

ON NOT DREAMING OF AFFIRMATIVE ACTION

Amy L. Wax***

Is there anything new to say about affirmative action? As a purely legal matter, the answer is probably “Not much.” The story of current doctrine and its evolution is widely known and obsessively recounted, and the commentary on that story is voluminous. The majority and dissenting opinions in the Fifth Circuit’s decision in *Fisher v. University of Texas at Austin*¹ represent the latest attempt to apply a framework established by prior cases for affirmative action by public universities. If the Supreme Court chooses to review that decision again, the questions at issue will be whether the benefits are large enough, and the state interest compelling enough, to justify the continuing injection of race into the University of Texas undergraduate admissions process. But, for the reasons explained in this Article, whatever the Court decides—if it decides anything at all—will not matter much to the future of educational affirmative action. State law bans, such as those enacted in California² and Michigan,³ although they might have more bite, will likewise not succeed in completely eliminating the use of racial affirmative action. Racial identity will continue to be a factor in university admissions and beyond. At this point, the law is virtually irrelevant to actual practice on the ground.

How did we arrive at the present juncture? In decades past, the ambit of active controversy for race was wider, and the rationale broader. Affirmative action was proposed for employment,⁴ government contracting,⁵ and education,⁶ and the policy was subject to robust debate within and outside the courtroom. Initially, the principal question was whether affirmative action could be justified as a reme-

* Robert Mundheim Professor of Law, University of Pennsylvania Law School.

** The print and online versions of this Article previously contained an author footnote that was created and inserted by the Journal editors without the author’s knowledge or permission. Professor Wax did not write or authorize the footnote and expressly repudiates it.

1 *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014).

2 Cal. Const. art. I, § 31.

3 Mich. Const. art. I, § 26.

4 *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

5 Exec. Order No. 10,925, 3 C.F.R. 448 (1959–1963).

6 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

dy. Could reverse discrimination help make up for the effects of slavery and official and private discrimination? After racial discrimination was outlawed and its overt forms faded, courts began to look more closely at the remedial rationale. Judges started demanding greater proof of past official discrimination and a demonstrable relationship between such discrimination and observed racial imbalances.⁷ The Court stated several times that private and “societal” discrimination could not justify race-conscious affirmative action.⁸ The public also became more skeptical of the need for, and fairness of, race-conscious selection. All of these pressures yielded a sea change. In the wake of *Bakke* decision, a new era dawned: education—and

7 Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 438–39 (1986) (upholding race-based remedies where there was a record of egregious and pervasive discrimination as well as a resistance to ending it); *Dallas Fire Fighters Ass'n v. City of Dallas*, 150 F.3d 438, 441 (5th Cir. 1998) (“The record is devoid of proof of a history of egregious and pervasive discrimination or resistance to affirmative action that has warranted more serious measures in other cases.”); *Setser v. Novack Inv. Co.*, 657 F.2d 962, 968 (8th Cir., 1981) (“Some indication that the employer has identified a racial imbalance in its work force is necessary to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action.”); *see also* *Black Fire Fighters Ass'n of Dallas v. City of Dallas*, 19 F.3d 992, 996 (5th Cir. 1994) (contrasting the Dallas Fire Department's employment practices with those in *Sheet Metal Workers* and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), in which there was “a pattern of lying to minority applicants and deliberately losing their applications”).

8 *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 310 (1978) (“[T]he 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 of the special admissions program 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.”); *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.”); *Messer v. Meno*, 130 F.3d 130, 136 (5th Cir. 1997) (“In as many as ten federal circuit and district courts, majority opinions have favorably quoted the *Wygant* language limiting race-conscious remedies to the ‘governmental unit involved.’”); Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998) (“[M]any federal circuits . . . continue to insist that governmental units can only use affirmative action to remedy their own discrimination.” (citing *Messer*, 130 F.3d at 136; *Aiken v. City of Memphis*, 37 F.3d 1155, 1162 (6th Cir. 1994); *In re Birmingham Reverse Discrimination Employment Litig.*, 20 F.3d 1525, 1540 (11th Cir. 1994); *Billish v. City of Chicago*, 962 F.2d 1269, 1280 (7th Cir. 1992); *Hiller v. County of Suffolk*, 977 F. Supp. 202, 206 (E.D.N.Y. 1997); *McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1008 (D. Mass. 1996); *Koski v. Gainer*, No. 92 C 3293, 1995 U.S. Dist. LEXIS 14604, *40 (N.D. Ill. 1995); *Mallory v. Harkness*, 895 F. Supp. 1556, 1559 (S.D. Fla. 1995); *Shuford v. Alabama State Bd. of Educ.*, 846 F. Supp. 1511, 1521 (M.D. Ala. 1994); *Concrete Gen., Inc. v. Washington Suburban Sanitary Comm'n*, 779 F. Supp. 370, 378 (D. Md. 1991))).

especially university admissions—emerged as the main proving ground for government-sponsored affirmative action. Diversity, not remediation, became its official goal.

Important questions remain under the framework established by the Supreme Court's decisions in *Gratz v. Bollinger*⁹ and *Grutter v. Bollinger*.¹⁰ Some of the unresolved issues are raised and only partly resolved in the *Fisher* case. Is the interest in student diversity sufficiently compelling to support race-conscious programs? Are the educational and pedagogical benefits substantial enough? Are the race-conscious programs universities have adopted narrowly tailored to satisfy whatever standard the Court establishes? As the opinions in the Fifth Circuit's latest round in *Fisher* reveal, these questions are surprisingly easy to fudge, and the evidentiary requirements remarkably lax.¹¹ Highly relevant facts and considerations are routinely ignored and important countervailing evidence fails to appear in the discourse or in court opinions. Judicial decisions rarely discuss the costs and drawbacks of affirmative action, such as the effects of educational mismatch as documented by some scholars,¹² or the negative reputational consequences or harmful incentives for beneficiaries. Schools that practice affirmative action are allowed to tout the benefits of diversity in highly abstract terms, without the need to specify or demonstrate the concrete positive effects. Great deference is accorded to educational administrators and officials, who are never asked to provide concrete benchmarks or objective metrics for assessing the "educational benefits" that diversity allegedly delivers. Counterexamples—such as the excellent education available at such notably non-diverse schools as the California Institute of Technology¹³—are never

⁹ *Gratz v. Bollinger*, 539 U.S. 244 (2003).

¹⁰ *Grutter*, 539 U.S. 306.

¹¹ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 249 (5th Cir. 2011) ("A university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity...What is more, the deference called for in *Grutter* seems to allow universities, rather than the courts, to determine when the use of racial preferences is no longer compelling.").

¹² See Peter Arcidiacono, Esteban M. Aucejo, Hanming Fang & Kenneth Spenner, *Does Affirmative Action Lead to Mismatch? A New Test and Evidence*, 2 QUANTITATIVE ECON. 303, 303 (2011) (discussing mismatch "in the sense that the intended beneficiaries of affirmative action admission policies are made worse off . . ."); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 452 (2004) ("In other words, being academically mismatched with one's peers has a powerful impact on one's ability to learn and to achieve one's academic goals.").

¹³ U.S. News and World Reports currently ranks CalTech in the #10 position in its list of National Universities. *Education*, U.S. NEWS & WORLD REPORTS, <http://colleges.usnews.rankingsandreviews.com/best-colleges/cal-tech-1131> (last visited Jan. 27, 2015). According to Forbes, African Americans make up only 2% of those enrolled there. *Cal-*

cited or pressed. In short, the criteria the courts have set out for affirmative action in the educational setting are permissive and manipulable. There is no reason to believe that this status quo will change, or that the Court will adopt a more exacting jurisprudence anytime soon.

But even if that were not so, affirmative action would continue. The reason that the law does not matter much at this point is that the individuals who wield power in universities unequivocally favor the idea of student diversity.¹⁴ Because those diversity advocates have the means to make it happen, racial affirmative action will be a significant part of the landscape of our massive educational-industrial complex for the indefinite future.

Of course, “diversity” in today’s educational parlance means something more than the demographic variations that would emerge spontaneously from non-racial or non-identity-based criteria. Those in charge of the universities believe in “forced diversity”—diversity that is deliberately engineered.¹⁵ Despite the multi-faceted rhetoric, the principal goal of the campaign for diversity is to boost the number of under-represented minorities, and especially blacks, who are the group least likely to achieve the academic credentials needed to gain admission to highly competitive institutions.¹⁶ The complex bureaucracies of the modern university facilitate this diversity project. These structures have developed myriad devices for circumventing any limits the Court might impose on their decisions. By shaping and controlling the bureaucratic processes that operate at many institutional levels, university administrators have crafted policies and strategies designed to maximize their ability to achieve the diversity goal.

ifornia Institute of Technology, FORBES, <http://www.forbes.com/colleges/california-institute-of-technology/> (last visited Jan. 27, 2015).

14 See Arthur L. Coleman, *Behind the Headlines: Remembering the Fundamentals about Diversity*, 100 LIBERAL EDUC. (Spring 2014), available at <https://www.aacu.org/liberaleducation/2014/spring/coleman> (discussing how “many institutions of higher learning endeavor to pursue the educational benefits of diversity”).

15 See, e.g., *Toward New Destinations: Open Doors, Open Hearts, and Open Minds: Cornell’s Statement on Diversity and Inclusiveness*, CORNELL UNIVERSITY, <http://diversity.cornell.edu/toward-new-destinations> (last visited Jan. 31, 2015) (“As an enlightened academic community, we boldly pursue full inclusion as a central component of our values and our approach to each other and the world around us.”).

16 NAT’L CTR. FOR EDUC. STATISTICS, NCES 2011-462, AMERICA’S HIGH SCHOOL GRADUATES: RESULTS OF THE 2009 NAEP SCHOOL TRANSCRIPT STUDY (2011), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2011462> (survey showing that while black students have improved by a number of measures from 1990 to 2009, they still lag behind their white and Asian counterparts in more academically rigorous curricula); *Black Enrollments at High-Ranking Colleges and Universities Since 1980*, 50 J. BLACKS HIGHER EDUC. 11 (2006).

One important tack has been to denigrate, at least rhetorically, the importance, or even the distinct existence, of the type of cognitive aptitude that usually underwrites high academic achievement. Universities have moved to downplay or discredit conventional educational metrics, such as the SAT and similar admissions exams, which reveal these abilities. Paradoxically, there has also been growing stress on academic achievement in practice. At the same time that the SATs are under attack, exploding numbers of applicants have made the SATs increasingly important as a screening device for admission to highly competitive, prestigious universities.¹⁷ Unfortunately, black students, on average, perform poorly on these tests.¹⁸ Recently, a number of reputable colleges have dropped these tests or made them optional. In general, even the most competitive universities have moved towards placing a growing emphasis on non-academic factors, such as character, overcoming past adversity, leadership, social class, and the like, in university admissions. This development represents the reversal of a 50-year long trend, starting in the late 1960s, of elite colleges placing less weight on these factors in favor of academic prowess and intellectual aptitude—the capacity to learn, think, analyze, organize and manipulate information, and understand complex, sophisticated concepts.¹⁹ These abilities were deemed essential to demanding occupations and leadership roles in an increasingly complex, technocratic society. Although university admissions are still quite academically competitive for most students, university administrators have more recently worked to expand their prerogative to slight or de-emphasize cognitive ability or academic

17 See Steven Pinker, *The Trouble with Harvard: The Ivy League is Broken and Only Standardized Tests Can Fix It*, NEW REPUBLIC (Sept. 4, 2014), <http://www.newrepublic.com/article/119321/harvard-ivy-league-should-judge-students-standardized-tests> (describing the bottleneck phenomenon that occurs as more and more students attempt to squeeze into highly selective institutions).

18 See Kaitlin Mulhere, *Average SAT Scores Show Little Change*, INSIDE HIGHER ED (Oct. 7, 2014, 3:00 AM), <http://www.insidehighered.com/print/news/2014/10/07/average-sat-scores-show-little-change> (noting that of all race/ethnic groups, blacks reported the lowest average score).

19 Leslie Kilgore, *Merit and Competition in Selective College Admissions*, 32 REV. HIGHER EDUC. 469 (2009), available at <http://eric.ed.gov/?q=title%3acollege+admissions+policies&id=EJ844071> (describing how 17 elite or selective institutions use merit-based criteria for admissions, but noting that they also use criteria other than merit in order to admit students who meet the perceived needs of the institutions); see also Andrew V. Beale, *The Evolution of College Admission Requirements*, 15 NAT'L ACAC J. (1970), reprinted in J. C. ADMISSION, Winter 2012, at 20, available at <http://eric.ed.gov/?q=evolution+of+college+admission+requirements&id=EJ992666> (describing how the admissions standards in the 19th and early 20th centuries had a diversity of admissions requirements that gradually gave way to more uniform standards).

achievement in select cases as needed, and especially for minority students (although, in all fairness, not only for them). That discretion is an essential tool for the practice of “forced diversity.” For example, a number of reputable colleges have dropped the SATs or made them optional.²⁰ This and other substantive and procedural changes have allowed administrators far greater leeway in emphasizing “soft measures” in the selection process, which has permitted the admission of a greater number of black students than would otherwise result.

Finally, it should not be forgotten that a major component of our higher education establishment is private, not public. Because private institutions are not arms of the government, the constitutional guarantee of equal protection does not limit their activities or bar them from engaging in race-based affirmative action. To be sure, universities know that statutes governing educational institutions, based on the constitutional spending power, could be conscripted to challenge private universities’ use of race in admissions.²¹ But little effort has been made in this direction as yet, and the landmark cases have all involved constitutional challenges to the practices of public university systems, such as those in California,²² Michigan,²³ and Texas.²⁴ Thus, forcing private universities to drop their affirmative action efforts would require developing a new line of precedent. In any event, any restrictions that might emerge would be just as easy to evade as those the courts have developed in the context of lawsuits against public universities. What this means in practice is that race-

20 See Sara Rimer, *College Panel Calls for Less Focus on SATs*, N.Y. TIMES (Sept. 21, 2008), <http://www.nytimes.com/2008/09/22/education/22admissions.html> (noting that schools such as Bates College, Wake Forest University, and Lawrence University have made the ACT and SAT optional).

21 Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2345 (2000) (“[E]ven private schools that voluntarily engage in affirmative action may be vulnerable under civil rights statutes. Title VI of the Civil Rights Act of 1964, for example, prohibits racial discrimination by all schools, private or public, that receive federal funds. If benign racial preferences by state schools represent racial discrimination in violation of the Equal Protection Clause, then such preferences should likewise violate Title VI when practiced by any schools receiving federal funds. *Adarand* may not only prevent the federal government from requiring affirmative action by federally funded schools, it may also, through existing civil rights statutes, forbid the federal government from funding any schools that voluntarily engage in affirmative action. Given the vast number of private (and public) colleges and universities that depend on federal funding, *Adarand* may well signal the abolition of racial preferences by all schools of higher education.” (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995))).

22 *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

23 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

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

based affirmative action will continue to be alive and well in the country's most prominent, powerful, and influential institutions of higher education. Affirmative action is here to stay because that is what the constituencies of our high-profile colleges want. Indeed, it can safely be said that the people who control and bankroll these institutions are by and large happy with the status quo. They do not perceive affirmative action as, on balance, harmful to them personally. And the conditions that create the continuing need for affirmative action operate at a safe distance from their affluent and well-organized lives. All told, the powers-that-be embrace affirmative action comfortably and without significant personal sacrifice.

One corollary of this situation is that support for educational affirmative action may have little to do with whether it is actually good for the black community. Likewise, there is no effective check on whether the rhetoric that supports "forced diversity" matches the reality. Although the courts have decisively adopted diversity as the rationale for educational affirmative action, with proponents following their lead by pushing that justification, remedial hopes and aspirations continue to underwrite the practice's persistence.²⁵ Evidence that affirmative action is still considered remedial can be found in the Supreme Court's decision in *Schuette v. Coalition to Defend Affirmative Action*.²⁶ In that case, a Michigan state constitutional provision banning any official race-based affirmative action, enacted by state referendum, was challenged under the political restructuring doctrine. In her passionate dissent from the majority decision upholding the ban, Justice Sonia Sotomayor discusses at length the importance of affirmative action as a corrective for ongoing discrimination and disadvantage, and appears remarkably uninterested in its role in generating student diversity.²⁷ Her opinion highlights minorities' staunch support for affirmative action that is grounded in claims of basic justice and the belief that the policy redounds to their benefit. In short, despite the Court's abandonment of remediation as a justification for

²⁵ See, e.g., Cedric Herring & Loren Henderson, *From Affirmative Action to Diversity: Toward a Critical Diversity Perspective*, 38 CRITICAL SOCIOLOGY 629, 640 (2011) (recommending that, although the rhetoric surrounding inclusion has shifted over time, "diversity and affirmative action should be reconnected to offset historical and ongoing racial and gender discrimination, segregation, and bias").

²⁶ *Schuette v. Coal. to Defend Affirmative Action*, 134 S.Ct. 1623 (2014).

²⁷ *Id.* at 1683 (Sotomayor, J., dissenting) ("Today's decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government.").

race-based university admissions, that goal retains vitality. Affirmative action's remedial role lives on both in the case law and in the popular mind.

Unfortunately, whether remediation is actually achieved is another matter. Recent developments in social science and educational psychology cast doubt on whether affirmative action actually functions as a remedy, in the sense of "making the victim whole" by alleviating or curing the effects of past wrongs.²⁸ A true remedy would put victims in the position they would have occupied if they had never been injured by others' wrongdoing. This presumably includes possessing the ability to compete, based on their own aptitudes and achievements, on the same terms as people from other groups. Accordingly, the most plausible remedial case for affirmative action goes something like this: although blacks, on average, lag behind other groups in academic achievement, they possess untapped talent and ability. Suppressed by discrimination and disadvantage, those abilities are waiting to be cultivated and unleashed. By admitting more blacks to universities, society creates conditions in which blacks can catch up with others and achieve what is possible in the absence of discrimination and disadvantage.

Unfortunately, there is little evidence that this account corresponds to reality. The problem is not with the notion that underachieving blacks represent untapped talent, but rather with the assumption that creating opportunities at the university level will enable blacks to catch up academically and achieve equality. A wealth of emerging evidence on learning, educational attainment, and human capital has revealed that opportunities provided at the point of university admissions simply come much too late.²⁹ By that time, damage has been done that is almost impossible to reverse. University students who lag significantly behind their peers in academic skills and aptitude virtually always remain behind. Human capital—including the cognitive and non-cognitive capacities that are needed to function effectively at work and in society—is built slowly over time and requires a lengthy period of consistent cultivation, nurture, and care. As the work of James Heckman³⁰ and others reveals,

²⁸ Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995).

²⁹ James J. Heckman, *Skill Formation and the Economics of Investing in Disadvantaged Children*, 312 SCIENCE 1900 (2006).

³⁰ See Heckman, *supra* note 29, at 1900 (2006) ("A landmark study concluded that 'virtually every aspect of early human development, from the brain's evolving circuitry to the child's capacity for empathy, is affected by the environments and experiences that are encountered in a cumulative fashion, beginning in the prenatal period and extending throughout the early childhood years . . .'" (internal citation omitted)).

these capacities are established from birth, with the period of early childhood counting the most. Early deficits are stubborn and compound themselves. Disparities that show up before kindergarten, which is when class and race differences emerge, rarely disappear. People who do relatively poorly in grade school and high school, and who would not otherwise qualify for admission to competitive universities, rarely perform as well as their student peers after they are admitted and enroll.³¹ As some of the evidence at this Symposium shows, minority students who lag behind academically going into university programs at any stage (including professional school) continue to struggle once they are there and beyond.³² Therefore, the notion that educational deficits can be fully corrected at the college level—that allowing people to “jump ahead” in admissions enables them to “catch up”—is a myth.

Call this the Central Myth of affirmative action. Highlighting the Central Myth triggers a confused set of countermoves. One oft-made accusation is that denying the equalizing power of affirmative action is tantamount to asserting that one group (for example, blacks) is “intrinsically” less capable, or is born with less potential, or is inferior to others. Opponents of a proposal to increase the number of blacks in New York City’s elite high schools by dropping the admissions exam,³³ for instance, are accused of taking the position that blacks are less gifted and talented than other groups. But that accusation muddies an important distinction. All groups may be born equal, but they soon become unequal. By the time students get to high school—or college—it hardly matters that they once had the potential to excel in equal numbers. The fact is that they now do not. And whatever forces have produced these group inequalities cannot be entirely, or even significantly, reversed. Indeed, no one knows how to narrow, let

31 James Piereson & Naomi Schaefer Riley, *Getting More Poor Kids into College Won't Fix Income Inequality*, WASH. POST (Oct. 23, 2014), http://www.washingtonpost.com/opinions/getting-more-poor-kids-into-college-wont-fix-income-inequality/2014/10/23/494e491a-4fc5-11e4-babe-e91da079cb8a_story.html.

32 Richard Sander & Stuart Taylor Jr., *The Painful Truth about Affirmative Action*, THE ATLANTIC (Oct. 2, 2012, 10:30 AM), <http://www.theatlantic.com/national/archive/2012/10/the-painful-truth-about-affirmative-action/263122/> (“Large preferences often place students in environments where they can neither learn nor compete effectively—even though these same students would thrive had they gone to less competitive but still quite good schools.”).

33 See Kate Taylor, *Despite Racial Disparity, Alumni Group Backs Test-Only Policy for Elite Schools*, N.Y. TIMES (Aug. 26, 2014), http://www.nytimes.com/2014/08/27/nyregion/despite-racial-disparity-alumni-group-backs-test-only-policy-for-elite-schools.html?_r=0 (discussing legislators’ and civil rights groups’ attempts to remove the Specialized High School Admissions Test).

alone eliminate, existing gaps. Regardless of other possible benefits, university affirmative action does not, and cannot, come close to delivering on its remedial promise.

But so what? The arguments about whether blacks gain or lose from educational affirmative action—whether it really helps or hurts—are mired in sophisticated statistics and empirical evidence and counter-evidence. Even if blacks do not entirely catch up, do they still gain important benefits from attending good schools, or at least better schools than they would otherwise be able to attend? There is, in fact, some indication that, unlike whites, blacks who graduate from elite colleges earn more than those who attend less competitive schools, even when they enter with similar credentials.³⁴ On the other hand, the mismatch literature suggests that black students who are overplaced in college perform worse academically than similar students who attend institutions better matched to their abilities.³⁵ So the evidence so far on these questions is decidedly mixed.

My argument does not resolve this debate, but it does attempt to bypass it. Behind the Central Myth of affirmative action stands a knotty reality. Regardless of how much blacks actually benefit by being admitted to better schools than they would otherwise attend, the fact remains that they continue to lag significantly behind other groups in educational attainment at all levels.³⁶ Whether Stanford or UVA will have a few more black undergraduates would appear to be an important question, since these institutions train a leadership class. But blacks' penetration of that leadership class will continue to be effectively impeded, despite affirmative action, if skill acquisition and expertise are deficient. In fact, blacks have made relatively few

³⁴ See Sean F. Reardon, Rachel Baker & Daniel Klasik, *Race, Income, and Enrollment Patterns in Highly Selective Colleges, 1982–2004* (Stanford Univ. Ctr. for Educ. Policy Analysis, Working Paper, 2012), available at <http://cepa.stanford.edu/content/race-income-and-enrollment-patterns-highly-selective-colleges-1982-2004> (“[S]tudents attending highly selective schools also experience disproportionate increases in social and cultural capital.”).

³⁵ See Sander & Taylor, *supra* note 32 (“[E]ven though blacks are more likely to enter college than are whites with similar backgrounds, they will usually get much lower grades, rank toward the bottom of the class, and far more often drop out.”).

³⁶ Exec. Order 13,621, 77 Fed. Reg. 45471 (July 26, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/07/26/executive-order-white-house-initiative-educational-excellence-african-am> (“African American student achievement not only lags behind that of their domestic peers by an average of two grade levels, but also behind students in almost every other developed nation. Over a third of African American students do not graduate from high school on time with a regular high school diploma, and only four percent of African American high school graduates interested in college are college-ready across a range of subjects. An even greater number of African American males do not graduate with a regular high school diploma.”).

inroads into top echelons of key economic and professional sectors—such as technological and scientific fields³⁷ and the professoriate³⁸—where academic proficiency and highly developed aptitudes are critical to genuine success.

What can, and should, be done about these broader inequalities? I submit that affirmative action offers no satisfactory answer to that question and actually stands in the way of an enduring solution. The argument of this Article is that blacks should stop supporting educational affirmative action and, indeed, should turn their back on that practice. The continuing underachievement of blacks at every level, and the persistence of broader social and behavioral problems across many domains, suggest that the faith placed in affirmative action's effectiveness, the efforts expended to maintain and entrench it, and the energy invested in debates surrounding its costs and benefits, are a waste of time and a distraction. Indeed, there is good reason to think that affirmative action is counterproductive.

The laws that govern affirmative action are irrelevant to this position. As already argued, race-conscious university admissions, even if limited, will continue in most places regardless of official restrictions and what the courts decide. Even schools that would appear significantly constrained—such as public universities in Michigan, which are formally subject to a statewide ban on the use of race in public programs that was recently upheld by the Supreme Court in *Schuette*³⁹—will continue to admit significant numbers of blacks who would not otherwise be competitive in a race-blind process.

The recommendation to abandon affirmative action begins with the observation that, to date, this practice has not enabled blacks—the group that is the central focus of race-based efforts—to compete effectively with more successful groups. Educational affirmative action has not accomplished this goal in the sense that it has not succeeded in moving blacks significantly closer to achieving equality on their own and under their own steam, without special help or a thumb on the scale. Indeed, the evidence indicates that the near-universal practice of affirmative action for blacks at the university level has made virtually no inroads into the pattern of black undera-

37 See LIANA CHRISTIN LANDIVAR, U.S. DEP'T OF COMMERCE ECON. & STATISTICS ADMIN., AM. COMTY. SURVEY REPORTS: DISPARITIES IN STEM EMPLOYMENT BY SEX, RACE, AND HISPANIC ORIGIN (2013), available at <http://www.census.gov/prod/2013pubs/acs-24.pdf> ("Blacks and Hispanics have been consistently underrepresented in STEM [science, technology, engineering, and mathematics] employment.").

38 *Black Faculty in Higher Education: Still Only a Drop in the Bucket*, 55 J. BLACKS HIGHER EDUC. (2007), available at http://www.jbhe.com/features/55_blackfaculty.html.

39 *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014).

chievement overall. Educationally, blacks still score significantly lower than other groups on a range of academic assessments, often by a large margin.⁴⁰ The gaps are pervasive, significant, persistent, and largely stable in magnitude. The result is a chronic under-supply of college-ready minority candidates.⁴¹ Thus, Justice Sandra Day O'Connor's twenty-five years of race-based admissions stretches out indefinitely on the horizon with no terminus in sight.

Does this mean that affirmative action should be abandoned? Is the widespread and entrenched practice of affirmative action a wise and productive social policy? Are the political capital and attention blacks lavish upon it worth the candle? The notion that affirmative action is counterproductive is not a new one. This Article specifically argues that the psychology of affirmative action feeds into the underachievement that makes affirmative action necessary. Not only does affirmative action fail to rectify the underachievement problem, but it also encourages a mentality that impedes the ultimate goal. Both the practice of affirmative action and its fervent pursuit reinforce and exacerbate broad, attitudinal differences between groups that bear on their attainments, well-being, and success. Affirmative action makes no sense unless a favored group needs it and continues to need it. The mindset that supports and endorses affirmative action is thus inimical to the "catching up," and to the self-sustaining achievements, that are indispensable to true equality.

Although arguments of this sort are routinely dismissed by proponents of affirmative action—who are the overwhelming majority of people in the academy today—they deserve serious consideration, especially in light of the persistent racial gaps that fuel support for affirmative action. Yet it is difficult, if not impossible, to prove these arguments' validity. How could we? Add to this difficulty the fact

40 THE NATION'S REPORT CARD, <http://www.nationsreportcard.gov/> (last visited Feb. 13, 2015) (containing links to 2013 mathematics and reading results, including fourth, eighth, and twelfth grades). The Grade 12 assessment includes information about readiness for college. See NATION'S REPORT CARD, *NAEP as an Indicator of Students' Academic Preparedness for College* (2013), available at http://www.nationsreportcard.gov/reading_math_g12_2013/#/preparedness.

41 See Amy Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 648 (2011) ("Thus, blacks and whites with an equivalent amount of education and training and similar years of schooling show marked performance disparities, with blacks on average lagging systematically behind."); see also F. CADELLE HEMPHILL, ALAN VANNEMAN & TASLIMA RAHMAN, NAT'L CTR. FOR EDUC. STATISTICS, NCES 2011-459, *ACHIEVEMENT GAPS: HOW BLACK AND WHITE STUDENTS IN PUBLIC SCHOOLS PERFORM IN MATHEMATICS AND READING ON THE NATIONAL ASSESSMENT OF EDUCATIONAL PROGRESS: STATISTICAL ANALYSIS REPORT iii* (2009), available at <http://nces.ed.gov/nationsreportcard/studies/gaps/> (noting that white students performed better on all assessments than black students).

that prominent academic social scientists have little or no interest in marshaling supportive evidence. Quite the contrary. But anyone who has grown up as part of a group that self-consciously rejects the very idea of affirmative action for itself will be able to contrast that way of thinking to the embrace of affirmative action as indispensable to getting ahead. The affirmative action mentality directs significant effort to adjusting and relaxing standards for those who have been the targets of discrimination and disadvantage. But that position stands in stark contrast to a decisive rejection of double standards of any kind in response to discrimination and social adversity. For lack of a better term, let us call the latter the “people power” outlook.

The key difference between the affirmative action and “people power” approach lies in the focus of attention and effort. Affirmative action’s chief strategy is to address the problem of underachievement by changing society’s response to it. Energy is directed at inducing institutions and outsiders to adopt a lower standard for designated groups. The stance that embraces affirmative action—that sees it as a strategy worth copious amounts of political capital and investment—is fundamentally at odds with the “people power” mindset, which rejects double standards. The “people power” approach makes it the business of the lagging or disadvantaged group to reduce or eliminate performance gaps, and to address or circumvent whatever factors impede the group’s progress, even if that requires much harder work or a significantly greater effort than others must expend. The injustice of that necessity, and of the need to deal with extra obstacles, is ignored or tolerated in favor of the goal: to succeed by whatever means necessary. Outsiders are not expected to address a group’s problems by eliminating hurdles, let alone by altering rules of entry or changing standards of performance for achievement-based positions. When it comes to these types of barriers—most especially those related to aptitude, skill, and proficiency—all challenges must be met and overcome.

I am intimately familiar with the “people power” mentality because I grew up with it. My childhood was spent in upstate New York as part of a close-knit, observant, conservative Jewish family in a predominantly Catholic town. No one denied that Jews were excluded from key positions and jobs and disfavored by schools, corporations, and clubs in our community and the world at large. We did not “accept” it but spent virtually no time thinking or worrying about it. The Harvard psychologist Steven Pinker, who was brought up in a Jewish family in Montreal, Canada, describes the attitude well: anti-Semitism

was regarded as just an annoying form of “background noise.”⁴² Like other forms of such noise, it soon blended into the fabric of “life as we knew it”—the reality that we had to deal with and make the best of. We applied initiative and energy as necessary to the creation of workarounds in the form of our own schools, clubs, businesses, and institutions. We concentrated on the day to day imperatives of living up to our parents’ religious precepts and emulating their bourgeois values. To the extent obstacles existed, we devised ways to surmount, circumvent, outfox, outsmart, or just ignore them. Although it was common in our culture to complain a lot—about friends, relatives, business partners, bad luck, and the general cluelessness of non-Jews—we were not permitted to complain that anti-Semitism and discrimination were standing in our way. We knew discrimination was out there, but the discussion was limited to anti-Semitism as a general social problem rather than as a stumbling block in individual lives. Social pathologies like criminal behavior, out of wedlock childbearing, drug abuse, or financial irresponsibility were rare, but pointing to discrimination as a “cause” of these deviant behaviors (and they were unabashedly regarded as deviant and, as such, were in fact quite unusual in our community) was rarer still. Indeed, citing discrimination or social exclusion as an explanation, let alone an excuse, for bad behavior was simply not done. Anyone who tried it was regarded with contempt, labeled a loser, and dismissed. In this milieu, asking for educational affirmative action was simply unthinkable. The standards for achievement that were set at school were accepted without criticism or question, and everyone was expected to meet or exceed them. If we did not, it was never someone else’s fault—certainly not “society’s fault.” It was our own (or our parents’) fault. Any negative consequences of such failures were expected, deserved, and endured. That was the code we lived by. Pretty simple.

For many sophisticated people, this code will seem simpleminded, outdated, and naive. At best, it is irrational and deluded and, at worst, insensitive or offensive. Some will regard the notion that “whatever it takes” self-betterment is the proper counter for ill-treatment as unjust, pernicious, and reactionary. And even if these attitudes may have served underdog groups in a bygone era, they certainly will not help blacks now. Times have changed, we know better, and anyway, racial discrimination is different.

⁴² See *Desert Island Disks*, BBC RADIO 4 (July 5, 2013), <http://www.bbc.co.uk/programmes/b0366xsb>.

Unfortunately, these reactions are emblematic of how we respond to racial ills of all kinds. Put simply, it is not the victims' role to make things better. That is the responsibility of outsiders, of persons other than the victims. The news coverage surrounding the recent police shooting of Michael Brown, a black teenager, in Ferguson, Missouri, exemplifies the one-sided and obsessive focus on society's role in producing the ills that plague the black community, and in correcting those ills by reforming society's practices and reactions. Two specific issues that emerged in the wake of the shooting were the paucity of black police officers in Ferguson (despite the majority-minority citizenry)⁴³ and the plethora of traffic citations and outstanding warrants issued against Ferguson's black citizens, especially for traffic violations.⁴⁴ The news stories soft-pedaled or ignored the question of how the behaviors of the allegedly victimized citizens may have contributed to both problems and the steps complaining citizens could take to alleviate the situations. Although some stories touched on the possibility that police demographics might be partly due to the shortage of qualified black officer candidates (based on interest in the job, police exam results, educational credentials, or criminal record), those considerations were downplayed in favor of external causes and official solutions.⁴⁵ But what might those solutions be? The articles are vague on strategies that are needed. Changes in recruitment tactics, candidate screening, and qualifying requirements (years of education, test results, lack of criminal record) are all possibilities, but

43 See Rebecca Leber, *Ferguson's Police Force Is 94 Percent White—and That's Basically Normal in the U.S.*, NEW REPUBLIC (Aug. 13, 2014), <http://www.newrepublic.com/article/119070/michael-browns-death-leads-scrutiny-ferguson-white-police> ("Ferguson's population is 67 percent black, but African Americans make up just 5.6 percent of the police force."); Frances Robles, *Mistrust Lingers as Ferguson Takes New Tack on Fines*, N.Y. TIMES (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/us/mistrust-lingers-as-ferguson-takes-new-tack-on-fines.html?emc=eta1.&r=0> (noting that on average every Ferguson household has three arrest warrants issued against it).

44 See Walker Moskop, *Police Stops in Ferguson: What are the Numbers?*, ST. LOUIS POST-DISPATCH (Aug. 12, 2014), http://www.stltoday.com/news/local/crime-and-courts/police-stops-in-ferguson-what-are-the-numbers/article_012cf751-9cec-5733-8025-09e03abb9d86.html ("[B]lack, who make up a little less than two-thirds of the driving age population in the North County city, accounted for 86 percent of all stops.").

45 Allen G. Breed & Sharon Cohen, *Achieving Diversity Among Police Ranks Not Easy*, CBS ST. LOUIS (Sept. 14, 2014), <http://stlouis.cbslocal.com/2014/09/14/achieving-diversity-among-police-ranks-not-easy/>; Walker Moskop, *St. Louis County Police Forces Often Don't Reflect Communities*, ST. LOUIS POST-DISPATCH (Aug. 24, 2014), http://www.stltoday.com/news/local/metro/st-louis-county-police-forces-often-don-t-reflect-communities/article_a29dc3e4-91bb-5cf5-9b30-9ebb95c5e1c6.html; Shaila Dewan, *Mostly White Forces in Mostly Black Towns: Police Struggle for Racial Diversity*, N.Y. TIMES (Sept. 9, 2014), http://www.nytimes.com/2014/09/10/us/for-small-police-departments-increasing-diversity-is-a-struggle.html?_r=0.

are never set out or discussed with specificity. The articles also avoid analyzing how many blacks are currently equipped to meet existing or desirable standards, and which of those standards might have to be relaxed or abandoned to meet numerical targets. However, the clear implication is that the ways in which police are recruited and selected must change. Lowered standards and double-standards are the unspoken subtext, albeit never talked about explicitly.⁴⁶

In the same vein, a New York Times article discussing the plethora of traffic citations issued to citizens of black communities surrounding St. Louis⁴⁷ neglects the topic of driver behavior. Although the case histories of some individual scofflaws are recounted, there is no attempt to assess the frequency of traffic violations in the communities with high rates of citations or outstanding warrants or to probe the question of whether the incidence of violations is higher than in other areas. There is no discussion of the possibility that too many citizens in Ferguson might be driving recklessly, or without licenses or car insurance, or in poorly maintained cars. How the targets of police attention behave is taken as given, and as essentially irrelevant. The strong implication is that solving the problems detailed in the article requires the police and the government to change their policies and behavior. Officials should somehow adjust their practices to ensure fewer stops and a lower number of citations against black drivers. That might require a relaxation of standards for driving, and entail laxer or selective enforcement of traffic rules—or it might not. If it does, more people could be injured or endangered. Certainly these consequences are worth considering. But they are not even mentioned, let alone discussed, in the New York Times articles on this issue.

Finally, in the wake of suggestions that Michael Brown's behavior towards the police may have been uncooperative or menacing, or his demeanor thuggish or otherwise threatening, a number of critical articles appeared that disparage these points as attempts to engage in so-called "respectability politics."⁴⁸ The message in these articles is

⁴⁶ See, e.g., Dewan, *supra* note 47 (taking note generally of the trouble minorities have in succeeding in law enforcement and the lengths some departments go to in order to hire minorities).

⁴⁷ See, e.g., Robles, *supra* note 45.

⁴⁸ See, e.g., Nikki Hardison, *The Vision: Being an Angel Saved No One*, DAILY PENNSYLVANIAN (Sept. 9, 2014), <http://www.thedp.com/article/2014/09/being-an-angel-respectability>; Julia Ioffe, *No One Treats African-Americans Worse than We Treat Each Other: The Troubling Self-Flagellation in Ferguson's Black Community*, NEW REPUBLIC (Aug. 19, 2014), <http://www.newrepublic.com/article/119148/ferguson-renews-debate-among-blacks-politics-respectability> ("This self-criticism—or self-flagellation—is nothing new. It's the return of

that urging better behavior is futile, ineffective, and distracting. Respectability cannot be expected to improve blacks' situation in any way. Do not bother pulling up your pants and acting more refined. It will not do you any good. Bill Cosby is all wrong.⁴⁹ Being polite and cooperative, dressing neatly, obeying the laws, treating police and authority figures with respect, working hard, and taking the initiative will not overcome racism and discrimination and will have no effect on ill-treatment.

Overall, large quantities of ink continue to be spilled on deflecting attention away from how blacks can help themselves and towards emphasizing how other people and institutions should change. The message that comes through loud and clear is that the disadvantaged do not need to do better. Society needs to do something different. Therefore, there is no point in trying to alter the self-defeating behaviors or patterns that hold blacks back—patterns such as poor school performance or dropping out, family breakdown and paternal abandonment, or lawbreaking of any kind. Rather, the effort should be directed at massaging the social and official reactions to those behaviors. That is the best way to make the problems go away. Unfortunately, in the current climate, the focus on externals as the most important route to equality leads inevitably to lower standards and double standards, along with a hefty dose of defining deviancy down. These results, unfortunately, fit in with the affirmative action mentality.

One obvious question suggested by the contrast between affirmative action and “people power” is why the approach to racial disparities has to be “either-or.” Cannot behavioral change and affirmative action programs operate simultaneously, with the project of self-criticism and self-betterment receiving an extra boost from the broader opportunities affirmative action provides? After all, blacks need all the help they can get. Although this sounds sensible in theory, the balance between “people power” and double standards is impossible to maintain in practice. Indeed, the mindset that advocates for affirmative action cannot co-exist with the “people power” mentality because the tension between them is deep-seated and fundamental. “People power” is not just a matter of embracing self-betterment. Rather, it actively eschews the attention to obstacles and injustices

a phenomenon that is referred to by African-American historians as the ‘politics of respectability.’”).

49 Bill Cosby, *Dr. Bill Cosby Speaks at the 50th Anniversary Commemoration of the Brown vs. Topeka Board of Education Supreme Court Decision*, RUTGERS (May 17, 2004), available at http://www.rci.rutgers.edu/~schochet/101/Cosby_Speech.htm.

that lies at the heart of the affirmative action calculus. A “people power” approach rejects the goals of remediation and is willfully oblivious to desert, justice, and balancing the scales. What matters is the bottom line. The prize it eyes is always success, and just that. If reaching the goal requires excessive, relentless, outsized effort, then so be it—as long as it works. To the extent that affirmative action actively rejects as unjust the need to do “whatever it takes” to come from behind, its pursuit is in fatal tension with, and crowds out, the “people power” alternative. The strong embrace of affirmative action, as reinforced by an abhorrence of “blaming the victim,” inevitably directs public discourse and private effort away from self-help and towards the actions and reactions of outsiders.

At the Symposium for this paper, one of the last questions asked by an audience member was this: “Given that Jews have been persecuted, despised, and discriminated against—not to mention murdered, exiled, and incinerated—for centuries, why have Jewish immigrants and their progeny achieved so much success in the United States, and so much more than blacks?” Needless to say, this is not a welcome inquiry. Such comparisons are thought divisive and have acquired an almost taboo status in academic circles and public discourse. I chose not to offer an answer at the time. One panel member did bring forward the oft-heard response, which is that “race is different.” Discrimination against blacks is just worse and more crippling than anything Jews have ever endured. Jews have had it rough, but they still partake of “white privilege.” Even leaving aside the hefty dose of glibness in this “post hoc ergo propter hoc” assertion, it is difficult to dismiss it definitively. No two groups in American society have the same history or have experienced identical hardships. Trying to identify the factors responsible for disparate trajectories can feel like shadow-boxing with reality.

But one distinction does stand out. Jews and Blacks have historically differed starkly in their views of how best to respond to adversity, persecution, and whatever discrimination they do experience. To put it simply, when it comes to existing educational or aptitude-based standards, Jews always stand ready to meet or exceed them. Jews do not ask for special treatment. Although they may get behind affirmative action for other groups,⁵⁰ they would never dream of asking for it

⁵⁰ See SIDNEY SCHWARZ, *JUDAISM AND JUSTICE: THE JEWISH PASSION TO REPAIR THE WORLD* 114 (2006) (noting that “Jewish community groups supported affirmative action programs as early as 1965”).

for themselves.⁵¹ They expend no effort on their own behalf in attacking expectations as unfair or in requesting that standards be lowered or requirements relaxed. Indeed, Jews are not alone in this attitude. Asians also focus their energy and attention on acquiring skills and achieving educational excellence, rather than on seeking a change in the measures of achievement.⁵² In contrast, blacks take a very different tack. They invest tremendous political energy and capital in advocating for and procuring affirmative action programs.⁵³ This necessarily involves a push to lower or alter educational and aptitude-oriented requirements, with less effort necessarily expended on meeting them. The focus is on changing other people's reaction to their performance, rather than what is being reacted to: the performance itself. This divide, which distinguishes two groups (Asians and Jews) that have achieved significant economic, social, and educational success from one (blacks) that has lagged chronically behind, ties into an important attitudinal difference in the view of the self as agent as opposed to victim.

These distinctions suggest that a group's embrace of a lower standard is not an effective formula for getting ahead. The affirmative action mindset, and the efforts and commitments that go with it, may operate against the outlook that is needed to catch up. In other words, the embrace of affirmative action may end up undermining

51 Susan Edelman, *New Minority Label at CUNY: 'Jewish'*, N.Y. POST (June 3, 2012), <http://nypost.com/2012/06/03/new-minority-label-at-cuny-jewish/> (discussing the CUNY policy to add a minority group category "White/Jewish" and the negative reactions of many Jews on campus); *Jews and Affirmative Action: What the CUNY Diversity Plan Gets Wrong*, THE JEWISH WK., June 13, 2012, available at <http://www.thejewishweek.com/print/blogs/well-versed/jews-and-affirmative-action-what-cuny-diversity-plan-gets-wrong> (discussing the opinions of American Jews on being counted for discriminatory quotas, and critiquing the morphing of affirmative action from policies targeted towards correcting historic wrongs suffered by minority populations to the goal of achieving diversity, which should not be the aim of affirmative action).

52 See, e.g., Amy Chua & Jed Rubenfeld, *THE TRIPLE PACKAGE: HOW THREE UNLIKELY TRAITS EXPLAIN THE RISE AND FALL OF CULTURAL GROUPS IN AMERICA* (2014) (describing Asians' outstanding academic success, as measured by test scores, grades, and other conventional metrics); Jennifer Lee & Min Zhou, *Frames of Achievement and Opportunity Horizons, in IMMIGRATION, POVERTY, AND SOCIOECONOMIC INEQUALITY* (David Card & Steven Raphael eds., 2013) (describing Asian immigrants' push to equip their children to gain entry to competitive high schools and colleges).

53 See Jeffrey M. Jones, *Race, Ideology, and Support for Affirmative Action*, GALLUP (Aug. 23, 2005), <http://www.gallup.com/poll/18091/race-ideology-support-affirmative-action.aspx> (noting that 72% of blacks support affirmative action, while only 21% oppose); Frank Newport, *The Role of Government in Race Relations Today*, GALLOP (Sept. 3, 2014), <http://pollingmatters.gallup.com/2014/09/the-role-of-government-in-race.html> (noting that "blacks are significantly more likely than whites" to favor governmental intervention to improve race relations and minority well-being).

the goal of equality. Lowering standards and expectations can be pernicious because it encourages people to expend less effort on self-improvement. Too often, what is achieved reflects what is expected.

These propositions, which resist definitive empirical proof, run up against considerable opposition on a number of fronts. One source of resistance is a powerful assumption that informs a host of measures designed to address social disadvantage by altering society's response rather than by focusing on the behaviors and patterns that are being reacted to. It is frequently asserted that people's behavior represents an adaptive, rational response to outside constraints. Because groups can be expected to follow the most self-interested, optimal course available to them, we must conclude that circumstances prevent chronically disadvantaged groups from getting ahead through the strategies that work for others. If people persistently fail to meet academic requirements or standards, for example, it follows that they cannot realistically be expected to do so. Their life situations prevent it. Ergo, affirmative action is fair and necessary.

The fallacy in this approach is that it makes no room for dysfunction. Although some responses to adversity work better than others, not everyone will necessarily adopt the best. In practice, people's reactions to hardship are grounded in "culture"—learned habits, attitudes, and preferences—which can lead them to respond differently to similar ambient conditions, with outcomes of variable success. There is no single, uniform, pre-determined, "rational" response to external constraints, setbacks, and obstacles. Many social scientists share this insight.⁵⁴ If the rewards of work (such as pay rates) are reduced, some people react by working harder with the goal of maintaining overall earnings (the "income effect"). But others work less hard, due to the relative increase in the value of leisure (the "substitution" effect).⁵⁵ Whether the income effect or the substitution effect dominates depends on the importance attached to getting ahead versus enjoying leisure. Although neither response is more "rational" than the other, people in whom the income effect dominates earn more. In the same vein, Richard Herrnstein has described two distinct approaches to decisionmaking—"local" versus "global." The local approach maximizes payoffs in the short term, whereas the global

⁵⁴ Stanley Sue & Sumie Okazaki, *Asian-American Educational Achievements: A Phenomenon in Search of an Explanation*, 45 AM. PSYCHOLOGIST 913 (1990).

⁵⁵ See LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA* 82-84 (1992) (arguing that employment that pays less due to lower wages can result in less work or in more effort and describing the income and substitution effects).

approach yields greater rewards on a longer time horizon.⁵⁶ Both represent forms of “rational action,” but from different perspectives. Herrnstein demonstrates that a “global” approach to decisions, which takes more account of future consequences, often yields a better result overall.

These observations suggest that, to put it bluntly, some reactions to adverse circumstances are superior to others for achieving long-term goals. Whether focusing efforts on affirmative action is the “way to go” is thus a matter that must ultimately be settled by experience. So far, however, the track record is unimpressive. Affirmative action has resulted in a few more blacks enrolled in selective schools than would otherwise attend, but college attendance rates remain low overall.⁵⁷ Academic achievement gaps by race across skills and subjects have not significantly narrowed for decades.⁵⁸ Other social indicators—such as family breakdown, involvement with the criminal justice system, and employment levels for young blacks—have either deteriorated or stagnated.⁵⁹ There is no question that blacks have a lot of ground to make up. In light of this observation, it is worth considering whether the “people power” approach might represent the preferable alternative. Affirmative action operates as a massive distraction from the potentially more fruitful strategy of working to circumvent obstacles and treating what is left of discrimination as just so

56 See Amy L. Wax, *Diverging Family Structure and “Rational” Behavior: The Decline in Marriage as a Disorder of Choice*, in HANDBOOK OF THE ECONOMICS OF THE FAMILY (J. Wright & Lloyd Cohen eds., 2011); Richard Herrnstein, *Behavior, Reinforcement, and Utility*, 1 PSYCHOL. SCI. 217, 219 (1990).

57 NAT’L CTR. FOR EDUC. STATISTICS, FAST FACTS, <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Feb. 13, 2015) (“From 1976 to 2011 . . . the percentage of Black students rose from 10 percent to 15 percent . . .”).

58 COLIN C. CHELLMAN, VANESSA T. ANDERSON & DAVID CROOK, EXAMINING POSTSECONDARY PERFORMANCE GAPS BY RACE, INCOME, AND GENDER: WILL CLOSING ONE GAP CLOSE THEM ALL? (CUNY Office of Policy Research, Working Paper, Nov. 2010), *available at* <http://www.cuny.edu/about/administration/offices/ira/opr/papers/gaps.pdf> (examining the persistent Black-White, and Hispanic-White race gaps in postsecondary education, and the possible negative impacts on racial groups of eliminating income and gender gaps; contains statistical information on gaps over a ten-year period); RUSSELL SAGE FOUND., EDUCATIONAL ATTAINMENT AND ACHIEVEMENT, <http://www.russellsage.org/sites/all/files/chartbook/Educational%20Attainment%20and%20Achievement.pdf> (last visited Feb. 13, 2015) (showing achievement gaps from 1962 to 2011 by gender and race).

59 PEW RESEARCH CTR., KING’S DREAM REMAINS AN ELUSIVE GOAL; MANY AMERICANS SEE RACIAL DISPARITIES, CHAPTER 3: DEMOGRAPHIC & ECONOMIC DATA, BY RACE (Aug. 22, 2013), *available at* <http://www.pewsocialtrends.org/2013/08/22/chapter-3-demographic-economic-data-by-race/> (containing information on family breakdown as shown in section on marriage and births, and involvement with the criminal justice system as shown by incarceration).

much “background noise.” Abandoning the project of affirmative action will free up substantial political, mental, and psychological energy. That energy can then be devoted to cultivating the habits and abilities that are the true path to enduring equality.