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PLACE, NOT RACE: AFFIRMATIVE ACTION AND THE GEOGRAPHY OF EDUCATIONAL OPPORTUNITY

Sheryll Cashin*

We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. . . .

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

Chief Justice Earl Warren, *Brown v. Board of Education* (1954)

INTRODUCTION

The discourse in America about segregation is dishonest. On the surface, we pretend that the values of *Brown v. Board of Education* have been met, although most of us know in our hearts that the current system of public education betrays those values. In this essay, I reflect on how residual, *de facto* segregation and the stratified architecture of opportunity in our nation contribute to the achievement gap that has made race-based affirmative action necessary. Despite the Supreme Court’s compromise decision in *Fisher v. Texas*,¹ affirmative action is on life support. As this essay goes to print, the Supreme Court has heard argument, but has not issued a decision in the case of *Schuette v. Coalition to Defend Affirmative Action*, which challenges the ability of Michigan voters to ban affirmative action.² At oral argument, conservative justices seemed

* Professor of Law, Georgetown University Law Center. This essay is adapted from parts of the following works: *Place, Not Race: Affirmative Action and the Geography of Opportunity*, in *CONTROVERSIES IN AFFIRMATIVE ACTION*, (James Beckman, ed., forthcoming 2014) and *PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA* (2014).

1. 133 S. Ct. 2411 (2013).

2. See *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).

inclined to uphold the ban.³ Conservative opponents will continue to attack the policy in courts and through politics however the Court rules: there will always be another Abigail Fisher. Eight states have banned affirmative action programs: six through ballot measures (California (1996), Washington (1998), Michigan (2006), Nebraska (2008), Arizona (2010), and Oklahoma (2012)); one by executive order (Florida (1999)); and another by legislative act (New Hampshire (2011)).⁴

Ultimately, I argue that one important response to the demise of race-based affirmative action should be to incorporate the experience of segregation into diversity strategies. A college applicant who has thrived despite exposure to poverty in his school or neighborhood deserves special consideration. Those blessed to come of age in poverty-free havens do not. I conclude that use of place, rather than race, in diversity programming will better approximate the structural disadvantages many children of color actually endure, while enhancing the possibility that we might one day move past the racial resentment that affirmative action engenders.

While I propose substituting place for race in university admissions, I am not suggesting that American society has become post-racial. In fact, much social science research supports the continued salience of race, especially in the subconscious of most Americans.⁵ My proposal accounts for the racial architecture of opportunity in this country through the race-neutral means of place. Ultimately, I conclude that the social costs of racial preferences outweigh any marginal benefits when race-neutral alternatives are available that will create racial diversity by expanding opportunity to those most disadvantaged by structural barriers. The truly disadvantaged—black and brown children trapped in high-poverty environs—are not getting the quality of schooling they need, partially because backlash wedge politics undermine any possibility for common sense public policies.⁶ Affirmative action as currently practiced in admissions at most elite institutions does little to help this group and may make matters worse by contributing to political gridlock borne of racial cleavage. I would not make place the only dimension for consideration of affirmative action, but I do think that, given how large it looms in structuring educational opportunity and

3. See Transcript of Oral Argument, *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623 (2014) (No. 12-682).

4. NATIONAL CONFERENCE OF STATE LEGISLATURES, AFFIRMATIVE ACTION: STATE ACTION, <http://www.ncsl.org/issues-research/educ/affirmative-action-state-action.aspx> (last visited Sept. 17, 2013).

5. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005).

6. See *infra* Part I.

outcomes, it should be given much greater weight and attention than it currently receives in diversity programs. I would also give considerable weight to another factor that disproportionately affects blacks and Latinos: low family wealth. Finally, I call on universities to radically reform admissions processes and jettison concepts of “merit” that are unrelated to their professed missions.

As a post-civil rights baby, I attended integrated public schools in Alabama during the era when America was making good on the promise of *Brown v. Board of Education*. In 1980, I graduated from S.R. Butler High School in Huntsville. At that time, it was one of the largest schools in the state. Our mascot was the Butler Rebel, a Confederate colonel who appeared more avuncular than defiant. Butler was an integrated, but majority-white, powerhouse in sports and a place where a nerd like me could take Advanced Placement classes and gain entrance to elite colleges. Kids from housing projects and sturdy, middle-class neighborhoods attended the same school, albeit with a degree of sorting into racially identifiable academic tracks. We played on sports fields together, attended the same “fifth quarter” dances, and generally got along.

At our thirtieth reunion, my classmates and I bemoaned Butler’s demise. Enrollment at the school where we had thrived and which we had loved had dwindled to thirty-five percent of capacity, depleted by demographic change. Butler had become an impoverished, predominately black school and a source of derision despite its string of state basketball championships in the 2000s. Barely half of its seniors graduated, and its students *were* being “left behind” as families with options moved on and standardized test scores declined. Middle-class people exited the neighborhoods surrounding the school, opting for greener, higher-opportunity acres in rapidly growing suburban Madison County. The state accelerated the school’s isolation when it built an interstate highway connector that mowed down scores of homes in Butler’s attendance zone. This created a concrete firewall between the affluent majority-white and declining majority-black sides of town, with predictable results for our alma mater. A similar story of race and class segregation in public schools and neighborhoods could be told in most American cities with a critical mass of people of color.

I. SEGREGATION, INEQUALITY & THE ACHIEVEMENT GAP

A recent report⁷ on school segregation issued by the Civil Rights Project of UCLA paints a stark picture. The overwhelming majority of Latino and black students (eighty and seventy-four percent respectively) now attend majority-nonwhite schools.⁸ Meanwhile, the typical white student attends a school that is seventy-five percent white.⁹ Asian public school students come closest to living the ideal of *Brown v. Board of Education*. They are more likely than any other group to attend a multiracial school.¹⁰ Exposure to poverty is also typical for black and Latino children and much less common for white and Asian kids. The average black or Latino public school student attends a school where nearly two-thirds of her peers are poor.¹¹ Meanwhile, the average white and Asian student attends a school where at least sixty percent of her peers are not poor.¹²

School segregation exists largely because school districts have returned to neighborhood school assignment plans. The Supreme Court essentially absolved school districts of any obligation to overcome racial segregation in neighborhoods that was not of the district's own making in a series of decisions in the 1990s.¹³ In the 2007 case of *Parents Involved in Community Schools v. Seattle*,¹⁴ the Court prohibited school districts from considering the race of individual children in school assignments, thus striking down voluntary school integration plans. In sum, even if the local political consensus favors race-conscious integration strategies, the Court limits those possibilities.

Schools, then, tend to track the racial and economic demarcations of the neighborhoods in which they are located. Admittedly, our nation is less segregated than it used to be.¹⁵ In large metropolitan areas, it is increasingly difficult to find what we used to refer to

7. See GARY ORFIELD, JOHN KUCSERA & GENEVIEVE SIEGEL-HAWLEY, THE CIVIL RIGHTS PROJECT, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS (2012), available at http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf.

8. *Id.* at ix.

9. *Id.* at x.

10. *Id.* at 20.

11. *Id.* at 26.

12. *Id.*

13. See generally SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 211–18 (2004) (citing Bd. of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237 (1991); Missouri v. Jenkins, 515 U.S. 70 (1995)).

14. 551 U.S. 701 (2007).

15. See JOHN R. LOGAN & BRIAN STULTS, US2010 PROJECT, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 3, 9 (2011), available at <http://>

in the South as a “lily white” neighborhood. In post-civil rights America, residential markets are freer, and black, brown, and yellow people have begun to add color to formerly all-white environs. That said, a considerable degree of racial segregation persists in our life space.

The average non-Hispanic white person in metropolitan America resides in a neighborhood that is approximately seventy-five percent white.¹⁶ Meanwhile a typical African American lives in a neighborhood that is only approximately forty percent white.¹⁷ In the largest metropolitan areas, most black people can be found living in environs where they predominate.¹⁸ Latinos also tend to live in neighborhoods with a large presence of people of color and very few white neighbors.¹⁹ Asians are the most integrated of so-called minorities; the largest share of their neighbors, on average, is non-Hispanic white.²⁰ Thus, whites, blacks, Latinos, and Asians tend to experience diversity very differently in their daily lives.

This differential experience of place greatly affects opportunity. Exposure to extensive poverty is the norm for most blacks and Latinos, while *the opposite* is true for most whites and Asians. Only about thirty percent of black and Latino families reside in neighborhoods where fifty percent or less of the people are poor.²¹ *Put differently, less than one third of black and Latino children live in middle-class neighborhoods where middle-class norms predominate.* Meanwhile, more than sixty percent of white and Asian households live in neighborhoods where the majority of people are not poor.²² As demographer John Logan succinctly put it, “It is especially true for African Americans and Hispanics that their neighborhoods are often served by the worst performing schools, suffer the highest crime rates, and have the least valuable housing stock in the metropolis.”²³

Race appears to play a more dominant role than class in determining where one lives. Even affluent blacks and Latinos suffer from neighborhood inequality. In the last two decades, black and

/www.s4.brown.edu/us2010/Data/Report/report2.pdf.; SHERYLL CASHIN, PLACE, NOT RACE: A NEW VISION OF OPPORTUNITY IN AMERICA 23 (2014); *see generally* Douglas Massey & Nancy Denton, American Apartheid: Segregation and the Making of the Underclass (1993).

16. JOHN R. LOGAN, US2010 PROJECT, SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS, AND ASIANS IN METROPOLITAN AMERICA 2–3 (2011), *available at* <http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf>.

17. *Id.*

18. *Id.*

19. *Id.* at 3–4.

20. *See id.*

21. *Id.* at 6.

22. *Id.*

23. LOGAN & STULTS, *supra* note 15, at 21

Latino households with annual incomes greater than \$75,000 experienced more average exposure to poverty in their neighborhoods than did poor²⁴ whites.²⁵

Elsewhere, I have written extensively about the causes of residential segregation, including persistent discrimination in housing markets, weak antidiscrimination enforcement, and exclusionary zoning, whereby affluent jurisdictions intentionally prevent affordable housing, even apartments, from invading their turf.²⁶ That the state no longer maintains a *de jure* commitment to racial exclusion is irrelevant to children who endure economic isolation. Whether intentional or *de facto*, racial and economic segregation beget racial inequality, which in turn implicates the debate over whether and how to maintain affirmative action.

The Kirwan Institute at Ohio State has pioneered research on neighborhood structure and opportunity, accumulating five decades of research that demonstrates what common sense tells us.²⁷ Low- and very low-opportunity neighborhoods depress life outcomes with high poverty, limited employment, underperforming schools, distressed housing, and violent crime. They create a nearly closed loop of systemic disadvantage, in which failure is common and success aberrational. A dearth of successful models, lack of networks that lead to jobs, unsafe streets, recurrent multi-generational family dysfunction, or the general miasma of depression that can pervade high poverty contexts may inhibit the success of even the most motivated.²⁸ In his public speeches, John Powell, former head of Kirwan and a leading authority on neighborhood opportunity analysis, likens living in a low-opportunity neighborhood to running up the “DOWN” escalator.²⁹ Additionally, a 2009 Pew study on

24. LOGAN, *supra* note 15, at 18 (defining “poor” as households with incomes under \$40,000 during the time period 2005–2009).

25. *Id.* at 5.

26. *See* CASHIN, *supra* note 13, at ch. 3.

27. *See* Jason Reece, Senior Researcher & Dir., Kirwan Inst. for the Study of Race & Ethnicity, Presentation at the NLADA Substantive Law Conference, Opportunity Mapping: Mapping the Geography of Opportunity for Public Interest Advocacy Conference Presentation, (July 23, 2010), available at http://kirwaninstitute.osu.edu/wp-content/uploads/2011/02/2010_07_23_oppmapping_reece_nlada.pdf.

28. *See* John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUS. & CMTY. DEV. L. 188, 195–99 (2002).

29. John A. Powell, Exec. Dir., Kirwan Inst. for the Study of Race & Ethnicity, Speech at Urban Habitat’s Social Equity Caucus State of the Region: Regionalism and Race (Jan. 15, 2010), available at <http://urbanhabitat.org/files/powell.20th.17-1.pdf>.

economic mobility showed that living in a high-poverty neighborhood virtually guarantees downward mobility.³⁰

Meanwhile, those privileged to live in high-opportunity neighborhoods rise easily with the benefits of exceptional schools and social networks. As Powell observes, it is like riding on the “UP” escalator. Anyone who has experienced a high-opportunity neighborhood knows intuitively what this means—the habits you observe, the people and ideas to which you are exposed, and the books you are motivated to read. These systems work in areas of low poverty and rich employment. Unfortunately, this opportunity structure continues to be highly racialized. *The vast majority of whites and Asians live in neighborhoods with a poverty rate below fourteen percent while a majority of blacks and Latinos do not.*³¹ The Kirwan Institute has performed opportunity-mapping analyses in ten states or localities nationwide. In Massachusetts, for example, ninety percent of blacks and Latinos live in areas of low opportunity compared to only thirty-one percent of whites.³² In King County, Washington, seventy-five percent of the black population is isolated in low and very low opportunity communities.³³

Whites do not want to hear about these statistics. They may trigger what social scientists call “cognitive shutdown,” prompted by factors such as fear of being labeled racist for entering any debate about race or weary perception that whites are being blamed for societal ills they did not cause.³⁴ But this isn’t a blame game. In fact,

30. PATRICK SHARKEY, PEW CHARITABLE TRUSTS, NEIGHBORHOODS AND THE BLACK-WHITE MOBILITY GAP 11 (2009), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/Economic_Mobility/PEW_SHARKEY_v12.pdf?n=1399.

31. ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, AREAS WITH CONCENTRATED POVERTY: 2006–2010 7 (2011), available at <http://www.census.gov/prod/2011pubs/acsbr10-17.pdf>.

32. KWABENA AGYEMAN, CHAUNCEY ROBBS & CRAIG RATCHFORD, KIRWAN INST., THE GEOGRAPHY OF OPPORTUNITY: BUILDING COMMUNITIES OF OPPORTUNITY IN MASSACHUSETTS, 2–3 (2009), available at http://kirwaninstitute.osu.edu/docs/publications/finalreport_maoppcomm_kirwan_jan2009.pdf.

33. SO-YOUNG LEE, BRANDON MOSS & STACEY CHAN, KIRWAN INST., THE GEOGRAPHY OF OPPORTUNITY: MAPPING TO PROMOTE EQUITABLE COMMUNITY DEVELOPMENT & FAIR HOUSING IN KING COUNTY, WA 6 (2010), available at http://kirwaninstitute.osu.edu/docs/publications/king_county_wa_opportunity_mapping_apr_2010.pdf.

34. RACHEL GODSIL & ALEXIS MCGILL JOHNSON, AM. VALUES INST., RESETTING A VISION OF RACE FOR THE 21ST CENTURY: INSIGHTS FROM THE MIND SCIENCES 3 (2013), available at <http://www.scribd.com/doc/163496747/Talking-About-Race-Memo> (noting that “[w]hite people—for whom discussions of race are often guilt inducing—often shut down entirely and cease listening.”) See also ALEXIS MCGILL JOHNSON & RACHEL D. GODSIL, AM. VALUES INST., TRANSFORMING PERCEPTION: BLACK MEN AND BOYS 12–13 (2013), available at www.perception.org/wordpress/wp-content/uploads/2013/03/BMR2_EXEC_HI_RES.pdf (citing social science studies showing white anxiety about being perceived racist and attendant defensiveness and diminished cognitive function).

the same forces that create geographic disadvantage for many blacks and Latinos also disadvantage average white folk.

In an American metropolis stratified into areas of low, medium, and high opportunity, place is a disadvantage for anyone who cannot afford to buy a home in a premium neighborhood.³⁵ The iconic, picket-fence spaces that once nurtured middle-class American dreams have shrunk along with real wages. A recent study found that only forty-four percent of American families now live in middle-class neighborhoods, down from sixty-five percent in 1970.³⁶ This is due to the rising segregation of the affluent and the poor from everyone else. While income segregation has grown fastest among black and Hispanic families, high-income families of all races are now much less likely to have middle- or low-income neighbors.³⁷

Proponents of affirmative action should worry about neighborhood inequality. A large body of social science research suggests that where one lives can directly affect one's social, economic, or physical outcomes.³⁸ This is especially true of low-income children's school performance. A recent study conducted in Montgomery County, Maryland, for example, demonstrated greatly improved achievement among black and Latino public housing residents when they moved to a middle-class neighborhood and attended middle-class schools.³⁹ A control group of children of color who remained in public housing and were assigned to high poverty schools with extra resources were not as successful as those allowed to integrate into higher opportunity schools.⁴⁰ Among the proffered explanations for the impact of poverty are poorer quality teachers, fewer resources that tend to attach to high poverty

35. powell, *supra* note 28, at 195–201.

36. SEAN F. REARDON & KENDRA BISCHOFF, US2010 PROJECT, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970–2009 (2011), *available at* <http://www.s4.brown.edu/us2010/Data/Report/report111111.pdf>.

37. KENDRA BISCHOFF & SEAN F. REARDON, US2010 PROJECT, GROWTH IN THE RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970–2009 11-17 (2013), *available at* <http://cepa.stanford.edu/sites/default/files/report10162013.pdf>; Sean F. Reardon & Kendra Bischoff, *Income Inequality & Income Segregation*, 116 AM. J. SOC. 1092, 1115–25 (2011) (showing a rise in residential segregation by income in a study of the nation's thirty largest metro areas). *See also* REARDON & BISCHOFF, *supra* note 36, at 21.

38. BISCHOFF & REARDON, RESIDENTIAL SEGREGATION OF FAMILIES BY INCOME, 1970-2009 (2013), *supra* note 37, at 4.

39. HEATHER SCHWARTZ, CENTURY FOUND., HOUSING POLICY IS SCHOOL POLICY: ECONOMICALLY INTEGRATIVE HOUSING PROMOTES ACADEMIC SUCCESS IN MONTGOMERY COUNTY, MARYLAND 33-34 (2010), *available at* <http://tcf.org/publications/pdfs/housing-policy-is-school-policy-pdf/Schwartz.pdf>.

40. *Id.*

schools, *and* an oppositional culture that tends to denigrate learning.⁴¹ This oppositional culture has been identified not just in high poverty African American and Latino communities but also in high poverty white areas.⁴²

The challenge of overcoming negative cultural influences in high poverty settings is one of the reasons I have steadfastly advocated for race and class integration, even though that goal often feels quixotic. An alternative to meaningful school integration would be to dramatically reduce class sizes and place excellent, experienced teachers in the most impoverished schools. This, too, feels like an irrationally idealistic strategy in a time of partisan gridlock and public scarcity.⁴³

It is not at all surprising, given the structural disadvantages of segregation described above, that black and Latino youth lag behind whites in math and reading on the National Assessment of Educational Progress.⁴⁴ Achievement gaps at the elementary and secondary levels are replicated in SAT scores. In 2008, African American students lagged behind white students in the critical reading portion of the SAT by nearly 100 points on average.⁴⁵ In math, they generally lagged behind Asians and whites by 155 and 111 points, respectively.⁴⁶ According to a study published in the *Sociology of Education*, selective colleges enroll 9.2 percent of black immigrants compared to only 2.4 percent of non-immigrant black high school graduates.⁴⁷ Possible explanations for why immigrant blacks are disproportionately competitive in university admissions include that they tend to live in less segregated neighborhoods, experience less violence and disorder as they come of age, possess an immigrant identity that renders them much less susceptible to peer influences, and often have better educated parents than do their

41. See James Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 280-88 (1999) 249, 280-88; SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 224 (2004).

42. *Id.*

43. See CASHIN, *supra* note 13, at ch. 6 (providing a more detailed overview of the social science and arguments regarding public education).

44. F. CADELLE HEMPHILL, ALAN VANNEMAN & TASLIMA RAHMAN, NAT'L CTR. FOR EDUC. STATISTICS, *ACHIEVEMENT GAPS: HOW HISPANIC AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATION PROGRESS* 11, 37 (2011), available at <http://nces.ed.gov/nationsreportcard/pdf/studies/2011459.pdf>.

45. WILLIAM M. CHACE, *Affirmative Inaction*, AM. SCHOLAR (2011), available at <http://theamericanscholar.org/affirmative-inaction/>.

46. *Id.*

47. Pamela R. Bennett & Amy Lutz, *How African American is the Net Black Advantage? Differences in College Attendance among Immigrant Blacks, Native Blacks, and Whites*, 82 SOC. EDUC. 70, 79 (2009).

African American peers.⁴⁸ As long as segregation exists, inequality of inputs (less experienced teachers, fewer resources, more violence, and an oppositional culture in high poverty settings) will exist with attendant unequal outcomes. This begs the question of how and whether affirmative action should compensate for these structural disadvantages.

II. THE DEMISE OF RACE-BASED AFFIRMATIVE ACTION

Ideologically conservative members of the Supreme Court have embraced a colorblind constitutionalism that, as Justice Scalia put it in *Adarand Constructors v. Peña*, requires the “Constitution[] [to] focus upon the individual . . . and [reject] dispositions based on race, or based on blood.”⁴⁹ In practical terms, this has meant that the Court does not distinguish between invidious uses of race—Jim Crow forms of racial caste and exclusion—and modern attempts to include status minorities through affirmative action. Since the 1995 ruling in *Adarand*, any use of race by the state will invoke the strictest of scrutiny under Fourteenth Amendment equal protection analysis. The Court’s 2003 decision in *Grutter v. Bollinger*,⁵⁰ upholding the University of Michigan Law School’s holistic affirmative action program was a rare example of state consideration of race surviving strict scrutiny. Justice O’Connor, author of the *Grutter* opinion, injected a degree of realism into the equal protection analysis. The *Grutter* majority deferred to universities, conceding that they had a compelling interest in diversity in higher education and according them discretion to use race as one flexible factor among several as a means to achieving that end.⁵¹ O’Connor’s speculation that affirmative action might no longer be necessary in a quarter-century was actually a call to action. America was on notice that it had better get to work closing racial gaps of achievement because use of race by the state would be time-limited.

With O’Connor’s retirement and replacement by Justice Alito, an opponent of racial preferences, proponents of affirmative action have pinned their hopes on Justice Kennedy, now the most moderate of the conservative voices on the Court. When it comes to racial

48. Douglas S. Massey, Margarita Mooney, Kimberly Torres & Camille Z. Charles, *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. EDUC. 243, 256-62 (2007).

49. 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

50. See 539 U.S. 306 (2003).

51. *Id.* at 328, 336-37.

preferences, however, that hope seems misplaced. Kennedy dissented in *Grutter* and has been an advocate for colorblindness. In a series of cases, including *Parents Involved*, *Grutter*, and *Rice v. Cayetano*,⁵² he has suggested that consideration of the race of individuals is not only unconstitutional but inherently demeaning. In *Rice* he stated, “[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”⁵³

In his dissenting opinion in *Grutter*, Kennedy agreed with the majority that universities have a compelling interest in a diverse student body and stated that “[t]here is no constitutional objection to the goal of considering race as one modest factor among many others to achieve diversity”⁵⁴ But he reasoned that strict scrutiny required that universities deploy “sufficient procedures”⁵⁵ to ensure that each applicant receives individual consideration and that race does not become a predominant factor in admissions decisions. In Kennedy’s view, the concept of critical mass deployed by Michigan’s School of Law operated as a quota whereby race became determinative for those students left to compete for the final fifteen to twenty percent of places offered to the entering class.

In *Fisher*, Justice Kennedy seems to have made his peace with the *Grutter* decision by putting his gloss on it. Writing for the majority he reaffirmed that universities have a compelling interest in the educational benefits of diversity and that they deserve deference on why diversity produces those benefits.⁵⁶ Kennedy made it clear, however, that any use of race must be narrowly tailored and that judges, not universities, must decide whether that prong of strict scrutiny has been met.⁵⁷ When an affirmative action plan is challenged in court, the court must be satisfied that there are “no workable race-neutral alternatives”⁵⁸ to achieve the educational benefits of diversity. In theory, a race-based affirmative action plan can survive strict scrutiny. But the Court imposed an exacting standard for narrow tailoring that will be difficult to meet and may invite litigation as demographic change and experimentation enhance possibilities for achieving diversity without using race.

52. 528 U.S. 495 (2000) (involving voting rights of non-native Hawaiians for election of public trustees of a fund to assist native Hawaiians).

53. *Id.* at 517.

54. *Grutter*, 539 U.S. at 392–93 (Kennedy, J., dissenting).

55. *Id.* at 393.

56. *Fischer v. Univ. of Tex. at Austin*, 113 S. Ct. 2411, 2417–19 (2013).

57. *Id.* at 2419–2420.

58. *Id.* at 2420.

Race-based affirmative action had been declining in university admissions even before Abigail Fisher's case arrived at the Court. Since Ward Connerly kick-started a state-by-state political mobilization against affirmative action in the mid-1990s, the percentage of public four-year colleges that consider racial or ethnic status in admissions has fallen from about sixty percent to thirty-five percent.⁵⁹ Only forty-five percent of private colleges still explicitly consider race; elite schools are more likely to do so, although they, too, have retreated.⁶⁰ The Court's holding in *Fisher* is likely to depress that number even further as private institutions contend with law suits, regulations, and public angst on the question.

Politics also make race-based affirmative action increasingly untenable. While a majority of Americans say in opinion polls that they support affirmative action programs generally, large majorities oppose when asked specifically if they support racial preferences in college admissions. In a 2013 Public Religion Research Institute poll, fifty-seven percent of respondents opposed racial preferences, including a majority of Republicans (80%), independents (67%), and Democrats (53%).⁶¹ African Americans were the only subgroup that clearly favored racial preferences in admissions; Latinos were mixed and the vast majority of whites were opposed.⁶² In a 2009 Quinnipiac University poll of registered voters, fifty-five percent said affirmative action should be abolished.⁶³ In a Pew Research Center values survey released in 2009, only thirty-one percent agreed that "we should make every effort to improve the position of blacks and minorities, even if it means giving them preferential treatment," while sixty-five percent disagreed—a balance of opinion that has endured throughout most of the two decade history of the Pew values survey.⁶⁴

These results are not hard to understand. Although proponents of affirmative action argue that such programs advance only qualified minorities and do not disadvantage others, "voters see a zero-

59. Chace, *supra* note 45.

60. *Id.*

61. Press Release, Pub. Religion Research Inst., New Survey: Two-thirds of Americans Support Affirmative Action Principles, Oppose Applying Them to College Admissions (May 30, 2013), available at <http://publicreligion.org/newsroom/2013/05/news-release-may-2013-rtp/>.

62. *Id.*

63. Press Release, Quinnipiac Univ. Polling Inst., U.S. Voters Disagree 3-1 With Sotomayor On Key Case, Quinnipiac University National Poll Finds; Most Say Abolish Affirmative Action 3 (June 3, 2009) available at www.quinnipiac.edu/images/polling/us/us06032009.doc.

64. PEW RESEARCH CTR., PUBLIC BACKS AFFIRMATIVE ACTION, BUT NOT MINORITY PREFERENCES 1 (2009) available at <http://www.pewresearch.org/2009/06/02/public-backs-affirmative-action-but-not-minority-preferences>.

sum game in which someone—generally white males—loses when someone else gains.”⁶⁵ For the parent who fills Adderall prescriptions for a white teenager for whom “above average” is not good enough, observing Cosby kids in that range advance is a provocation.

Inconveniently for affirmative action proponents, the policy has a black face and retains power as a dog whistle for political mobilization, even though legions of non-blacks and women have also benefitted. It is hard for non-blacks to see blacks as disadvantaged and needing affirmative action when examples of black success are ubiquitous, from Obama to Oprah to Jay-Z, not to mention the black bosses to whom non-blacks may report, the fictional black surgeons and lawyers they encounter on TV, and the well-dressed black people driving expensive cars that they occasionally notice on their daily commute. While non-blacks see real and virtual examples of black success every day, they do not see black poverty because they are removed from the deprivations of ghetto neighborhoods. Not surprisingly, only forty-nine percent of participants in a 2009 Pew survey believed that African Americans were subject to “a lot of discrimination.”⁶⁶ A majority of survey participants did perceive *other* groups as enduring serious discrimination: Latinos (52%), Muslims (58%), and gays and lesbians (64%).⁶⁷ In fact, whites are more apt to perceive discrimination against themselves than against people of color. A recent study found that both blacks and whites in America think progress has been made against anti-black bias.⁶⁸ Whites, however, perceived that progress as coming at their expense, and they viewed anti-white bias as a bigger social problem than anti-black bias.⁶⁹

Opponents of affirmative action have succeeded in harnessing such public opinion. With the exception of a proposed constitutional ban that was narrowly defeated in Colorado in 2008, state voters have chosen to end affirmative action whenever the issue has been placed before them. Republican legislators have spearheaded the three most recent state initiatives against affirmative action. They have taken up the movement Ward Connerly started, bypassing the need for expensive ballot initiatives in states where they

65. Quinnipiac Univ. Polling Inst., *supra* note 63, at 2.

66. PEW RESEARCH CTR. FOR PEOPLE & THE PRESS, MUSLIMS WIDELY SEEN AS FACING DISCRIMINATION 4 (2009), available at <http://www.people-press.org/2009/09/09/muslims-widely-seen-as-facing-discrimination>.

67. *Id.*

68. Michael I. Norton & Samuel R. Sommers, *Whites See Racism as a Zero-Sum Game That They Are Now Losing*, 6 PERSPS ON PSYCHOL. SCI. 215, 216 (2011).

69. *Id.* at 216-17.

dominate. In Arizona and Oklahoma, voters approved constitutional bans proposed by GOP legislators.⁷⁰ In New Hampshire, Republicans gained control of the legislature in 2010 and introduced a measure to prevent the state's university and community college system and all state agencies from considering "race, sex, national origin, religion, or sexual orientation" in recruiting, hiring, promotion, or admissions.⁷¹ It passed overwhelmingly in both houses in the spring of 2011 and became law when the Democratic Governor, John Lynch, took no action.⁷²

Indeed, opposing affirmative action has been a venerable plank in Republican politics for three decades. While affirmative action has eroded in popularity and usage at public and private institutions, the GOP in the 1980s and 1990s used the policy to achieve an enduring political realignment through a cynical wedge politics of racial resentment. Ronald Reagan ran for president in 1980 on a GOP platform that labeled affirmative action's goals and timetables as inherently discriminatory quotas.⁷³ His coded appeals regarding a cluster of race-oriented issues resonated in the South and the white ethnic suburbs of the Midwest and Northeast, swelling the ranks of "Reagan Democrats." Soon, these voters began to identify the GOP as the "white party" and the Democrats as the "black party." Such identification created no incentive for racial reconciliation and great incentive for Republicans to create political majorities by dividing whites from blacks and other people of color.

Ultimately Reagan's main vehicle for undermining affirmative action was to gut enforcement. He cut funding for the EEOC and the civil rights division, and by 1984 the EEOC was filing sixty percent fewer cases than it did at the onset of his first term.⁷⁴ Civil rights cases against segregation in schools or housing that traditionally had been filed by the Justice Department virtually disappeared by 1984.⁷⁵ Reagan also replaced proponents of affirmative action on the Civil Rights Commission with vigorous opponents.⁷⁶ Opposition

70. S.J. Res. 15, 1st Reg. Sess. 53d Legis. Okla. (Okla. 2011); Oklahoma State Question 759; H.R. Con. Res. 2019 (Ariz. 2010).

71. Peter Schmidt, *New Hampshire Ends Affirmative Action Preferences at Colleges*, CHRON. HIGHER EDUC., Jan. 4, 2012, available at <http://chronicle.com/article/New-Hampshire-Ends/130196/>.

72. H.B. 623, 2011 Leg., 2011 Sess. (N.H. 2011).

73. See THE LEADERSHIP CONF. ON CIVIL & HUMAN RIGHTS & THE LEADERSHIP CONFERENCE EDUC. FUND, *The 80s: Dismantling the Commission*, WWW.CIVILRIGHTS.ORG, <http://www.civilrights.org/publications/reports/commission/the-80s.html> (last visited Dec. 26, 2013).

74. JOHN L. PALMER, *THE REAGAN RECORD*, 206 (Isabel V. Sawhill ed., 1984).

75. See THE LEADERSHIP CONF. ON CIVIL AND HUMAN RIGHTS & THE LEADERSHIP CONFERENCE EDUCATION FUND, *supra* note 73.

76. CASHIN, *supra* note 15, at 8.

to affirmative action and black-associated civil rights became a key aspect of the Reagan zeitgeist.

Subsequent Republican candidates also used racial wedge issues, such as affirmative action, busing, crime, capital punishment, and Willie Horton, to make inroads with white working class voters who had been dependable Democrats from 1932 to 1960.⁷⁷ The stagflation of the 1970s and economic restructurings of the 1980s fueled these voters' resentments about race.⁷⁸ In some blue-collar areas, race seemed to be *the* predominant factor in whites' transition from the Democratic to the Republican column. Macomb County, Michigan, just north of Detroit, offers a potent example. It went from being the most Democratic suburban county in the country in 1960, voting sixty-three percent for Kennedy that year, to voting sixty-six percent for Reagan in 1984.⁷⁹ In focus groups, Democratic pollster Stanley Greenberg found that racial resentment animated much of the switch:

Blacks constitute the explanation for their vulnerability for almost everything that has gone wrong in their lives . . . [They see] the federal government as a black domain where whites cannot expect reasonable treatment . . . There was a widespread sentiment . . . that the Democratic [P]arty supported giveaway programs, that is, programs aimed primarily at minorities.⁸⁰

Fortunately race-coded politics now seem more apt to backfire than to resonate with the American electorate. You cannot yell "Macaca" at a crowded campaign rally or rail against welfare for "blah people" and succeed in getting yourself elected in a largely tolerant, multihued nation. But the overtly race-coded politics of a bygone era did break up the multiracial coalition that made the New Deal and civil rights possible. The New Deal model of politics pitted a winning coalition of economically marginal black and white Democrats against a small minority of wealthy Republicans.⁸¹ That model was replaced by a modern Republican Party that managed to unite many affluent, middle-, and working-class white voters. In the 2012 presidential election, fifty-nine percent of whites voted Republican, up from fifty-five percent in 2008 and about

77. *Id.*

78. *Id.*

79. *Id.*

80. Sheryll Cashin, *Democracy, Race, and Multiculturalism in the Twenty-First Century: Will the Voting Rights Act Ever be Obsolete?*, 22 WASH. U. J. L. & POL'Y 71, 95–96 (2006).

81. CASHIN, *supra* note 15, at 8-9.

equal to the fifty-eight percent of whites who voted for George Bush in 2004.⁸² This is significantly higher than the GOP's share of the white vote in past presidential elections: fifty-five percent in 2000, forty-six percent in 1996, and forty-one percent in 1992.⁸³ The racial divide is even sharper among men. In 2012, sixty-two percent of white men voted for Mitt Romney while men of color heavily favored Barack Obama (eighty-seven percent of Black men; sixty-five percent of Latino men; and sixty-six percent of all other races).⁸⁴

Our nation lives with political gridlock born of racial cleavage. The ascendance of political conservatism in the late twentieth century—an ideology of limited government, individual responsibility, and traditional values—coincided with the ascent of color blindness, and the one ideology fueled the other. As Harvard professor Jennifer Hochschild has argued, opponents of affirmative action gained cultural and political traction in part because their message fit with our most cherished values: the dream that in America anyone can prosper through sheer ambition and hard work, regardless of race, sex or other background.⁸⁵ This ideology of individualism, in turn, animates the anti-statist attitudes and consequent Republican obstructionism in Congress.⁸⁶

In light of this backlash, those who continue to champion race-based affirmative action must consider whether its benefits are worth the costs of continued racial cleavage. Empirical studies of the impact of affirmative action show that the policy did help create the black middle-class.⁸⁷ According to Hochschild, however, affirmative action was not nearly as influential as other less controversial strategies like antidiscrimination enforcement, raising educational achievement of students of color, and reducing barriers to voting

82. See *How Groups Voted in 2012*, THE ROPER CENTER, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_12.html (last visited January 11, 2014); *How Groups Voted in 2008*, THE ROPER CENTER, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_08.html (last visited January 11, 2014); *How Groups Voted in 2004*, THE ROPER CENTER, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_04.html (last visited January 11, 2014).

83. See *How Groups Voted in 2000*, THE ROPER CENTER, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_00.html (last visited January 11, 2014); *How Groups Voted in 1996*, THE ROPER CENTER, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_96.html (last visited January 11, 2014); *How Groups Voted in 1992*, THE ROPER CENTER, http://www.ropercenter.uconn.edu/elections/how_groups_voted/voted_92.html (last visited January 11, 2014).

84. *Races and Results*, CNN ELECTION CENTER (Dec. 10, 2012, 11:22 AM), <http://www.cnn.com/election/2012/results/race/president> (follow “Exit Polls” hyperlink; then scroll down to “Vote by Gender and Race” horizontal bar chart).

85. Jennifer L. Hochschild, *Affirmative Action as Culture War*, in *THE CULTURAL TERRITORIES OF RACE: BLACK AND WHITE BOUNDARIES* 343, 354–55 (Michèle Lamonte ed., 1999).

86. *Id.*

87. *Id.* at 348.

and holding office.⁸⁸ While affirmative action had critical influence in raising minority presence at selective colleges in the 1980s, it seemed to play little to no role in admissions at the non-elite schools that eighty percent of college students attended.⁸⁹

The relevant debate is not whether we should have had affirmative action in the first place. That question is moot. Given the inevitable demise of race-based affirmative action, the relevant question is, what is its logical replacement? Political constraints born of a perception gap between whites and nonwhites about the need for government interventions to redress racial inequality are likely to harden with rising demographic diversity. Institutions necessarily are changing to accommodate both emerging racial complexity and globalization. Latino enrollment in U.S. colleges grew by a whopping twenty-four percent between 2009 and 2010, an increase of 349,000 students.⁹⁰ In the same one-year period, enrollment by blacks and Asians also grew while non-Hispanic white enrollment fell by 320,000.⁹¹

Increased diversity will result naturally from such demographic change. The future is Rice University: today, at this elite school founded on a “whites-only” charter,⁹² less than half of the undergraduates are white Americans.⁹³ With the browning of America and the pressures of globalization, all institutions face a diversity imperative to maintain relevance and market share. White anxiety will continue to rise as more and more whites experience a loss of majority status. If whites are to engage with diversity instead of resenting it, they must perceive the rules of competition as fair to them and everyone else.

III. AN ALTERNATIVE: PLACE-BASED AFFIRMATIVE ACTION

Proponents of race-based affirmative action argue that the numbers of blacks and Latinos at elite schools will plummet without it.

88. *Id.*

89. *Id.*

90. RICHARD FRY, PEW RESEARCH CENTER, HISPANIC COLLEGE ENROLLMENT SPIKES, NARROWING GAPS WITH OTHER GROUPS 3 (2011), available at <http://www.pewhispanic.org/2011/08/25/hispanic-college-enrollment-spikes-narrowing-gaps-with-other-groups/>.

91. *Id.*

92. *The Short History of Race-Based Affirmative Action at Rice University*, 13 J. BLACKS HIGHER EDUC. 36, 36 (1996).

93. Students & Scholars Enrollment by Race & Ethnicity, RICE UNIVERSITY OFFICE OF INSTITUTIONAL RESEARCH FACTBOOK, http://oir.rice.edu/Factbook/Students/Enrollment/Race_and_Ethnicity (select “Undergraduate” under “Customize Your View” menu; then scroll down to view pie chart).

This has been the initial pattern in states that have banned use of race in admissions. In a 2003 study of five selective law schools in California, Texas and Washington, enrollment rates declined by nearly two-thirds among African Americans and nearly one-third among Latinos once race was removed from the admissions process.⁹⁴ Similarly precipitous declines in black enrollment have occurred at elite public undergraduate institutions immediately after bans on affirmative action. Black and Latino undergraduate enrollment at UC Berkeley fell by half immediately after Prop 209 took effect in California.⁹⁵

The picture is better when the lens is widened. A recent study of the impact of affirmative action bans in four states (California, Washington, Texas, and Florida) found that total enrollment of unrepresented minorities did not change at four-year universities.⁹⁶ The decline did occur at *selective* schools, with black and Latino enrollment falling 4.3 percent overall at those schools.⁹⁷

And yet, some degree of diversity has endured, even in the wake of bans on the use of race. In California, demographic change alone is raising the numbers of Latinos attending college. Among Golden State residents admitted to the University of California system for the fall of 2012, thirty-six percent are Asian American, twenty-eight percent white, twenty-seven percent Latino, and four percent African American.⁹⁸ The state itself is roughly fourteen percent Asian, forty percent white, thirty-eight percent Latino, seven percent black and four percent multiracial.⁹⁹ Of course, diversity's proponents would like to see better representation of African Americans and Latinos. In the *Fisher* case, leaders of the University of Texas and University of California systems filed briefs arguing that they could not achieve critical levels of diversity in all classrooms without consideration of race.

Yet this blunt use of race has unintended, if perverse, consequences. At America's most selective institutions, admissions officers achieve optical diversity by admitting those applicants of color who are most prepared to compete and come from a socioeconomic background not unlike that of applicants admitted

94. Lilliana Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 REV. HIGHER EDUC. 93, 101 (2012).

95. *Id.* at 100.

96. *Id.*

97. *Id.*

98. UNIV. OF CALIFORNIA, PERCENT CHANGE IN CALIFORNIA RESIDENT FRESHMAN ADMIT COUNTS BY CAMPUS AND RACE/ETHNICITY, (2012) http://www.ucop.edu/news/factsheets/2012/fall_2012_admissions_table3.pdf.

99. U.S. CENSUS BUREAU, CALIFORNIA QUICKFACTS, <http://quickfacts.census.gov/qfd/states/06000.html> (last visited Sept. 18, 2013).

without affirmative action. As Walter Benn Michaels, professor of the University of Illinois frankly put it, “[w]hen students and faculty activists struggle for cultural diversity, they are in large part battling over what skin color the rich kids have.”¹⁰⁰

One of the more perverse aspects of the optical diversity currently being pursued at selective colleges and universities is that it benefits the children of African immigrants, who, on average, are the best educated of all racial and ethnic subgroups. Among the undergraduates that might be counted as black at Harvard in 2012 are fifty-seven students from sub-Saharan Africa and the Caribbean.¹⁰¹ Nigeria and Ghana were among the highest feeder countries.¹⁰² According to an analysis of census data by the *Journal of Blacks in Higher Education*, almost half of all African immigrants in the United States are college graduates, a rate slightly higher than that of Asian immigrants, nearly twice the rate for native-born whites and nearly four times the rate of college attainment for native-born blacks.¹⁰³

Ironically for proponents of affirmative action, who seem most worried about how African American youth will continue to be represented on college campuses without consideration of race in admissions, non-immigrant black strivers might fare better under programs based upon economic or structural disadvantage. A well-designed, place-based diversity program might better approximate the actual obstacles that many non-immigrant black children face on the path to college. For non-immigrant black youth, those disadvantages are three-fold.

First, as established in Part I above, black and Latino children are more likely to have had to overcome the effects of concentrated poverty in segregated schools and neighborhoods. Second, black and Latino youth are more likely than whites to suffer the deprivations of low net worth. The traditional wealth gap between whites and people of color, worsened by the Great Recession and the bursting of the housing bubble, intersects with the disadvantages of segregation. According to the 2010 census, median household wealth of white families was twenty-two times that of black families

100. *Most Black Students at Harvard Are From High-Income Families*, 52 J. BLACKS HIGHER EDUC. 13, 13 (2006), available at http://www.jbhe.com/news_views/52_harvard-blackstudents.html.

101. HARVARD INT’L OFFICE, FULL TIME INTERNATIONAL STUDENTS IN THE VARIOUS SCHOOLS OF HARVARD UNIVERSITY (2012), http://www.hio.harvard.edu/about/hio/statistics/pdf/HIO_-_MainStudentFileFY13-NEW2.pdf.

102. *Id.*

103. *African Immigrants in the United States are the Nation’s Most Highly Educated Group*, 26 J. BLACKS HIGHER EDUC. 60 (2000).

(\$111,000 to \$5000) and fifteen times that of Latino families (\$111,000 to \$7500).¹⁰⁴ Research shows that low net worth affects a family's ability to purchase a home in a high opportunity neighborhood with good schools and affects a student's confidence that working hard will enable her to attend college.¹⁰⁵ Finally, black children are disproportionately disadvantaged by growing up in single-parent households, with less child supervision and support than is typically available in two-parent households.¹⁰⁶ Richard Kahlenberg has argued that building these three elements of disadvantage—exposure to concentrated poverty, low wealth, and single-parent household status—into a class-based affirmative action program would fairly consider factors known to affect educational outcomes while also disproportionately benefitting students of color.¹⁰⁷ I agree but would give special significance to place and other radical reforms that remove unnecessary exclusion from admissions.

Such a holistic design would answer criticisms that race-neutral, class-based affirmative action favors whites who do not have to deal with the accumulated restrictions of race, regardless of their economic status. William Julius Wilson supports class-based affirmative action but does not view it as a substitute for race-based affirmative action for several reasons. Middle-class black kids often suffer the restrictions of segregated neighborhoods and America's racial history can make a black family's hold on middle-class status more fragile.¹⁰⁸ Wilson and others are correct in their assertion that mere consideration of income differences does not adequately reflect the structure of disadvantage in the United States. Promoting affirmative action based upon class rather than race is not enough when there is a racialized, separate, and unequal K-12 pipeline. As noted earlier, low-income whites tend to be less economically segregated than affluent blacks.¹⁰⁹ On average, they are less exposed to concentrated poverty and have a higher probability of living in middle-class settings that offer genuine opportunity and better schools.

104. Tami Luhby, *Worsening Wealth Inequality by Race*, CNN MONEY (June 21, 2012, 1:09PM), <http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/index.htm>.

105. CENTURY FOUND., A BETTER AFFIRMATIVE ACTION: STATE UNIVERSITIES THAT CREATED ALTERNATIVES TO RACIAL PREFERENCES 18 (2012), available at <http://tcf.org/publications/2012/10/a-better-affirmative-action-state-universities-that-created-alternatives-to-racial-preferences>.

106. *Id.*

107. *Id.* at 12.

108. See William Julius Wilson, *Race and Affirming Opportunity in the Barack Obama Era*, 9 DU BOIS REV.: SOC. SCI. RESEARCH ON RACE 5, 7–9 (2012), available at journals.cambridge.org/action/displayFulltext?type=1&fid=8601519&jid=DBR&volumeId=9&issueId=01&aid=8601517&bodyId=&membershipNumber=&societyETOCSession=.

109. See *supra* text accompanying notes 16–22.

That said, whites who *do* live in impoverished environs or attend high-poverty schools are no less deserving of special consideration—as is anyone who is actually disadvantaged by economic isolation. If a middle-class black applicant is disadvantaged along some dimension other than place, as I argue below, a holistic approach to admissions would enable consideration of such actual disadvantage.

Recent research on class-based affirmative action that considered a complex range of factors beyond parental income, including parental education, language, neighborhood, and high school demographics, found that such programs would raise African American and Latino enrollment nearly as much as race-based affirmative action and also increase economic diversity.¹¹⁰ Among ten universities that adopted race-neutral plans, seven met or exceeded the levels of black and Latino student representation they had previously achieved using racial preferences.¹¹¹ If we are honest about the extant data on the effects of moving from race-based to place-based methods of affirmative action, the debate is really about how and whether African Americans will retain a meaningful presence at the most selective colleges and universities. UC Berkeley and UCLA, California's most elite public higher education institutions, currently meet or exceed the numbers of Latino students they had before Proposition 209, but they have yet to recover fully in terms of black student representation.¹¹²

Among civil rights advocates, a familiar justification for continued use of race in college admissions is its necessity to ensure that a diverse leadership class emerges from elite private and public institutions. During the *Fisher* oral argument, UT's lawyer asserted that the ability to give extra consideration to a hypothesized son of a black dentist from a Dallas suburb was important. Mr. Garre reasoned:

[T]he minority candidate who has shown that . . . he or she has succeeded in an integrated environment, has shown leadership and community service . . . is precisely the kind of candidate that's going to . . . come on campus, help to break

110. KAHLBERG & POTTER, *supra* note 105, at 16.

111. *Id.* at 12.

112. See generally PATRICIA GÁNDARA, THE CIVIL RIGHTS PROJECT, CALIFORNIA: A CASE STUDY IN THE LOSS OF AFFIRMATIVE ACTION 5 fig. 1-2 (2012). I deeply regret that Native Americans are invisible in this debate, largely because of a lack of reported data about them

down racial barriers, work across racial lines [and] dispel stereotypes.¹¹³

Such candidates seemed more desirable to Garre (and possibly UT's admissions officers) because, he stated, "the minorities who are admitted [under the Top Ten Percent Plan] tend to come from segregated, racially-identifiable schools."¹¹⁴

As a passionate advocate for integration, I believe in the value of diversity and the idea that people should be exposed to "the other." Still, there was something unseemly about UT's argument, as Justice Alito pointed out in his rejoinder:

Well, I thought that the whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before. The top 10 percent plan admits . . . lots of Hispanics and a fair number of African Americans. But you say . . . it's faulty because it doesn't admit enough . . . who come from privileged backgrounds.¹¹⁵

UT, unlike its elite private competitors, has a surfeit of "minorities" from "segregated" communities because of the operation of the Ten Percent Plan. Unvarnished, UT's logic appears to be that they want to be able to compete for the most palatable or assimilated black and brown students. This argument is just as unseemly as the fact that the primary beneficiaries of affirmative action at the nation's most selective private institutions are those that are most advantaged by parental education, neighborhood, or school quality.¹¹⁶

Let's face it: fewer African Americans enter elite institutions under an affirmative action system based upon structural disadvantage than under race-based affirmative action. This raises the question of whether the marginal benefits of getting more blacks into elite institutions—hypothetically, an eight percent black class using race vs. a four percent black class using other criteria—are worth the political costs of continued racial division. I think not,

113. Oral Argument at 42:19-43:1, *Fisher v. Texas*, 133 S. Ct. 2411 (2013) (No. 11-345), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf.

114. *Id.* at 43:15-17.

115. Oral Argument at 43:19-44:2, *Fisher v. Texas*, 133 S. Ct. 2411 (2013) (No. 11-345), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf.

116. See *supra* text accompanying notes 99-102.

especially when the harms that flow from a racially divided electorate include mass incarceration and underinvestment in both public education and the social safety net. In any event, if I am correct in my prediction that law or politics will eventually render race-based affirmative action extinct, it would make sense to get started on race-neutral reforms that have the potential to create real diversity and more social cohesion.

I prefer strategies that will render centers of learning more racially and economically diverse while *encouraging* rather than *discouraging* cross-racial alliances. Notably, the Texas Ten Percent Plan emerged from a cross-racial coalition of black, Hispanic, and rural white members of the Texas legislature who represented districts that were not sending large numbers of students to UT institutions.¹¹⁷ The Texas and Florida plans that send the top ten and twenty percent of high school graduates, respectively, to state universities are imperfect alternatives that rely on racial segregation to achieve racial diversity by ostensibly race-neutral means.¹¹⁸ They are a rare first step among diversity policies toward accounting for residential segregation and its attendant disadvantages, albeit indirectly and incompletely. California has also adopted a similar place-based program that guarantees admission to the UC system to the top nine percent of graduates of each local high school.¹¹⁹ The UC system has also eliminated legacy preferences, as have some universities like Texas A&M and the University of Georgia.¹²⁰

The University of Michigan is rare in that it has incorporated place—"residence in an economically disadvantaged region"—expressly into its program design although it is unclear what weight this factor is given in a context of holistic admissions review. UM also adopted geography-based scholarships as part of its strategy to increase racial diversity in a race-neutral way.¹²¹ The fact that place has not played a more prominent role in states where race-based affirmative action has been banned suggests a lack of awareness geography's role in creating racial structures of opportunity or, more likely, a desire to admit racial minorities who are less challenged by circumstances of racial and economic isolation. After all, admitting middle- or upper-middle-class students of color who graduate from strong, integrated high schools is likely to be less costly in terms of

117. CASHIN, *supra* note 15, at 81.

118. *Id.* at 82.

119. *Id.*

120. See KAHLBERG & POTTER, *supra* note 105, at 18.

121. *Id.* at 53.

financial aid awards and less threatening to *U.S. News* rankings because those students have higher average test scores than inner-city strivers.

If an institution is sincere about achieving diversity and wishes to or is forced to do so without considering race, then place is an important, underutilized, and fair tool. An admissions process that affords holistic, individualized review of a variety of factors should give extra weight to living in a low opportunity neighborhood (e.g., a poverty rate above twenty percent) or attending a high poverty school. This would benefit those who most need and deserve affirmative action. It could also have the salutary benefit of encouraging racial and socioeconomic integration in low opportunity neighborhoods. A strategic middle-class family might decide to stay in or move into a historically low-opportunity neighborhood in order to receive the benefit of this plus factor in college admissions.

I would not make place affirmative action's only consideration but it should be given much greater weight and attention than it currently receives in diversity programs, given how large it looms in structuring educational opportunity and outcomes. Low family wealth should also receive considerable weight as another factor that disproportionately affects blacks and Latinos. Exposure to concentrated poverty and low family wealth are both "structural" forms of disadvantage because their racial dimensions can be traced to conscious, racist policy choices that endured for decades.¹²²

While single-parent status is another factor that disproportionately affects African American youth, the degree of government culpability is less clear (and frankly beyond my realm of expertise). In any event, diversity programs can capture single-parent status and other forms of disadvantage by allowing individual applicants to state what obstacles they have overcome. On the order of magnitude currently given to race in race-based affirmative action programs, the structural disadvantages of segregation and low wealth should be given far more consideration and weight.

This proposal might not help middle-class black kids who live in medium- or high-opportunity environs, especially those aiming to enter elite institutions. But affirmative action should be reserved for students of any color who are challenged by serious disadvantages. For those who are not, I think it is healthy to send a message that most global aspirants have already absorbed: rewards come to those who work exceedingly hard. In our bewilderingly diverse future, no one is entitled.

122. See CASHIN, *supra* note 13, at 83–126 (providing an overview of this history).

IV. RACIAL RECONCILIATION AND RADICAL REFORM

Statistically, poor and working-class whites are more likely to live in middle-class surroundings than blacks and Latinos, but they also face structural constraints to upward mobility. Even working-class whites that have the test scores and grades to gain entrance to college are not attending commensurate with their numbers because the current system of college admissions and financial aid works against working class white people in insidious ways. A cottage industry of tutors, test preparers, consultants, learning centers, and other resources that only the affluent can tap has sprung up around college admissions and the elementary and secondary training that precedes it. Performance on the SAT is tightly correlated with family income.¹²³ It has no correlation whatsoever to university mission statements, unless a college is willing to rewrite its mission to say: “Our purpose is to preserve advantages of wealth and income in America.” Using cumulative high school GPA to evaluate college applicants is a more legitimate measure of merit because it is a better predictor of likely performance throughout college, and it has less adverse impact on disadvantaged and underrepresented minority students.¹²⁴ Yet selective colleges slavishly accept exclusionary criteria propagated by the College Board and *U.S. News and World Report* as merit. “Merit-based” financial aid, as opposed to “need-based” financial aid, also works against entry by white working-class students.¹²⁵ These exclusionary practices render working-class whites as alien and alienated on college campuses as children of the ghetto. Progressives should not be surprised that anti-intellectualism and denigration of “liberal elites” has become a common cultural sensibility among blue-collar whites or those who would lead them.¹²⁶

If the American Dream is to be more than a platitude, the avenues to opportunity must be real, and universities have a unique

123. Catherine Rampell, *SAT Scores and Family Income*, N.Y. TIMES ECONOMIX BLOG (Aug. 27, 2009, 1:01 PM), <http://economix.blogs.nytimes.com/2009/08/27/sat-scores-and-family-income>.

124. See SAUL GEISER & MARIA VERONICA SANTELICES, CTR. FOR STUDIES IN HIGHER EDUC., VALIDITY OF HIGH-SCHOOL GRADES IN PREDICTING STUDENT SUCCESS BEYOND THE FRESHMAN YEAR 24–27 (2007), available at http://cshe.berkeley.edu/sites/default/files/shared/publications/docs/ROPS.GEISER_SAT_6.13.07.pdf. A study that examined academic outcomes of students by race and gender at twenty-eight selective colleges found that “the biggest effect in predicting college grades is that associated with high school GPA, whereas the SAT score is nowhere to be found among the strongest predictors.” Douglas S. Massey & LiErin Probasco, *Divergent Streams: Race-Gender Achievement Gaps at Selective Colleges & Universities*, 7 DU BOIS REV. 219, 241 (2010).

125. CASHIN, *supra* note 15, at 57-58.

126. *Id.* at 61.

role to play in countering the structural injustices that exist in our nation. Indeed, centers of learning may be the only remaining institutions in American society capable of transcending partisan gridlock to repair the social contract. In diverse, fragmented America, a widely shared value is that no one's access to opportunity or pursuit of happiness should be limited based upon immutable characteristics like race, ethnicity, or nationality. Proponents and opponents of affirmative action alike invoke this ideal of equality, embodied in the Fourteenth Amendment, even if they do not agree on what such equality should mean in practice. The so-called American Dream, however tattered, is also premised upon equality among the classes. According to a favored shibboleth, all Americans, regardless of economic station are supposed to be able to get ahead and prosper by dint of hard work.

Restoring the American Dream might begin with a principle of universal fairness based on the American values we profess to revere: freedom, opportunity, and universal human dignity. A true commitment to these ideals requires institutions and employers to replace their traditional practices because existing systems are simply replicating and reinforcing socioeconomic advantage. Universities are not immune from this need to change, since these inequalities are contrary to their missions to serve the country and advance the whole of human knowledge. A country where the avenues of upward mobility are open mainly to affluent individuals living concentrated in advantaged environs contradicts the professed values of centers of learning.

In addition to explicit using place in any diversity calculus, several other reforms may be necessary to revive social mobility and the social contract in the United States. First, I would jettison the phrase "affirmative action," with its loaded meanings. Most universities and employers have stopped using the term anyway, favoring an amorphous concept of "diversity" that does not challenge existing exclusionary norms. I prefer the term "diversity practice" because it conveys acceptance of a diverse society and the constant effort required to create practices and structures that are truly inclusive. Colleges and employers should be forthright about how and why they value diversity, what diversity means to them, and the (fair) practices they undertake to achieve it. In this way, all applicants will know a given institution's commitments and they can form realistic expectations or apply elsewhere. Transparency about diversity commitments and practices will promote actual fairness as well as a perception of fairness.

Second, institutions and employers should clarify their mission. Truly committed institutions will explicitly incorporate diversity into their mission statements. Then, institutions and employers should *define merit in terms that are directly tied to advancing their mission*. In fact, one study suggests that affirmative action entrants, with their lower test scores, become the alumni that most exemplify universities' frequently stated mission of cultivating community leaders who give back to society.¹²⁷ For example, aspiring firefighters need to be able to demonstrate that they can deploy relevant technology to put out fires. A standardized test that merely performs a gate-keeping function and does not test for skills relevant to extinguishing fires is neither useful nor fair.

The same could be said of most standardized tests. A student's high school GPA is the best available predictor of how a student will perform in college,¹²⁸ although it cannot alone predict how and whether an applicant will promote a university's mission. In sum, universities should rethink ill-defined, exclusionary concepts of "merit." In my field of legal education, for example, the ability to publish theoretical articles in elite law journals is more valued among select law faculties than the ability to teach students how to practice law in the real world.

An institution truly committed to diversity and universal access to opportunity would offer financial aid *solely* based upon demonstrated financial need. It would make the SAT and ACT optional or not use them at all, as is increasingly the case at hundreds of colleges.¹²⁹ It would not give special consideration to race, ethnicity, *or* legacy status. Instead, in addition to the standard application form, all applicants would be invited to submit an optional statement on what disadvantages they have had to overcome. All forms of disadvantage would be considered, but structural disadvantages like living in a high-poverty neighborhood, attending a high-poverty school, or low household wealth would receive extra weight.

My argument about legacies is simple. Research establishes a correlation between parental educational attainment and student educational achievement.¹³⁰ Being the son or daughter of someone

127. Lani Guinier, *Law School Affirmative Action: An Empirical Study of Confirmative Action*, 25 LAW & SOC. INQUIRY 565, 568-70 (2000).

128. See Douglas S. Massey and LiErin Probasco, *Divergent Streams: Race-Gender Achievement Gaps at Selective Colleges and Universities*, 7 DU BOIS REV. 219, 241, 244 (2010).

129. See FAIRTEST: NATIONAL CENTER FOR FAIR AND OPEN TESTING, COLLEGES AND UNIVERSITIES THAT DO NOT USE SAT/ACT SCORES FOR ADMITTING SUBSTANTIAL NUMBERS OF STUDENTS INTO BACHELOR DEGREE PROGRAMS, <http://www.fairtest.org/university/optional/> (last visited Sept. 18, 2013).

130. See, e.g., *The College Board, The SAT Report on College & Career Readiness: 2012* 29 (2012), available at <http://media.collegeboard.com/homeOrg/content/pdf/sat-report-col>

who has attended a university, especially an elite one, offers its own advantage. Legacy applicants are well prepared to compete. As with advantaged racial minorities, legacy applicants do not need or intrinsically deserve any special consideration.

Finally, institutions should hire more admissions staff to ensure that every individual applicant receives careful, holistic consideration. The goal of the admissions process should be to identify highly qualified applicants of all races and classes who personify the university's mission. The goal for society, over time, is to ensure that getting ahead is not a function of circumstances of birth.

Admittedly, these ideas swim against a tide of entrenched practice and privilege. While many people complain about the unfairness of racial preferences, far fewer voices engage with the evidence of *de facto* class preferences in university admissions. Professor Lani Guinier is a notable exception.¹³¹ If universities are unwilling to rethink conventional practices or reexamine what really counts as merit, as Guinier has suggested, an experimental lottery for some of the places in an entering class is preferable to the current certainty of class advantage.¹³² A university could define a baseline GPA and standardized test score that would be acceptable and let applicants roll their dice. At least then all strivers would have a modicum of hope and systems would retain an aura of fairness.

CONCLUSION

Proponents of affirmative action or diversity should take the long view: power is in numbers. Creating a racially diverse politics in which working class whites and people of color share a common agenda will have a more transformative impact than affirmative action programs, which currently tinker at the margins of opportunity on behalf of those who least need help. Unless and until we recognize the mutual oppression of economically marginalized people of any race and undertake the labor-intensive work of building political alliances among them, the American Dream will remain just that—a dream that mocks the forty-six million Americans who live the nightmare of poverty and the millions more who eke out a

lege-career-readiness-2012.pdf (showing that the more education a student's parents have, the more rigorous their high school course load and curriculum tend to be).

131. See Lani Guinier, *Colleges Should Take Confirmative Action in Admissions*, CHRON. HIGHER EDUC., Dec. 14, 2001, at B10, available at <http://chronicle.com/article/Colleges-Should-Take/22060>.

132. *Id.*

middle-class existence. While we are gathering multiracial power, the all Americans must ask how can we prepare more black and brown kids to compete without racial preferences, since those preferences will eventually disappear.

The system is rigged against all middle-income and poor people. Performance on the SAT mirrors family income. Access to an excellent public school depends heavily on buying your way into an affluent neighborhood. Employment opportunities depend on whom you know and having skills that you may not be able to afford to acquire. Even those middle-class people blessed with a regular paycheck, healthcare, and a sound roof over their heads struggle to form or raise a family in a way that prepares the next generation to prosper. Social mobility in the “land of opportunity” has ground to a halt. Meanwhile, without a multiracial majority that consistently represents at least fifty-five percent of voters in elections and policy battles, there is little chance of enacting sound policies that might correct the underlying structures that create racial and economic inequality. In the case of anti-democratic measures like super-majority requirements to break a filibuster in the U.S. Senate or to pass a revenue measure in the California Legislature, even more cross-racial political cohesion is required.

Nothing will get better, then, without reconciliation between sizeable numbers of whites and people of color. What we need is a politics of fairness, one in which people of color and the white people who are open to them move past racial resentment to form an alliance of the sane. There are plenty of common sense ideas about how to create more, not less, opportunity in this country. A “Sanity Alliance” might get some things done for the common good of us all.

Being intentional in our choice of policies and language can help us begin to reconcile, to move past racial resentments, and to create a politics of fairness. One first step is to base affirmative action upon structural disadvantage, not race. Working-class whites need a signal that they are welcome to enter the multiracial tent and this would be one such signal.

However, jettisoning race-based affirmative action is the beginning, not the end, of creating a fairer society. While we should not favor one race for preferential treatment, we also should not single out one group for discriminatory treatment. That, too, is un-American. Mass incarceration and racial profiling come to mind. Our best hope to redress both forms of unfairness is a language based upon

common harms and the common weal.¹³³ For example, California is sagging under the weight of its prison budgets due to a racially unfair and fiscally insane War on Drugs. California spends more on prisons than it does on higher education, and its public schools, once the envy of the nation, now rank near last in performance and per-pupil spending.¹³⁴ Fortunately the state is beginning to self-correct. On November 6, 2012, Californians voted to raise taxes in order to invest six billion dollars annually in education and they approved a measure that moderated the state's infamous "three-strikes" law that had required life sentences even for non-violent, three-time felons.¹³⁵ Democrats also gained the necessary legislative supermajority to raise revenues.¹³⁶ These developments, like the 2012 presidential election itself, suggest the emerging promise of multiracial politics. I write this not as a cheerleader for the Democratic party but as citizen who longs for a functional democracy in which parties and politicians vigorously compete for all of the votes in a multiracial electorate.

Once we get started on a "Sanity Alliance" and begin to build trust and relationships, we can begin to have more honest, refreshing discussions about how racial harms do damage to society as a whole. A "Sanity Alliance" might identify public and private policies that disproportionately discriminate against people of color in a way that harms the common good, including mass incarceration, the War on Drugs, and predatory lending. Then, this coalition of the willing should organize state and local movements to reform those policies. Washington D.C. is nearly impossible these days. A better place to start is with numerous multiracial, faith-based coalitions that are already working in scores of communities, often in a bipartisan manner. Elsewhere I have written about this wonderful, righteous work.¹³⁷

Throughout American history, economic elites have used racial categories and racism to drive a wedge between working class whites and people of color. In the colonial era, indentured servitude gave

133. See CASHIN, *supra* note 15, at Ch. 5 (2014) (providing a detailed overview of the best strategies and rhetoric for creating an effective multiracial politics that redresses common harms).

134. Prerna Anand, *Winners and Losers: Corrections and Higher Education in California*, CALIFORNIA COMMON SENSE (Sept. 5, 2012), <http://www.cacs.org/ca/article/44>; John Fensterwald, California Drops to 49th in School Spending in Annual Ed Week Report, ED-SOURCE (Jan. 14, 2013), <http://edsources.org/2013/california-drops-to-49th-in-school-spending-in-annual-ed-week-report/25379#.U3jvd8fhcn4>.

135. *Id.*

136. *Id.*

137. *Id.* See also Sheryll Cashin, *Shall We Overcome? Transcending Race, Class and Ideology Through Interest Convergence*, 79 ST. JOHN'S L. REV. 253 (2005).

way to white freedom and black slavery so that white servants would no longer join blacks in revolt as they did in Bacon's Rebellion. In the late 19th century, Jim Crow laws proliferated after a biracial farmers' alliance threatened to change unfair financial policies imposed by elites. And the GOP devised a cynical, race-coded southern strategy that broke up the multiracial alliance that made the New Deal possible. Given this history and its current manifestations, intentional efforts are sorely needed to begin to rebuild trust among "we the people" and to recapture a sense of collective will to protect the common good.

Race-based affirmative action in a context of ascending diversity will continue to fuel white resentment and division and is unnecessary when place-based alternatives that track actual disadvantage are available. I would substitute "low opportunity neighborhood" for race as a plus factor in the type of formulas that university's use in admissions decisions because race is too blunt an instrument and too costly politically.

