socially constructed through negotiations and renegotiations with the people with whom one interacts.<sup>186</sup> Middle-class status, for example, might give black males more freedom to adopt a “Good Black Man” racial identity based on the virtues automatically assigned to people with means.<sup>187</sup> Similarly, researchers have found that

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<sup>182</sup> See Onwuachi-Willig, *supra* note 180, at 883 (juxtaposing the costs for Blacks of “passing” to the costs for gays, lesbians, and bisexuals to illustrate the similarities between interracial marriage and same-sex marriage).

<sup>183</sup> See Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853, 875–85 (2006) (describing the historical origins and social implications of being a “Bad Black Man” versus a “Good Black Man” and arguing that the bipolar representations of heterosexual black men as either crime-prone and hypersexual or “good” are used to help resolve the white mainstream’s post-civil rights anxiety about inclusion and exclusion of black men).

<sup>184</sup> See Mary Coombs, *Interrogating Identity*, 11 BERKELEY WOMEN’S L.J. 222, 223 (1996) (describing how context informs the degrees of freedom that individuals have to negotiate their racial identity and reviewing JUDY SCALES-TRENT, *NOTES OF A WHITE BLACK WOMAN* (1995), a book exploring the process of understanding and defining individual and collective identities).

<sup>185</sup> See, e.g., Claire A. Hill, *The Law and Economics of Identity*, 32 QUEEN’S L.J. 389, 393 (2007) (noting that the law and economics perspective on identity focuses on “people choosing . . . particular identities or particular aspects of those identities, or making other choices based in part on identity, or other people influencing the choice, including by creating and defining particular identities”); Haney López, *supra* note 179, at 47 (advancing a theory of race as a social complex of meanings continually replicated in daily life).

<sup>186</sup> An example of this process of negotiation and interaction from a domain analogous to racial identity is “working identity,” which describes the negotiations between an employee’s sense of self and his or her sense of institutional values promoted in the workplace. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1264 (2000) (citing JUDITH BUTLER, *BODIES THAT MATTER* (1993), Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1763–64 (1993), and Karst, *supra* note 18, at 287, for the proposition that creating and maintaining social identity is a process of negotiation between oneself and others).

<sup>187</sup> It is also possible that middle-class status might give black males more freedom to adopt a “Bad Black Man” identity. The cultural capital that often accompanies middle-to-upper class experiences might allow a black male to embrace a “bad” identity, but be more readily forgiven for that identity given access to middle-class resources, language patterns, or social networks, which help frame the bad identity in a less threatening manner. Similarly, to the extent that people might perceive black men as physically threatening, signifiers of middle-class status, including dress, may ameliorate that threat. One might imagine,

although there are components of African American racial identity that remain relatively stable, situations can influence the centrality of race in an individual's conception of identity, making race more or less salient to an African American's self-concept at a particular time.<sup>188</sup>

Scholars have also noted that racial identity is performed, in both a strategic and social constructivist manner.<sup>189</sup> Judith Butler's concept of performativity, developed in the context of gender, is particularly instructive on this point, explaining that identity maintenance requires the repetition of symbolic acts.<sup>190</sup> In the context of race, this means that racial identity performance must correspond to symbolic representations that are culturally understood as evocative of a particular racial identity.<sup>191</sup> Accordingly, a black male wishing to express "authentic" black identity might subscribe to progressive or liberal political ideology, live in a black neighborhood, and marry a black person.<sup>192</sup> By contrast, a black male wishing to perform as a "Good Black Man" might downplay his race, insisting on identifying himself first and foremost as "a human being" or refusing to discuss race or racism with Whites.<sup>193</sup>

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for instance, that fearful reactions to black men walking down the street are less intense if the male is wearing a high-end suit.

<sup>188</sup> See J. Nicole Shelton & Robert M. Sellers, *Situational Stability and Variability in African American Racial Identity*, 26 J. BLACK PSYCHOL. 27, 46 (2000) (describing the results of two experiments demonstrating that when situations make race more salient for African Americans, it can temporarily move race to the forefront of self-conceptualization).

<sup>189</sup> See Carbado & Gulati, *supra* note 186, at 1265 n.11 (explaining that there is a distinction between identity performed as a result of social construction and identity performed as a strategic decision given the constraints linked to a particular context).

<sup>190</sup> See Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1176–82 (2004) (applying Butler's performativity concept to the performance of race and ethnicity).

<sup>191</sup> *Id.* at 1180.

<sup>192</sup> Onwuachi-Willig, *supra* note 180, at 887–92.

<sup>193</sup> See Cooper, *supra* note 183, at 880–81 (describing the naturean example of "The Good Black," as described in PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999): "Barrett's message that blacks should try to transcend race is the predominant alternative to the image of the Bad Black Man. In other words, the way to be a Good Black Man is to downplay one's race."). This insistence on the recognition of oneself as a *person*, rather than as a member of a specific racial group, parallels the "transparency phenomenon" subscribed to by Whites; that is, Whites typically do not think of themselves as belonging to a particular race, but instead see themselves solely as part of the larger human race. See *infra* notes 220–23, 243 and accompanying text (describing the impact of this phenomenon on the discussion of race and racism).

No matter how identity is conceptualized, racial identity development—or lack thereof, as is often the case with Whites<sup>194</sup>—exerts a significant influence on how individuals navigate their lives. For people of color, much attention has been paid to minority-specific models of racial identity performance and development. For example, the Black Identity Development (BID) model is a tool used by teachers, counselors, and group leaders who seek an understanding of black identity based on positive models, rather than on cultural-deficit models.<sup>195</sup> Two major themes underlying the BID model are the turning away from white values and standards and the affirmation of nonwhite reference points.<sup>196</sup> Alternately, black identity development can be conceptualized as a transformative process that serves as the stimulus for liberation. According to this theory, the black protests, social movements, and political activism of the 1960s are considered integral to emerging self-identity.<sup>197</sup>

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<sup>194</sup> See *infra* Part II.C.1 (explaining that Whites typically do not have a sense of racial identity and tend not to think about the norms, behaviors, experiences, or perspectives that are specific to being white).

<sup>195</sup> Maurianne Adams, *Core Processes of Racial Identity Development*, in *NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT* 209, 214–15 (Charmaine L. Wijeyesinghe & Bailey W. Jackson III eds., 2001). Cultural-deficit theorists characterize a child's social, cultural, or economic environment as being deprived of the elements necessary to learn the behavior rules that are necessary to succeed. In the academic context, these theories advance the idea that social and emotional deficiencies within students themselves negatively affect student performance. In contrast, cultural-difference theories characterize academic underachievement as teachers and students playing into each other's blind spots, while cultural-ecological theorists conclude that certain structural variables create barriers to success for some underachieving groups. Donna Bolima, *Contexts for Understanding: Educational Learning Theories*, U. WASH., [http://staff.washington.edu/saki/strategies/101/new\\_page\\_5.htm](http://staff.washington.edu/saki/strategies/101/new_page_5.htm) (last visited Mar. 13, 2014) (discussing theoretical frameworks that attempt to explain academic disparity among ethnic groups); see also Augustine F. Romero & Marin Sean Arce, *Culture as a Resource: Critically Compassionate Intellectualism and Its Struggle Against Racism, Fascism, and Intellectual Apartheid in Arizona*, 31 *HAMLIN J. PUB. L. & POL'Y* 179, 183–86 (2009) (considering whether diversity should be seen as an obstacle or a resource in the learning process). Ultimately, cultural deficit models have been criticized for incorrectly perpetuating the idea that poor and minority groups do not value education in the same way as middle- and upper-class people and/or Whites. See Margaret Beale Spencer & Vinay Harpalani, *What Does "Acting White" Actually Mean? Racial Identity, Adolescent Development, and Academic Achievement Among African American Youth*, in *MINORITY STATUS, OPPOSITIONAL CULTURE, AND SCHOOLING* 222 (John U. Ogbu ed., 2008) (examining Ogbu's "acting white" theory and concluding that the claim lacked empirical verification, was informed by a cultural-deficit model, and ignored the long history of African American valuing of, and investment in, education).

<sup>196</sup> See Adams, *supra* note 195, at 215.

<sup>197</sup> See *id.* at 214–15 (citing the BID and Nigrescence—a development theory that also characterizes minority racial identity formation as a liberatory sequence—as models of identity development that might serve as the stimulus for a psychology of liberation). For a discussion of the critiques of both the Nigrescence and BID models, see Rich, *supra* note 190, at 1174–82 (suggesting that this area of identity studies might benefit from a new

Given the relevance of social context and construction to identity, judicial decisions and popular understandings of those decisions can certainly impact identity formation. In the context of equal protection, then, it is no surprise that attention has been paid to how affirmative action has impacted racial identity formation among minorities. For example, Stephen Carter, in his 1991 book *Reflections of an Affirmative Action Baby*, argues that affirmative action ultimately vests “black people who gain positions of authority or influence . . . with a special responsibility to articulate the presumed views of other people who are black—in effect, to think and act and speak in a particular way, the *black* way—and [suggests] that there is something peculiar about black people who insist on doing anything else.”<sup>198</sup>

More recently, Nancy Leong, going further, suggested that the diversity rationale has encouraged white institutions of higher education to commodify and trade on the racial identities of nonwhite students in pursuit of the socially desirable goal of having a diverse campus.<sup>199</sup> The commodification of race and racial identity results in a more alienated racial identity. Individuals are distanced from an integral aspect of their personhood when the racial aspect of their identity is effectively bought and sold in the racial market of higher education.<sup>200</sup> As a result, identities are fractured,<sup>200</sup> and the efforts individuals put into creating cohesive racial identities are undermined.<sup>201</sup> For people of color, this disassociation results in a loss of control and of the integrity of their identity; it also cultivates resentment among this population, as these students come to feel that their presence at their institution is ultimately subject to the whims of the institution’s administration.<sup>202</sup>

### C. *The Diversity Rationale and White Racial Identity Formation*

Compared with these contemplations of how the diversity rationale impacts non-Whites, little has been said about how the diversity

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paradigm for understanding racial and ethnic identity development that is designed to be generalizable across groups and that draws on Judith Butler’s model of performativity).

<sup>198</sup> CARTER, *supra* note 23, at 31.

<sup>199</sup> See Leong, *supra* note 134, at 2155, 2169–72 (“Efforts to create racial diversity usually begin—and often end—with increasing the number of nonwhite people within a group or institution. As a result, nonwhiteness has acquired a unique value because, in many contexts, it signals the presence of the prized characteristic of diversity.”).

<sup>200</sup> See *id.* at 2205 (explaining that, “[g]iven the fundamental role that racial identity in fact plays in our lives, whole personhood requires integration of racial identity with one’s concept of self”).

<sup>201</sup> See *id.* (“If identity resides in a self that is integrated and continuous over time, then commodification interrupts that continuity, causing a loss of control of identity.”).

<sup>202</sup> *Id.* at 2215–17.

rationale impacts *white* identity formation. Of course, just like black racial identity, white racial identity is socially constructed and subject to external and internal influence.<sup>203</sup> Additionally, white racial identity is not a constant: Socially stigmatized identity features such as gender, sexual orientation, and working-class status can qualify the experience of white privilege.<sup>204</sup> Nevertheless, because whiteness operates as a cultural baseline in the United States,<sup>205</sup> white identity adoption and performance—however context-specific—is typically unacknowledged.<sup>206</sup>

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<sup>203</sup> For example, Jewish and Irish people only “became white” over a period of time. See, e.g., Charles W. Mills, *White Supremacy as Sociopolitical System: A Philosophical Perspective*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 160, at 35, 39 (providing a general overview of the anthropological, sociological, and historical research documenting how various ethnic groups that are currently described as white, and that were previously the targets of quasi-racial discrimination and prejudice, were incorporated over time into the construction of whiteness). Rules in the United States regarding who can be counted as white have changed, with some scholars theorizing that U.S. whiteness can be divided into three periods: from the 1790 law limiting naturalization to free white persons to the influx of Irish immigrants in the 1840s; from the 1840s to the more restrictive immigration legislation in 1924, aimed at limiting immigration overall, and targeting the Irish and Italians in particular; and from the 1920s to the present. See *id.* at 39 (describing the views of Matthew Frye Jacobson and others). Similarly, during the late nineteenth and early twentieth centuries, Eastern Europeans generally, and European Jews in particular, were considered by “real” white Americans—those of the Nordic or Anglo-Saxon origin—to be members of nonwhite, “inferior European races” whose immigration threatened to “destroy[ ] the fabric of the nation.” Karen Brodtkin Sacks, *How Did Jews Become White Folks?*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR*, *supra* note 7, at 395, 395. Changes in immigration policies, as well as social practices and beliefs—including the willingness of some members of these groups to be complicit in discrimination against African Americans and other immigrants—eventually led to the inclusion of groups like the Irish, the Italians, and Jews in America’s white racial group. For a detailed account of this process as applied to Irish immigrants to the United States, see NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* (2008).

<sup>204</sup> See Camille Gear Rich, *Marginal Whiteness*, 98 CALIF. L. REV. 1497, 1519–20 (2010) (describing several factors, including female gender, homosexuality, and working-class status, that disrupt the ability of white persons to fully experience white privilege); see also Lisa R. Pruitt, *The Geography of the Class Culture Wars*, 34 SEATTLE U. L. REV. 767, 794–800, 802–03, 812–14 (2011) (identifying rural origin as another factor qualifying white privilege, and calling for liberal elites to recognize the structural and cultural obstacles to education and advancement facing working-class Whites). A failure to draw more complex narratives about whiteness, particularly in terms of class, has led to culture wars and class conflict that undermine the coalitions between the white working-class and liberals needed to advance progressive legislation. See JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 213–14 (2010) (outlining steps to bridge the gap between reform-minded elites and the white working-class, including “accept[ing] the fact that class is a key axis of social disadvantage in American life”).

<sup>205</sup> See *infra* notes 220–26 and accompanying text (describing how white racial identity encourages Whites to consider their experience as normative, and demonstrating how privilege affords middle-class Whites a different experience than middle-class minorities).

<sup>206</sup> See Flagg, *supra* note 20, at 957, 970–76 (describing the transparency phenomenon and using it to challenge the discriminatory intent requirement under equal protection).

In an attempt, however, to dismantle white privilege and racial dominance, a few researchers have explored and offered frameworks for understanding the process of white identity formation, conceptualizing white identity formation as a series of developmental tasks akin to the BID model.

Psychologists Janet Helms and Rita Hardiman were two of the first scholars to develop models of white identity based on the development of an antiracist identity. Helms identified six stages of white racial identity development that occur in the context of black-white relations: (1) contact, (2) disintegration, (3) reintegration, (4) pseudo-independence, (5) immersion/emersion, and (6) autonomy.<sup>207</sup> In this model, after an encounter with the idea or actuality of black people (contact), Whites begin to acknowledge their whiteness and its social implications (disintegration), which triggers recognition of moral dilemmas. Stage three (reintegration) requires the individual to consciously acknowledge a white identity, and then, in stage four (pseudo-independence) the individual develops an identity capable of questioning the proposition that Blacks are inferior to Whites. In stage five (immersion/emersion) Whites replace problematic myths and negative stereotypes about Blacks with a sense of the reality of being white or black in America. Finally, stage six (autonomy)—the ultimate development of an antiracist white identity—is defined by the absence of a desire to denigrate, oppress, or idealize people on the basis of their racial identity.<sup>208</sup>

Similarly, Hardiman's model of white identity theorizes identity development as a process in which a person moves through five stages to create an antiracist white identity: (1) naïveté, (2) acceptance, (3) resistance, (4) redefinition, and (5) internalization.<sup>209</sup> Naïveté is marked by a lack of awareness about race, racism, or racial identity. Once Whites discover and begin to internalize racism, they enter acceptance, marked by a belief in the “meritocracy myth,” white supremacy, and the innate inferiority of people of color.<sup>210</sup> These

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<sup>207</sup> Janet E. Helms, *Toward a Model of White Racial Identity Development*, in *BLACK AND WHITE RACIAL IDENTITY: THEORY, RESEARCH, AND PRACTICE* 51–52 tbl. 4.1 (Janet E. Helms ed., 1990).

<sup>208</sup> *Id.* at 54–66.

<sup>209</sup> Rita Hardiman & Molly Keehn, *White Identity Development Revisited: Listening to White Students*, in *NEW PERSPECTIVES ON RACIAL IDENTITY DEVELOPMENT: INTEGRATING EMERGING FRAMEWORKS* 123–24 (Charmaine L. Wijeyesinghe & Bailey W. Jackson III eds., 2d ed. 2012).

<sup>210</sup> The myth of meritocracy, as I employ this term, is a dominant American cultural assumption that generally attributes political, economic, educational, or employment success strictly to merit, thus dismissing the discrimination claims of members of marginalized groups, including racial minorities, women, and the working-class. See Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 *MINN. L. REV.*

beliefs are exhibited both consciously, as in the expression of racist beliefs, and passively, as in collusion with a racialized system.<sup>211</sup> Akin to Helms's pseudo-independence stage, Hardiman's resistance stage is sometimes triggered by a racialized incident or event that leads Whites to question their prior beliefs. As Whites enter the resistance stage, the unlearning of racism begins. This stage is often accompanied by feelings of guilt and shame.<sup>212</sup> In the next stage, redefinition, Whites begin to honestly acknowledge and examine their privilege and the ways that it perpetuates racism. Finally—similar to Helms's autonomy stage—in the internalization stage, Whites integrate their new nonoppressive identity into their entire being, committing to antiracist beliefs and conduct.<sup>213</sup>

Neither model assumes that Whites will necessarily move through all of the outlined stages, but—according to both models—the development of an antiracist white identity requires that individuals recognize and acknowledge white privilege and the myths of merit. As belief in those myths are shed, so too is the psychological investment in white privilege and its justifications. Unfortunately, for many Americans, white identity formation is often stalled in the early stages of development that characterize affirmative action as inimical to true meritocracy.<sup>214</sup> After all, only a belief in the meritocracy myth—a hallmark of the acceptance phase of Hardiman's model—can justify conclusions that affirmative action unfairly benefits minority students at the expense of innocent Whites. Indeed, Hardiman and Helms found few Whites in their interviews prepared to consider affirmative action as an appropriate response to institutional or societal racism,<sup>215</sup>

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587, 590 (2000) (describing the meritocracy myth in the employment context as resting on two interconnected beliefs: (1) “an assumption that employment discrimination is an anomaly” and (2) “a belief that merit alone determines employment success”); Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 586 (1996) (describing the myth of meritocracy in the context of gender disparities in the law as resting on two dominant assumptions: that female lawyers are close to achieving proportionate representation and that lingering disparities are attributable to women's own “choices” and differing capabilities). In the context of higher education, the meritocracy myth is informed by: (1) a belief that admissions criteria are objective, neutral, and can adequately account for talents deserving of university admission or accurately predict academic and career success; and (2) a belief that all students who are willing to work hard enough can achieve the grade point average, standardized test score, and extracurricular activities standards set by admissions criteria.

<sup>211</sup> Hardiman & Keehn, *supra* note 209, at 123.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 123–24.

<sup>214</sup> See *supra* note 168 and accompanying text (discussing the characterization of affirmative action as “reverse discrimination”).

<sup>215</sup> Unless, of course, Whites are the beneficiaries. Recent experimental studies suggest that Whites are more willing to give advantages to white university applicants when Whites

or to even acknowledge the social implications of white identity at all.<sup>216</sup> Both their models also suggest, however, that movement toward an antiracist identity can be triggered by external events, such as cross-racial friendships, racialized incidents, and culturally significant events.<sup>217</sup>

The introduction and affirmation of the diversity rationale are culturally significant events for which identity development theories prove useful in considering the impact of the diversity rationale on white identity. The judicial and popular justification for affirmative action—particularly as grounded in the diversity rationale—is that diversity will improve white identity development as Whites are exposed to non-Whites, introduced to a diversity of viewpoints, and prepared for work in an increasingly pluralistic society and globalized marketplace. By this thinking, diversity pays dividends not just to beneficiaries of affirmative action, but also to the other students in the classroom.<sup>218</sup>

This conclusion, however, must be retested in light of critical examinations of and theories about white identity development. White racial identity is typically rooted in privilege and subordina-

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appear to be losing their dominant share of higher educational opportunity. Frank L. Samson, *Altering Public University Admission Standards to Preserve White Group Position in the United States: Results from a Laboratory Experiment*, 57 COMP. EDUC. REV. 369 (2013) (finding that in response to data that suggests a freshman enrollment trend toward an Asian-American plurality, white student evaluators lower their minimum class rank standard for admitting white applicants); Frank Samson, *Multiple Group Threat and Malleable White Attitudes Towards Academic Merit*, 10 DU BOIS REV.: SOC. SCI. RES. ON RACE 233 (2013) (finding that white Californians decrease the importance of grade point average in public university admissions when Asian group threat is primed, but finding that white Californians increase the importance of grade point average when thinking about group threat from Blacks or Blacks and Asians simultaneously).

<sup>216</sup> See, e.g., Hardiman & Keehn, *supra* note 209, at 131–33 (discussing the lack of awareness of racial oppression and white privilege among most of the study’s participants). For example, Hardiman and Keehn used the WID model to review interview responses of white students and concluded that most were in the “early stages of White identity development.” *Id.* at 131. “Their understanding of racism was primarily described as the attitudes and behaviors of individuals acting upon race prejudice, with little mention of political or economic power structures affecting . . . people of color. Similarly, their views of the privileges and advantages conferred on White people are quite limited.” *Id.* at 131; see also Helms, *supra* note 207, at 50 (“Except for hard-core racial supremacists, the meaning of being White is having the choice of attending to or ignoring one’s own Whiteness . . . . [I]t appears that most Whites may have no consistent conception of a positive White identity or consciousness.” (internal quotation marks omitted)); *id.* at 54 (“One result of this [dominant White] racial status is that . . . even if one has few resources oneself, as long as one has White skin in America, one is entitled to feel superior to Blacks. This sense of entitlement seems to be a basic norm of White society.”).

<sup>217</sup> See *supra* notes 208, 212 and accompanying text (noting the outcome of these models).

<sup>218</sup> See *supra* Part I.B (discussing arguments for the diversity rationale).

tion,<sup>219</sup> and development of an antiracist white identity requires overcoming both conscious and unconscious beliefs in the myth that merit justifies privilege. The diversity rationale as currently deployed, however, does not undermine this myth. Rather, it lends credence to notions of white innocence, affirms belief in a false meritocracy, promotes individualism inimical to understanding power differentials between racial groups, perpetuates the idea of white racial transparency, and reinforces a relationship of subordination between Whites and non-Whites. Ultimately, white identity—whether conceptualized as a social construction, a sense of self, or a strategic performance—is negatively impacted by the diversity rationale in ways that retard social justice.

### 1. *The Problem with Transparency: White Identity as No Identity*

The first problem with the diversity rationale is the way in which its deployment encourages transparency—a failure of Whites to recognize their own racial identity—as well as a tendency to assume that the experiences of privileged Whites are normative. Unlike nonwhite groups that form racial identities around shared cultural norms, histories of immigration, or racial oppression,<sup>220</sup> white Americans typically

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<sup>219</sup> As explored and explained by many scholars, white identity typically confers on those who successfully claim it greater economic, political, and social security in society, often without any awareness on the part of the beneficiary. See Eduardo Bonilla-Silva, “New Racism,” *Color-Blind Racism, and the Future of Whiteness in America*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 160, at 271, 271 (explaining that, whether expressed in militant or tranquil fashion, whiteness is embodied racial power, the uniform of a dominant racial group that receives systematic privileges while denying the same to non-Whites); Doane, *supra* note 168, at 7 (explaining that “the ‘hidden’ nature of Whiteness is grounded in the dynamics of dominant group status,” with Whites successfully having used their political and cultural hegemony to “shape the racial order and racial understandings of American society,” as well as to promote white interests masquerading as those of American society more generally); Peter Halewood, *Laying Down the Law: Post-Racialism and the De-Racination Project*, 72 *ALB. L. REV.* 1047, 1049–50 (2009) (describing a “post-white society” as one in which Whites develop a critical self-awareness of white privilege and white racial identity that “challenge[s] the epistemic and interpretive pillars of whiteness . . . that have guaranteed the massive material subsidies that have accompanied whiteness from slavery forward—wealth, power, and control of the means of reproduction of those assets”); Harris, *supra* note 186, at 1731–37 (arguing that following a period of slavery and conquest, white identity in the United States became the basis of racialized privilege, of which a right to exclude non-Whites is a key feature); McIntosh, *supra* note 7, at 293–94 (compiling a list of white skin privileges, which include the ability to rent or purchase housing in a desirable and affordable area, seeing white people widely represented in media, and being sure that skin color will not work against an appearance of financial reliability).

<sup>220</sup> Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 *AM. U. L. REV.* 695, 701 (1996). Latinos, for example, might form a racial identity informed by histories of immigration to the United States from Latin America, while Blacks might form racial identities informed by shared struggle against racial oppression in the United States.

do not have a sense of racial identity unless it is juxtaposed against those of other, nonwhite racial groups, such as Blacks, Latinos, or Asians.<sup>221</sup> Indeed, the most salient aspect of white identity is perhaps its “transparency,” or the tendency of Whites not to think about the norms, behaviors, experiences, or perspectives that are specific to being white.<sup>222</sup> As Peggy McIntosh explained, many white students believe that “racism doesn’t affect them because they are not people of color; they do not see ‘whiteness’ as a racial identity.”<sup>223</sup>

This ignorance about white identity and its attendant privileges tacitly requires assimilation on the part of nonwhite people, as Whites fail to appreciate that their behaviors and cultural norms are not the naturally occurring standards against which to assess all other behavior, but rather are informed by their distinct racial identity and shared experiences. Transparency, therefore, remains a mechanism through which Whites can, whether intentionally or inadvertently, disavow white racial supremacy while still imposing white norms on people of color.<sup>224</sup> Having failed to acknowledge those impositions as expressions of racial prerogatives or customs, Whites can ultimately deny claims of racial subordination.

Accordingly, many Whites are unable to realize that their experiences neither necessarily form “the norm” nor set cultural baselines, but are actually behaviors and experiences more common among Whites. Abigail Fisher’s complaints that she had worked harder than others for admission into college exemplify this type of obliviousness: Fisher ignored the privileges she had been afforded in undertaking these efforts in the first place.<sup>225</sup> Ultimately, the experiences of minor-

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<sup>221</sup> See *id.* at 701–02 (focusing on the social construction of whiteness that drives the process of legally classifying groups of color, including Blacks, Asian Americans, and Latinos).

<sup>222</sup> See Flagg, *supra* note 20, at 969–73 (defining and describing the transparency phenomenon).

<sup>223</sup> McIntosh, *supra* note 7, at 297.

<sup>224</sup> See Flagg, *supra* note 20, at 957 (observing that the transparency phenomenon often has this effect).

<sup>225</sup> See *supra* notes 6–10 and accompanying text (noting Fisher’s lack of awareness regarding the privileges her background afforded her and observing that, in reality, opportunities to participate in extracurricular activities, learn to play musical instruments, and enroll in AP classes are all markers of privilege that are sometimes denied even to middle-class minorities). Moreover, it is a misconception that extracurricular activities in public schools are typically free and open to everyone. Rather, income constraints can limit access, as can teachers, who serve as gatekeepers to many activities and whose decisions about the students to whom they extend invitations can be imbued with conscious and unconscious bias like other decisions in the school setting. See Pamela Anne Quiroz et al., *Carving a Niche in the High School Social Structure: Formal and Informal Constraints on Participation in the Extra Curriculum*, 11 RES. SOC. EDUC. & SOCIALIZATION 93, 95–97, 100, 109–14 (1996) (challenging the idea that extracurricular activities are open to all stu-

ities, even those who are similarly situated to Abigail Fisher in terms of economic and social status, cannot be assumed to be the same as Ms. Fisher's—these minority students do not live the white experience.<sup>226</sup> The experience of encountering racism and discrimination, a lack of intergenerational assets, limited resources even in middle-class majority-minority schools, and proximity to economically marginalized communities all call into question the transferability of experience that Abigail Fisher seemed to perceive and endorse.

When white racial understanding does progress beyond transparency and its attendant assumptions about normative white experiences, such “progress” often entails invocations of ethnic identity.<sup>227</sup>

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dents and participation is wholly voluntary, and exploring formal and informal constraints on student participation such as attendance, grades, teacher recruitment, differential access to information, self-selection, culture, and student status).

<sup>226</sup> Minority middle-class status is tenuous and unstable, particularly when compared to white middle-class status. See MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 7–8 (2d ed. 2006) (explaining that minority middle-class status often depends on the precarious flow of income, while white middle-class status is supported by assets that provide economic stability and security); *id.* at 94–97 (explaining that to sustain a middle-class living standard in 1988, two-thirds of white and close to three-quarters of all black households needed more than one worker, and that it took two full-time workers in sixty percent of black homes to earn between \$25,000 and \$50,000 yearly, while the same was true for only thirty-seven percent of white homes); Malamud, *supra* note 138, at 976–78 (noting that not only is a black family's high income at a particular point in time less predictive of permanent high earnings than that of a white middle-class family, but also that middle-class black families are more likely to be dependent on the income of two working spouses than middle-class white families). Furthermore, middle-class minorities are more likely than their white counterparts to live in less affluent neighborhoods in close proximity to poor black enclaves. See *id.* at 972 (observing that suburban middle-class black families are exposed to more poverty than other middle-class groups, including in their children's public schools). It is unsurprising, then, that even minority students hailing from middle-class backgrounds are more likely to be subject to the inferior educational and extracurricular opportunities that poorer schools provide. See JOE R. FEAGIN & MELVIN P. SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 80 (1994) (noting that although black middle-class communities can provide social support to black children, “the public schools available [in these neighborhoods] may not be as well equipped or staffed as those in white suburban areas”); Elizabeth Stearns & Elizabeth J. Glennie, *Opportunities to Participate: Extracurricular Activities' Distribution Across and Academic Correlates in High Schools*, 39 SOC. SCI. RES. 296, 307 (2010) (finding that school size and poverty levels significantly influence the number and types of activities available, with larger schools and schools with more affluent student bodies offering more activities).

<sup>227</sup> Ethnic identity and racial identity are not the same. Ethnicity was a concept initially developed to refer to differences in national and cultural patterns and practices among Europeans who were nevertheless still united by a white racial identity. Although it was a step toward racial egalitarianism because it erased racial hierarchy among persons of European descent, it did not transcend race. IAN F. HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS* 93–94 (2014). Ultimately, “racial identity is a matter . . . of social understandings, although those may give great weight to purportedly salient differences in morphology and ancestry.” Ian F. Haney Lopez, *Colorblind to the Reality of Race in America*, CHRON.

These ethnic narratives allow white privilege to be discounted and white race-based grievances to be aired without seeming racist.<sup>228</sup> For example, young Whites selectively resurrect ethnicity through immigrant tales that detail the hardships their ancestors endured as newly arrived immigrants to the United States. The genuine but temporary discrimination faced by these relatives “becomes analogous to and indistinguishable from three centuries of slavery, Jim Crow, legal segregation, and state-sanctioned ‘benign neglect.’”<sup>229</sup> Despite the incongruence of these experiences, given the privilege that has since accrued to ethnic Whites, this analogy allows Whites to maintain the fiction that every group has been equally victimized and to tap into the “mythologized narrative” of hardship that has become a part of the American experience for many citizens.<sup>230</sup>

This narrative, of course, is not based in reality. Scholars have long associated whiteness with racialized privilege, regardless of ethnic background. W.E.B. Du Bois detailed the “public and psychological” benefits that a claim to whiteness provides.<sup>231</sup> Ruth Frankenberg, considered the pioneer of “whiteness studies,” explained that the very term “‘whiteness’ signals the production and reproduction of dominance rather than subordination, normativity rather than marginality, and privilege rather than disadvantage.”<sup>232</sup> Cheryl Harris has conceptualized whiteness as racialized privilege in the form of a property interest, providing its owners with benefits such as higher wages, racially exclusive access to public facilities, and the affirmation of self-identity and liberty that Blacks have been denied.<sup>233</sup> As an identity and property interest, whiteness provides

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HIGHER EDUC., Nov. 3, 2006, at B6. A Latino person, for example, can have a black racial identity while also having a Puerto Rican cultural and national identity. See, e.g., Rosa Clemente, *Who Is Black?*, 1NEDROP (Oct. 30, 2011), <http://1nedrop.com/who-is-black-by-rosa-clemente/> (explaining that while she has a black racial identity, she also has a Latino political identity and a Puerto Rican cultural and national identity).

<sup>228</sup> Charles A. Gallagher, *Playing the White Ethnic Card: Using Ethnic Identity to Deny Contemporary Racism*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 160, at 145, 146.

<sup>229</sup> *Id.*

<sup>230</sup> See Charles A. Gallagher, *White Racial Formation: Into the Twenty-First Century*, in *CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR*, *supra* note 7, at 6, 8 (exploring whiteness and mythologized immigrant tales that allow Whites to share with other racial groups “a historical common denominator of passage, victimization, and assimilation”).

<sup>231</sup> W.E.B. DU BOIS, *BLACK RECONSTRUCTION IN AMERICA 700–01* (Touchstone 1995) (1935).

<sup>232</sup> RUTH FRANKENBERG, *WHITE WOMEN, RACE MATTERS: THE SOCIAL CONSTRUCTION OF WHITENESS* 236–37 (1993).

<sup>233</sup> See Harris, *supra* note 186, at 1724–28, 1741–44 (explaining how and why whiteness may be characterized as a property interest and describing some of the benefits it has yielded to its owners).

social and psychological benefits to Whites, who are buoyed by the sense of superiority that whiteness confers by virtue of its monopoly on political, legal, financial, and social power.<sup>234</sup> This sense of racial superiority encourages even “the most economically and culturally deprived” Whites to feel superior to any black person.<sup>235</sup>

So high is the value of whiteness that some have felt the need to lay claim to it even at personal cost. The value of whiteness, for example, has historically undermined the ability of Whites and Blacks to form cooperative labor movements in pursuit of economic justice.<sup>236</sup> Similarly, even though ethnic white immigrants to the United States in the latter half of the nineteenth century were exploited in mines and factories under unsafe conditions for substandard wages, they nevertheless assimilated to a white identity founded on disparagement of Blacks rather than crossing the color line to join forces in resisting their mutual exploitation.<sup>237</sup> More recently, the value of whiteness was identified as one obstacle to white working-class support for President Barack Obama’s arguably more populist 2008 election campaign.<sup>238</sup> The black comedian Chris Rock astutely noted the worth of whiteness when he joked that, despite his wealth and success, poor Whites would never trade places with him, preferring instead to “ride this white thing out.”<sup>239</sup> Ultimately, white identity is a distinctive racial identity defined in part by its inherent value and attendant privileges.

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<sup>234</sup> See Thomas Ross, *The Unbearable Whiteness of Being*, in CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY 251, 253–54 (Francisco Valdes et al. eds., 2002) (noting that being white is particularly valuable when “Whites hold most of the power,” and arguing that “[c]ontemporary racism . . . provides Whites with an intangible but powerful sense of racial superiority,” as well as “a presumptive sense of worthiness and belonging”).

<sup>235</sup> Derrick Bell, *Racism as the Ultimate Deception*, 86 N.C. L. REV. 621, 623 (2008).

<sup>236</sup> Cf. David R. Roediger, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* 12–13 (3d ed. 2007) (summarizing W.E.B. Du Bois’s argument that claims to whiteness became so important to working-class Whites that to them, in effect, the benefits of whiteness functioned as a wage that compensated for the exploitation inherent in labor-capital relationships, but that these “wages of whiteness often turned out to be spurious”).

<sup>237</sup> Derrick Bell, *Getting Beyond a Property in Race*, 1 WASH. U. J.L. & POL’Y 27, 32 (1999).

<sup>238</sup> See Angela Onwuachi-Willig & Osamudia James, *The Declining Significance of Presidential Races?*, 72 LAW & CONTEMP. PROBS. 89, 95–100 (2009) (discussing the Obama campaign’s struggle to win approval from and connect with white working-class voters and observing that white candidates did not face such difficulty).

<sup>239</sup> “There’s a white, one-legged busboy in here right now that won’t change places with my black ass. He’s going, ‘No, man, I don’t wanna switch. I wanna ride this white thing out. See where it takes me.’” CHRIS ROCK: BIGGER AND BLACKER (HBO 1999).

Nonetheless, whether by refusing to acknowledge it or by resurrecting stories of immigrant hardship,<sup>240</sup> many Whites discount their race-based privilege. Indeed, white privilege includes the very ability to ignore white privilege by disregarding whiteness altogether. Consequently, benefits and advantages afforded to Whites are justified as the result of merit, hard work, and thrift. This uncritical perception of whiteness and racial inequity only perpetuates “culturally sanctioned assumptions, myths, and beliefs that justify the social and economic advantages white people have as a result of subordinating others.”<sup>241</sup> The unfortunate result is that Whites develop a view of self that depends on their perceived racial superiority.<sup>242</sup> Anything that undermines or questions the racial order “inevitably challenges the self-identity of white people who have internalized these ideological justifications.”<sup>243</sup> As such, white racial identity is consciously and unconsciously rooted in privilege and subordination. As Eduardo Bonilla-Silva noted, “Whiteness . . . in all of its manifestations, is embodied racial power,” and white identity is the “foundational category of white supremacy.”<sup>244</sup>

Legal challenges to affirmative action in higher education provide ideal examples of the problematic transparency and normativity phenomena. These lawsuits are often grounded in complaints based on the merit, as indicated by higher grade point averages and standardized test scores, of white students denied admission.<sup>245</sup> Implicit in these challenges is the assumption that those measures are objective and bias-free, unaffected by historical, economic, political, and educational advantages for Whites and corresponding disadvantages for non-Whites.<sup>246</sup>

The plaintiffs in these lawsuits—Hopwood, Grutter, Gratz, Fisher, and the parents in Louisville and Seattle—similarly exemplify

<sup>240</sup> See Gallagher, *supra* note 228, at 149–52 (excerpting interviews in which white interviewees invoked the work ethic of their ancestors to refute minority claims regarding racism).

<sup>241</sup> Joyce E. King, *Dysconscious Racism: Ideology, Identity, and Miseducation*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR, *supra* note 7, at 128, 128.

<sup>242</sup> See Flagg, *supra* note 20, at 957 & n.20 (citing Helms, *supra* note 207, at 49) (advocating the development of an alternative white racial identity that no longer depends on “the implicit acceptance of white racial domination”).

<sup>243</sup> King, *supra* note 241, at 128.

<sup>244</sup> Bonilla-Silva, *supra* note 219, at 271 (internal quotation marks omitted); *id.* at 271–72 (explaining how white identity has persisted and generated a “new racism” more subtle than previous forms).

<sup>245</sup> See *supra* notes 33–40, 53–68, 88–98 and accompanying text (detailing the basis for lawsuits brought by Cheryl Hopwood, Barbara Grutter, and Abigail Fisher, respectively).

<sup>246</sup> See *infra* notes 254–62 and accompanying text (highlighting Abigail Fisher, Barbara Grutter, and Cheryl Hopwood’s claims that hard work alone was responsible for their academic success and standardized test scores, thus justifying their admission).

the transparency and normativity phenomena. When they spoke publicly about their lawsuits, these plaintiffs acknowledged white racial identity only as the basis for victimization vis-à-vis non-Whites.<sup>247</sup> For example, on the day before oral arguments in her case, Jennifer Gratz<sup>248</sup> explained, “We are taught in our schools and in our homes and in our churches that you should never judge another person based on her skin color,”<sup>249</sup> thus evoking her white identity in the context of her victimization. Similarly, when Grutter invoked identity, it was to compare her victimization as a white law school applicant to the discrimination she had suffered as a working woman;<sup>250</sup> her comparison resembles the manner in which Whites sometimes invoke ethnic identity to insulate themselves from accusations of racial insensitivity.<sup>251</sup> Grutter also invoked her own victimization when she explained that she had decided to bring suit because she believed “it was the right thing to do,”<sup>252</sup> saying: “I had always taught (my kids) discrimination was wrong and the law protects them from that. I could have been angry and bitter—or whined about it—or I could do something positive. I viewed filing a lawsuit as a positive thing.”<sup>253</sup> In these statements, Gratz and Grutter reference their whiteness as the basis of a wrong done unto them: They feel victimized because of their race.

None of the plaintiffs (Hopwood, Grutter, Gratz, or Fisher) made statements demonstrating awareness of the privileges and benefits they had enjoyed by virtue of their white identity. Their silence on the topic might be read as a failure to recognize that the uniqueness of the minority experience may merit consideration, or as ignorance of how

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<sup>247</sup> Admittedly, these examples draw from articles and literature that featured only limited quotes or brief excerpts from interviews with the plaintiffs as their cases went before the Court, perhaps produced as part of litigation or public relations strategies. Therefore, conclusions drawn from their statements are speculative and cannot be considered definitive analyses of what these plaintiffs believed. To the extent, however, that the available information and quotations reflect the genuine thinking animating the plaintiffs’ considerable expenditures of financial and emotional resources in their lawsuits, they illustrate the problematic aspects of white identity perpetuated by the diversity rationale.

<sup>248</sup> See *supra* note 73 (describing Jennifer Gratz’s lawsuit against the University of Michigan, which successfully persuaded the Court that the school’s undergraduate admissions policy was unconstitutional).

<sup>249</sup> Tomislav Ladika, *Plaintiffs Discuss Goals in Bringing Their Cases Before Supreme Court*, MICH. DAILY (Apr. 1, 2013), <http://www.michigandaily.com/content/plaintiffs-discuss-goals-bringing-their-cases-supreme-court> (internal quotation marks omitted).

<sup>250</sup> See Brackett, *supra* note 64 (discussing Grutter’s thoughts on being one of the only women in her workplace).

<sup>251</sup> See *supra* notes 227–30 and accompanying text (discussing how white privilege is discounted through invocations of ethnic narratives).

<sup>252</sup> Brackett, *supra* note 64.

<sup>253</sup> Mark Clayton, *The Woman Behind the Law-School Admissions Suit*, CHRISTIAN SCI. MONITOR, Apr. 3, 2001, at 14 (internal quotation marks omitted), available at <http://www.csmonitor.com/2001/0403/p14s1.html>.

the benefits of whiteness accrue even to the white working class—that white identity always includes white privilege.<sup>254</sup>

When discussing, for example, her initial rejection from UT, Hopwood maintained that if the school had considered overcoming hardship as a plus factor, she would have been one of the more qualified candidates. She further asserted that “[r]ace should just not be a determining factor in admissions policy at the level of law school . . . . At that level I’m competing with others who have B.A. degrees and they’re not people who necessarily have more disadvantaged backgrounds than I have.”<sup>255</sup> She also argued, “The fact that I have one severely handicapped child and another one died is an injustice. But nobody’s helping me.”<sup>256</sup> Faced with an affirmative action program justified by a compelling state interest in diversity, Hopwood com-

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<sup>254</sup> See *supra* notes 231–41 and accompanying text (exploring the privileges of whiteness, including benefits felt by working-class Whites and the ability to disregard whiteness altogether).

<sup>255</sup> Richard Bernstein, *Racial Discrimination or Righting Past Wrongs?*, N.Y. TIMES, July 13, 1994, at B8.

<sup>256</sup> Sam Howe Verhovek, *For 4 Whites Who Sued University, Race Is the Common Thread*, N.Y. TIMES, Mar. 23, 1996, at 6 (quoting William M. Adler, *Evening the Score*, ROLLING STONE, Aug. 10, 1995, at 35, 69) (internal quotation marks omitted). Although raising a differently-abled child can most certainly present unique and significant challenges, government-provided aid and services are rightly available in helping parents care for children with disabilities and were likely available to Hopwood as she responded to her own child’s medical needs. The Individual with Disabilities Education Act (IDEA), for example, is a federal law that governs how state and public agencies educate children with disabilities. 20 U.S.C. §§ 1400–1482 (2012). Moreover, several services, including Children’s Health Insurance Plans (CHIP), Medicare, Medicaid, and Supplemental Security Income (SSI) are potentially available to the caregivers of children with cerebral palsy, the disease afflicting Hopwood’s daughter. See generally *Government Assistance: Getting Started with Government Assistance*, CEREBRALPALSY.ORG, <http://cerebralpalsy.org/popular/%20government-assistance/getting-started/> (last visited Mar. 13, 2014) (providing links to information about various government assistance programs); Jonathon Reid, *Affirmative Action, the Debate Continues, Part I*, POLITICOLE (Jan. 30, 2013), <http://thepoliticole.com/2013/01/30/affirmative-action-the-debate-continues-part-1/> (describing Cheryl Hopwood’s background and noting that she had to spend much of her time caring for her child with cerebral palsy). Moreover, even controlling for socioeconomic status, by mere virtue of being a white child, Hopwood’s daughter would be more likely to receive higher-quality medical and educational services than the treatment afforded to the disabled who are part of a racial minority group. Rene Bowser, *Racial Profiling in Health Care: An Institutional Analysis of Medical Treatment Disparities*, 7 MICH. J. RACE & L. 79, 83–91 (2001) (presenting research findings concluding that even after controlling for socioeconomic status, racial disparities in health care exist across a spectrum of settings and diseases). See generally *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (Brian D. Smedley et al. eds., 2003) (exploring why and how race and ethnicity continue to serve as significant predictors for quality of healthcare received). My point here is not to dismiss the difficulty of caring for a disabled child, but rather to challenge Hopwood’s suggestion that there is no state support for that care—however limited it might be—and to highlight that white privilege can mitigate even the difficult experience of raising and supporting a child with special needs.

pared her own legitimate life obstacles with the obstacles she saw UT attributing to nonwhite applicants, and did not understand how the latter could merit greater consideration than the former. Discounting race, she summarily concluded that students of color who had achieved a degree comparable to hers were likely to have been no more disadvantaged than she was. She believed, instead, that students of color who failed to achieve her grades and test results did not work hard, a sentiment also expressed by Abigail Fisher.<sup>257</sup>

By ignoring white privilege and presenting their own experiences as normative, the affirmative action plaintiffs seemed to believe that only a particular brand of merit should count in the admissions process. Grutter arguably would have contributed viewpoint diversity to the classroom,<sup>258</sup> but she seemed unaware that presenting an alternate viewpoint might not guarantee her a spot in the classroom or that the high value she placed on her perspective might not be the norm. The same was true of Hopwood, who seemed to set her hardship as the standard by which other students should have been judged, and Fisher, who—in light of her own accomplishments—could not understand her rejection from UT.<sup>259</sup> Fisher could think of no reason for her

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<sup>257</sup> See *supra* notes 4–6 and accompanying text (quoting Fisher on the subject).

<sup>258</sup> Hailing from working-class backgrounds, Grutter, as well as Hopwood, might have increased class diversity at the elite institutions to which they applied. However, if we are to use current equal protection jurisprudence as an analytical framework for assessing diversity, it is relevant that the Court, regrettably, failed to recognize wealth as a suspect classification in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 18–28 (1973). In the case, the Court declined to recognize a suspect class of poor people for an equal protection challenge to unequal school financing structures. Questions remain about the extent to which class can or should supplant race in diversity initiatives. See, e.g., RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* 80, 83 (1996) (arguing that the focus on race in affirmative action has only undermined the moral legitimacy of the policies, and arguing for class-based affirmative action); Angela Onwuachi-Willig & Amber Fricke, *Class, Classes, and Classic Race-Baiting: What's in a Definition?*, 88 DENV. U. L. REV. 807 (2011) (demonstrating why class-based affirmative action is an inadequate substitute for race, and explaining why race-based affirmative action, in addition to class-based affirmative action, is still needed); Onwuachi-Willig & James, *supra* note 238 (exploring the salience of race in the 2008 Presidential election to conclude that even the most upwardly mobile Blacks still encounter obstacles on account of their race); Richard H. Sander, *Class in American Legal Education*, 88 DENV. U. L. REV. 631 (2011) (detailing the flaws with race-based affirmative action, and advocating for class-based preferences); Jonathan D. Glater & Alan Finder, *Diversity Plans Based on Income Leave Some Schools Segregated*, N.Y. TIMES, July 15, 2007, at A24 (discussing the racial effects of a schooling system implementing class-based affirmative action); Sophie Quinton, *What if Colleges Embraced Affirmative Action for Class Instead of Race?*, ATLANTIC (Oct. 21, 2013, 12:10 PM), <http://www.theatlantic.com/education/archive/2013/10/what-if-colleges-embraced-affirmative-action-for-class-instead-of-race/280733/>.

<sup>259</sup> See Tolson, *supra* note 2 (“I took a ton of AP classes, I studied hard and did my homework—and I made the honor roll. . . . I was in extracurricular activities. I played the cello and was in the math club, and I volunteered. I put in the work I thought was necessary to get into UT.”).

rejection, even though UT made it clear that her composite score was just too low.<sup>260</sup> Maintaining that her accomplishments should have guaranteed her admission, she dismissed the possibility that nonwhite applicants with scores lower than hers could have had application profiles that made them more desirable for admission.<sup>261</sup> She showed no understanding that, given the racialized and often negative experiences of minorities in the school system, successfully preparing for higher education as a person of color is often an accomplishment that demonstrates character, dedication, and perseverance of a sort more impressive than Fisher's commitment to playing the cello or completing AP classes.<sup>262</sup> In Fisher's mind, her experience set the norm, and students with backgrounds that deviated from hers and resulted in a different set of accomplishments were not worthy of acceptance over her.

In the context of K–12 education, the remarks of Kathleen Brose and Meredith Crystal, plaintiffs in *Parents Involved*,<sup>263</sup> further illustrate the problematic phenomena of transparency and normativity. Brose, who founded the organization Parents Involved in Community Schools (PICS) after her daughter was denied her first choice in Seattle's controlled-choice school assignment program<sup>264</sup> and ultimately used the organization to sue the Seattle school district, lamented:

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<sup>260</sup> *Supra* notes 3–4 and accompanying text.

<sup>261</sup> *Supra* notes 4–10 and accompanying text.

<sup>262</sup> *See supra* note 8 and accompanying text (observing that assessments of minority students' intellectual and emotional capabilities are interpreted negatively and that they are disproportionately selected for special education programs); Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1114–19 (2014) (detailing the negative and racialized schooling experience of minorities in the United States to explain the appeal of charter schools and other exits from the public school system); cf. Angela Onwuachi-Willig, *Why My Pride Is Not Prejudice and Other Tales About the Souls of Black Folks: What Gabby Douglas and President Barack Obama Teach Us About Hope and Vision* 11–25 (unpublished manuscript) (on file with the *New York University Law Review*) (explaining how ignoring race discounts the greatness of the achievement of African American “firsts” because of the race-related obstacles they had to overcome).

<sup>263</sup> *Parents Involved in Cmty. Sch. v. Seattle School Dist. No. 1*, 551 U.S. 701 (2007).

<sup>264</sup> *See Kathleen's Story*, PARENTS INVOLVED IN COMMUNITY SCHOOLS, <http://piics.org/page9.html> (last visited Mar. 13, 2014) (describing Brose's increasing frustration after her daughter did not get into her first, second, or third choice high school and explaining how after receiving no concern or response from the school board, she turned to a group of parents, who then turned to a local law firm to file their suit against the Seattle School Board). In an attempt to provide minority students living on the south side of Seattle access to the city's wealthier and higher-performing public K–12 schools on the north side, the Seattle, Washington school district implemented a controlled-choice plan in which it used race as a factor when assigning children to schools. *See Parents Involved*, 551 U.S. at 711–13 (describing the Seattle school assignment system).

After volunteering hundreds of hours over 9 years in many capacities such as PTA President, field-trip driver, volunteer music teacher, coordinator of the wiring project, auction coordinator, bake sales and room mother, and a great supporter of the school levy campaign, I felt absolutely betrayed that my child was denied access to three schools because of her race and the community where she resided.<sup>265</sup>

Even though she invoked her daughter's whiteness as the basis of her victimization, Brose did not recognize the disadvantages faced by non-Whites, and instead, suggested that people "move beyond race."<sup>266</sup> Crystal Meredith, who successfully challenged school assignment plans in Louisville, Kentucky designed to maintain racial integration,<sup>267</sup> similarly refused to acknowledge the salience of racial identity for non-Whites, explaining that the case was never about race for her. Indeed, she was "shocked that people think it is a race issue."<sup>268</sup>

Again, white racial identity in both cases was invoked only as the basis for white victimization. Neither Meredith nor Brose addressed how minority identity has impacted students of color in their school districts through racial isolation and the denial of access to more competitive schools.<sup>269</sup> Moreover, neither vocalized awareness of the privileges they had been afforded, privileges that necessarily made their decisions to bring suit an expression of racial dominance. When Brose detailed her exhaustive list of ways in which she served her commu-

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<sup>265</sup> *Kathleen's Story*, *supra* note 264.

<sup>266</sup> Mike Lewis, *Q&A: Woman Who Fought School District*, SEATTLE POST INTELLIGENCER (June 28, 2007, 10:00 PM), <http://www.seattlepi.com/local/article/Q-A-Woman-who-fought-school-district-1242209.php>.

<sup>267</sup> The Jefferson County School District in Louisville, Kentucky, also implemented a similar controlled-choice plan in an attempt to avoid resegregation of its public schools. *See Parents Involved*, 551 U.S. at 716–17 (describing the district's plan).

<sup>268</sup> Janelle MacDonald, *Local Mom Makes National Headlines with Lawsuit Against JCP&S*, WAVE3 NEWS (Oct. 10, 2006, 3:05 PM), <http://www.wave3.com/global/Story.asp?s=5522206>.

<sup>269</sup> *See* Mickelson, *supra* note 21, at 1547 (finding that as the percentage of black students in a school increased, the percentage of the school's teachers with master's degrees or more teaching experience decreased); John A. Powell, *A New Theory of Integrated Education*, in *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 281, 285–86 (John Charles Boger & Gary Orfield eds., 2005) (noting racially isolated schools' "devastating implications for the educational environment," including greater reliance on transitory teachers, larger class sizes, higher rates of tardiness and absence, lower rates of extracurricular involvement, and less access to technology, as well as contribution to the achievement gap between black and white students). *See generally* *SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?*, *supra* (canvassing a broad array of social science literature explaining how racially isolated schools negatively impact both white and nonwhite students).

nity,<sup>270</sup> she did not acknowledge the privilege inherent in her ability to commit so much time to volunteer work for her child's school, a privilege more likely to be enjoyed by white women.<sup>271</sup> Instead, she presented the list as evidence of injustice in her daughter's denial from her first-choice school.

The diversity rationale, unfortunately, magnifies this problematic identity performance. Even as institutions use this doctrine to advance a narrative and value structures that esteem different perspectives in the classroom, the diversity rationale gives the appearance of placing greater value in admissions on the experience of racial minorities than that of other groups without providing a justification for why.<sup>272</sup> This unexplained preference may help explain the plaintiffs' indignation. The diversity rationale, as deployed, encourages Whites to think of themselves as having no racial identity, which reinforces the idea that white racial identity and white racial privilege need not be acknowledged.

Although the presence of racial and ethnic minorities in higher education is certainly desirable, diversity initiatives that are not candid about *why* white racial identity is not given (additional) weight in the admissions process are troublesome. Instead of contextualizing minority racial identity relative to white identity, diversity focuses solely on minority identity, implying to Whites that racial identity is something they do not have. Divorced from any critical understanding of the advantage white identity provides in achieving social, political, and economic success, a white racial identity grounded in superiority is perpetuated.

## 2. *The Problem with Innocent White Identity*

In addition to encouraging Whites to think of their experiences as normative, even as they fail to recognize their own racial identity, the diversity rationale advances a narrative of white racial innocence. Darren Hutchinson, in his scholarship about racial egalitarian measures in the United States, explains that social narratives play a crucial role in public life, "allow[ing] groups of individuals to unify around a

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<sup>270</sup> *Kathleen's Story*, *supra* note 264.

<sup>271</sup> Black middle-class families, for example, are more likely than white middle-class families to be dependent on the income of two working spouses. Malamud, *supra* note 138, at 976–77. Since white middle-class families are more likely to be dependent on the earnings of one spouse, the income potential of the second spouse tends to be untapped and on reserve in case of a financial emergency. *Id.* at 977.

<sup>272</sup> In stating that diversity focuses on racial minorities, I mean that discussions of diversity, particularly in institutions of higher education, lack any discussion of Whites as a racial group. The focus is on the minority population of the school, not on the presence (or absence) of Whites.

set of shared experiences and beliefs.”<sup>273</sup> In particular, social movements “rely on rhetoric and narratives to articulate shared social and political perspectives.”<sup>274</sup> And, to the extent that dominant group narratives attempt to explain social events and conditions, the dominant group “legitimize[s] inequality by attributing group disparities to individual shortcomings instead of domination or bias.”<sup>275</sup> Given a belief in the innate shortcomings of non-Whites, it is not surprising that many Whites have contested racial justice measures attempting to further equality as “unfair to Whites.”<sup>276</sup>

Labeling racial measures as “unfair” implies white innocence; this rhetorical leap is consistently employed to challenge affirmative action<sup>277</sup> by presenting Whites as victims of race-conscious admissions policies.<sup>278</sup> Moreover, the innocence narrative reaffirms blindness to white privilege because it suggests that Whites have not received

<sup>273</sup> Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917, 924 (2008).

<sup>274</sup> *Id.* at 925.

<sup>275</sup> *Id.* at 924–25.

<sup>276</sup> *Id.* at 926 (noting also that such measures have been characterized as “redundant, unnecessary, vexatious, [and] futile”).

<sup>277</sup> See, e.g., Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 960–61 (1996) (discussing the narrative of an archetypal challenger to affirmative action in the employment context, who argues that he lost out on the job he deserved to an unqualified minority on account of that minority’s gender or race); Richard C. Paddock, *Affirmative Action Era Over, Foe Says; Fresh from a Victory in Michigan, Former UC Regent Ward Connerly Is Eyeing New Crusades*, L.A. TIMES, Nov. 26, 2006, at B1 (describing how Ward Connerly, a former member of the University of California Board of Regents and a key figure behind Proposition 209’s ban of racial preferences in California higher education, has argued that affirmative action programs are misguided and unfair); Stuart Silverstein, *Pepperdine Defends Its Minority Scholarships; Successful Elsewhere, Anti-Affirmative Action Activists Seek to Force College to Revise Awards*, L.A. TIMES, Jan. 22, 2004, at B1 (quoting Roger Clegg, general counsel for the Center for Equal Opportunity, opining that scholarship programs that exclusively benefit minorities are “bad policy . . . [and] unfair for the students who are excluded”); Rebecca Trounson, *His Tenure’s at the Finish Line, but for Connerly, Race Goes On*, L.A. TIMES, Jan. 21, 2005, at A1 (quoting Ward Connerly’s characterization of the University of California’s race-conscious admissions as unfair to many applicants and “a lawsuit just ready and waiting to happen”); *supra* note 256 and accompanying text (quoting Cheryl Hopwood’s suggestion that others are unfairly receiving admissions assistance while she is not, although she is raising a disabled child).

<sup>278</sup> I thank Professor Brent White for thoughtful exchanges about whether white victimhood narratives predated the diversity rationale and were triggered in the first instance by affirmative action programs more generally. I agree that the phenomenon of white victimhood emerged before the Supreme Court first endorsed the diversity rationale in *Bakke* or affirmed it in *Grutter*. Yet the diversity rationale has served to intensify the phenomenon, particularly because it is untethered to notions of social justice and therefore does virtually nothing to help educate would-be white plaintiffs on the nature and legacy of racial bias and discrimination in the United States. Ultimately, this is a primary problem with the diversity rationale: Devoid of context or understanding as to the enduring racial bias and discrimination—intentional or not—that justify attempts to broaden access to

unearned benefits. The image of an innocent white victim draws power from its implicit contrast with a person of color who unfairly benefits from affirmative action, a contrast that is buttressed by stereotypes regarding lazy and undeserving minorities.<sup>279</sup>

The narrative of white innocence repeatedly surfaces in Supreme Court cases and doctrine regarding racial measures and remedies. In *Bakke*, for example, the Court highlighted the unfairness of asking “*innocent* persons . . . to endure . . . [deprivation as] the price of membership in the dominant majority,”<sup>280</sup> and then went on to note that it had “never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other *innocent* individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.”<sup>281</sup> A few years later, in *Wygant v. Jackson Board of Education*, the Court rejected a collective bargaining agreement that extended preferential treatment to minority employees, writing: “No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against *innocent* people, societal discrimination is insufficient and over-expansive.”<sup>282</sup>

In *Grutter*, the Court echoed this innocence narrative, acknowledging that there are “serious problems of justice connected with the idea of preference itself,” and that “[e]ven remedial race-based government action generally ‘remains subject to continuing oversight to assure that it will work the least harm possible to other *innocent* persons competing for the benefit.’”<sup>283</sup> Finally, the Court noted that “[t]o be narrowly tailored, a race-conscious admissions program must not *unduly burden* individuals who are not members of the favored racial and ethnic groups.”<sup>284</sup> Notably absent from the justifications for diversity recognized in *Grutter* were any corrective or distributive justice claims, claims that implicitly demand that people acknowledge and assume responsibility for (or admit complicity in) racial oppression. In

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higher education for non-Whites, the diversity rationale, and really any race-conscious remedy, will always trigger problematic deployments of white innocence and victimhood.

<sup>279</sup> See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 314–15 (1990) (“The assertion of the innocent white victim draws power from the implicit contrast with the ‘defiled taker.’ The defiled taker is the black person who undeservedly reaps the advantages of affirmative action.”).

<sup>280</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (emphasis added).

<sup>281</sup> *Id.* at 307 (emphasis added).

<sup>282</sup> 476 U.S. 267, 276 (1986) (emphasis added).

<sup>283</sup> *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (emphasis added) (quoting *Bakke*, 438 U.S. at 298, 308).

<sup>284</sup> *Id.* (emphasis added) (internal quotation marks omitted).

demanding such acknowledgement, these claims potentially trigger white guilt and defensiveness.<sup>285</sup>

The most recent iteration of the innocence narrative in the context of education came in *Parents Involved*.<sup>286</sup> There, the Supreme Court equated consideration of race in pursuit of diverse public school enrollment to Jim Crow segregation policies and concluded that, absent intentional discrimination by school districts, Whites could not be asked to bear any burden in the attempt to diversify public schools.<sup>287</sup> Accordingly, Whites—who had previously benefited from their whiteness, but now do not directly benefit from diversity initiatives intended to broaden minority access to better public schools—were analogous to Blacks who were excluded from public accommodations on account of their race. In making this argument, the majority of the Court implicitly dismissed the disadvantage suffered by minorities in the school system who were denied access to more competitive schools by residential segregation and complicit school assignment policies.<sup>288</sup>

Like other destructive elements of white identity I describe, the innocence narrative is reflected in the words of the affirmative action plaintiffs. Fisher, for example, condemned UT's admissions policies, casting herself as an innocent victim: "I was taught from the time I

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<sup>285</sup> See Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171, 174 (2005) (noting that the corrective justice rationale's focus on a "history of racial oppression" may arouse "fatigue, guilt, defensiveness, and anger" and be met with resistance by those who feel they "have done nothing wrong").

<sup>286</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

<sup>287</sup> See *id.* at 720–25, 746–47 (holding that school districts' race-conscious integration policies failed strict scrutiny because there was no unremedied intentional discrimination and *Grutter*'s diversity rationale did not apply, and also comparing the schools' policies to the segregation regimes ruled unconstitutional in *Brown v. Board of Education*, 347 U.S. 483 (1954)).

<sup>288</sup> Cf. Ross, *supra* note 279, at 305–06 (noting that by characterizing claims as "generalized" and "amorphous," the Court denies the actual victimization of black beneficiaries of affirmative action policies). The innocence narrative also persists outside of the education context. In *Fullilove v. Klutznick*, for example, the Court noted: "When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination . . . a sharing of the burden by innocent parties is not impermissible." 448 U.S. 448, 484 (1980) (citation omitted) (internal quotation marks omitted). In *Ricci v. DeStefano*, the Court again implicitly challenged the victimization of minorities, who suffered a disparate impact from the use of an employment test, by emphasizing the white firefighters' merits and qualifications, noting that "some of the firefighters here invested substantial time, money, and personal commitment in preparing for the tests. . . . [H]owever, the firefighters saw their efforts invalidated by the City in sole reliance upon race-based statistics." 557 U.S. 557, 583–84 (2009). Again, the point is not that white candidates did not invest time, money, and personal commitment into preparing, but that by focusing on these virtues the Court—perhaps unwittingly—contrasts the virtuous, innocent plaintiff to the guilty affirmative action beneficiaries.

was a little girl that any kind of discrimination was wrong.”<sup>289</sup> Grutter similarly claimed to be an innocent victim of discriminatory policies, going so far as to present herself as a hero who proactively filed a lawsuit instead of being complacent with the unjust hand she was dealt.<sup>290</sup> Like Fisher, she noted that she had learned that racial discrimination was wrong.<sup>291</sup> While Grutter suggested that her problem was with the university itself, and not with other admitted students,<sup>292</sup> the implication is that accepted minorities with lower grades or tests scores obtained something that they didn’t deserve: Their acceptances were ill-gotten. Finally, the parent-plaintiffs in *Parents Involved* expressed similar sentiments. Explaining why Whites had been victimized in the Seattle controlled-choice plan, Brose explained: “Only 7.5% of students from Blaine School who are white were assigned to their first-choice school. . . . It is clear that we were really treated unfairly.”<sup>293</sup> In challenging the Louisville integration plan, Crystal Meredith accused the school board of wanting her to “sacrifice [her son’s] learning in order to maintain the status quo,” and declared that “each child’s education is more important than [the school district’s] plan.”<sup>294</sup>

This innocence narrative has significant implications for the development of antiracist white identity. As advanced by the diversity rationale, this narrative traps Whites in the acceptance stage of Hardiman’s White Identity Development (WID) model, a stage defined by a belief in meritocracy and the inferiority of people of color.<sup>295</sup> By focusing on the virtues of diverse viewpoints in the classroom and the common good inherent in exposure to people of different backgrounds, the diversity rationale avoids consideration of active white participation and complicity in larger patterns and structures of subordination that result in the exclusion of alternate viewpoints in the first place.

Quality K–12 public education, for example, is a necessary prerequisite for higher education. Having acquiesced to the dismantling of formal segregation, many Whites fail to see the role they play in

<sup>289</sup> Tolson, *supra* note 2.

<sup>290</sup> See *supra* notes 250–53 and accompanying text (describing Grutter’s view of herself as a victim).

<sup>291</sup> *Supra* note 5, 253 and accompanying text.

<sup>292</sup> Grutter stated that her “issue has always been with the university; it’s not been with any students or anyone personally.” Cobbs, *supra* note 60.

<sup>293</sup> *Kathleen’s Story*, *supra* note 264.

<sup>294</sup> Crystal Meredith, Statement at Press Conference (June 28, 2007), available at <http://www.courier-journal.com/assets/B278019628.pdf>.

<sup>295</sup> For more information on Hardiman’s WID model, see *supra* notes 209–13 and accompanying text.

undermining quality education for children of color. White flight from urban centers has led not only to deeply entrenched residential segregation<sup>296</sup> but also to rapid and intense resegregation of public schools.<sup>297</sup> Academic outcomes at majority-minority schools are hindered by the social and economic isolation of their students, as well as the broader discrimination faced by these schools within the educational system.<sup>298</sup> Moreover, tracking perpetuates second-generation segregation even in “integrated” schools: Students of color are disproportionately placed in lower tracks staffed by less qualified teachers or

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<sup>296</sup> See MASSEY & DENTON, *supra* note 9, at 44–45, 52–54 (describing white flight and chronicling how the federal government perpetuated and supported it); Erwin Chemerinsky, *The Segregation and Resegregation of American Public Education*, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?, *supra* note 269, at 29, 33–35 (describing the relationship between white flight and school segregation); Gary Orfield, *Segregated Housing and School Resegregation*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN v. BOARD OF EDUCATION* 314–15 (Gary Orfield & Susan E. Eaton eds., 1996) (same).

<sup>297</sup> Public schools are more segregated now than they were at the time of *Brown v. Board of Education*. School resegregation of black students is increasing most dramatically in the South, while segregation has increased most seriously across the country for Latino students. GARY ORFIELD ET AL., THE CIVIL RIGHTS PROJECT, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 7 (2012); see also Sarah Garland, *Was ‘Brown v. Board’ a Failure?*, ATLANTIC (Dec. 5, 2012, 12:42 PM), <http://www.theatlantic.com/national/archive/2012/12/was-brown-v-board-a-failure/265939/> (discussing studies finding a resegregation of public schools, particularly at the elementary level). Supreme Court jurisprudence has perpetuated school segregation by limiting the ability of school districts and states to address racial segregation and isolation in public schools. For example, *Milliken v. Bradley*, 418 U.S. 717 (1974), limited the ability of the states to include suburban school districts in desegregation plans, even though failure to do so virtually guaranteed that state-sponsored segregation would go unremediated. See Chemerinsky, *supra* note 296, at 29, 34 (describing *Milliken’s* holding and effects). Similarly, in *Parents Involved*, 551 U.S. 701 (2007), the Court struck down attempts by the Seattle and Jefferson County School Districts to undermine racial isolation and guarantee broadened access for minorities to all city schools. See *supra* notes 106–09 and accompanying text (explaining the *Parents Involved* decision).

<sup>298</sup> Majority-minority schools often have limited access to educational resources and materials, including experienced and credentialed teachers, media centers, and new technology. See Mickelson, *supra* note 21, at 1546–48 (noting that segregated black schools offer fewer “material and human resources,” including less-credentialed teachers and less access to technology); see also Gary Orfield, *The Growth of Segregation: African Americans, Latinos, and Unequal Education*, in DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *Brown v. Board of Education*, *supra* note 296, at 53, 67–68 (1996) (finding that majority-minority schools offer curricula that are inferior to those offered at low-minority and wealthier schools); C.E. ESCH ET AL., CTR. FOR THE FUTURE OF TEACHING AND LEARNING, *TEACHING AND CALIFORNIA’S FUTURE: THE STATUS OF THE TEACHING PROFESSION 2005*, at 70 (2005) (finding that in the 2004–2005 school year, twenty percent of teachers serving in schools with between ninety-one and one hundred percent minority populations were underprepared or novice, compared to only eleven percent of teachers serving schools with few or no minority students); U.S. DEP’T OF EDUC., *THE CONDITION OF EDUCATION 2004*, at 73 (2004) (finding that high schools with at least seventy-five percent low-income students employed three times as many uncertified or out-of-field teachers in both English and science than schools with low poverty rates).

over-identified for stigmatizing special education curricula,<sup>299</sup> while white students are disproportionately placed in higher tracks.<sup>300</sup>

White complicity is manifested in the urgency with which Whites abandoned public schools and later failed to support school assignment plans that sought to maintain integration once desegregation orders were lifted,<sup>301</sup> as well as Whites' allegiance to discriminatory tracking policies, racialized school assignment plans, and high-stakes testing regimes (until, of course, Whites are negatively impacted).<sup>302</sup> This complicity is unexamined and unacknowledged by the affirmative action plaintiffs. Take, for example, Brose, for whom only her experience of being denied access to a particular school registers as victimization. She does not articulate any awareness of the racialized injustices that minority students have been continually subjected to in the United States (or in Seattle particularly). To her, discrimination describes what her family and others like it experienced, even though discrimination more readily describes the city's minority students' limited access to the high-quality schools in Brose's neighborhood. The

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<sup>299</sup> See *supra* note 8 and accompanying text (describing how racial minorities are disproportionately identified for special education and as mentally retarded or emotionally disturbed). Nor are the disparities explained by poverty rates or exposure to environmental hazards, as both factors normally result in increased identification among the "hard" disability categories, categories in which black school children are consistently under-represented. Although the incidence of educably mentally retarded (EMR) classifications generally increases with poverty, black children are more likely to be identified as EMR in wealthier school districts. See Daniel J. Losen & Gary Orfield, *Introduction to RACIAL INEQUITY IN SPECIAL EDUCATION*, at xv, xxii–xxiv (Daniel J. Losen & Gary Orfield eds., 2002) ("The effects of poverty cannot satisfactorily explain racial disparities in identification for mental retardation or emotional disturbance." (emphasis omitted)).

<sup>300</sup> See Mickelson, *supra* note 21, at 1531–32, 1560 (explaining that tracking maintains white privilege by disproportionately placing Whites into higher levels than their comparably abled black peers and by disproportionately assigning black students to racially identifiable lower tracks with diminished access to superior learning opportunities); see also Angela Onwuachi-Willig, *For Whom Does the Bell Toll: The Bell Tolls for Brown?*, 103 MICH. L. REV. 1507, 1522 (2004) (reviewing DERRICK BELL, *SILENT COVENANTS: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (2004)) (noting that, post-*Brown*, tracking was used to segregate minority and white children in the classroom, with white children admitted to accelerated or advanced programs and Blacks and Latinos relegated to inferior tracks).

<sup>301</sup> In spite of the suburbanization of non-White families, eighty percent of Latino students and seventy-four percent of black students attend majority-minority schools, due in part to both increases in the majority population relative to Whites and the dismantling of desegregation plans which quickly led to resegregation of American schools. ORFIELD ET AL., *supra* note 297, at 7–9.

<sup>302</sup> Opposition to high-stakes testing regimes in Florida, for example, was initially dismissed as a "minority issue" until the consequences of the regime started to also impact white students. See Peter Whoriskey, *Political Backlash Builds over High-Stakes Testing; Public Support Wanes for Tests Seen as Punitive*, WASH. POST, Oct. 23, 2006, at A3 (reporting that early opposition against the FCAT standardized test consisted of mostly African American and Hispanic students).

irony of her position, however, was lost on Brose, who declared that she did not “want other parents to go through what [her family] went through.”<sup>303</sup>

Scholarship on education law and policy unhelpfully avoids analyzing white privilege as facilitated by the subordination of people of color.<sup>304</sup> Blame is instead placed on parents of color, or on the state for mismanaging its public schools.<sup>305</sup> By disregarding race as a barrier to educational advancement, material inequalities between Whites and non-Whites can be dismissed as derivative of nonracial factors, such as individual effort and merit. Unsurprisingly, then, hostility to remedial affirmative action initiatives is due in part to the ways that these initiatives delegitimize assumptions regarding inequality, merit, and the privileges afforded to Whites as a result of past and present racial inequality.<sup>306</sup>

By contrast, the diversity rationale does not engender the same hostility, premised as it is on notions of improved citizenship and intellectual engagement.<sup>307</sup> This more palatable version of affirmative action, however, ultimately perpetuates white racial identity rooted in innocence. Even as diversity initiatives are celebrated as tools to decrease racial bias and balkanization, the narrative surrounding the diversity rationale does just the opposite. Having moved away from considerations of race as a remedial measure that corrects for bias against people of color, and for the privileges generally afforded

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<sup>303</sup> Jessica Blanchard, *Supreme Court to Hear Seattle Schools Race Case*, SEATTLE POST-INTELLIGENCER (June 5, 2006, 10:00 PM), <http://www.seattlepi.com/local/article/Supreme-Court-to-hear-Seattle-schools-race-case-1205411.php>. Brose is apparently unaware that parents of color did, indeed, experience ongoing discrimination when they were consistently denied access to the more competitive city schools in which her own children were enrolled as a matter of course.

<sup>304</sup> See Margaret L. Andersen, *Whitewashing Race: A Critical Perspective on Whiteness*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 160, at 21, 28–29 (cautioning that whiteness must be analyzed in relation to people of color, and calling for examination of whiteness in the context of other forces and institutions, including global capitalism, labor markets, residential segregation, and school tracking).

<sup>305</sup> See James, *supra* note 262, at 1109–14 (detailing how cultural-deficit theories, which blame minority parents for the underachievement of their children, inform education law and policy).

<sup>306</sup> See, e.g., Harris, *supra* note 186, at 1778 (explaining how the Court’s resistance to affirmative action is rooted in ideologies and structures supporting white supremacy); Girardeau A. Spann, *Affirmative Inaction*, 50 *How. L.J.* 611, 664 (2007) (describing the Court’s general hostility to affirmative action).

<sup>307</sup> For some scholars this is ultimately a benefit, given the politically charged landscape of the discourse surrounding affirmative action. See, e.g., Daniel Ibsen Morales, *A Matter of Rhetoric: The Diversity Rationale in Political Context*, 10 *CHAP. L. REV.* 187, 189 (2006) (“[T]he diversity rationale is the most effective means of securing the interests of racial minorities in the face of limited political and economic clout, as well as continuing racial prejudice.”).

Whites by the sheer virtue of being white, the diversity rationale can be justified as beneficial for all students. The diversity rationale is popular precisely because it fails to address structural and societal bias and at the same time placates Whites: Whites believe either that they are bearing an unjust burden for the good of all, or are benefiting from the presence, experience, and perspective of non-Whites, or both.

This narrative not only advances notions of unjust and unmeritorious minority enrichment, but also furthers notions of Whites as martyrs whose hands are clean of involvement in those systems and processes that result in racial subordination. This is perhaps best exemplified by research demonstrating that Whites today consider antiwhite bias to be more prevalent and problematic than discrimination against Blacks.<sup>308</sup> The diversity rationale, then, helps establish a new racism “as effective as slavery and Jim Crow in maintaining a racial status quo.”<sup>309</sup> Further, the diversity rationale may be even more problematic because of the absence of clear and intentional instances of discrimination that Jim Crow and slavery once permitted—obvious expressions of the subordination of particular groups of people by race. Subordination today, however, is less likely to take the form of intentional discrimination, operating instead as less visible systematic and structural racism. Working against the backdrop of white complicity in discrimination that is harder to recognize, the innocence narrative advanced by the diversity rationale more effectively casts Whites as righteous actors in the system.

### 3. *The Problem with Individualism*

In contrast with the values and understandings promoted by the diversity rationale, the pseudo-independent and redefinition phases of Helms’s and Hardiman’s white identity models require an understanding of larger structural imbalances that perpetuate inequality.<sup>310</sup> Whites, however, often ignore—or are unaware of—institutional and structural racism. As such, the processes of favoritism and inclusion that help Whites, even if they do not explicitly harm Blacks, are made invisible. These advantages inoculate Whites from the vagaries of the

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<sup>308</sup> See Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSP. ON PSYCHOL. SCI. 215 (2011) (describing the results of an empirical study with responses from a nationally representative sample of Whites who believed that in the last decade there has been more antiwhite than antiblack racial discrimination).

<sup>309</sup> Bonilla-Silva, *supra* note 219, at 272.

<sup>310</sup> See *supra* notes 207–13 and accompanying text (detailing Helms’s and Hardiman’s models).

market while permitting Whites to promote market solutions to inequality for non-Whites.<sup>311</sup> This ignorance allows Whites to attribute their success to individual achievement or hard work while minimizing the systemic advantages conferred by whiteness as a basis for their successful life outcomes.<sup>312</sup>

This focus on individual achievement instead of inequality and intergroup power differentials is only further promoted by the use of the diversity rationale in higher education. Sanctioned by the Supreme Court, college admissions administrators engage in individualized, holistic reviews of applicants that consider race as one factor in a person's individual application profile. Schools attempt to assuage discomfort with the use of race by maintaining that individualized review means that race is never directly outcome determinative, and that applicants are assessed by a series of metrics of which race is just one component.<sup>313</sup>

The admissions process is inherently individualized. Long before race became an explicit component of assessment, multiple aspects of applicant profiles—including race—were scrutinized and assessed for strengths, weaknesses, and distinctive characteristics. When colleges and universities, however, justify the consideration of race with promises of individualized review, the positive or negative impact of individual membership in one racial group or another is rendered unjustifiably opaque. Although decisions are made about any one particular applicant, that applicant's race is considered because of the experience of the racial group to which the applicant belongs in society.<sup>314</sup> Colleges and universities are prohibited from considering race in order to remediate larger societal inequality, but that should

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<sup>311</sup> Nancy DiTomaso et al., *White Views of Civil Rights: Color Blindness and Equal Opportunity*, in *WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM*, *supra* note 160, at 189, 190 (arguing that naïveté or ignorance about racial favoritism allows Whites to believe that market forces will eliminate racial inequality).

<sup>312</sup> *Id.* at 191.

<sup>313</sup> Brief for Respondents at 3, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241), 2003 WL 402236.

<sup>314</sup> Even if institutions wanted to, it is unlikely that they could completely excise the consideration of race from the admissions process, given the likelihood that any one student's application contains both explicit and implicit racial signifiers, including the student's name, geographical connections, and any possible discussions of race in the student's personal statement. Admissions officers, primed by prohibitions on explicit considerations of race, will be unable to avoid thoughts about race and will, at a minimum, operate under the default assumption that each applicant is white. See Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139, 1146–47 (2008) (finding that antipreference initiatives, like Proposition 209 and Proposal 2, produce race preference, whereas race-conscious regimes better achieve race neutrality). As such, preventing the explicit consideration of race does not necessarily mean preventing any consideration of race, nor, for the reasons articulated above, should it.

not prohibit a diversity narrative that is more explicit about broader societal racial dynamics and power differentials that make racial diversity on campuses, and the accompanying consideration of race in college admissions, so important.

Such a narrative might have discouraged challengers to the diversity rationale. The diversity rationale as explained, however—with its focus on the value of perspectives in the classroom—seems neither to have challenged Hopwood, Grutter and Fisher’s understanding of merit, nor to have invited their consideration of how persistent and structural racial bias might depress the standardized test scores of otherwise deserving applicants. Nor do any of the plaintiffs appear to move past their individual grievances. Instead, these plaintiffs directly challenge the use of the diversity rationale itself. The consideration of race, for them, is about their individual achievements and applications, with no reflection on larger inequalities in social power that provide advantages to some—including themselves—and necessitate consideration of the racial composition of an entering class at an institution of higher education. The adherence of the challenged universities to individualized review as a legal defense<sup>315</sup> only aggravates plaintiffs’ tendencies, as it enables their unwillingness, or inability, to consider the larger societal and historical context in which admissions operate.

Ultimately, the focus on individualized review eclipses both awareness of larger structural inequities that impact life outcomes and any understanding of racism as a pervasive phenomenon.<sup>316</sup> As

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<sup>315</sup> “[W]e look at people as individuals. We look at all of their life experience and we’re making individual judgments in order to assemble the best class that we can.” Brackett, *supra* note 64 (transcript of an interview with Liz Barry, Deputy General Counsel of the University of Michigan). Given the rulings in *Grutter* and *Gratz*, universities have little choice but to broadcast their commitment to an admissions process that gives consideration to multiple facets of each individual application. Unfortunately, the individual review mantra obscures substantive discussions of the larger social dynamics impacting race and privilege.

<sup>316</sup> These issues are implicated in questions about the benefits a “black doctor’s son or daughter” would unfairly receive through affirmative action—an oft-repeated challenge to affirmative action. See Delgado, *supra* note 24, at 140–41 (responding to the argument that affirmative action helps “the proverbial son or daughter of a black neurosurgeon who got into Stanford or Harvard under an affirmative action program” by asserting that “race is probably the best measure of social disadvantage that we have”); Sherrilyn A. Ifill, Op-Ed., *Race vs. Class: The False Dichotomy*, N.Y. TIMES, June 14, 2013, at A27 (arguing that the charge that affirmative action benefits only middle- and upper-class students is untrue as a general matter and mostly reflective of overreliance on standardized testing); Negassi Tesfamichael, Op-Ed., *Is Affirmative Action for Me?*, WASH. POST, June 25, 2013, at A15 (considering whether affirmative action should apply to well-off students and concluding that it should due to the benefits of diversity). Even middle-class minorities, however, continue to be impacted by the influence of race and ethnicity on life outcomes. See James, *supra* note 86, at 872–74 (detailing the tenuous financial status of middle-class Blacks, as

employed in this manner, diversity diverts attention away from power differentials and from an understanding of racism as a function of group relations.

#### 4. *Return of the Subordination Narrative*

Finally, the diversity rationale helps to entrench a problematic relationship between Whites and non-Whites, further undermining the realization of an antiracist white identity. Both autonomy in the Helms model and internalization in the Hardiman model require a relationship that is not based on subordination and control. Yet the diversity rationale as deployed reaffirms both.

To the extent that the diversity rationale fails to undermine white privilege, challenge assumptions about merit and inequality, or consider larger structural forces that perpetuate inequality, it perpetuates beliefs about white industriousness relative to the unearned and unfair advantages enjoyed by non-Whites. As such, Whites are congratulated for their self-sacrifices when allowing a small number of unmeritorious non-Whites to access the world of elite education. This is very different from remedial considerations of race that force Whites to confront the nature not just of individual racism, but of societal discrimination and white privilege. Rather, the diversity rationale encourages Whites to develop paternalistic relationships with the people of color around them—relationships that are ultimately informed by a disdain for their less-deserving counterparts.<sup>317</sup>

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well as the impact of their racialized life experiences on their willingness to borrow for higher education).

<sup>317</sup> For example, Richard Sander's mismatch theory, discussed in Richard H. Sander, *A Systematic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004), has been consistently critiqued as not only methodologically unsound, but as also paternalistic regarding the beneficiaries of affirmative action. See, e.g., Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807, 1818–40 (2005) (reviewing Sander's analysis to find no persuasive evidence that affirmative action has reduced the probability that black students will become lawyers, and calling instead for better distribution of applicants' likelihood of success at any school); David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855, 1857 (2005) (stating that Sander's analysis not only overestimates the cost of affirmative action while failing to demonstrate the benefit from ending it, but that the conclusions of his analysis "rest on a series of statistical errors, oversights, and implausible assumptions"); and é douglas pond cummings, "Open Water": *Affirmative Action, Mismatch Theory and Swarming Predators—A Response to Richard Sander*, 44 BRANDEIS L.J. 795, 824–29 (2006) (critiquing Sander for telling African Americans to rely on his empirical research and select less competitive schools that will supposedly lead to better bar passage and stronger law school grades, rather than rely on their own determination regarding which admission offer is best). Sander's analysis is informed by the same paternalistic tropes of "lesser qualified" minorities and the "unfair" burden of affirmative action that go unchallenged by the diversity rationale. These tropes are ultimately justified as beneficial for primarily white

More perniciously, however, the diversity rationale further entrenches the role of non-Whites as subordinate to Whites. Consider the example, discussed by Danielle Allen, of the infamous photograph depicting a white high school student in Little Rock, Arkansas, named Hazel Bryan screaming curse words at Elizabeth Eckford, one of her new black classmates, in front of Central High School in protest of the Supreme Court's 1954 desegregation orders. Professor Allen explains that Whites were able to "insist[ ] on [their] habitual prerogatives (with power behind [them] to back up [their] demand[s])."<sup>318</sup> By outlawing legally enforced segregation in America's public schools, however, *Brown v. Board of Education*<sup>319</sup> gave Bryan's action a new frame: Old habits were no longer legally permissible in the public sphere. As a result, United States citizenship was reconstituted, and "citizens of the United States . . . reorganized their basic plan for assigning and protecting political rights and powers, this time to protect the rights of minorities."<sup>320</sup> In rebalancing the protection of political rights and powers, *Brown v. Board of Education* insisted on a new narrative about relationships between Whites and Blacks, a narrative insisting on political and social parity even if not perfectly achieved.<sup>321</sup>

The diversity rationale affirmed in *Grutter*, however, disrupted the quest for parity required by *Brown*<sup>322</sup> and re-established non-

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institutions and their students. This deployment of the diversity rationale, uninformed by the reality of larger structural and institutional patterns of racial inequality, disturbs neither the innocent white identity narrative nor the myth of meritocracy. In a wide variety of contexts, social dominance theory has demonstrated that these meritocratic myths justify individuals' beliefs in social inequality and resistance to affirmative action. See generally JIM SIDANIUS & FELICIA PRATTO, *SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION* (1999) (discussing social dominance theory).

<sup>318</sup> ALLEN, *supra* note 21, at 5.

<sup>319</sup> 347 U.S. 483 (1954).

<sup>320</sup> ALLEN, *supra* note 21, at 7.

<sup>321</sup> The legacy of *Brown* has itself been critiqued and challenged. See, e.g., Bell, *supra* note 130, at 524–25 (arguing that the Court's decision in *Brown* was only made possible because the interests of Whites—namely, providing credibility in America's struggle with Communism, stemming black resentment, and removing segregation as a barrier to economic advancement—and the interests of Blacks happened to align at the time of the case); Angela Onwuachi-Willig, Comments at the Southeastern Association of Law Schools Sixty-Second Annual Meeting: Retaliation and Whistleblowers in the Workplace After *Crawford v. Metropolitan Government of Nashville* (Aug. 6, 2009) (on file with the *New York University Law Review*) (noting that when identifying the harms imposed upon minority schoolchildren by discrimination, the *Brown* opinion also failed to identify the associated harms experienced by the dominant group, such as a feeling of superiority among white children, and potential uneasiness with participation in a system of racial subordination).

<sup>322</sup> Arguably, Supreme Court cases prior to *Grutter* that addressed diversity and integration also established people of color as subordinate to Whites by marginalizing the concerns of people of color relative to Whites. In *Keyes v. School District No. 1*, 413 U.S. 189 (1973), for example, the Court refused to characterize *de facto* segregation as an equal

Whites as subordinate to Whites.<sup>323</sup> No longer deserving of inclusion at elite institutions based on their own merit—as informed, in part, by the ways in which minorities experience and nevertheless overcome individual and societal discrimination—minorities are instead admitted in service of Whites. In this capacity, non-Whites are allowed into elite educational institutions to “diversify” them, and to enhance classroom engagement such that Whites can be better trained for an increasingly globalized and multicultural workplace. This framing of the diversity rationale legitimizes the tendency of such institutions to place burdens on minority candidates (without similarly burdening white candidates),<sup>324</sup> while quietly, but dangerously, encouraging Whites to use and control non-Whites.<sup>325</sup>

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protection violation, even though the harm to students of color isolated in segregated schools was the same. *Id.* at 208 (holding that a finding of intentionally segregative school board actions in a meaningful portion of the school system creates a presumption that other segregated schooling within the system is not advantageous). One year later, in *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court relied on its preference for local control to justify its refusal to order an interdistrict desegregation remedy, even though racial integration was not possible without it. *Id.* at 741 (“No single tradition in public education is more deeply rooted than local control over the operation of schools . . .”). Similarly, the Court’s series of integration cases in the early 1990s, including *Board of Education v. Dowell*, 498 U.S. 237, 249 (1991) (holding that “[t]he test espoused by the Court of Appeals would condemn a school district . . . to judicial tutelage for the indefinite future” when determining whether the dissolution of a decree imposing desegregation was appropriate), *Freeman v. Pitts*, 503 U.S. 467, 490 (1992), and *Missouri v. Jenkins*, 515 U.S. 70 (1995), was responsive not to the harms of segregation for people of color, but rather to the fatigue experienced by white school districts still under desegregation orders. In *Parents Involved*, 551 U.S. 701 (2007), the Court ignored the racial equity concerns informing controlled-choice plans in Seattle and Louisville, insisting that race could not be a factor in school assignment plans meant to integrate by race. For a more detailed discussion of the Court’s neglect of equity issues in American public education, see Osamudia R. James, *Business as Usual: The Roberts Court’s Continued Neglect of Adequacy and Equity Concerns in American Education*, 59 S.C. L. REV. 793, 816–24 (2008) (discussing the Supreme Court’s treatment of equal protection doctrine with regard to desegregation cases leading up to, and including, *Parents Involved*).

<sup>323</sup> Consider, for example, Justice O’Connor’s reasoning in *Grutter*, which relied heavily on the arguments made by more than 100 amici from the business sector while ignoring arguments presented by social justice-oriented interveners. See *supra* notes 77–85 and accompanying text (describing the arguments articulated by various amici in *Grutter* and the Court’s receptiveness to those positions).

<sup>324</sup> See Malamud, *supra* note 138, at 962–64 (arguing that the utilitarian justification for diversity is problematic because it implies that, beyond the typical duties that would be required of similarly positioned white individuals at an institution, minorities must also perform the additional job of specializing in white-minority relations).

<sup>325</sup> Control of non-Whites is made all the more apparent when one considers the ways in which non-Whites, in service of the narrative of the diversity rationale, are expected to perform and present their racial identity in ways that benefit white institutions. See *supra* notes 198–201 and accompanying text (discussing how affirmative action encourages the commodification and performance of race and racial identity).

Emboldened, for example, by a diversity rationale that does not challenge merit as defined almost exclusively by standardized test scores, Grutter and Fisher exercised privilege and power by defining merit in ways favorable to themselves, and then characterized minorities as unmeritorious, despite the fact that minorities play the admissions game at a disadvantage.<sup>326</sup> Moreover, despite Grutter's assertion that her problem is not with other admitted students, the lawsuits are, ultimately, about controlling—and, by extension, subordinating—non-white individuals. Although they do not explicitly acknowledge it in their public remarks, the plaintiffs' ultimate goal in bringing these suits seems, based on the manner in which they structured their challenges, to have the Court affirm their desire for admission *in place of persons of color*. Cheryl Hopwood did not challenge an application process that granted admission to 140 white students with Texas Index scores lower than hers; rather, she focused on the sixty-six black and Mexican-American students with lower scores than hers.<sup>327</sup> Similarly, Barbara Grutter did not challenge the admission of the thirty-five white applicants with lower profile scores who were admitted instead of her, choosing instead to challenge a policy that admitted students of color with lower profile scores.<sup>328</sup> Finally, Abigail Fisher failed to challenge the admission of forty-two Caucasian applicants with combined Academic Index and Personal Achievement Index scores identical or lower than hers,<sup>329</sup> choosing instead to challenge the admission of minority students with application scores equal to or lower than her own.

Technicalities regarding the constitutional basis for these lawsuits aside, this strange elision is a consistent feature of the discussion and

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<sup>326</sup> See GUINIER & TORRES, *supra* note 21, at 110–13 (delineating three dimensions of power: (1) power observed by simply watching who wins and loses in a conflict; (2) understanding how the underlying rules and structures that play to the strengths of the winners are created; and (3) exploring the cultural narrative that the powerful develop to “sell” those rules and structures to the powerless); *supra* note 137 and accompanying text (discussing how admissions criteria like standardized tests have a negative disparate impact on minority students).

<sup>327</sup> Lani Guinier, *Reframing the Affirmative Action Debate*, 86 KY. L.J. 505, 510–11 (1997).

<sup>328</sup> See Brief for Respondents, *supra* note 313, at 47 n.78 (stating that thirty-five white students were admitted from “lower cells” than Grutter).

<sup>329</sup> Moreover, Fisher failed to challenge the denial of summer program admission for 168 African American and Hispanic applicants with combined AI/PAI scores identical to or higher than hers. See Brief for Respondents, *supra* note 49, at 15–16 (explaining that the school offered provisional admission to certain students who were denied fall class admission but completed summer academic requirements).

narrative of challenges to affirmative action.<sup>330</sup> The plaintiffs' exclusive focus on a process that granted non-Whites admission that they believed rightfully and naturally belonged to them is the very expression of white "habitual prerogatives" of power and dominance—prerogatives for which the plaintiffs sought judicial endorsement.<sup>331</sup>

#### D. *The Diversity Rationale and White Citizenship*

Discussions of these plaintiffs are not presented to determine which identity group has been more victimized. Rather, they are presented to illustrate how the diversity rationale helps produce Whites who are unprepared to engage in a democratic process and citizenship practice<sup>332</sup> that considers the whole polity even if it means that white interests cannot come first. This is ultimately the crux of white supremacy and is a significant obstacle to the development of an antiracist white identity.

The diversity rationale as currently advanced by the courts is both ahistorical and acontextual. It ignores issues of racial or social justice, and is silent on the privilege typically afforded to Whites in the public school system, from elementary school to higher education. As such, even as diversity opens up doors to elite education for non-Whites, it also cultivates white identities grounded in racial innocence—hyper-focused on individualism to the exclusion of an understanding of broader racial imbalances, and quick to jettison diversity initiatives when they no longer suit white purposes.

This development of white racial identity is particularly problematic in a society plagued by enduring racial inequality. As Professor Allen explains, citizenship consists not just of duties to institutions—like jury or military service—that protect citizens' rights, but of "long-

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<sup>330</sup> See Guinier, *supra* note 327, at 510–11 (arguing that the conceptual frame limiting the ambit of affirmative action to racial minorities and women draws attention away from those social systems that also engage and involve Whites).

<sup>331</sup> ALLEN, *supra* note 21, at 5. Consider, also, the decisions of Kathleen Brose and Crystal Meredith to challenge school district attempts to maintain racial integration, reduce racial isolation, and guarantee more equal access for nonwhite students to competitive schools. Unable to move beyond their individual circumstances, both Meredith and Brose are stuck in Hardiman's acceptance stage, unwilling—or unable—to understand that decisions to bring lawsuits, similar to school enrollment decisions, cannot be divorced from power and privilege.

<sup>332</sup> See *supra* note 21 and accompanying text (discussing how diversity in educational settings fosters commitment to genuine racial equality and shared decisionmaking). I use the term "democratic process" broadly to encompass the participation of residents and citizens in the creation, promulgation, and social acceptance of law and policy, as well as the discourse that provides the context for law and policy. In the context of race-conscious policies in higher education, and for purposes of the behavior critiqued in this Article, problematic democratic practices range from physical protests and written work opposing diversity initiatives to legal suits filed to frustrate these policies.

enduring habits of interaction [that] give form to public space and so to our political life.”<sup>333</sup> Equal citizenship has been further described as:

the dignity of full membership in [a] society. Thus, the principle not only demands a measure of equality of legal status, but also promotes a greater equality of that other kind of status which is a social fact—namely, one’s rank on a scale defined by degrees of deference or regard. The principle embodies an “ethic of mutual respect and self-esteem.”<sup>334</sup>

In a society like ours, genuine equality can only be achieved by a commitment to citizenship that bestows the dignity of full societal membership to everyone therein. Citizenship, then, also requires a commitment to bringing everyone into the franchise, even as it requires recognition that privilege cannot be maintained for particular groups.

For white identity development, this requires honest assessments of white privilege; understandings of how that privilege perpetuates racism, including differential societal status and regard; and a willingness to release that privilege. The current deployment of the diversity rationale, however, helps render many Whites unfit for this sort of citizenship. At the same time, the diversity rationale perpetuates both conscious and unconscious beliefs that genuine citizenship (and access to the benefits of citizenship) is limited and that some members of the citizenry have more legitimate access to these benefits than others. As concluded by Hardiman and Keehn after interviewing young white students regarding race, identity, and privilege in America, “[T]hese young White people [are] ill-equipped to understand or fully participate in an increasingly multicultural society. They [have] a limited understanding of how the politics of race continue to shape U.S. society and their privilege as White people.”<sup>335</sup>

Unfortunately, current deployment of the diversity rationale encourages a form of white identity performance that does not realize that collective democratic action necessarily involves communal decisions that will “inevitably benefit some citizens at the expense of others, even when the whole community generally benefits.”<sup>336</sup> This form of white identity performance fails to understand that “democracy [does not achieve] the common good by assuring the same bene-

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<sup>333</sup> ALLEN, *supra* note 21, at 10.

<sup>334</sup> Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 5–6 (1977) (footnotes omitted) (quoting JOHN RAWLS, *A THEORY OF JUSTICE* 256 (1971)).

<sup>335</sup> Hardiman & Keehn, *supra* note 209, at 135.

<sup>336</sup> ALLEN, *supra* note 21, at 28.

fits . . . to everyone, but [is] rather a political practice by which the diverse negative effects of collective political action . . . can be distributed equally . . . on the basis of consensual interactions.”<sup>337</sup> Instead, this current form of white identity performance is unprepared to incur any cost if the ultimate benefit inures to people of color.<sup>338</sup> This zero-sum view of dominance and power makes impossible the sort of transformative democracy that undermines the problematic distribution of power, privilege, and political representation by race.

### *E. From Diversity to the End of Racial Identity*

To be clear, the goal of diversity is not the problem. Rather, the problem identified by this Article is the way in which Whites react to that goal, as informed by the stunted racial identity formation that the diversity rationale, as currently deployed, encourages. One such reaction is “exhaustion.” Professor Hutchinson has written about “racial exhaustion,” or the attempts by opponents to racial egalitarian measures to contest the policies as “redundant, unnecessary, or too burdensome or taxing.”<sup>339</sup> While affirming, for example, the compelling interest of diversity in higher education, Justice O’Connor also seemingly imposed a time limit of twenty-five years on affirmative action,<sup>340</sup> thereby reflecting the Court’s own exhaustion with race-conscious state action.<sup>341</sup>

Exhaustion rhetoric can lead to legitimate policy explorations, like the need to reconsider factual bases for legislation or the need to place substantive resource and time limits around regulatory measures.<sup>342</sup> The diversity rationale, however, does not implicate such considerations. It is not a pathway to legislation or regulation; rather, the diversity rationale is a conceptual justification for the considera-

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<sup>337</sup> *Id.* at 29.

<sup>338</sup> For a description of a zero-sum conception of power in the United States in which one group’s benefit necessarily comes at another’s expense, see GUINIER & TORRES, *supra* note 21, at 111. Guinier and Torres, however, also conceptualize a more transformative understanding of power that allows groups to discover that “the hierarchy of power itself is their common antagonist, rather than one another.” *Id.* at 130.

<sup>339</sup> Hutchinson, *supra* note 273, at 922.

<sup>340</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (observing that, in the twenty-five years since the Court first approved the use of race-conscious measures aimed at diversifying public higher education, “the number of minority applicants with high grades and test scores has indeed increased,” and predicting that, within another twenty-five years, “the use of racial preferences will no longer be necessary to further the interest approved today”).

<sup>341</sup> See Hutchinson, *supra* note 273, at 955–56 (noting that the Court’s discomfort and skepticism toward affirmative action inspired Justice O’Connor’s dictum calling for an end to affirmative action within a specified term of years).

<sup>342</sup> See *id.* at 968 (considering the legitimate policy concerns that can be raised by exhaustion rhetoric).

tion of race in government policies. Diversity, recognized as a compelling state interest, represents a normative ideal for society. Moreover, the use of diversity challenged in *Grutter* was affirmed as serving the compelling state interest of ensuring a diverse student body. Affirmative action that uses diversity in pursuit of a critical mass of students is nonremedial in nature, and as such does not demand the type of time limits that remedial measures, adopted to address particular grievances, require.<sup>343</sup>

Nevertheless, the Court's response to Fisher's attack on diversity could be taken as evidence of another wave of racial exhaustion. It seemed, initially, that the Court might allow the discrete use of race in higher education because it would ameliorate isolation of minorities without stoking racial hostilities.<sup>344</sup> As initially permitted, the Court was less concerned about the burdens that race-conscious remedies might impose, perhaps because individualized consideration eased the impact of the burden.<sup>345</sup> Over time, however, it has become clearer that key votes on the Court have been upholding but restricting race-conscious remedies with an increased focus on the balkanizing impact of the remedies on Whites.<sup>346</sup> This shift was made apparent by Justice Kennedy's insistence in *Fisher* that the UT plan be sent back to the district court and again subject to strict scrutiny to ensure that the school's use of race was both "necessary" and a response to the absence of "workable race-neutral alternatives."<sup>347</sup> This increased focus on individual burdens for Whites comes at the cost of minority interests, and is only perpetuated by the diversity rationale.

The diversity rationale has even influenced the development of Fourteenth Amendment jurisprudence. The spirit and purpose animating the Fourteenth Amendment might be understood in one of several ways. As informed by an antisubordination ideal, approaches to equal protection focus more on the discriminatory effects of state

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<sup>343</sup> See Kevin R. Johnson, *The Last Twenty Five Years of Affirmative Action?*, 21 CONST. COMMENT. 171, 183–85 (2004) (arguing that if a diverse student body, and not racial remedy, is the justification for affirmative action, it is unclear why the law would require a time limit). Like imposing time limits on other normative ideals (such as state attempts to maximize the best interests of children within its borders or state interests in protecting unborn life), time limits on the normative ideal of diversity are inappropriate.

<sup>344</sup> See Siegel, *supra* note 16, at 806 (suggesting that the Court's equal protection jurisprudence reflects a pattern of concern regarding the potential impact of race consideration on balkanization).

<sup>345</sup> *Id.* at 806–07.

<sup>346</sup> See Siegel, *supra* note 24, at 1307–08, 1325–37 (demonstrating Justice Kennedy's reliance on equal protection doctrine as a means of promoting social cohesion and shared community).

<sup>347</sup> *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420–22 (2013) (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)) (internal quotation marks omitted).

action, rather than on the explicit intent of policymakers. As such, laws and policies subject to equal protection challenges might be assessed for the extent to which they reinforce or impart political, social, or economic marginalization of historically disadvantaged classes.<sup>348</sup> Alternately, a distributive justice framework for applying equal protection imposes on the state an affirmative duty to “dismantle the unequal conditions created by historical systems of domination or inequities that deny to poor individuals access to important societal resources.”<sup>349</sup> Like an antistatutory framework, a distributive justice framework operates without regard to intent, focusing instead on impact and effects.<sup>350</sup>

In contrast, the Court has sanctioned the “colorblind” approach to equal protection, which finds a potential equal protection violation whenever the state differentiates between similarly situated groups.<sup>351</sup> In the context of race, this has led to the preservation of facially neutral laws that have a disparate impact on minority groups.<sup>352</sup> Courts

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<sup>348</sup> See Barnes & Chemerinsky, *supra* note 25, at 1066–76 (analyzing the Reconstruction Amendments and finding that, although we cannot know precisely what “equality” meant in a society that simultaneously freed slaves and socially subordinated Blacks, we can conclude that: (1) the conflicted nature of the history of the Amendments requires a shift toward a moral or normative standard and (2) the Amendments not only undid the Constitution’s previous textual acceptance of slavery, but redefined Blacks as citizens for whom substantive, and not just formal, equality is needed); Hutchinson, *supra* note 177, at 637–40 (arguing that in contemporary equal protection analysis, the highest level of scrutiny is reserved for historically privileged groups, while the constitutionality of enactments that harm historically disadvantaged groups is determined by a far less demanding standard); see also Lawrence, *supra* note 157, at 1382 (“[T]he Equal Protection Clause does more than require that every individual have equal access to the democratic process and grant blacks the right to treatment free of . . . racial motives. Rather, it creates a new substantive value of ‘non-slavery’ and antistatutory to replace the old values of slavery and white supremacy.”); cf. Knouse, *supra* note 177, at 767–85 (suggesting that current equal protection doctrine is harmful rather than helpful, as it merely reinforces identity politics without achieving the constitutional goals of the Fourteenth Amendment).

<sup>349</sup> Hutchinson, *supra* note 177, at 623.

<sup>350</sup> See Lawrence, *supra* note 156, at 345 n.115 (explaining that under this substantive theory of equal protection, a prima facie case for relief is established wherever one racial or ethnic group is substantively worse off than another).

<sup>351</sup> See Hutchinson, *supra* note 177, at 637–55 (using the Court’s colorblindness jurisprudence, including *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in the context of affirmative action to illustrate how this framework treats Whites with racial privilege as politically vulnerable, while treating socially subordinate persons of color as privileged).

<sup>352</sup> The doctrine of discriminatory purpose was first established in 1976 through *Washington v. Davis*, 426 U.S. 229 (1976). Requiring plaintiffs challenging the constitutionality of facially neutral laws to prove a racially discriminatory purpose, the *Davis* Court upheld Washington, D.C. police department hiring procedures that had a disparate impact on African American applicants. *Id.* at 238–40, 245–48. The doctrine has since been applied in many other cases challenging disparate impact, including *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), which upheld the city’s

uphold these laws so long as they do not find an intentional discriminatory purpose.<sup>353</sup> At the same time, race-conscious government policies that are implemented with the specific intent to ameliorate racial inequality are prohibited.<sup>354</sup> This understanding of equal protection operates alongside what Jed Rubenfeld has termed the “anti-antidiscrimination agenda,” which argues that the “liberal” antidiscrimination movement has gone too far down a path that erodes meritocracy, creates a sense of entitlement among undeserving people, and foments a victimization culture. Indeed, the Supreme Court has failed to extend antidiscrimination law to traditionally unprotected groups and refused to expand equal protection beyond the principle of formal legal equality.<sup>355</sup>

To counter these problematic approaches to equal protection, scholars have advanced more universal post-identitarian equality frameworks.<sup>356</sup> Kenji Yoshino, for example, has advanced a new understanding of equal protection that furthers liberty, rather than equality.<sup>357</sup> In response to “pluralism anxiety”—the social backlash to increased recognition of identity groups in the United States—this new understanding accelerates the move away from group-based equality claims under the guarantees of the Fifth and Fourteenth Amendments. It instead aligns equal protection with individual liberty

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zoning decisions even though they had racially discriminatory effects. For analysis suggesting that the doctrine fails to capture unconscious, but equally damaging, racism, see Lawrence, *supra* note 156, at 318–20.

<sup>353</sup> See Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1409, 1412–13 (11th Cir. 1985) (holding that groupings of students by ability is not per se unconstitutional as violative of the Equal Protection Clause even when it results in racial disparity); Debra P. v. Turlington, 644 F.2d 397, 402, 406 (5th Cir. 1981) (holding that absent a failure to teach all materials covered in the tests, functional literacy tests required for high school graduation did not violate equal protection even if they had a disparate impact on minority students).

<sup>354</sup> See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747 (2006) (striking down controlled-choice plans that sought to integrate schools and broaden minority access to competitive schools because the racial identity of students was considered in school assignments); Gratz v. Bollinger, 539 U.S. 244, 273–75 (2003) (striking down an admissions policy that awarded a specific number of points to minority applicants because race was outcome determinative).

<sup>355</sup> Jed Rubenfeld, *The Anti-Antidiscrimination Agenda*, 111 YALE L.J. 1141, 1142–43 (2002).

<sup>356</sup> Post-identity or universal equality frameworks attempt to move away from the identities and suspect classes recognized by Fourteenth Amendment jurisprudence, and focus instead on rights and privileges that should be protected among all people, regardless of identity. See, e.g., Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776–87 (2011) (promoting an equal protection doctrine that focuses on liberty rather than equality); Fineman, *supra* note 152, at 8–10 (suggesting mobilization around shared human vulnerability, rather than around identity).

<sup>357</sup> Yoshino, *supra* note 356, at 776–87 (2011).

claims under the amendments' due process guarantees,<sup>358</sup> thus legitimating calls for an end to race-conscious remedial measures. Similarly, vulnerability theory is laudably responsive to the pluralism anxiety that has precluded protection for additional suspect classes, and the social backlash to racial identity that undergirds calls for an end to race-conscious remedial measures. Freed from incentives to perceive ourselves as belonging to distinct classes that must compete for material and legal resources, people are encouraged instead to mobilize around an understanding of shared vulnerability.<sup>359</sup>

Concerns about balkanization, however, are likely misplaced, as the real danger of balkanization comes not from race-conscious measures, but from the lack of diversity at institutions themselves. Indeed, structural diversity leads to substantive and positive cross-racial interactions when accompanied by institutional attempts to foster a positive racial climate.<sup>360</sup> Moreover, the problem with a universal framework is precisely its post-racial outlook. Ultimately, race pervades all facets of social life, impacting collective identities and social structures, and permeating individual psyches and relationships on conscious and unconscious levels.<sup>361</sup> Identity politics remain necessary because people cannot see past identity,<sup>362</sup> making it unclear that

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<sup>358</sup> See *id.* at 748, 776–87 (explaining the Court's shift toward individual liberty claims and the implications of that shift).

<sup>359</sup> See Fineman, *supra* note 152, at 17 (framing the idea of “shared vulnerability” in the context of the sub-prime mortgage crisis and welfare reform during the 1990s).

<sup>360</sup> See Uma M. Jayakumar, *Can Higher Education Meet the Needs of an Increasingly Diverse and Global Society? Campus Diversity and Cross-Cultural Workforce Competencies*, 78 HARV. EDUC. REV. 615, 641–42 (2008), available at <http://her.hepg.org/content/b60031p350276699/fulltext.pdf> (arguing that attending a school with a diverse student body can aid developmental growth for students, even if they are raised in segregated communities).

<sup>361</sup> Ultimately, race's permeation of all facets of social life, and the problem with any legal doctrine that does not acknowledge this reality, is at the heart of this Article's central point. Many works, too numerous to list, address the impact of race on social life, including ALLEN, *supra* note 21; GUINIER & TORRES, *supra* note 21; MASSEY & DENTON, *supra* note 9; WHITE OUT: THE CONTINUING SIGNIFICANCE OF RACISM, *supra* note 160; Crenshaw, *supra* note 140; Flagg, *supra* note 20; Ford, *supra* note 175, at 1845; Glennon, *supra* note 8, at 1252; Lawrence, *supra* note 157, at 1368–75; Lawrence, *supra* note 156, at 352–53; McCabe, *supra* note 121, at 139–43; McIntosh, *supra* note 7; Onwuachi-Willig, *supra* note 180, at 883.

<sup>362</sup> The salience of identity, and of racial identity in particular, has been consistently documented in all sectors of American life. See, e.g., Bernard, *supra* note 9 (documenting research findings which conclude that independent of income, home ownership, assets, and education, Blacks are twice as likely as Whites to wind up in the more onerous and costly form of bankruptcy); *supra* note 256 (documenting racial disparities in healthcare, even after controlling for socioeconomic status). In public education, for example, racial minorities are generally subject to over-identification for special education, independent of their disproportionate representation among the poor. See *supra* notes 8, 299 and accompanying text (describing the disparate identification of racial minorities as mentally retarded or

identity can, or should, be subsumed into more universal equity frameworks. Recognition that we are all vulnerable would have to override deeply held beliefs that particular racial and ethnic groups are vulnerable due to their own cultural deficits. The intransigence, however, of beliefs regarding race has been well documented, particularly because they are so central to (white) beliefs about self-worth and superiority.<sup>363</sup>

Unfortunately, the current deployment of the diversity rationale accelerates troubling doctrinal shifts away from identity and remedy, and ultimately crowds out the antisubordination values underlying the Fourteenth Amendment.<sup>364</sup> Although the diversity narrative is one of inclusion, by magnifying the transparency phenomenon, the rationale encourages simplistic and unrealistic notions of merit, while discouraging recognition of white privilege. It also perpetuates white identities grounded in racial innocence, such that would-be plaintiffs are free to challenge even the diversity rationale itself as unfair to Whites. Diversity's focus on individualism further obscures structural inequality,<sup>365</sup> permitting those suffering from pluralism anxiety to justify

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disturbed). Furthermore, black school children, in particular, are underrepresented in the least stigmatizing "hard" disability categories like deafness or blindness, for which assessment is most objective, and overrepresented in the most stigmatizing "soft" disability categories like educable mentally retarded or emotionally disturbed, for which assessment is most subjective. See Losen & Welner, *supra* note 8, at 415–17 (arguing that poverty alone could not account for black children's increased rate of categorization in "soft" disability categories and that this overclassification was a result of systematic discrimination). Similarly, minorities are overrepresented in public school suspensions and corporal punishment, with black students being 2.19 (kindergarten to fifth grade) to 3.78 (sixth to ninth grades) times more likely than their white peers "to be referred to the office for problem behavior." Russell J. Skiba et al., *Race Is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 SCH. PSYCHOL. REV. 85, 93 (2011).

<sup>363</sup> See Onwuachi-Willig & James, *supra* note 238, at 92–94 (attributing the value of whiteness to some of the problems in the campaign election of President Barack Obama).

<sup>364</sup> See *supra* notes 25, 177 and accompanying text (describing the shift toward the diversity rationale and its impact on the antisubordination values of the Fourteenth Amendment); see also Darren Lenard Hutchinson, Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection (Mar. 13, 2014) (unpublished manuscript) (on file with the *New York University Law Review*) (advocating for antisubordination theory to inform Supreme Court doctrine and arguing that the Court's efforts to discontinue class-based equal protection in order to avoid balkanization actually "enforces dominant racial perspectives that legitimize racial inequality").

<sup>365</sup> The modifier "structural" before inequality is meant to convey the unexamined and often invisible—but nevertheless impactful—cultural, political, and social patterns and practices that, although not invidious, result in societal inequality. Structural racism, for example, has been defined as a system "conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for . . . people of color. It comprises cultural beliefs, historical legacies, and institutional policies within and among public and private organizations . . . to create drastic racial disparities in life outcomes." William M. Wiecek, *Structural Racism and the Law in*

doctrinal shifts away from legal frameworks that focus on race and remedy.

Ultimately, the impact of the diversity rationale on white identity has long-term negative consequences for racial justice. Race-conscious measures meant to advance racial justice will continue to be challenged, with the permanence of the measures undermined by the negative impacts of the measures on the development of antiracist white identity. If, in an ironic twist, stunted white identity development leads to the prohibition of diversity measures, institutions of higher education will have lost one of the last remaining tools for openly promoting racial diversity on and maximizing access to college and university campuses. No longer able to explicitly consider race, institutions are left to rely on measures like Texas's Top Ten Percent Plan, which produces some diversity but relies on segregation of public K–12 schools by race and class to do so.<sup>366</sup> This result sacrifices the type of thoughtful individualized consideration that allows admissions officials to consider which applicants will bring the most to a particular educational community. Moreover, it is unlikely that institutions will give up on the diversity rationale, given the cultural cachet of diversity and the importance of broadened racial diversity in higher education. Accordingly, the use of race will become even more opaque and mysterious as institutions take their consideration of race completely underground. Unable to determine whether and how race is considered, applicants' feelings of mistrust and suspicion regarding the admissions process will intensify. In broader society, the problem-

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*America Today: An Introduction*, 100 KY. L.J. 1, 5 (2011). It is distinguishable from traditional overt racism by several characteristics, including (1) its manifestation in racially-disparate outcomes, rather than invidious intent; (2) its invisibility and operation behind the illusion of “colorblindness”; (3) its interconnectedness across multiple social domains, including housing, education, and healthcare; and (4) its automatic perpetuation, without overt action. *See id.* at 5–7 (citing as an example of structural inequality the exclusion of agricultural and domestic workers for eligibility for Social Security benefits in 1935, an act which resulted in the inability of field hands, sharecroppers, maids, and nannies—the bulk of the black labor force in the New Deal South—to amass wealth or collect survival assistance during economic downturns). Consider, also, Ian Haney López's work on institutional racism, in which he describes New Institutionalism as an understanding that “frequently repeated but largely unexamined social practices or patterns . . . structure and give meaning to human interaction.” Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1723 (2000). Haney López ultimately applies this understanding to race and insists that there is an obligation to “respond to these immensely harmful but previously little-recognized social and organizational dynamics.” *Id.* at 1730.

<sup>366</sup> *See* Torres, *supra* note 51, at 98 (noting that Texas's Top Ten Percent Plan, which guarantees all students who finish in the top ten percent of their graduating high school class automatic admission to Texas's flagship public universities, relied on the “obdurate residential segregation of Texas”).

atic deployment of the diversity narrative will likely continue, unabated.

In the meantime, Whites—distracted by the possibility that the consideration of race has marginally impacted their chances of college and university admission<sup>367</sup>—fail to address larger and more pernicious threats to equity in admissions, like the underrepresentation of white working-class students on college and university campuses, particularly at elite institutions.<sup>368</sup> Lani Guinier has pointed out, for example, that Cheryl Hopwood’s rejection from the University of Texas was as much, if not more, about class as it was about race, as indicated by the admission committee’s belief that her GPA belied her community college origins.<sup>369</sup>

### III

#### REMEDIATING THE DIVERSITY RATIONALE

Given the problems with diversity, scholars may be too quick to give up on the remedial uses of race inside (and outside) higher education. Progressive scholars and activists have never been completely satisfied with the diversity rationale,<sup>370</sup> nor should they be, given its

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<sup>367</sup> See Siegel, *supra* note 16, at 802 n.99, 807 n.112 (noting that affirmative action programs have a greater impact on the admissions prospects of Whites in the middle range of applicants); see also Liu, *supra* note 16, at 1050–78 (contending that the perception that affirmative action causes rejection of deserving white applicants in favor of less qualified minority applicants is exaggerated and a distortion of statistical truth).

<sup>368</sup> See WILLIAM G. BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 74, 96–97, 119–22 (2005) (finding that, nationally, “[o]nly 54 percent of high school graduates from the lowest-income quartile enroll in college, compared to 82 percent” of those in the top quartile, and noting that low socioeconomic status (SES) students are underrepresented for several reasons, including failure to take college entrance exams, lower rates of application to selective colleges despite high standardized test scores, and slightly lower graduation rates (quoting THE COLL. BD., *TRENDS IN COLLEGE PRICING* 4 (2003) (internal quotation marks omitted)); Derek V. Price & Jill K. Wohlford, *Equity in Educational Attainment: Racial, Ethnic, and Gender Inequality in the 50 States*, in *HIGHER EDUCATION AND THE COLOR LINE: COLLEGE ACCESS, RACIAL EQUITY, AND SOCIAL CHANGE* 63–64 (Gary Orfield et al. eds., 2005) (finding that “more than 150,000 college-qualified students each year do not enroll in any postsecondary education” because of a lack of financial aid).

<sup>369</sup> In fact, admissions officials took points off of her application because she attended community college and nonflagship state schools. See Guinier, *supra* note 327, at 511–13 (explaining how class determines both test performance—by limiting ability to pay for test preparation—and college matriculation—by limiting ability to pay for private and/or flagship state institutions).

<sup>370</sup> See, e.g., Jones, *supra* note 285, at 176–88 (arguing that the diversity rationale may lead to confusion, distortion, and obfuscation, while failing to ensure the inclusion of certain groups); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221 (2004) (arguing that the Court, in *Grutter*, embraced a colorblind conception of racial equality that is actually constitutionally suspect because it is what now constitutes American culture’s preferred form of racial discrimination).

flaws. While hailed as a victory for proponents of affirmative action, *Grutter* legitimized the diversity rationale as the sole justification for race-conscious admissions policies while failing to recognize minority interests that do not overlap with societal interests more generally.<sup>371</sup> Ultimately, the Court reaffirmed its commitment to the de facto/de jure distinction that makes societal discrimination so difficult to address, and made the remedial use of race at most universities and colleges difficult, if not impossible, to justify.

The emergence of post-identitarian equity frameworks like dignity, human rights, and vulnerability have developed, in part, as a response to the failures of equal protection jurisprudence to yield necessary remedial measures.<sup>372</sup> And yet, remedial measures are needed because of the simple fact that racial discrimination persists. In the education context, racial discrimination impacts any number of policy decisions, including special education identification,<sup>373</sup> discipline policies,<sup>374</sup> and teacher assignment. These acts of discrimination, though not always conscious, nevertheless impact academic outcomes for children of color, making preparation for college education difficult.

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<sup>371</sup> The Courts in *Bakke*, *Grutter*, and *Parents Involved in Community Schools* have all either rejected or refused to rule on the goals of undermining racial isolation, addressing economic racism, or eliminating discrimination through disparate impact in the admissions processes—to name just a few minority interests that might have been validated. In *Grutter*, interveners' claims regarding racialized credentials bias in college admission were met with complete silence by the Court. See Brown-Nagin, *supra* note 77, at 1480 (explaining that no Justice who endorsed race-conscious admissions in *Grutter* engaged the credential bias argument).

<sup>372</sup> The de jure intent requirement, in combination with tiered levels of review, has drastically limited the reach of equal protection for identity groups. The tiered levels of review create a strong presumption in favor of weak rational basis review, as heightened scrutiny will only apply when a court is convinced that a racial or gender classification (or a burden to a fundamental right) is at stake. The discriminatory intent requirement, however, poses an evidentiary obstacle: Not only are most decisionmakers savvy enough to conceal discriminatory intent behind neutral language, but the sentiments underlying government action with a racially disproportionate impact are often the result of unconscious racism. See Barnes & Chemerinsky, *supra* note 25, at 1076–83 (describing how the structural aspects of modern equal protection analysis dramatically limit the reach of equal protection); Hutchinson, *supra* note 177, at 633–37 (explaining the doctrinal “tiered” test the Court has established for equal protection analysis); see also Lawrence, *supra* note 156, at 355–64 (discussing unconscious racism and possible ways to address the problem).

<sup>373</sup> See *supra* note 8 and accompanying text (describing racial disparities in special education identification).

<sup>374</sup> Minorities are overrepresented in public school suspensions and corporal punishment, with schools being more likely to implement extremely punitive discipline and zero tolerance policies, and less likely to use mild discipline and restorative techniques, as the percentage of black students enrolled increases. Glennon, *supra* note 8, at 1255–56. Black students, in particular, are 2.19 to 3.78 times more likely than their white peers to be referred to the office for behavior problems, and Blacks and Latinos are more likely to be expelled or suspended than their white peers are for the same or similar conduct. Skiba et al., *supra* note 362, at 85.

When relying on standardized test scores that have a disproportionately negative impact on students of color, institutions of higher education are then complicit in the discrimination.<sup>375</sup>

Moreover, recognition of implicit bias is gaining scholarly traction in the law, potentially providing avenues for new litigation strategies that utilize the equal protection framework to vindicate these claims.<sup>376</sup> Even though alternatives to remediation must be considered, it is important to continue discussing remedy until the courts are prepared to hear it—not only because it may someday result in a solution, but because it forces a more robust national dialogue on racial subordination, even if this dialogue is not fully recognized within the law.

Judicial recognition, however, of the necessity of race-conscious measures for a broader array of harms is admittedly not forthcoming in the short-term, especially given the likely failure of even the Justices to develop antiracist white identities.<sup>377</sup> At the same time, the diversity rationale, although used with positive intentions, has had a negative impact on antiracist white identity. The question then becomes: What should scholars, policymakers, and institutions of higher education do to encourage development of the antiracist identities the diversity rationale has undermined? I offer some preliminary thoughts about how the diversity rationale can be employed to more

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<sup>375</sup> Kidder & Rosner, *supra* note 137, at 141–45, 156–59 (finding not only that standardized tests fail to fairly or accurately reflect group differences in educational attainment, but that for purely statistical reasons independent of animus, facially neutral test construction guarantees the lower performance of African Americans and Chicanos on the SAT). Many institutions, however, are starting to decrease their reliance on standardized test scores. See *infra* note 381 and accompanying text (noting that many colleges and universities no longer use—or at least make optional—standardized test scores in the admissions process).

<sup>376</sup> See, e.g., Jonathan Feingold & Karen Lorang, *Defusing Implicit Bias*, 59 UCLA L. REV. DISCOURSE 210, 221–23 (2012) (examining implicit bias and its impact on an individual's decision to fire a weapon at a perceived threat); Dale Larson, *A Fair and Implicitly Impartial Jury: An Argument for Administering the Implicit Association Test During Voir Dire*, 3 DEPAUL J. SOC. JUST. 139, 140–41 (2010) (exploring methods to determine potential jurors' implicit stereotypes during voir dire); Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 98 (2010) (suggesting a framework for addressing implicit bias in the workplace); Anna Roberts, *(Re)forming the Jury: Detection and Disinfection of Implicit Juror Bias*, 44 CONN. L. REV. 827, 830–32 (2012) (evaluating current proposals to ameliorate implicit juror bias and suggesting improvements to juror orientation to address this problem); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359, 1363 (2012) (explaining the difficulty of challenging implicit discrimination under the equal protection clause).

<sup>377</sup> Supreme Court Justices, who have increasingly rarefied personal and professional experiences, are not immune to the problematic phenomenon of white transparency, belief in the myth of meritocracy, or the investment in white innocence. Accordingly, it is not surprising that the Court's jurisprudence on racial justice has been limited.

positively impact white identity. In this, I aim to provide a foundation for future work offering a more detailed account of how the diversity rationale and its deployment can be improved, changed, or replaced in order to help—and not hinder—social justice.

As an initial matter, deployment of the diversity rationale must be accompanied by genuine commitments to broadening racial access. Use of the diversity rationale at universities, for example, without genuine cultivation of a positive racial climate, results in superficial diversity that balkanizes students, negatively impacts nonwhite identity, and stunts antiracist white identity development.<sup>378</sup>

Moreover, institutional narratives about diversity and use of the diversity rationale as justification for race-conscious measures must shift away from extolling the usefulness and benefits of a diverse educational experience, and toward addressing the illegitimacy of all-white institutions. Diversity is not just about training students for a global marketplace, citizenship, or deepening intellectual exchange. Rather, institutions that function as gatekeepers to valuable social and cultural capital are simply illegitimate if that access is limited to the racially and economically privileged. Erik Olin Wright notes that two of the values fundamental to the American ethos—individual freedom and democracy—share the same underlying value of self-determination.<sup>379</sup> Neither individual freedom, nor democracy, nor citizenship<sup>380</sup> can be advanced if particular segments of society are disproportionately excluded from higher education—particularly from access to the elite education typically required for participation in the higher-level decisionmaking that impacts American society and culture. Disproportionate exclusion, then, of non-Whites from elite education also presents an obstacle to self-determination, as it denies members of nonwhite groups the opportunity to shape and impact American society in the same ways that Whites do. As promoters of democracy, and as institutions that benefit from privileges distributed by the state, colleges and universities have an obligation to be inclusive and advance self-determination for all by allowing access to the value they provide.<sup>381</sup>

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<sup>378</sup> See *supra* Parts II.A and II.B (exploring how the diversity rationale can shape white identity, and the subsequent impact of that identity).

<sup>379</sup> Erik Olin Wright, *Transforming Capitalism Through Real Utopias*, 78 AM. SOC. REV. 1, 5 (2012).

<sup>380</sup> See Sturm & Guinier, *supra* note 277, at 1033 (arguing that the exclusionary “testocracy” at institutions of higher education operates like a modern-day poll tax, constricting opportunities for full participation in contemporary forms of citizenship, like work and education).

<sup>381</sup> Admittedly, the commitment of many colleges and universities to either pursue or maintain “elite” status is not likely to diminish soon. Indeed, an insistence on race-con-

At colleges and universities, this necessitates more than a blurb about diversity in the glossy pages of admissions materials. Instead, institutions should initiate broader campaigns committed to informing potential and current members of university communities that their mission necessarily includes broadened access for all. Schools may not universally adhere to such a mission, but institutions that advocate a commitment to the diversity rationale in admissions purportedly do, and can thus be expected to deepen their commitment to diversity in ways that positively impact white racial identity.

Prior to admissions, a more robust justification for the consideration of race in college admissions is needed. Diversity is currently sanctioned as a compelling interest only for nonremedial reasons.<sup>382</sup> There is a difference, however, between considering race to remedy racial discrimination and acknowledging that race is necessarily a crucial consideration in the pursuit of diversity. Accordingly, institutions should pull away from justifications that focus merely on the contributions non-Whites bring to white classrooms and move toward broadcasting and teaching about the larger societal dynamics that marginalize minorities and minority perspectives in politics, policymaking, and popular culture, thus making the inclusion of those perspectives inside classrooms—particularly at elite institutions—crucial.

Relatedly, institutional commitments to individualized review must be better contextualized for students. Admissions is an inherently individualized, subjective, and idiosyncratic process. That reality, however, should not be used only to justify the consideration of race, but should also be used to help students understand the multitude of factors that are considered in the application of each student. Individ-

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scious measures is how universities counter the exclusionary effects of their commitment to the use of standardized test scores that allow them to identify and admit the most competitive students and thus maintain elite status. Nevertheless, colleges and universities are increasingly waiving SAT or ACT examinations in favor of AP or IB exam results, and several top liberal arts colleges have decided not to require any standardized measures of achievement. *Colleges and Universities that Do Not Use SAT/ACT Scores for Admitting Substantial Numbers of Students into Bachelor Degree Programs*, FAIRTEST, <http://www.fairtest.org/university/optional> (last accessed Mar. 13, 2014). Professor Erik Olin Wright's work on progressive societies reminds us that "real utopias" are about envisioning the institutions of an ideal alternate social world, and then looking for social innovations based on these visions that can be created in the world as it is. ERIK OLIN WRIGHT, *ENVISIONING REAL UTOPIAS* 5–9 (2010). In a world in which exclusionary admissions criteria will likely remain in use for some time to come, race-conscious admission practices, although not perfect, move us closer to an ideal, or at least limit the damage of those traditionally exclusionary practices until better alternatives are accepted. For an example of alternate admissions and hiring practices that are more inclusive, see Sturm & Guinier, *supra* note 277, at 1008–34.

<sup>382</sup> See *supra* Part I.A (discussing cases where the Court has upheld the diversity rationale almost exclusively on utilitarian justifications).

ualized review may consider the athletic background of some students, the legacy status of others, and the unique social experiences of minority students—experiences that were informed by race, no matter what the student’s ultimate worldview. Individualized review may also consider the racial or ethnic background that privileged some students prior to college. Other factors like class or disability may (or may not) have mitigated or compounded marginalization or privilege on account of race and ethnicity, and admissions officers will often have to make hard decisions about how these factors impacted students and whether the institution and the student would be best served by that student’s admission and enrollment. To this extent, individualized review does not attempt to remedy societal discrimination, but it does take into account the social dynamics of race on *all* applicants—white and nonwhite—and on the institutions themselves, and should be discussed as such. The goal is not necessarily to make every rejected (or admitted) applicant perfectly happy with an institution’s admissions decisions, but to help the Abigail Fishers of the world accept those decisions by helping them understand the larger societal context in which those decisions are made.

In the post-admissions context, a more substantive commitment to diversity might include mandatory classes for incoming students about the racialized nature of opportunity and inequality in the United States.<sup>383</sup> Given the aspects of white identity most negatively impacted by superficial deployments of diversity, such a course would explore white and nonwhite racial identity, racial privilege, or narratives of meritocracy in the United States.<sup>384</sup> This approach signals not just a commitment to an improved racial climate, but a step toward unpacking myths about merit while making white privilege more vis-

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<sup>383</sup> Research has found, for example, that courses on multiculturalism and race relations positively impact racial attitudes. See Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CALIF. L. REV. 2241, 2263–64 (2000) (exploring the change in the educational experiences of students at Boalt Hall after the elimination of affirmative action).

<sup>384</sup> Lest some believe that such courses are unnecessary, consider the case of Shannon Gibney, a Professor of English and African Diaspora Studies at Minneapolis Community and Technical College (MATC). In 2013, Gibney was reprimanded under MATC’s antidiscrimination policy after three white students filed a discrimination complaint alleging that the classroom conversation she led on structural privilege made them feel uncomfortable. In 2009, students similarly alleged discrimination after she “suggested . . . that fashioning a noose in the newsroom of the campus newspaper—as an editor had done the previous fall—might alienate students of color.” Tressie McMillan Cottom, *The Discomfort Zone: Want to Teach Your Students About Structural Racism? Prepare for a Formal Reprimand*, SLATE (Dec. 3, 2013, 11:23 AM), [http://www.slate.com/articles/life/counter\\_narrative/2013/12/minneapolis\\_professor\\_shannon\\_gibney\\_reprimanded\\_for\\_talking\\_about\\_racism.html](http://www.slate.com/articles/life/counter_narrative/2013/12/minneapolis_professor_shannon_gibney_reprimanded_for_talking_about_racism.html).

ible, thus encouraging the development of antiracist white identity among students.

Furthermore, colleges and universities must implement a broader, more substantive conception of diversity, which means ending the practice of using people of color to maximize reputation and status. When institutions do commodify race and people of color in this way, it should be identified and acknowledged, and should then prompt a compensatory measure that reduces future use of non-Whites in this manner and also furthers equality.<sup>385</sup> Take, for example, the case of Diallo Shabazz, a university student whose image was photo-shopped into a University of Wisconsin admissions brochure to portray a more racially diverse campus than the university actually had. In response, Shabazz sued the school over unauthorized use of his likeness, ultimately winning a “budgetary apology” in the form of ten million dollars earmarked for diversity initiatives and the recruitment of minority students within the University of Wisconsin system.<sup>386</sup> Ideally, those initiatives would include the sort of training and engagement already outlined above.

The same is true for any other institution or individual employing the diversity rationale. For example, corporations that promote their diversity initiatives should educate employees on the nature of racial exclusion and the power of white privilege in the workplace, and should organize service projects or pro bono activities that seek to broaden minority access to the business sector in surrounding communities. Even elementary and secondary schools can deepen their commitments to diversity.<sup>387</sup> It is not enough, for example, to boast diverse viewpoints in the classroom. Rather, schools can adopt antibias curricula that help children form identities that are not rooted in white supremacy or racial subordination,<sup>388</sup> while educating stu-

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<sup>385</sup> See Leong, *supra* note 134, at 2220–21 (discussing the “difficulties inherent in moving from our current, nonideal world to an ideal one,” including the tension inherent in acknowledging that “the diversity rationale has reinforced a way of thinking of race as a commodity” even as it has also materially benefited many lives).

<sup>386</sup> *Id.* at 2206.

<sup>387</sup> See Jacqueline Johnson et al., *Doing Anti-Racism: Toward an Egalitarian American Society*, 29 CONTEMP. SOC. 95, 102–03 (2000) (explaining that a move to a nonracist society requires that schools affirmatively teach students, through example and ideology, that all people have a right to grow and develop to their fullest potential, and that schools actively work to destroy the sense of white innocence and common denial about past and present racism in the United States).

<sup>388</sup> For examples of, and guidance on, implementing antibias curricula, see generally LOUISE OLSEN DERMAN-SPARKS ET AL., *WHAT IF ALL THE KIDS ARE WHITE?: ANTI-BIAS MULTICULTURAL EDUCATION WITH YOUNG CHILDREN AND FAMILIES* (2011); STACEY YORK, *ROOTS AND WINGS: AFFIRMING CULTURE IN EARLY CHILDHOOD PROGRAMS* (2003).

dents and parents on why public schools—which act as symbols of a community—have a responsibility to be racially inclusive.

#### CONCLUSION

Although racial diversity is an important societal goal, the narrative surrounding deployment of the diversity rationale fractures and undermines coherent nonwhite identity, while simultaneously stunting the development of antiracist white identity. The result is perpetual attack on race-conscious measures designed to bring about racial justice, led by plaintiffs like Abigail Fisher who—unaware of the privilege they have been afforded by virtue of their whiteness—pursue their own interests to the detriment of people of color. Learning, however, to critically examine our deployments of diversity makes possible more substantive and honest justifications for the diversity rationale that ultimately benefit both nonwhite and white racial identity, as well as racial justice in general.