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What's So Compelling About Diversity Anyway?: How the Affirmative Action Diversity Rationale Was Built to Fail Under Today's Equal Protection Doctrine

Fariza Hassan†

> "[I]f we don't take seriously the ways in which racism is embedded in structures of institutions, if we assume that there must be an identifiable racist . . . who is the perpetrator, then we won't ever succeed in eradicating racism."
> — Angela Davis[1]

> "None of us got where we are solely by pulling ourselves up by our bootstraps. We got here because somebody . . . helped us pick up our boots."
> — Thurgood Marshall[2]

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†. J.D. Candidate 2025, University of Minnesota Law School, and Editor-in-Chief of *Minnesota Journal of Law & Inequality*, Vol. 43. I am incredibly grateful for all who helped bring this Note to life. First and foremost, I want to thank my parents, Ishret and Tanvir, for their unconditional love and support. They are the reason I am able to write these words, and without their guidance, I would never have become the woman I am today. To my brother Zuhair, thank you for being you, and of course, for always keeping me humble. Thank you to the members of this Journal, especially Zinaida Carroll, for your hard work and editorial support throughout this Note process—it has been a privilege working with you all on Volume 43. To Professor Susanna Blumenthal and Alexandra Schrader-Dobris, thank you both for pushing me to dream while also keeping me grounded throughout the many versions of this Note. To Professor Liliana Zaragoza and my peers in the Racial Justice Law Clinic, thank you for sharing this passion for racial justice and for inspiring me to keep up the good fight, every day. Finally, to my Bangladeshi community here in Minnesota, thank you for teaching me that it truly does take a village. This Note is entering the legal sphere at a time where the law is being used to divide and erase many of us. In a world where knowledge, empathy, and compassion can be much more powerful tools towards change, I hope this Note serves as a push for us to question the language we use and the power we hold in both law and life, and to dream a bit harder. In solidarity, always.

1. ANGELA Y. DAVIS, FREEDOM IS A CONSTANT STRUGGLE 18 (Frank Barat ed., 2016).

2. Daniel J. Almeida, Andrew M. Byrne, Rachel M. Smith & Saul Ruiz, *How Relevant is Grit? The Importance of Social Capital in First-Generation College Students' Academic Success*, 23 J. OF COLL. STUDENT RETENTION: RSCH. THEORY & PRAC. 539, 554 (2021).

Introduction

On September 4, 1957, Elizabeth Eckford put on a new dress—one she had hand sewn with the help of her sister—and styled her hair with the help of her mother.[3] Like any 15-year-old, Elizabeth spent the morning of her first day of school preoccupied with what she was wearing and how she looked, especially since this would be a completely new school with completely new people.[4] When she got off the city bus and headed towards Little Rock Central High School, however, Elizabeth wasn't met with the typical excitement of a new school year.[5] Instead, a growing crowd and a line of armed guards controlling the flow of students entering the school grounds swarmed the street in front of her.[6] Elizabeth was bombarded with jeers and racist chants from the crowd as she made her way to the entrance of the school.[7] "Two, four, six, eight, we don't wanna integrate!"[8] Elizabeth approached the sidewalk where a line of guards were stationed.[9] She assumed they were there to protect her and other students from the rowdy crowd.[10] Expecting the guards to let her pass as she had seen them do with the white students, Elizabeth, however, stood face-to-face with crossed rifles that barred her entrance into the school and refuge from the angry mob.[11] She then tried to enter the school from a different entrance point, at which she was met with the same staunch and threatening refusal by the guards who stood between her and her promised education.[12] Afraid and confused, Elizabeth left the school grounds altogether, attempting to maintain composure while waiting for the bus as the crowd grew more violent in their threats.[13] Elizabeth would later learn that the armed guards were not called to the school for *her* protection as a student, but rather for the *high school's* protection from the violence towards integration that she

3. *In Elizabeth Eckford's Words*, FACING HISTORY & OURSELVES, https://www.facinghistory.org/resource-library/elizabeth-eckfords-words [https://perma.cc/6N5W-2M25] (Jan. 5, 2015) [hereinafter *Eckford's Words*].
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*; DAVID MARGOLICK, ELIZABETH AND HAZEL 58–68 (2011).

and the eight other Black students enrolled at Little Rock Central High School were forced to endure.[14]

On the day before Elizabeth was barred from entering Little Rock Central High School, Governor Orval E. Faubus called for the Arkansas National Guard to block all desegregation efforts, including the physical blocking of Black students, like Elizabeth Eckford, from entering the school.[15] Faubus called for military enforcement in clear defiance of federal authority, claiming that such measures were necessary in order to mitigate the civil disorder that threatened to erupt in response to such integration efforts.[16] Three weeks of discourse followed—involving Faubus, the local school board, the NAACP, federal courts, and President Dwight D. Eisenhower—until Faubus finally complied with a federal order to withdraw the National Guard.[17] However, three days after the removal of the Guard, the nine Black students attending Little Rock Central High School were forcefully removed from their classes when a large and dangerous crowd formed outside of the building.[18] In response to the crowd, President Eisenhower dispatched paratroopers to the city and federalized the Arkansas National Guard as a means of enforcing the court's desegregation mandate.[19] The National Guard remained stationed at the high school until the end of the academic school year.[20]

The Supreme Court's ruling in *Brown v. Board of Education* (also known as *Brown I*), declaring segregation within educational facilities as an unconstitutional violation of the Equal Protection Clause, is one of the United States' most aspirational attempts at enacting social change through the law.[21] Expecting that such an aspiration would be met with great resistance, the Court revisited the decision one year later in *Brown II*, holding that local courts must push public schools to make a "prompt and reasonable start" towards desegregation efforts within educational facilities, which

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14. *Id.*; *see also* Karen Anderson, *The Little Rock School Desegregation Crisis: Moderation and Social Conflict*, 70 J. OF S. HIST. 603, 603–636 (2004).

15. Tony A. Freyer, *Enforcing* Brown *in the Little Rock Crisis*, 6 J. OF APP. PRAC. AND PROCESS 67–78 (2004) [hereinafter Freyer: *Enforcing* Brown].

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Brown v. Bd. of Educ. (Brown I), 347 U.S. 483 (1954) (holding that separate educational facilities are inherently unequal and have detrimental effects on Black children); TONY A. FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION 4 (1984) [hereinafter Freyer: *The Little Rock Crisis*].

ought to proceed "with all deliberate speed."[22] The case of Elizabeth Eckford and the other Black students at Little Rock Central High School, known as the Little Rock Nine, is one that exemplifies such visceral resistance and stagnant efforts towards desegregation.[23]

Since the rulings of *Brown I* and *Brown II*, efforts to rectify racial inequities within the realm of education have evolved in various ways. As exemplified in the case of the Little Rock Nine, one of the first affirmative steps towards the removal of de jure segregation—segregation enforced and protected by the law—was the federal requirement to desegregate schools, as ordered in *Brown II*.[24] While a sizeable step towards legalized racial equality, such desegregation efforts resulted in an onslaught of de facto racial discrimination—racial imbalance resulting from societal patterns and practices allowed under, and as a result of, the law.[25] A prominent example of de facto segregation still present today is the gerrymandering of attendance zones in residential neighborhoods that further the racial divides of Black and white students in public schools.[26] In the fall of 2021, 37% of Black children across the U.S. attended high-poverty primary and secondary schools compared to only 7% of white students.[27] Such racially divided primary education opportunities inevitably result in skewed racial makeups

22. Brown v. Bd. of Educ. (Brown II), 349 U.S. 294, 300, 301 (1955); Freyer: *Enforcing* Brown, *supra* note 15, at 67; Daniel H. Pollitt, *Equal Protection in Public Education: 1954-61*, 47 AM. ASS'N. UNIV. PROFESSORS BULL. 197, 198 (1961).

23. *Eckford's Words*, *supra* note 3; Freyer: *Enforcing* Brown, *supra* note 15, at 67–68 (discussing the role of Governor Orval Faubus in defying federal authority to desegregate by bringing in the state's National Guard to block Black students like Elizabeth Eckford from entering Little Rock Central High School).

24. *See* Georgina Verdugo, *Edited Comments on Defining Affirmative Action by Reference to History*, 1995 ANN. SUV. AM. L. 383, 384 (1995) ("Simply put, affirmative action programs are an effective means of insuring opportunities for groups that have been the victims of historical discrimination or for groups presently denied equal opportunity.").

25. Brown II, 349 U.S. 294 (1955); *see also* Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275 (1972) ("However, the problem of de facto segregation—racial imbalance resulting merely from adherence to the traditional, racially neutral, neighborhood school policy in a community marked by racially segregated residential patterns—has yet to be faced.") (footnote omitted).

26. *Id.* at 283; *see also* Richard Rothstein, De Facto *Segregation: A National Myth*, *in* FACING SEGREGATION: HOUSING POLICY SOLUTIONS FOR A STRONGER SOCIETY 15–34 (Molly W. Metzger & Henry S. Webber, eds., 2018) (discussing the role of racial segregation in public housing facilitated by the Fair Housing Act of 1968, resulting in ongoing discrimination that continues to permeate).

27. National Center for Education Statistics, *Concentration of Public School Students Eligible for Free or Reduced-Price Lunch*, U.S. DEP'T OF EDUC., INST. OF EDUC. SCIENCES (May 2023), https://nces.ed.gov/programs/coe/indicator/clb/free-or-reduced-price-lunch [https:// https://perma.cc/P2UE-XVSW].

within higher education as well. In 2022 alone, the number of bachelor's degrees conferred to Black students by postsecondary institutions was approximately 17.7% of the total number of degrees conferred to white students.[28]

Solving explicit de jure segregation policies seemed straightforward enough, for any explicit race-based division of students that impacted educational opportunities and outcomes was a clear violation of the Fourteenth Amendment's Equal Protection Clause, as found in *Brown I*.[29] Addressing the equally harmful effects of de facto racial discrimination, however, seemed a more difficult feat, for it is a very rare occurrence that the Supreme Court declares a facially race-neutral law unconstitutional on the sole basis of statistical disproportionate impact on members of a certain racial group.[30] Over time, the threshold for the Court in deciding whether a race-neutral law produces unconstitutional, racially imbalanced outcomes has only heightened, making it much more difficult for Black and other racially marginalized communities to seek redress for de facto harms.[31]

Within the realm of higher education, efforts to remediate racial imbalances and lingering effects of racial discrimination have been pursued through methods known as affirmative action, which are targeted policies and programs that "came into existence specifically to rectify the history of race-based exclusion, legally enforced segregation, and quota systems" that limited the number of racially marginalized students permitted to enroll at colleges and universities across the United States.[32] For example, the requirement to desegregate schools upheld in *Brown I* and *II* is an

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28. National Center for Education Statistics, *Bachelor's Degrees Conferred by Postsecondary Institutions, by Race/Ethnicity and Sex of Student: Selected Academic Years, 1976-77 through 2021-22*, DIG. OF EDUC. STAT. (2023), https://nces.ed.gov/programs/digest/d23/tables/dt23_322.20.asp?current=yes [https://perma.cc/CKW4-JF9N] (displaying that in the 2021-2022 school year, the number of degrees conferred to Black students was 199,962, while the number of degrees conferred to white students was 1,129,570).

29. Brown I, 347 U.S. 483, 495 (1954).

30. *See* Goodman, *supra* note 25, at 301.

31. *See* Katherine Lambert, *Discriminatory Purpose: What It Means under the Equal Protection Clause–Washington v. Davis*, 26 DEPAUL L. REV. 650, 650–665 (1977) (citing Washington v. Davis, 426 U.S. 229 (1976)) (discussing the role of statistical evidence needed to demonstrate unconstitutional discrimination involving a facially neutral law, as seen in *Washington v. Davis*).

32. Adewale A. Maye, *The Supreme Court's Ban on Affirmative Action Means Colleges Will Struggle to Meet Goals of Diversity and Equal Opportunity*, ECON. POL'Y INST.: WORKING ECON. BLOG (June 29, 2023, 04:29 PM), https://www.epi.org/blog/the-supreme-courts-ban-on-affirmative-action-means-colleges-will-struggle-to-meet-goals-of-diversity-and-equal-opportunity/ [https://perma.cc/N4X5-6TVV].

example of affirmative action, where actionable measures were taken in attempting to rectify unconstitutional, racially disproportionate education systems. Since the *Brown* cases, race-based admissions policies aiming to rectify racial disproportionality have been some of the most prominent and impactful forms of affirmative action in U.S. colleges and universities.[33] Under modern-day Equal Protection doctrine, however, explicit race-based practices are not constitutional, regardless of their intent to redress the lingering effects of a racist history.[34] In order to bypass the heightened scrutiny of the Equal Protection doctrine and achieve the inherent goals of affirmative action, a serious butchering of the policy and its practices have taken place over time.[35] Despite its roots targeting the unique plights of Black students to receive the same educational opportunities as white peers, affirmative action has all but dwindled down to one buzzword that dictates its future in the realm of higher education: diversity.[36]

While the Constitution does not explicitly use the word "diversity" in its language, the legal lexicon has carefully contoured it, in true legal fashion, to a variety of applications within constitutional law. On a broad level, for example, diversity jurisdiction facilitates the federal review of cases in which parties lack state commonality.[37] On a more narrow level, laws protecting

33. *See* Susan P. Sturm, *Reframing Affirmative Action: From Diversity to Mobility and Full Participation*, 2020 U. CHI. L. REV. 59 (2020) (highlighting the use of affirmative action in higher education institutions and their admissions decision-making); *see also* Jamie Gullen, *Colorblind Education Reform: How Race-Neutral Policies Perpetuate Segregation and Why Voluntary Integration Should Be Put Back on the Reform Agenda*, 15 U. PA. J. L. & SOC. CHANGE 251, 273 (2012) ("While integrated schools often do not provide equal educational experiences to students of all races, the vast majority of research indicates that students of color do achieve higher levels of academic success in integrated schools.") (citing Roslyn Arlin Mickelson, *Subverting Swann: First- and Second-Generation Segregation in the Charlotte-Mecklenburg Schools*, 38 AM. EDUC. RES. J. 215 (2001)).

34. Sturm, *supra* note 33, at 60 ("[T]he Supreme Court's racial jurisprudence has developed in an area that triggers strict scrutiny because [higher education institution]s' use of race in admissions has been found to operate as a classification allocating benefits and opportunities to individuals based on race.").

35. *See* Goodwin Liu, *Affirmative Action in Higher Education: The Diversity Rationale and the Compelling Interest Test*, 33 HARV. C.R.-C.L. L. REV. 381 (1998) (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)) (analyzing the diversity rationale used in affirmative action cases since its introduction in *Bakke* in 1978).

36. *Id.*

37. *See generally* U.S. CONST. art. 3, § 2 (discussing the federal review of cases involving differing citizenship between parties, also known as "diversity jurisdiction"); Legal Information Institute, *Diversity Jurisdiction*, CORNELL L. SCH. (Sept. 2022) https://www.law.cornell.edu/wex/diversity_jurisdiction [https://perma.cc/BZ3D-TB2L].

plant and animal diversity attempt to preserve different native species and varieties of ecosystems.[38] At its core, the use of "diversity" in the legal sphere, often without being explicitly defined, seems to entail notions of difference or variety of some sort, taking shape as lawmakers deem fit. Today, diversity as a legal and social concept has stood at the forefront of the historical affirmative action debates, namely within the realm of higher education.[39] Ranging from a "robust exchange of ideas[,]"[40] to a vehicle for "livelier, more spirited, and simply more enlightening and interesting" classroom discussions,[41] diversity has been stretched and contorted in a manner that subverts the inherent goals of affirmative action, catering to a white-centered narrative as it attempts to make room for itself under the Equal Protection doctrine.[42] In the most recent affirmative action case, *Students for Fair Admissions (SFFA) v. Harvard*, the plaintiffs are a nonprofit organization alleging that race-based admissions violates the Equal Protection Clause given that diversity is an immeasurable concept, thus failing the strict scrutiny test of narrow tailoring.[43] In a major shift in the historical affirmative action discussion, the Court in *SFFA* struck down race-based affirmative action in higher education institutions altogether on the very basis that diversity *is* essentially unqualifiable and thus, unjustifiable under the current Equal Protection doctrine.[44] While such an outcome came as a shock to many, the evolution and whittling of affirmative action policy

38. *See* 36 C.F.R. § 219.9 (2016).

39. *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (introducing the potential of using diversity as a rationale in an applicant's admissions decision); *see also* Students for Fair Adm., Inc. (SFFA) v. Pres. & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that the diversity rationale is not a narrowly tailored compelling interest and thus the consideration of race in higher education admissions is unconstitutional)*; see also* The Learning Network, *What Students Are Saying About the End of Race-Based Affirmative Action in College Admissions*, N.Y. TIMES: CURRENT EVENTS CONVERSATION (Sept. 21, 2023) https://www.nytimes.com/2023/09/21/learning/what-students-are-saying-about-the-end-of-race-based-affirmative-action-in-college-admissions.html [https://perma.cc/8WXS-88HK] (highlighting the voices of high school students and the impact on their future college careers in the aftermath of the Supreme Court's ruling in *SFFA v. Harvard*).

40. *Bakke*, 438 U.S. at 330.

41. Grutter v. Bollinger, 539 U.S. 306, 330 (2003) (internal quotation marks omitted).

42. *See* Wendy Leo Moore & Joyce M. Bell, *Maneuvers of Whiteness: 'Diversity' as a Mechanism of Retrenchment in the Affirmative Action Discourse*, 37(5) CRITICAL SOCIO. 597, 602 (2011) ("Nearly the instant that 'diversity' in education became a rationale recognized by the Court . . . the concept gets de-racialized; securely fitted to the color-blind sub-frame.").

43. 600 U.S. 181, 197 (2023).

44. *Id.* at 221–22.

demonstrates that the diversity rationale was built to fail all along, for today's Equal Protection Clause framework—one that fails to account for the unique plights of Black and racially subordinate groups in the U.S.—is inherently incompatible with a policy that requires targeted, intentional race-based action in order to achieve authentic racial justice.

This Note explores how the diversity rationale used in trying to justify affirmative action, and its ultimate failure, demonstrates that racial justice and remediation of historical racial discrimination require transformative jurisprudence: a radical shift in legal framework that deliberately centers race-consciousness in order to enact concerted, targeted remedial action. Part I examines the structural goals of affirmative action: remediation of historical racial discrimination targeting the unique barriers faced by subordinated racial groups, also known as race-conscious remedy.[45] This section discusses the doctrinal requirements necessary in the effective implementation and facilitation of affirmative action policies. Part II analyzes the concept of diversity as a white-centered narrative, highlighting that any attempt to use a colorblind concept, one that refuses to acknowledge the role and impact of race, for inherently race-conscious efforts will ultimately fail, no matter how the law tries to contort it. Part III looks at the history of the diversity rationale as used in previous affirmative action cases, leading to its eventual failure in *SFFA v. Harvard*. By dissecting the various ways in which the Supreme Court warps the definition and contours of diversity, the anticipated failure of its application in *SFFA v. Harvard* can be better understood. Finally, this Note concludes by challenging the current scheme of the race-based equal protection doctrine at large, questioning the ability for genuine remedy of racial discrimination to even take place under the modern-day regime. This Note does not offer concrete legal solutions to reinstating affirmative action, but instead argues that such an occurrence is incredibly unlikely under the current equal protection scheme. While such an argument may seem bleak or defeatist in nature, this Note pushes for greater thought on efforts toward intentional and effective racial justice in the realm of education and beyond. This Note pushes against the narrative that critical methods of achieving racial justice must be diluted to fit into neatly packaged legal framework only to be met with occasional and symbolic "wins" as the Court deems fit.[46]

45. *See* Sally Chung, *Affirmative Action: Moving beyond Diversity*, 39 N.Y.U. REV. L. & SOC. CHANGE 387, 390 (2015).

46. *See* DERRICK BELL, FACES AT THE BOTTOM OF THE WELL, 19 (1992) (internal

I. Affirmative Action: An Inherently Race-Conscious Effort

The aftermath of *Plessy v. Ferguson*, particularly within the realm of education, emboldened segregation and its violent effects under the renowned guise of "separate but equal."[47] In the late 1930s, the American Council on Education (ACE) conducted a survey of Black schools in the segregated Deep South.[48] The survey reported common threads of small, extremely dilapidated buildings housing up to four grades at once, few if any books all in battered condition, high rates of dropout among students who left school to assist in farm work and raise money for their families, and many other factors contributing to severely underdeveloped education for these Black students.[49] Included in this report were testimonies of students, such as 15-year-old Maggie Red, who shared that she "just loves to go to school" and would walk twelve miles on a daily basis to attend due to the lack of transportation provided by the city.[50] "Sometimes it rains so hard I just can't go . . . . If I just had some way of getting to school when it rains I'd be so much further along in school than I am now," Maggie noted.[51] Despite Black children outnumbering white children in rural counties of the Deep South, blatant disparities persisted in the attention Black students were receiving by states.[52] In 1930, Alabama school boards spent $37 on each white child and just $7 on each Black child; in Georgia, $32 and $7; in Mississippi, $31 and $6; in South Carolina, $53 and $5.[53] As a result of such skewed and racist policies, educational achievements of Black Americans were abysmally low, resulting in continued economic and societal subordination justified by law and racism.[54]

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quotation marks omitted) ("From the Emancipation Proclamation on, the Man been handing us a bunch of bogus freedom checks he never intends to honor. He makes you work, plead, and pray for them, and then when he has you either groveling or threatening to tear his damn head off, he lets you have them as though they were some kind of special gift. As a matter of fact, regardless of how great the need is, he only gives *you* when it will do *him* the most good!").

47. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

48. CHARLES S. JOHNSON, GROWING UP IN THE BLACK BELT: NEGRO YOUTH IN THE RURAL SOUTH 102–134 (1941) https://hdl.handle.net/2027/heb02853.0001.00 [https://perma.cc/9LHR-Y6FW] (reporting the ACE findings among Black youth and schools in the Deep South).

49. *Id.*

50. *Id.* at 113.

51. *Id.*

52. Peter Irons, *Jim Crow's Schools*, AM. FED'N. OF TCHRS (2004) https://www.aft.org/ae/summer2004/irons [https://perma.cc/SB4F-R2PP].

53. *Id.*

54. *Id. See also Segregation in Education*, 12 NEGRO HIST. BULL. 5, 98 (Albert

The Supreme Court's holding in *Brown I* was a perceived first step towards alleviating such severe and jarring segregation practices in education.[55] In the 1960s and 1970s, for example, court-mandated busing plans were implemented to provide transportation to Black children in efforts to further desegregate schools—an affirmative action that could have helped Maggie attend school more often back in the 1930s.[56] However, white resistance and the new burdensome framework of proving de facto segregation in order to seek redress remained persistent in a post-*Brown* era.[57] A prominent example is the anti-busing movement that became a common-sense way for white parents to describe their opposition to school desegregation efforts, essentially masking their racist opposition towards integration.[58] White parents and politicians would frame their resistance to school desegregation in terms of "busing" and "neighborhood schools," allowing them to support white schools and neighborhoods without using explicitly racist language.[59] Rather than explicitly voicing their opposition towards racial integration in schools, white parents and politicians would claim that busing policies, bringing Black students into now-integrated white schools, was taking Black students out of their neighborhoods and bringing them into white neighborhood schools, creating issues of overcrowding and displacement.[60] Such rhetoric—abusing an important affirmative step towards racial justice for Black children to attend schools they once could not—underscores the theme of resistance to racial equality that persists to this day.

In the realm of higher education, affirmative action has been interpreted to serve as a tool to counter de facto barring of Black

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N.D. Brooks et al., eds., 1949) ("The former states engaged in slave-holding resorted to [segregation in schools] to secure the subordination of the Negroes to the whites and after emancipation extended it more widely and in multifarious ways to perpetuate the lower status of the former bondmen. Now that experience has shown that the system handicaps not only the Negro but works detrimentally to the entire nation[,] citizens of vision would like to uproot the system.").

55. 347 U.S. 483 (1954).

56. *See* Swann v. Charlotte-Mecklenburg Bd. Of Ed., 402 U.S. 1 (1971) (deciding that providing a means of bus transportation was a permissible tool in desegregation efforts and remedy of past constitutional violations); JOHNSON, *supra* note 48, at 113.

57. *See* MATTHEW F. DELMONT, WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION (Univ. of Cal. Press, 2016); *see also* Paul Aster, *De-Facto Segregation*, 6 WM. & MARY L. REV. 41, 41 (1965) (defining de facto segregation as "a situation in which schools are attended predominantly by one race, due to the racial composition of the neighborhoods served by those schools[,]" and highlighting that such illicit segregation produced feelings of inferiority among its students).

58. DELMONT, *supra* note 57, at 8.

59. *Id.* at 3.

60. *See id.* at 168–89.

and racially subordinated students in the admissions process.[61] On February 2, 1999, eight Black, Latinx, and Asian students filed suit against the University of California – Berkeley for their inherently racialized admissions preferences of white students, initiating the case *Rios v. Regents of the University of California*.[62] The students argued that the fairness of criteria used in the admissions process consistently demonstrated lower achievement among Black and brown students, such as SAT preparation and subsequent scores, and Advanced Placement (AP) courses that were not offered at most high schools with higher Black and brown student populations.[63] The *Rios* complaint alleged impermissible disparate treatment of students of color, demanding a targeted, race-conscious alleviation of such barriers in the school's selection process.[64] Though ultimately unsuccessful in its claims, the *Rios* complaint is a remarkable and important demonstration of how de facto exclusion of non-white students is ignored and misconstrued under the modern-day equal protection doctrine.[65] Additionally, the *Rios* complaint reflects how drastically efforts to repackage legal justification for affirmative action have changed over time.[66] The disparate treatment argument of the *Rios* complaint wavered due to its inability to pinpoint specific examples and elements of disparate treatment under the Equal Protection doctrine.[67] Conversely, most contemporary affirmative action cases focus on highlighting statistical and quantifiable analyses to try to demonstrate racial harms, which fail to touch on the inherent and underlying elements of historical discrimination and systemic harm faced by subordinated racial groups.[68] By painting over the persistent injuries of societal racism and white supremacy, affirmative action cases have evolved into colorblind narratives that appeal to a colorblind legal system.[69]

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61. *See* Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 942 (2001) (discussing Rios v. Regents of the Univ. of Cal., (N.D. Cal. Feb. 2, 1999) (No. C.99-0525)).

62. *Id.* at 942–58.

63. *Id.*

64. *Id.* at 949–50 ("[T]he *Rios* suit is grounded in antisubordination theory, a theory that takes the vantage point of those who are victimized by societal racism.").

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 949 ("The claim in the *Rios* suit . . . present[s] [an] example[]of how different the river of equality looks when viewed from the vantage point of those who are subordinated by America's racism rather than from the vantage point of the privileged.").

To understand how affirmative action and the Fourteenth Amendment work—or don't work—in conjunction with one another, an analysis of the two main Equal Protection doctrines must take place: antisubordination and anticlassification.

A. *Affirmative Action and Antisubordination*

At the heart of affirmative action—from Jim Crow era segregation of public schools to modern day segregation in higher education—is the inherent attempt to rectify a long history of race-based exclusion and its lingering effects.[70] This notion is housed within an antisubordination framework.[71] Introduced into the legal sphere by Owen Fiss in 1976, antisubordination theory encompasses the idea that justice is rooted in a theory of compensation for a subordinated group, like Black Americans, who were put into a position by the dominant social group (whites), and that redistributive measures are owed to the subordinated group as a form of compensation and remedy for historical harms.[72] This framework, Fiss argues, lies in the original intentions of the enactment of the Equal Protection Clause that, though not explicitly, attempts to rectify the long history of constitutionally subjugating Black Americans.[73] Antisubordination theory, thus, aims to allow for the full enjoyment of constitutional rights by members of a subordinated group, which entails targeted, race-conscious redistributive efforts like affirmative action to ensure such rights are fully protected.[74] This race-centered form of redress is an imperative value of affirmative action, and thus requires an inherently race-centered legal framework—antisubordination—in its application.

The first, and only, instance in which the Supreme Court has acknowledged the antisubordination doctrine as a vehicle for striking down de facto racism was in *Loving v. Virginia*, where laws banning interracial marriage were deemed unconstitutional under the Equal Protection Clause.[75] In *Loving*, the Court explicitly noted

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70. Maye, *supra* note 32.

71. *See* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107–177 (1976).

72. *Id.* at 150.

73. *Id.* at 147; *see also* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 7 (2021) (noting that antisubordination scholars are less concerned with even-handed treatment of government, but rather the effects such actions have on disadvantaged groups and whether the treatment facilitates dominance of one social group by another).

74. Bernick, *supra* note 73.

75. 388 U.S. 1 (1967).

the white supremacist nature of anti-miscegenation laws that aimed to preserve the "purity" of the white race.[76] For the first and only time in the history of racial segregation cases, the consideration of white supremacy was used by the Supreme Court in striking down race-based laws.[77] The explicit justification of white purity seemed to force the hand of the Court in acknowledging such a clear example of white supremacy.[78] While *Loving* symbolizes the capability of the Court to recognize explicit methods of upholding white supremacy, it failed to acknowledge a system of racial hierarchy in any prior case involving other measures like segregation that upheld white supremacy, such as in *Brown I* and *Plessy*.[79] Had the Court applied the lens of *Loving*—one that considered the role of white supremacy in the subordination of Black Americans and acted accordingly to counter such an embedded ideology—in curtailing state sanctioned racism, perhaps today's equal protection jurisprudence would have evolved in a manner that accepted the legitimacy of affirmative action measures to remedy discrimination.[80] However, the current scheme of the Equal Protection Clause did not follow the trend of *Loving*, and pushes aside the antisubordination framework that emphasizes the need to address historical racist wrongs. Instead, today's framework focuses squarely on explicit race-based laws, which Courts have stretched into a catchall for *all* races, including those who have not faced historical racial subordination.[81] This modern-day framework is known as the anticlassification doctrine.[82]

B. Affirmative Action and Anticlassification

Anticlassification, also referred to as antidiscrimination theory, encompasses the prohibition of any and all laws that seemingly disadvantage members of a racial group through explicit race-based classification.[83] The late Alan Freeman notes that at the

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76. *See id.* at 7; *see also* Peggy Cooper Davis, *Loving v. Virginia and White Supremacy*, 92 N.Y.U. L. REV. ONLINE 48–54 (2017) (discussing the role white supremacism played in the *Loving* decision).

77. Davis, *supra* note 76, at 54.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See* Alan D. Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

82. *Id.*

83. *Id.* at 1054 (highlighting that the principal task of the antidiscrimination principle is to "select from the maze of human behaviors those particular practices that violate the principle, outlaw the identified practices, and neutralize their

core of the antisubordination doctrine is the perspective of the victim, while the anticlassification doctrine is the perspective of the perpetrator.[84] Freeman argues that anticlassification theory is only violated by *intentional* discrimination, and thus a perpetrator can evade responsibility for ostensibly discriminatory conduct by showing the action was made in good faith with no inherent desire to produce discriminatory harm.[85] Thus, anticlassification theory creates a much higher threshold for racially discriminatory law that does not explicitly subordinate a certain group, allowing for facially neutral laws to pass through the cracks of the Equal Protection Clause without strict judicial review of potential undertones of white supremacy.[86]

The Supreme Court's attempt at curtailing explicitly race-based laws in the name of equality is carried out through the anticlassification model of strict scrutiny. Strict scrutiny is triggered by any race-based classification and requires a compelling government interest that is narrowly tailored to pass as constitutional under the Equal Protection Clause.[87] Affirmative action, then—as it has historically included the use of race in remedying historical discrimination of Black and marginalized students of color in higher education—is immediately subject to the highest level of scrutiny used by the Court.[88] The disconnect

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specific effects.").

84. *Id.* at 1053–54 ("The victim, or 'condition,' conception of racial discrimination suggests that the problem will not be solved until the conditions associated with it have been eliminated. To remedy the condition of racial discrimination would demand affirmative efforts to change the condition. The remedial dimension of the perpetrator perspective, however, is negative. The task is merely to neutralize the inappropriate conduct of the perpetrator . . . . The perpetrator perspective presupposes a world composed of atomistic individuals whose actions are outside of and apart from the social fabric and without historical continuity. From this perspective, the law views racial discrimination not as a social phenomenon, but merely as the misguided conduct of particular actors.").

85. *Id.* at 1055 (emphasis added).

86. *See id.* at 1056 (noting the nearly impossible burden of a victim in isolating particular conditions of discrimination produced by conditions of discrimination and perpetrators who utilize such conditions against them).

87. *See* U.S. v. Carolene Products Co., 304 U.S. 144 n.4 (1938) (noting for the first time a suggestion of heightened scrutiny for discrete and insular minorities); *see also* Korematsu v. U.S., 323 U.S. 214 (1944) (holding that race is a suspect group that immediately triggers the most rigid scrutiny offered by the Court); Loving v. Virginia, 388 U.S. 1 (1967) (solidifying strict scrutiny as the level of review for race-based classification).

88. *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *see also* Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that diversity, as it relates to produced educational benefits, is compelling enough to justify a consideration of race under strict scrutiny). *Cf. SFFA*, 600 U.S. 181 (2023) (holding that the diversity rationale is not a narrowly tailored compelling interest and thus the consideration of race in

between the goals of affirmative action and the modern framework of the Equal Protection Clause lies in the inherent reliance on race-consciousness in affirmative action policies.[89] Such efforts are virtually impossible to implement under an anticlassification framework given the level of strict scrutiny used in any matter concerning race-based classification.[90] This brings us to today's debates surrounding affirmative action and its ultimate demise in *SFFA v. Harvard*.

From *Regents of University of California v. Bakke* (establishing that diversity can serve as an educational benefit for *all* students),[91] to *Grutter v. Bollinger* (attempting to qualify diversity as it benefits *all* students, both in the classroom and in future workplaces),[92] to the most recent affirmative action case, *SFFA v. Harvard* (holding that diversity is inherently amorphous and thus, unjustifiable),[93] the main vehicle in upholding affirmative action has been the concept of diversity as a compelling government interest.[94] By eventually carving out race-consciousness—an implicit requirement in affirmative action—to make room for a white-centered concept of equality, the diversity rationale was built to fail under the modern Equal Protection doctrine of anticlassification. Analyzing diversity through a sociological lens helps clarify how affirmative action cases have distorted the word as used within the legal context.

II. Defining Diversity

A. Diversity as Defined by Whiteness

One of the central narratives proffered by critics of the term and concept "diversity" is the focus on whiteness that it holds at its

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higher education admissions is unconstitutional).

89. *See* Sturm, *supra* note 33, at 61 ("When affirmative action is the primary strategy for racial justice, it offers a narrow, at-the-margins response to exclusion, which deflects attention from more central problems with the current system and invites zero-sum reactions to racial justice efforts.").

90. *Id.*

91. 438 U.S. 265 (1978).

92. 539 U.S. 306 (2003).

93. 600 U.S. 181 (2023).

94. This Note will look primarily at the following affirmative action cases: *Bakke*, 438 U.S. 265 (Powell, J., concurring) (introducing the possibility of using diversity as a factor in higher education admissions); *Grutter*, 539 U.S. 306 (arguing that the value of diversity as a factor in the University of Michigan Law School admissions process produces benefits for white and students of color alike through diversity of thought and exposure in the classroom); *SFFA*, 600 U.S. 181 (holding that diversity is an amorphous concept that cannot be narrowly tailored, thus violating anticlassification doctrine under the Fourteenth Amendment).

core.[95] This narrative is embodied in what is known as the *white racial frame*, coined by sociologist Joe Feagin in 2006, and defined as "an organized set of racialized ideas, stereotypes, emotions, and inclinations to discriminate. This frame and associated discriminatory actions are consciously or unconsciously expressed in the routine operation of racist institutions of this society."[96] The white racial frame, in essence, speaks to how whiteness is so pervasive in our society that any deviation from such is to challenge the norm.[97] Given its centering of whiteness, conventional uses of "diversity" are often synonymous with racially marginalized individuals.[98] Thus, those who do not fall within the general white racial frame are a deviation, or in other words, diverse.

i. Colorblindness

Colorblindness, a principle which "minimizes the relevance of race and racism, and discursively divorces structural racial inequality from historical and present day racism," plays a key role in the application of diversity in cases of affirmative action.[99] One of the most prominent supporters of colorblindness in the realm of affirmative action, Chief Justice Roberts, has stated that "to the extent [that] the objective is sufficient diversity so that students see fellow students as individuals rather than solely as members of a racial group, using means that treat students solely as members of a racial group is fundamentally at cross-purposes with that end."[100] This line of thinking contributes to racial inequity by painting over the inherent harms of racial discrimination and ignoring any need for systematic changes to address it.[101] At the root of colorblindness is the threat to power held by white people that measures like affirmative action may impose.[102] By applying diversity in colorblind ways, such as mitigating its definition to incorporate that of talent or merit,[103] the term dilutes its inherent goals of remedying

95. Moore & Bell, *supra* note 42, at 598.

96. JOE R. FEAGIN, SYSTEMIC RACISM: A THEORY OF OPPRESSION 25 (2006).

97. Moore & Bell, *supra* note 42, at 598–99.

98. Amy L. Petts, *It's All in the Definition: Color-Blind Interpretations of School Diversity*, 35 SOCIO. F. 465, 468 (2020).

99. Moore & Bell, *supra* note 42, at 601.

100. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 733 (2007).

101. Petts, *supra* note 98, at 465 (noting that many whites assume that civil rights legislation created equality and that additional protections against discrimination are not necessary and may disadvantage them).

102. *Id.* at 469.

103. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (pointing to the many ways in which diversity can be considered, such as musical talent).

racial imbalances and instead contorts them in ways that center and reinforce the protection of whiteness and its power.[104]

ii. Interest-Convergence

Coined by the renowned Derrick Bell in the aftermath of *Brown v. Board of Education*, interest-convergence is the idea that checkpoints of success towards racial equality result primarily when there is a concurrent benefit to the dominant white group as well.[105] The manipulation of diversity not only provides higher education institutions with opportunities to prioritize white interests over students of color, but it also skirts any justification to implement practices that may directly benefit racially marginalized students.[106]

Colleges and universities across the U.S. espouse their efforts in increasing the number of racially 'diverse' students and programming on their campuses.[107] Schools often perceive diversity as a "win-win" scenario, where students of color benefit from access to education and opportunity, while the school benefits from higher rankings and prestige for their inclusion efforts.[108] In addition to rank and prestige, schools can also boast an uptick in exposing their white students to the vast array of perspectives and experiences that racially "diverse" students provide.[109] However, while students of color are condensed to numbers and marketing tactics, they are often left unsupported, tokenized, and othered while attending these predominantly white schools, ultimately resulting in "wins" only for institutions and white students.[110] Thus, the use of diversity is contorted once again in a manner that centers

104. Petts, *supra* note 98, at 470.

105. Derrick A. Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518–533, 523 (1980).

106. Amy L. Petts & Alma Nidia Garza, *Manipulating Diversity: How Diversity Regimes at US Universities Can Reinforce Whiteness*, SOC. COMPASS 1–12, 2 (2021).

107. *Id. See also* Susan L. Krinsky, *The Incoming Class of 2021 — The Most Diverse Law School Class in History*, LAW SCH. ADMISSIONS COUNCIL (December 15, 2022), https://www.lsac.org/blog/incoming-class-2021-most-diverse-law-school-class-history [https://perma.cc/L46J-XLW7]; *see also* Susan L. Krinsky, *Incoming Class of 2022: A Major Advance in Diversity, More Work to Do,* LAW SCH. ADMISSIONS COUNCIL (December 20, 2022), https://www.lsac.org/blog/incoming-class-2022-major-advance-diversity-more-work-to-do [https://perma.cc/6HDS-DMHR]; James Leipold, *Incoming Class of 2023 Is the Most Diverse Ever, But More Work Remains*, LAW SCH. ADMISSIONS COUNCIL (December 15, 2023), https://www.lsac.org/blog/incoming-class-2023-most-diverse-ever-more-work-remains [https://perma.cc/KW2L-3ZV4].

108. Petts & Garza, *supra* note 106, at 2.

109. *Id.*

110. *Id.*; Chung, *supra* note 45, at 390.

whiteness, this time using what is known as the "interest-convergence" principle.[111]

As applied to the realm of affirmative action, cases like *Bakke* and *Grutter* paint the concept of diversity as a benefit to *all* by curating a fruitful academic experience for white students through the presence of nonwhite peers, ultimately better preparing students for their professional careers after graduating.[112] Here, again, the concept of diversity is stretched to shift the focus away from remedial efforts for Black and racially marginalized students in higher education, instead centering arguments around whiteness. Today, the Supreme Court has manipulated a definition of diversity that fundamentally sideswipes any focus on race and ethnicity as it pertains to accomplishing the inherent goals of affirmative action, placing characteristics like talent and merit on a higher pedestal in the name of equality and inclusion of white students.[113]

Having endured severe distortion by the Court and higher education institutions in questioning the validity of affirmative action, diversity was essentially set up to fail. By centering whiteness and ignoring inherent values of race-conscious remedy, the legal application of diversity as a compelling interest under an anticlassification lens of strict scrutiny fails to achieve the underlying goals of affirmative action.

III. Diversity as a Compelling Interest

The anticlassification framework under the modern equal protection regime imposes a high standard in determining what constitutes a compelling interest for cases of racial classification.[114] A persuasive legal argument for the diversity rationale must do

111. Petts & Garza, *supra* note 106, at 2; Bell, *supra* note 105, at 523.

112. *See* Regents of Univ. of California v. Bakke, 438 U.S. 265, 313 (1978) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (citing U.S. v. Associated Press, D.C., 52 F. Supp. 362, 372 (D.C.N.Y. 1943); *see also* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("These benefits are 'important and laudable,' because 'classroom discussion is livelier, more spirited and simply more enlightening and interesting' when the students have 'the greatest possible variety of backgrounds.'") (citing the application for petition for certiorari from the district court below for the same case).

113. *SFFA*, 600 U.S. 181, 220 (2023) ("The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.").

114. *See* Liu, *supra* note 35, at 430 (describing the high evidentiary standard for educational diversity in affirmative action cases).

more than merely articulate why or how diversity is important to education, it must elaborate on why educational diversity is a (compelling) interest for *government* action.[115] In the existing scheme of the diversity rationale for affirmative action cases, attaining a racially diverse student body is compelling only so far as race is but one factor among many additional considerations, such as personal talents, life experiences, or other avenues that open doors for applicants to "promote beneficial educational pluralism."[116] Conversely, any arguments rationalizing affirmative action using historical remedy of societal discrimination as a compelling government interest failed early on, where such a rationale was considered to have rested on "an amorphous concept of injury that may be ageless in its reach into the past."[117] By knocking down any potential compelling interest resting on a notion of race-based remedy, the surviving vehicle for any future of affirmative action rested on the diversity rationale and its focus on appealing to the anticlassification doctrine by centering whiteness.[118]

Walking through the history of affirmative action cases demonstrates the clear gaps in its application of a restorative racial remedy in higher education. By looking at *Bakke*, *Grutter*, and *SFFA* specifically, the evolution of diversity as applied through a white-centered lens lays out a clear picture of how it was destined to fail in upholding a policy meant to serve the needs of Black and underrepresented students.

A. Bakke

Diversity was first established as a compelling government interest for affirmative action in *Regents of University of California v. Bakke*, where Justice Powell highlighted its value in the name of pursuing and upholding academic freedom.[119] Allan Bakke, the thirty-five-year old white male plaintiff, argued that his rejection from the University of California Davis Medical School was due to

115. *Id.* at 384–85 (emphasis added).

116. *Id.* at 389 (quoting *Bakke*, 438 U.S. at 317).

117. *Id.* at 397 (quoting *Bakke*, 438 U.S. at 290).

118. *See id.* at 402; *see also* Moore & Bell, *supra* note 42, at 603 ("Relying on a diversity justification for affirmative action creates limitations on its potential as a tool for redistributive or corrective racial justice.").

119. 438 U.S. 265, 312 (1978) ("Academic freedom, though not a specifically enumerated constitutional right, 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.").

his race.[120] The Court in *Bakke* was very cautious in applying strict scrutiny, making sure not to open any potential floodgates of antisubordination equal protection theories of historical societal discrimination remedy.[121] Ultimately, the Court ruled in favor of Bakke, holding that any explicit consideration of race in an admissions process was unconstitutional.[122] *Bakke* was a turning point in the affirmative action discussion, however, because it provided the groundwork for diversity to serve as a potentially compelling government interest within the strict scrutiny framework.[123]

In elaborating on this rationale, Powell, however, only grazes the surface in explaining *what* diversity is or how it constitutes such a uniquely compelling government interest.[124] The crux of his claim lies in the "robust exchange of ideas" and training future leaders through "wide exposure to the ideas and mores of students as diverse as this Nation of many peoples" that diversity provides in the realm of higher education.[125] Powell's main contention to such a seemingly liberal and open-ended claim is the notion that diversity, particularly that of ethnic or racial diversity, is but one element among many that furthers this compelling interest of a qualified and capable student body.[126] Goodwin Liu set forth how the *Bakke* court fundamentally "defined the contours of the diversity rationale" within the affirmative action framework:

> Attaining a racially diverse student body is a "compelling interest" —but only insofar as race is valued alongside other characteristics, such as geography, personal talents, or life experiences, that may enable an applicant "to promote beneficial educational pluralism."[127]

120. *Id*.

121. *See id*. at 310 ("Hence, the purpose of helping certain groups . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries . . . are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved.").

122. *Id.* at 319.

123. *Id.* at 311–16 ("The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.").

124. *Id*.

125. *Id.* at 313.

126. *Id.* at 314.

127. Liu, *supra* note 35, at 389 (quoting *Bakke*, 438 U.S. at 315).

i. *Bakke*'s preservation of whiteness in the name of diversity.

It is important to examine the concept of diversity that Powell connects to the compelling government interest of academic freedom and enrichment in *Bakke*. Powell's conception of diversity is "grounded in a colorblind frame, which includes, but is not limited to, an amorphous form of racial diversity (race as a 'plus factor' along with other 'pertinent elements of diversity') which limits the legally recognized basis for affirmative action policies in higher education admissions."[128] This framing of diversity results in a reduction of power that affirmative action could hold in altering existing racial hierarchy norms.[129] By arguing that the primary justification for affirmative action is the potential benefit of an individual's contribution to educational diversity in *Bakke*, the Court plays into the colorblind notion that the only relevant reason to discuss race or ethnicity in the realm of higher education is to welcome difference from the norm that is whiteness.[130] Students that fulfill an element of diversity within a *Bakke* framework are perceived as a form of "exposure" for white students.[131] Diversity as a rationale for compelling interest under strict scrutiny "neutralizes and conceals whiteness," creating an 'us versus them' dichotomy and preserving whiteness under the guise of equal protection.[132]

ii. *Bakke*'s uncertainty in future affirmative action cases.

The discursive framing of race and ethnicity in *Bakke* laid the groundwork to severely limit the potential force of affirmative action policies in effectuating racial change and justice in higher education.[133] While the Supreme Court has never formally established Powell's opinion as binding,[134] in *Wygant v. Jackson Board of Education*, the Court affirmed the compelling interest of promoting racial diversity in the context of higher education.[135] On the contrary (while not in the educational context), the court in *City*

128. Moore & Bell, *supra* note 42, at 602.
129. *Id.*
130. *Id.*
131. Regents of Univ. of California v. Bakke, 438 U.S. 265, 312 (1978).
132. *See* Moore & Bell, *supra* note 42, at 603.
133. *Id.*
134. Liu, *supra* note 35, at 391; *see SFFA*, 600 U.S. 181, 211 (2023) ("In the years that followed our 'fractured decision in Bakke,' lower courts 'struggled to discern whether Justice Powell's" opinion constituted 'binding precedent.'") (citing Grutter v. Bollinger, 539 U.S. 306, 325 (2003)).
135. 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) (citing *Bakke*, 438 U.S. at 311–15).

of Richmond v. J.A. Croson Co. highlighted the dangers of racial classification in carrying out a compelling government interest, noting that "[c]lassifications based on race carry a danger of stigmatic harm," and unless reserved for remedial settings, "they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[136] Additionally, the unstable logic of Powell's diversity rationale and its promised educational benefits places the future of affirmative action on shaky ground. Using the logic proffered in *Bakke*, if diversity *fails* to provide any benefits, then it cannot serve as a compelling government interest under current doctrine.[137] If diversity cannot serve as a compelling government interest, then affirmative action programs have little to stand on within an anticlassification theory of equal protection.

This contentious line of analysis was the tightrope upon which affirmative action walked from *Bakke* onwards. The coupling of shaky precedent and the amorphous definition and application of diversity paved way for the legal basis of affirmative action to drift further and further away from enacting legal and societal racial equity. *Bakke*'s application of diversity dug deeper into a white-centered entrenchment of equal protection doctrine, inevitably cracking under the magnifying glass of strict scrutiny.

B. Grutter

Grutter v. Bollinger is often labeled as a "win" for supporters of affirmative action, namely for its perceived victory in using the diversity rationale under strict scrutiny.[138] Where *Bakke* was limited in that it merely specified that diversity could serve as a compelling governmental interest, *Grutter* attempted to fill in the gaps. Barbara Grutter, another white plaintiff, was rejected from the University of Michigan Law School and brought suit on the grounds that her rejection was on the basis of her race.[139] The Court in *Grutter* relied heavily on Powell's concurrence in *Bakke*, namely regarding the compelling interest of educational benefits that racial diversity yielded.[140] *Grutter* takes Powell's reading a step further, however, highlighting the role of deference owed to an educational institution in fulfilling their mission:

> Our conclusion that the Law School has a compelling interest

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136. 488 U.S. 469, 493 (1989) (plurality opinion) (O'Connor, J.).

137. Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 336 (2022).

138. 539 U.S. 306 (2003).

139. *Id.*

140. *Id.*

> in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."[141]

Within this scope of deference provided to the University of Michigan Law School in *Grutter*, the Court then elaborates on the vast educational benefits that can be qualified under a lens of diversity. Such educational benefits include "livelier, more spirited, and simply more enlightening and interesting classroom discussions" stemming from cross-racial understanding that "breaks down racial stereotypes and enables students to better understand persons of different races," expert studies and reports elaborating on the role of diversity in promoting learning outcomes and "better preparing students for an increasingly diverse workforce and society," and real benefits that "can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints," as deemed by major American businesses.[142] In essence, the Court in *Grutter* attempts to break down the amorphous nature of diversity that Powell laid the groundwork for in *Bakke* using qualifiers and quantifiers.

i. *Grutter*'s preservation of whiteness in the name of diversity.

Like *Bakke*, the diversity rationale applied in *Grutter* follows a similar path of incorporating colorblindness and othering of students of color.[143] Within this line of thinking, Black, brown, and other racially marginalized students at large are perceived as an ornament of curiosity, whose presence benefits white students and provides an element of inquiry for white students and faculty.[144] The Court in *Grutter* also made a point to highlight prior relevant cases pertaining to affirmative action in areas outside of higher education to reaffirm how critical the rationale of racial diversity is in preserving equal protection.[145] One argument to be made in this seemingly liberal and open-ended application of such a diversity

141. *Id.* at 308 (quoting Regents of Univ. of California v. Bakke, 438 U.S. 265, 318–19 (1978)).

142. *Id.* at 326–34.

143. *See* Moore & Bell *supra* note 42, at 603–04.

144. *Id.*; Chilton et al., *supra* note 137, at 350–51 (discussing critiques on both the left and right condemning the diversity rationale).

145. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) ("[G]overnment may treat people differently because of their race only for the most compelling reasons.") (citing Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1998)); *see also id.* ("We are 'free people whose institutions are founded upon the doctrine of equality.'") (citing Loving v. Virginia, 388 U.S. 1, 11 (1967)).

rationale is the power of the Court to decide when and how to use it, and for which legal analyses it ought to comply with a compelling government interest and when it ought not.[146]

Furthermore, the *Grutter* Court, knowing the breadth of their diversity rationale may exceed the strict scrutiny standard of narrow tailoring, made a point to include a time limitation.[147] The Court noted that "race-conscious admissions policies must be limited in time," and that it trusts that the law school "would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable."[148] With this qualification, *Grutter* essentially strapped affirmative action with a time-bomb, paving a clear path for opponents of affirmative action to strike down the policy upon any finding that the educational benefits proffered cannot be determined and quantified within the 25-year time limit imposed by the Court. The goals of affirmative action were once again reduced to adhere to a flawed theory of equal protection, preserving the exact elements of social inequality it aimed to redress.[149]

ii. *Students for Fair Admissions v. Harvard*

Founded in 2014, Students for Fair Admissions is a non-profit organization that purports to "defend human and civil rights secured by law, including the right of individuals to equal protection under the law."[150] This organization is dedicated to filing lawsuits challenging race-based admissions processes like affirmative action.[151] In a somewhat predictable manner, the Court in *SFFA* uses the premise of diversity as an amorphous concept to find that

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146. *See* Chilton et al., *supra* note 137, at 356 (pointing to the empirical tenuousness and theoretical implausibility of the premises underlying the diversity rationale for race-based affirmative action); *see also* Jamin B. Raskin, *From Colorblind White Supremacy to American Multiculturalism*, 19 HARV. J. L. & PUB. POL'Y 743, 744 (1996) ("It is important for those who champion the principle of "colorblindness" today to remember its origin and complete context. It was seen by its author as a principle of formal neutrality that would allow white people to continue their absolute dominance of American life.").

147. *Grutter*, 539 U.S. at 343.

148. *Id.*

149. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIA. L. REV. 9, 19 (2003).

150. *SFFA*, 600 U.S. 181, 197 (2023).

151. Students for Fair Admissions, *About*, https://studentsforfairadmissions.org/about/ [https://perma.cc/D6BN-3XF8] ("Our mission is to support and participate in litigation that will restore the original principles of our nation's civil rights movement: *A student's race and ethnicity should not be factors that either harm or help that student to gain admission to a competitive university*.") (emphasis in original).

the educational benefits put forth by the defendant schools, while commendable, "are not sufficiently coherent for purposes of strict scrutiny."[152] The Court goes on to find:

> At the outset, it is unclear how courts are supposed to measure any of these [educational benefit] goals. How is a court to know whether leaders have been adequately 'trained'; whether the exchange of ideas is 'robust'; or whether 'new knowledge' is being developed? . . . the question whether a particular mix of minority students produces 'engaged and productive citizens,' sufficiently 'enhances appreciation, respect and empathy,' or effectively 'trains future leaders' is standardless . . . [and] inescapably imponderable.[153]

Essentially, *SFFA* pinpoints the very weak spot of the diversity rationale: the vague definition and application of diversity as it has been passed from one affirmative action case to the next. The requirement of the diversity defense to rely on empirical evidence was one meant to fail under the Equal Protection Clause, particularly within the exact arena in which the vague definition was born.[154] Advocates of affirmative action were compelled to generate a plethora of scholarship in attempting to quantify diversity since *Grutter* to try and denounce any claim of its "amorphous" nature.[155] The Court in *SFFA* tiptoed this contrarian line of thinking by finding that there could never be "enough" evidence to demonstrably prove the educational benefits of diversity under a lens of strict scrutiny.[156]

The Court in *SFFA* uses the rejection of diversity as a compelling interest as a reminder: attempts at remedying racial imbalances that don't ultimately benefit white systems in tangible or observable ways can be discarded with ease.[157] Under today's Equal Protection doctrine, one of the most pertinent constitutional questions brought forth by race-based affirmative action is whether the equal protection of whites are violated in the purposeful assistance of Black and non-white racial groups.[158] The answer to such a question essentially determines the likelihood of implementing such policies—any threat to the status of white individuals by selectively granting opportunities to racially marginalized communities is unlikely to prevail under modern-day

152. *SFFA*, 600 U.S. at 214.
153. *Id.* at 214–15.
154. Chung, *supra* note 45, at 391.
155. *Id.* at 392–93.
156. *Id.*
157. *See* Petts & Garza, *supra* note 106, at 4; *see also* Liu, *supra* note 35, at 405.
158. Jed Rubenfeld, *Affirmative Action*, 107 YALE L. J. 427, 429 (1997) (discussing the role of strict scrutiny as applied to affirmative action).

law and social practice.[159] Thus, to work towards any successful affirmative action measures requires critical analysis of current legal framework, as well as the societal influences that uphold such framework.

Conclusion: Affirmative Action and the Equal Protection Clause: Can They Co-Exist?

Classification-driven strict scrutiny cannot account for the goals of affirmative action, as it protects a colorblind theory of equal protection doctrine that upholds facial neutrality and ignores the experiences of those impacted.[160] It is only under an antisubordination theory of equal protection that the goals of affirmative action can be upheld to their fullest intent.[161]

A substantive approach that responds to the violence and persistent harms of social group domination, particularly in the realm of race, is necessary when the constitutional interpretation of the Equal Protection Clause is questioned.[162] Antisubordination theory of equal protection embodies this approach, forcing courts to examine social group hierarchy and any power disparities that exist between groups.[163] The goals of affirmative action—remediating lingering disparities that persist from legal and societal race-based discrimination—require a substantive approach that then allows for a more targeted means of legal action.

Two fundamental shifts in the affirmative action battle must take place: 1) a shift in focus from rationalizing the practice as one that centers and benefits white individuals, instead highlighting the historical disparities impacting Black and racially marginalized groups, and 2) a shift in jurisprudence that can effectively carry out the first goal. Seeking a full transformation in a legal framework existing and evolving since the 1970s is no small ask. However, such a concept should not be entirely out of mind either. It is clear that legal efforts toward racial equality that fundamentally instill social change are possible.[164] The question arises in how or when social

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159. *Id.*

160. Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L. J. 1, 5 (2021) (citing Balkin & Siegel, *supra* note 149, at 10) (noting that anticlassification theories condemn governmental differentiation explicitly based on the basis of forbidden categories like race and differentiation that targets people despite facial neutrality).

161. *See id.* at 7.

162. Darren L. Hutchison, *"With All the Majesty of the Law": Systemic Racism, Punitive Sentiment, and Equal Protection*, 110 CAL. L. REV. 371, 417 (2022).

163. *Id.*

164. *See* Brown I, 347 U.S. 483 (1954); *see also* Brown II, 349 U.S. 294 (1955).

and legal interests toward achieving racial justice will align and work hand-in-hand to shape our legal framework.

The future of affirmative action in higher education, where it sits now post-*SFFA*, rests in the hands of the Court. It is difficult to say, under today's doctrine of Equal Protection, if or how affirmative action will be revived. With the concept of diversity now thrown out of courtrooms, perhaps there is ground for a transformative interpretation of affirmative action. Or, as some scholars posit, efforts should not be directed toward other means of achieving restoring racial imbalances.[165] For example, affirmative action efforts should not focus on urging colleges and universities to increase enrollment of students of color using facially neutral criteria, or targeting racially discriminatory practices that lead to eventual racial divides in higher education, such as housing policies and primary education disparities.[166] Instead, policies should aim to address the harms of racial inequities within education from their roots, rather than alleviate harms with temporary bandages and seemingly progressive optics.

This Note finds that yes, affirmative action and the Equal Protection Clause *can* co-exist. This relationship, however, requires a transformative approach to what equal protection means in the constitutional realm. The modern anticlassification doctrine does not meet this requirement, as seen in the downfall of affirmative action in *SFFA v. Harvard*.[167] Racial justice efforts through affirmative action cannot be pursued with vigor and potential success until legal doctrine is reformatted to uphold an antisubordination framework. It is only when moving beyond white-centered rationales like diversity, and towards race-centered efforts of remedy that true advancement of racial justice can pursue.

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165. Chung, *supra* note 45, at 407–08.
166. *Id.*; *see also* Gullen, *supra* note 33, at 283.
167. 600 U.S. 181 (2023).