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# Intra-group Diversity in Education: What If Abigail Fisher Were an Immigrant . . .

Dagmar Rita Myslinska\*

## Introduction

Education “must be made available to all on equal terms.”<sup>1</sup> The significance of not only making education available to all, but also doing so on equal terms has been recognized by scholars. They point out that education laws that help students “attain their full potential without regard to their circumstances of birth,” and “affirmative laws that remove roadblocks created by poverty, race, and immigration status” are heirs to *Brown v. Board of Education*, 347 U.S. 483 (1954).<sup>2</sup> As one of the most vital civic institutions for the preservation of a democratic system of government, public schools<sup>3</sup> must

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1. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). *See also* *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (“Public education . . . ‘fulfills a most fundamental obligation of government to its constituency.’”) (quoting *Foley v. Connelie*, 435 U.S. 291, 297 (1978)).

2. Victor C. Romero, *Immigrant Education and the Promise of Integrative Egalitarianism*, 2011 MICH. ST. L. REV. 275, 277.

3. Although the federal government does not impose specific admission

equalize the playing field for all children—including immigrants. Students cannot be punished for the decisions of their parents to immigrate.<sup>4</sup>

Equality in education requires more than just making equal education *available* to all students. Regardless of their race, students without full access to the social capital of the dominant group cannot benefit from education on equal terms. Not all whites are created equal. “All whites do not benefit from the possessive investment in whiteness in precisely the same ways. . .”<sup>5</sup> The social, economic, and cultural capital of white immigrants’ American-born counterparts enable them to both more easily access and more fully take advantage of good education. Cultural capital has been defined by sociologists as the non-monetary social assets that promote social mobility beyond the effect of just economic means.<sup>6</sup> Although possessing economic capital can help mitigate somewhat for lacking social and cultural capital—through, for example, access to standardized-exam preparatory courses or student exchange trips abroad—it does not replace them. Cultural capital is

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requirements on private universities that do not receive federal support, even private schools feel pressure to follow governmental policies. PETER H. SCHUCK, *DIVERSITY IN AMERICA: KEEPING GOVERNMENT AT A SAFE DISTANCE* 138 (2003). In addition, although *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013), was decided in the contexts of admissions at a public university, it will undoubtedly be applied to all institutions of higher education through Title VI of the Civil Rights Act because nearly all private universities accept federal funding. Council for American Private Education, *Facts and Studies*, <http://www.capenet.org/facts.html> (last visited Jan. 21, 2013). Accordingly, this Article addresses university admissions policies generally.

4. *Plyler v. Doe*, 457 U.S. 202, 221 (1982). Thus, for example, *Lau v. Nichols*, 414 U.S. 563 (1974), found that public schools must provide special programs to children with limited English-language proficiency to enable them to have equal access to educational opportunities. *Lau v. Nichols*,

5. GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* 22 (1998). See BEVERLY DANIEL TATUM, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?: AND OTHER CONVERSATIONS ABOUT RACE* 12 (1997) (noting how factors such as socioeconomic class, gender, age, religion, sexual orientation, and mental and physical abilities affect access to social privilege and power).

6. See, e.g., PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* (Richard Nice trans., Harvard Univ. Press 1984) (defining “cultural capital” to include assets like cultural awareness, interpersonal behaviors, institutional knowledge, and style of speech, which are transmitted by parents and affect internalized worldview and collective expectations).

passed on by parents, mirrored by others with the same sociocultural status, displayed to obtain access to institutional advancement, and interrelated with social capital (access to social networks).<sup>7</sup> High school participation, preparation for college, mastery of the college admissions process, and involvement in college all reflect and amplify those students' social capital, and further secure their place in the privileged class. All immigrant students, regardless of their color or ethnicity, tend to be left out of this process, and thus are unable to benefit from education on equal terms. They all need additional support to become appealing to colleges, which are the gatekeepers of access to social capital.

Critically, how colleges—particularly the elite ones<sup>8</sup>—define “merit” in their admissions considerations values the dominant group’s privilege and replicates their societal power, reinforces inequality, and leads to economically inefficient results. “The rhetoric of individual merit . . . obscures the role that culture plays in reproducing existing social structures.”<sup>9</sup> Student “character,” extracurricular involvement, and past sociocultural opportunities—all of which reflect social capital—matter in admissions. Furthermore, the privileges of belonging to the dominant class replicate in college as they enable those students to take full advantage of not only the educational, but also the socio-cultural benefits of attending college. Scholars have only recently called for the reevaluation of “merit” as defined by elite educational institutions.<sup>10</sup> Their discussions,

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7. See generally Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. MEM. L. REV. 239 (2012). Throughout this Article, when referring to “social capital,” the author intends to include cultural capital as well, and vice versa.

8. This Article focuses on admissions policies and diversity programs at elite schools because they exercise disproportionate power in disseminating and propagating social influence and privilege, which in turn affects opportunities in later life. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 259-60 & 379 (2009) (noting how the economic payoff of attending an elite college has been increasing recently at a higher rate than the benefit of attending college in general).

9. Jewel, *supra* note 7, at 244 (discussing how cultural disadvantage often operates in tandem with economic and racial disadvantage to obstruct social mobility).

10. See, e.g., Charles R. Lawrence, III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 931

however, have focused on students who are racial minorities or of low socioeconomic status.<sup>11</sup> Although those traits often intersect with diminished access to social and cultural capital—and all facilitate, and are a reflection of subordination—critics have overlooked how immigrant status *per se* limits access to social capital and all its benefits.

All first-generation immigrants tend to have limited access to the benefits available to American-born students. They do not have insider status. They do not belong to “old boy networks.” Although today’s European immigrants are not likely to start out their American lives in economic poverty,<sup>12</sup> they do suffer prejudice and occasional exclusion. They also lack sociopolitical power until they become assimilated into the white American norm and are rendered invisible after losing the markings of their foreignness.<sup>13</sup> After all, regardless of color, “in the United States, wherever there is foreignness, there is also a negative reaction to foreignness.”<sup>14</sup> Critically, for

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(2001) (reiterating a “radical” view for the time to “reexamine traditional notions of merit and the role of universities in the reproduction of elites.”). See also DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICAN’S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES – AND WHO GETS LEFT OUTSIDE THE GATES* (2006); JACQUES STEINBERG, *THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE* (2012); Ron Unz, *The Myth of American Meritocracy: How Corrupt Are Ivy League Admissions?*, AM. CONSERVATIVE, Dec. 2012, at 1.

11. See, e.g., WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* (1998); AMERICA’S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION (Richard D. Kahlenberg, ed. 2004).

12. Contemporary white immigrants’ household incomes place them within the economic “middle” class, and are comparable to native-born Caucasians’ incomes. Dagmar Rita Myslinska, *Contemporary First-Generation European-Americans: The Unbearable ‘Whiteness’ of Being*, 88 TUL. L. REV. 559, 571 (2014). However, this ignores higher average educational attainment and a greater percentage of working household members. *Id.* For a discussion of comparable “superficial” economic success achieved by Asian immigrants, see Frank H. Wu, *Changing America: Three Arguments About Asian Americans and the Law*, 45 AM. U. L. REV. 811, 814 (1996).

13. For a discussion of how contemporary first-generation Europeans tend to oscillate between being invisible as members of the dominant class and visible as immigrants, see Myslinska, *supra* note 12.

14. Terri Yun-lin Chen, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 ASIAN L.J. 69, 71 (2000). See generally KEVIN R. JOHNSON, *THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS* (2004).

this Article's discussion, immigrants lack access to social capital.

However, immigrants tend to be the subjects of scholarly or public discussions only when they are non-white;<sup>15</sup> silence<sup>16</sup> surrounds Caucasian<sup>17</sup> immigrants.<sup>18</sup> Although they might at times appear to belong to the dominant class, their access to white privilege is circumscribed. This, however, gets overlooked. The exclusionary effect of white privilege is so powerful that it even partially excludes white immigrants from all the social and cultural benefits of belonging to the dominant

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15. Patricia L. Price, *At the Crossroads: Critical Race Theory and Critical Geographies of Race*, 34(2) PROGRESS IN HUMAN GEOGRAPHY 154 (2009).

16. Anna Williams Shavers, *The Invisible Others and Immigrant Rights: A Commentary*, 45 HOUS. L. REV. 99 (2008). This absence might stem from several factors, including: (1) their small numbers, relative to the overall foreign-born population; (2) the assumed ease of (and their desire for) assimilation, STEPHEN STEINBERG, *THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA* 47-48 (1981); (3) little conflict with other groups, Sylvia R. Lazos Vargas, *Deconstructing Homo[generous] Americanus: The White Ethnic Immigrant Narrative and Its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1555 (1998); and (4) lack of organized groups representing them.

17. By referring to the subjects of this Article variously as "European immigrants," "Caucasian immigrants," "white immigrants," or "foreign-born Caucasians," among other terms, I hope to avoid creating a new label. I use all of these terms to refer to contemporary European-born white immigrants. My refusal to capitalize those terms or use quotation marks around them is intentional: The "act of naming" creates social realities." *The Census Counts, the Census Classifies*, in NOT JUST BLACK AND WHITE: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON IMMIGRATION, RACE, AND ETHNICITY IN THE UNITED STATES 150 (Nancy Foner & George M. Fredrickson eds., 2005). I want to avoid encouraging identity politics by having my subjects seen primarily through a consistent label. Similarly, despite not setting off the term "white" in quotation marks, I do not imply that this label is homogeneous or accurate. Flawed yet easily understood labels must be used, however, to discuss flawed cultural constructs if we are to better understand them and be able to change them.

18. The scope of this Article includes post-1965 permanent European-born Caucasian immigrants who possess markers of a foreign culture (such as accented speech, "fresh-off-the-boat" attire or hair style choices, or a preference for native foods, holiday celebrations, or music). Their U.S.-born children also likely fall within this Article's scope. Although immigrants who are temporary or undocumented share some characteristics of the subjects of this Article, a thorough analysis of their experience is beyond the scope of this piece. I also do not account for the role of factors such as gender, specific national origins, class, or geographic location, all of which need to be studied to arrive at a more nuanced understanding of the contemporary European-immigrant experience.

group. Inertia in higher education favors those who firmly partake of white privilege, and disadvantages those who deviate from the norm in any way. No matter what their class, contemporary European immigrants continue to further challenge the falsely assumed uniformity of “whiteness,” while exposing the relative significance of foreignness—as opposed to race—in immigrant life.

Not surprisingly, silence surrounds Caucasian immigrants in the educational context as well. Although racialized immigrants—particularly Hispanics and blacks—have garnered attention, in terms of both their K-12 experiences<sup>19</sup> and college admissions preferences,<sup>20</sup> white immigrants are ignored in such discussions. Affirmative action<sup>21</sup>—one of the education topics legal scholars address most frequently, particularly now in light of *Fisher v. University of Texas at Austin*<sup>22</sup>—is racialized. Scholars, commentators, and schools

19. See, e.g., Robert Crosnoe & Ruth N. López Turley, *K-12 Educational Outcomes of Immigrant Youth*, 21(1) THE FUTURE OF CHILDREN 121 (Spring 2011).

20. See, e.g., HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 4-5 (2002). See also Clarence Page, *Black Immigrants Collect Most Degrees But Affirmative Action is Losing Direction*, CHI. TRIB., March 18, 2007, § 2, at 7. Notably, due to increasing numbers of racialized immigrants since 1965, affirmative action policies provide almost [75%] of post-1965 immigrants with ethno-racial preferences in higher-education admissions, as well as preferences in employment, government contracts, and loans. SCHUCK, *supra* note 3, at 106.

21. The terms “affirmative action” and “admissions preferences” are used interchangeably in this Article to refer to any admissions preference given to applicants. The author expresses no opinion about race-based admissions preferences, and instead limits the scope of this Article to how immigrant background fits into intra-group diversity. Similarly, the author expresses no opinion as to whether admissions preferences should be based on diversity—as opposed to remedial—rationale. Instead, the scope of this Article follows the current Supreme Court precedent, which considers the diversity rationale as the only valid ground for admissions preferences. The author does note, however, that under the definition of “diversity” adopted here (as lacking access to social and cultural capital of the dominant group), racial minority members would tend to be “diverse” since they often deviate from the group in power in terms of their access to these types of capital.

22. *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013). Although *Fisher* was decided in the context of a public university, its effect will be far-reaching since almost all private schools receive federal funding and thus must comply with *Fisher*. Peter Sacks, *For-Profit v. Non-Profit Colleges – Which Use More Federal Cash?*, MANHATTAN INST., June 20, 2011, available

tend to make no distinction between native and immigrant students.<sup>23</sup> And so, affirmative action has been applied to immigrants (both lawful and unlawful) who belong to racial minorities.<sup>24</sup> This has resulted in a significant proportion of immigrants among racial minorities benefiting from affirmative action.<sup>25</sup> Although discussions of affirmative action and immigration policy began to slowly intersect in the 1990s, prompted by economic recession,<sup>26</sup> those discussions have addressed racialized immigrants only.<sup>27</sup> Courts are also slow to acknowledge the salience of immigrant background for Caucasian immigrant students. For example, in a suit by a white graduate school applicant who had emigrated from South Africa, the court did not address his immigrant status, but focused only on his race.<sup>28</sup>

This Article addresses the experiences of permanent first-generation Caucasian immigrants who have arrived in the United States after 1965.<sup>29</sup> Since the vast majority of them are from Europe, the Article will focus on their experiences, although the experiences of non-European white immigrants resemble the experiences discussed here. Between 1997 and 2009, approximately 6-7% of the European-born U.S. population was between five and nineteen years of age.<sup>30</sup> White

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at [http://www.mindingthecampus.com/originals/2011/06/for-profit\\_v\\_non-profit\\_colleg.html](http://www.mindingthecampus.com/originals/2011/06/for-profit_v_non-profit_colleg.html).

23. GRAHAM, *supra* note 20, at 10.

24. *Id.* at 12.

25. *See, e.g.*, Page, *supra* note 20.

26. Hugh Davis Graham, *Affirmative Action for Immigrants? The Unintended Consequences of Reform*, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 53, 53 (John David Skrentny ed. 2001).

27. *See generally* GRAHAM, *supra* note 20.

28. *Texas v. Lesage*, 528 U.S. 18 (1999).

29. In 1965, U.S. immigration laws underwent the most recent drastic round of reforms. The 1965 Immigration and Nationality Act abolished the national-origins quota system and created new preference categories based on professional skills, family reunification, and refugee status, with a 20,000 annual ceiling per country. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

30. U.S. Census Bureau, Current Population Survey tbl. 3.1 (2009), available at <http://www.census.gov/population/foreign/data/cps2009.html>; U.S. Census Bureau, Current Population Survey tbl. 3.1 (2003), available at <http://www.census.gov/population/foreign/files/cps2003/tab03-01.pdf>; U.S. Census Bureau, Current Population Survey tbl. 3.1 (Mar. 2000), available at



immigrants today comprise about 18% of immigrant children enrolled in K-12 education.<sup>31</sup> Although there are differences in the cultural, linguistic, and religious backgrounds of the various white immigrant groups addressed here,<sup>32</sup> they all share some traits in common: At least occasionally, they are all perceived as outsiders by those who are native-born, and they lack access to the social and cultural capital that U.S.-born whites possess.<sup>33</sup> Unlike racial minority students, they have few sources of institutional support. Moreover, non-white students tend to treat them as simply “white,” and U.S.-born Caucasians tend to exclude them as outsiders.

To be competitive with native-born Caucasians during the college admissions process and in reaping benefits of attending college, immigrants would need to have access to natives’ social and cultural capital, in high school and after enrolling in college. Learning English and performing well academically are not synonymous with fitting in, partaking of the extra-academic component of the American educational system, or being able to take advantage of social-capital propagation that takes place in high school and in college. Although college admissions preferences are in theory “based on a presumption that, on average, those not belonging to the preferred group are less effective in the competition for scarce positions because of

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<http://www.census.gov/population/foreign/files/cps2000/tab03-01.pdf>; U.S. Census Bureau, Current Population Survey tbl. 3.1 (Mar. 1997), available at <http://www.census.gov/population/foreign/files/cps1997/tab0301.pdf>.

31. See Karina Fortuny & Ajay Choudhary, *Children of Immigrants: Growing National and State Diversity*, URBAN INST. (Oct. 2011) available at <http://www.urban.org/publications/412433.html>.

32. Whites of Arab or Latino/a origin are not addressed here because both experience challenges—stemming from unique cultural, economic, political, or religious concerns—that differ from those of white immigrants with European heritage.

33. By writing collectively about contemporary European immigrants, I am not suggesting that there are no distinctions among them. Factors such as their countries of origin, English fluency, age at arrival, religion, education, and culture contribute to distinctions. However, they all tend to share some attributes that set them apart from native-born Caucasians. Furthermore, native-born Americans perceive European immigrants, at least at times, as not the norm. Identity is in part formed by how others see us. TATUM, *supra* note 5, at 18-19; LIPSITZ, *supra* note 5, at 60. By discussing white immigrants collectively, I also hope to prompt them to recognize the traits and concerns that they share, and to be more willing to offer one another support, decreasing their social isolation. TATUM, *supra* note 5, at 70.

some pre-existing social handicap,”<sup>34</sup> in practice, scholars and schools ignore deficiencies in access to cultural capital that stem from the mere fact of not being U.S.-born.<sup>35</sup> By doing so, they also ignore the value that comes from immigrant contributions to diversity, which continues to be recognized as a compelling interest in higher education.

Some scholars have noted the importance of taking into account cultural factors in admissions policies, especially in terms of any disadvantage faced by racial minority groups.<sup>36</sup> Acculturation measures such as cultural differences, psychological traits, linguistic skills, other cognitive skills, cultural heritage, self-identification, cultural attitudes, ethnic friendships, acceptance of Anglo values and customs, and ethnic behaviors allow for a more accurate understanding of one’s social and identity traits,<sup>37</sup> correlated with success in the educational system. However, such race-neutral approaches often look to students’ economic disadvantage, and view students through the white-colored paradigm.<sup>38</sup> Due to their middle-class status<sup>39</sup> and the popular assumption of how easy

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34. Roland G. Fryer, Jr. & Glenn C. Loury, *Valuing Diversity*, 121(4) J. OF POL. ECON. 747 (2013), available at <http://scholar.harvard.edu/files/fryer/files/valuingidentifymarch2013.pdf>.

Affirmative action programs in other countries, such as India, have similarly focused on the “societal disadvantage” of certain non-dominant castes. Sean A. Pager, *Antisubordination of Whom? What India’s Answer Tells Us About the Meaning of Equality in Affirmative Action*, 41 U.C. DAVIS L. REV. 289, 331 (2007).

35. Media reports also tend to portray immigrant students as non-white. See, e.g., Stacy Teicher Khadaroo, *Who Are America’s Immigrant Kids? Not Who You Think, Study Suggests*, CHRISTIAN SCIE. MONITOR, July 25, 2013, <http://www.csmonitor.com/USA/Society/2013/0724/Who-are-America-s-immigrant-kids-Not-who-you-think-study-suggests> (discussing racial-minority students only, despite the fact that the underlying study addressed in the article looked at all ethnicities of immigrant students).

36. Adela de la Torre & Rowena Seto, *Can Culture Replace Race? Cultural Skills and Race Neutrality in Professional School Admissions*, 38 U.C. DAVIS L. REV. 993, 996 (2005).

37. For a discussion of various acculturation rating scales, see *id.* at 1014-16.

38. See, e.g., Office of Civil Rights, U.S. Dep’t of Educ., *Race-Neutral Alternatives in Postsecondary Education: Innovative Approaches to Diversity* 5-7 (2003).

39. See pp. 18-19, *infra*. Of course, “[s]ubjective experience cannot be captured in statistics.” Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT’L L.

it is for Caucasians to assimilate, white immigrants are missing from that discussion.<sup>40</sup>

The intersection of education, whiteness, and access to social capital of the dominant group provides a better understanding of intra-group diversity and of the construction of race. Intra-group diversity is particularly relevant today as *Fisher* acknowledged diversity as the only allowable justification for admissions preferences (as long as each applicant is considered individually and holistically). Immigrants and other white students who are not the privileged norm help to fulfill the stated goals of diversity: expanding student knowledge, preparing them for participation in a multicultural society, breaking down race-based stereotypes, and creating leadership opportunities for various members within each racial group.

The concept of diversity in America today can be controversial. It is approached differently in various contexts – for example, it is to be imported and assimilated in the immigration framework, and defined and prized in affirmative action.<sup>41</sup> This Article touches upon both contexts: In admission preferences, schools should consider immigrant students' experiences and contribution to diversity, and those students should be offered additional support (both before and after college admissions) to help them assimilate and access the social privileges and cultural capital of native-born students. The modern American pluralistic belief “that we can have it both ways, [and] that the . . . celebration and maintenance of diverse traditions are compatible with assimilation to core American values”<sup>42</sup> demands no less. To facilitate accomplishing this goal, the author proposes a new way to define “diversity”—within any racial group—as deviation from the access to social and cultural capital of the dominant group. One way to measure diversity is to look at any degree of exclusion from the white elite privilege, which is a very powerful and closely-circumscribed force. White immigrants

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503, 527 (2000).

40. See, e.g., de la Torre & Seto, *supra* note 36, at 996 (addressing acculturation disadvantages of racialized immigrants).

41. SCHUCK, *supra* note 3, at 17.

42. *Id.* at 51.

are “diverse” because they differ from the stereotypical privileged white norm, in addition to having experiences and ideas that differ from those of the majority. Thus redefining the concept of diversity would better ensure that the stated benefits of diversity are accomplished.

Furthermore, in theory, admission preferences are based on the assumption that those not belonging to the dominant group are less effective in the competition for resources, such as education. At its core, this assumption should be defined to include any deficiency in access to social and cultural capital. By recontextualizing affirmative-action rhetoric in this way, all immigrants’ challenges can be more easily recognized.

Unlike women and racial minorities,<sup>43</sup> Caucasian immigrants have not been given a voice to demand increased awareness of their circumstances. (In fact, no white groups lacking complete access to white privilege—such as those socioeconomically disadvantaged—have been able to effectively voice such demands.) Any disadvantage they face is seen as far less troublesome than gender or race-based issues.<sup>44</sup> Not surprisingly, in addressing affirmative action, courts subsume “ethnic” groups within “racial” categories.<sup>45</sup> And, while

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43. Philip Kasinitz, *Becoming American, Becoming Minority, Getting Ahead: The Role of Racial and Ethnic Status in the Upward Mobility of the Children of Immigrants*, 620 ANNALS. AM. ACAD. POL. & SOC. SCI. 253, 265 (2008) [hereinafter *Becoming American*].

44. For example, for a discussion of how discrimination of immigrants is minimized in the workplace, see Myslinska, *supra* note 12, at 591.

45. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982) (noting how attending an “ethnically” diverse school could help teach students belonging to the “racial” majority to respect racial-minority children); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1166 (9th Cir. 2005) (noting how a school had a compelling interest in ensuring “racial and ethnic diversity, and in ameliorating racial isolation or concentration” by ensuring that student assignments did not follow *racially*-segregated housing patterns); *Majeske v. City of Chicago*, 218 F.3d 816, 816 n.1 (7th Cir. 2000) (referring to both black race and Hispanic national origin in terms of “race”); *Milwaukee County Pavers Ass’n v. Fiedler*, 922 F.2d 419, 421 (7th Cir. 1991) (noting how *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), applies to preferences that favor “blacks and other racial and ethnic minorities”); *United States v. Texas Educ. Agency.*, 467 F.2d 848, 871 (5th Cir. 1972) (discussing how, although exact “racial or ethnic” balance is not required, “one-race” schools require close scrutiny); *Wessman v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998) (noting how a school’s “racial/ethnic” guidelines are a way to achieve “racial” balancing); *Metro*

affirmative action has helped to integrate the children of nonwhite immigrants,<sup>46</sup> white immigrants have been excluded from its purview. Having had access to some markings of white privilege—such as Ivy League education, and employment at white-shoe law firms and in academia—yet continuing to experience moments when my access to the cultural and social capital of the dominant American-born group<sup>47</sup> is circumscribed, I feel well-positioned to begin this discussion.<sup>48</sup>

Some might react in disbelief or regard the experiences and perspectives presented in this Article as negligible. This is not surprising. No one can ever fully understand the experiences of another,<sup>49</sup> particularly the greater the difference between them. Concerns by Caucasian students<sup>50</sup> are especially likely to be overlooked given that Americans perceive racial groups as monochromatic and homogeneous, and subscribe to the white-black racial binary. Finding one's own racial or

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Broad. v. FCC, 497 U.S. 547, 565 (1990) (discussing “race”-conscious classifications implemented to address “racial and ethnic discrimination”); Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (in addressing the legality or race-based affirmative action program, Justice O'Connor noted the importance of access to legal education for students of “every race and ethnicity”).

46. PHILIP KASINITZ ET AL., *INHERITING THE CITY: THE CHILDREN OF IMMIGRANTS COME OF AGE* 366 (2008) [hereinafter *INHERITING THE CITY*].

47. Other than those firmly positioned in the upper echelons of social strata, most whites oscillate between the dominant norm and another identity. The privileged norm in America is typically circumscribed as “white, thin, male, heterosexual, Christian, and financially secure.” A. Lorde, *Age, Race, Class, and Sex: Women Redefining Difference*, in *RACE, CLASS, AND GENDER IN THE UNITED STATES: AN INTEGRATED STUDY* 445-51, 446 (3d ed. 1995).

48. In fact, critical race theory scholarship tends to come “from an experience-based perspective.” Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1248 n.15 (1993); see also Jerome M. Culp, Jr., *Voice, Perspective, Truth, and Justice: Race and the Mountain in the Legal Academy*, 38 LOY. L. REV. 61, 73 (1992).

49. TATUM, *supra* note 5, at 198.

50. In writing about white immigrants' concerns, I do not overlook some advantages that they have when compared to various non-white groups. The discussion here, however, looks only at the significance of immigrant background to intra-group diversity in education. For a discussion of some social, public, and psychological benefits of being white in America, see Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Foundation*, 89 N.Y.U. L. REV. 425 (2014).

ethnic identity is challenging for all of us, but it is especially difficult for those who do not easily fit into stereotypical or homogeneous racialized categories.<sup>51</sup> Silence, however, is not an option. It results in negative experience not only for those whose concerns go unheard, but also for our society as a whole. Unchallenged cultural attitudes decrease multi-culturalism and acceptance, and result in uneasiness among members of different groups. I hope to give immigrant students of all colors, ethnicities, persuasions, and types a stronger voice and a greater understanding of their commonalities, no matter how slow or uncomfortable that process might be. “[W]e can be unified eventually only if we examine honestly and critically the things that divide us in the present.”<sup>52</sup> We need to better understand the significance of social capital and privilege, and the unique position of immigrants and their children—including Caucasian ones—if we are to have a more cohesive and integrated society. A well-implemented policy to ensure representation of those who are less endowed with social capital would enable those with more privilege to better understand their concerns. Hopefully, it would also prompt the privileged to consider others in exercising their power over broader societal issues, paving the path for a more meaningful democracy in which everyone’s talent is fully developed.

Both *Grutter v. Bollinger*<sup>53</sup> and *Fisher* (including its amicus briefs)<sup>54</sup> focused on increasing intra-group diversity<sup>55</sup> in higher

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51. TATUM, *supra* note 5, at 166.

52. LIPSITZ, *supra* note 5, at 56.

53. *Grutter v. Bollinger*, 539 U.S. 306 (affirming racial diversity as a permissible goal in admission decisions, and recommending a 25-year window for moving to race-neutral admission policies). In a companion case, *Gratz v. Bollinger*, 539 U.S. 244 (2003), the Court required individualized consideration of each applicant in order to withstand strict scrutiny. Admission evaluations assigning fixed points based on traits such as race are not sufficiently narrowly tailored. *Id.*

54. Brief for Asian Am. Legal Defense & Educ. Fund et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 241 (2012) (No. 11-345), 2012 WL 3308203 (2012); Brief for Nat’l Women’s Law Ctr. et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 241 (2012) (No. 11-345), 2012 WL 3418602, at \*\*29-30; Brief for the Lawyers’ Comm. for Civil Rights Under Law, et al. as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 241 (2012) (No. 11-345), 2012 WL 3527856, at \*12.

55. I do not question the original purpose of affirmative action plans—to

education,<sup>56</sup> although scholars have not given this much attention.<sup>57</sup> Those who had noted the cases' analysis of intra-group diversity, have addressed it primarily as it pertains to racial minorities<sup>58</sup> or to students of lower socioeconomic status.<sup>59</sup> This Article considers intra-group diversity in a broader sense of uneven access to white privilege, by looking at first-generation European immigrants. Intra-group differences in access to cultural capital should be taken into consideration in the evaluation of diversity. Individualistic focus on "merit" and "character" overlooks the significant role that culture plays in transmitting social status and enabling educational and institutional advancement. Moving beyond critical race theory and critical whiteness studies,<sup>60</sup> the author's work can be

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help undo centuries of discrimination faced by former slaves. Recent jurisprudence, however, has transformed this purpose into advantages gained from student body "diversity." See, e.g., *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306; *Fisher*, 133 S. Ct. 2411. Thus, this Article discusses admissions preferences in the context of diversity only.

56. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 551 U.S. 701, 765 (2007) (limiting the scope of *Grutter* to higher education). The Court acknowledged the hallmarks of narrowly-tailored affirmative action programs as "(1) individualized consideration of applicants; (2) the absence of quotas; (3) serious, good-faith consideration of race-neutral alternatives to the affirmative action program; (4) that no member of any racial group was unduly harmed; and (5) that the program had a sunset provision or some other end point." *Id.* (quotation omitted).

57. Instead, scholars have focused on (1) the meaning of "critical mass," and (2) deference that should be given to universities in creating and carrying out their admissions policies. See generally Vinay Harpalani, *Diversity within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463 (2012).

58. See, e.g., Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1231 (2008) (questioning admissions policies "that lump[] all blacks into a single-category approach that pervades admissions decisions of so many selective colleges, universities, and graduate programs"); SCHUCK, *supra* note 3, at 163; Devon W. Carbado, *Intraracial Diversity*, 60 U.C.L.A. L. REV. 1131 (2013).

59. See, e.g., JENNY M. STUBER, *INSIDE THE COLLEGE GATES: HOW CLASS AND CULTURE MATTER IN HIGHER EDUCATION* 2 (2011). See also RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (noting how upper and upper-middle class American-born students tap into the advantages of their parents' status, which facilitates their ability to benefit from the educational system).

60. The author's work moves beyond the scope of critical legal studies ("CLS"), by focusing on how laws can be used to affect change, in addition to

critiquing how they are applied. As a complementary theory to the dominant liberal legalism (which assumes that all people have the same opportunity to exercise their free will), CLS seek to expose lack of objectivity and universality in legal discourse, emphasizing how the law is a function of politics and societal values. DAVID KAIRYS, *Introduction to THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 1& 3-6 (3d ed. 1998); PETER FITZPATRICK & ALAN HUNT, *CRITICAL LEGAL STUDIES* (1987). More absolute than legal realists, and arguably embracing Marxist criticism of illegitimate social power, CLS scholars (who tend to be white males) seek to unmask all law as politics, but renounce the importance of rights. Motoaki Funakoshi, *Taking Duncan Kennedy Seriously: Ironical Liberal Legalism*, 15 WIDENER L. REV. 232, 231 (2009); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

This Article can be better situated within outsider jurisprudence, a movement that developed from CLS, and which is more adamant on improving the social condition. A flexible and often multi-disciplinary approach, outsider jurisprudence relies on perspectives from various marginalized groups, and includes critical race theory ("CRT"), critical whiteness studies ("CWS"), as well as studies of other "outsider" groups such as LGBT ("queer-crit") and Latina/o-Americans ("LatCrit"). Richard Delgado, *The Inward Turn of Outsider Jurisprudence*, 34 WM. & MARY L. REV. 741 (1993). CRT (derived from the Civil Rights movement) and its offshoot, CWS, expose how laws are designed and applied in order to support and empower whites, while disadvantaging and subordinating non-whites. KIMBERLÉ CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995); DAVID ROEDIGER, *THE WAGES OF WHITENESS: RACE AND THE MAKING OF THE AMERICAN WORKING CLASS* (1991). The author's work goes beyond CRT and CWS, by dismantling the falsely-homogeneous construct of whiteness.

Outsider jurisprudence is broad enough to encompass this Article. At its core, outsider jurisprudence looks at *all* groups that are on the margins of the dominant norm and thus lack full social and cultural capital of the group in power. Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683 (1992). Broadly speaking, an "outsider" is anyone belonging to a group "whose marginality defines the boundaries of the mainstream. . . ." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989). Thus, outsider jurisprudence tends to be written by either those who belong to groups on the margins of the norm or those outside that society altogether. Mairi Nicola Morrison, *Towards a Trans-National Outsider Jurisprudence: A Postmodern Approach to Equality in the UK* (Trinity Term 2012) (unpublished D.Phil. Thesis dissertation, Oxford, New College), 27-28, available at <http://academia.edu/2565673> [hereinafter Morrison, *Towards a Trans-National Outsider Jurisprudence*]. Having emigrated at the age of twelve, the author belongs to the former group. She also has some perspective from outside American society due to having extensively lived and worked overseas. Thus, she is well-positioned to apply outsider jurisprudence discourse. The author recognizes that she is a privileged "outsider," however, due to operating within the elite legal and academic environments while having personal familiarity with white immigrants' experiences. This multiple consciousness allows her to embrace legal discourse tools to benefit the group from which she originates. Mari



situated within the broad scope of outsider jurisprudence—emphasizing the importance of rights, and hoping to inspire critical discussion and eventual change. Although this Article explores Caucasian immigrants' educational experiences, the ramifications of its implications apply to all immigrants since all tend to be disadvantaged due to a lack of social and cultural capital.

In Part I, this Article briefly describes some aspects of white immigrants' educational<sup>61</sup> experience (including extracurricular involvement and parental roles), exposing how it reflects immigrants' lack of access to the cultural capital of native-born whites. The Article exposes some unique challenges faced by Caucasian immigrants in high school,<sup>62</sup>

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Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 14 WOMEN'S RTS. L. REP. 297 (1992).

This work is in line with outsider jurisprudence's position that rights are valuable and capable of being changed to benefit those who are currently disadvantaged. See, e.g., PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS: DIARY OF A LAW PROFESSOR* (1991). Similarly to natural-law theorists, outsider scholars postulate that some rights are innate and pre-exist law, so that they cannot be taken away. *Id.* By speaking up, outsiders seek to not only criticize power structures embedded in law, but also teach and write so that their voices are heard, advancing social transformation and connecting various groups. Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 ASIAN AM. L.J. 65 (2003). The author believes that the right to equal opportunity is innate, and she hopes that by teaching and writing, she can increase access to opportunity for immigrants of all races and ethnicities.

Outsider jurisprudence scholars also note how current socio-legal structures advance and propagate one group's domination to the actual disadvantage of other groups—as opposed to merely coexisting with other groups. Morrison, *Towards a Trans-National Outsider Jurisprudence*, at 71. Similarly, this Article notes how access to cultural capital and social privilege intensifies at each stage of education, and how this access propagates itself at the expense and exclusion of all outsiders.

Despite being indebted to these legal discourses, the author does not wish to be judged by the standards and conceptions of the genre(s) of scholarship that influence this Article. Such labeling can lead to biases in how scholarship is perceived and evaluated. See, e.g., Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 748-55 (1990).

61. Arguably, the educational and employment contexts are the most salient and significant to this analysis because almost all immigrants enter them at some point in their lives in America. For a discussion of European immigrants' experiences in the employment context, see Myslinska, *supra* note 12.

62. The discussion focuses on high-school (as opposed to primary)

during the college application process, and in taking advantage of college opportunities that amplify social benefits. These experiences are contrasted with those of American-born students who benefit from their families' access to social capital that enables them to take advantage of its replication in college.

Part II addresses how some of the challenges white immigrants face in the educational context can be reduced. It then proposes some institutional programs and interventions in high school and in college. A more holistic and nuanced approach to admissions preferences is then proposed, compatible with the goals of increasing intra-group diversity per *Fisher*.<sup>63</sup>

The Article concludes by calling for greater attention to diversity within racial categories and to commonalities among various groups that do not fit the norm. Ultimately, noting such similarities will lead to a greater visibility and inclusion of the contemporary immigrant experience. In a country where one out of four children is or has an immigrant parent, this approach will add to the richness of what it means to be an "American" for all of us,<sup>64</sup> paving the way to a more integrated

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education because college grooming and preparation intensify at that stage.

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

64. By taking a broad look at outsider jurisprudence as encompassing *any* group that lacks full access to the social and cultural privileges of the dominant class, I expand its discourse to another group that tends to be excluded from public and scholarly exchanges—white immigrants. My work fits in with anti-balkanization principles of facially race-neutral laws that promote equal opportunity, as long as they do not cause social divisiveness. Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011). I am advocating that legislators, courts, and schools focus on intra-group diversity within whites (and within other racial groups), and acknowledge the effect that immigrant background has on experiences, regardless of race. In essence, I distill the impact of one's immigrant background, separate it from race-bound rhetoric, and argue that it tends to prevent access to equal opportunity. Anti-balkanization perspective calls for greater attention to the social context and individualized consideration, and that is what this Article postulates. As Justice Kennedy noted in *Parents Involved*, government has a "legitimate interest . . . in ensuring all people have equal opportunity regardless of their race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.*, No. 1, 551 U.S. at 787-88. This interest is not limited to racialized groups.

Immigrant-conscious measures might actually promote social cohesion by

society and a more meaningful democracy.

I. Access to Social and Cultural Capital Determines High School Experience, College Preparedness, and Propagation of Privilege

*After emigrating from Poland, we settled in the suburbs of upstate New York. I arrived here in the final months of fifth grade, without knowing English. I was the only Polish student at my school. For the first few months, instead of attending regular English class, I received one-on-one tutoring with a caring ESL teacher, Mrs. Cascio. A few weeks after she had started tutoring me, another immigrant student joined us – Alex, from Russia. We both excelled in math compared to native-born students, and so we both got bumped up by a year. The school administrators assumed that we would easily catch up in all the other courses once we learned English.*

*And they were right. English came fairly easily to us, albeit it remained accented, and was neither informal enough to easily socialize with other students nor formal enough to comport with the language necessary to excel on standardized tests. We both had no siblings to distract us, parents who emphasized education, and plentiful access to American television as a vehicle for learning American linguistic nuances and cultural tidbits. We were immersed in English at school since no one spoke our mother tongues. Neither TV nor my ESL teacher prepared me, however, for an icebreaker exercise on the first day of school, which relied on contemporary colloquial words: I did not know whose name I was to write down as the “cutest” boy in class. (To this day, the point of that exercise escapes me!)*

*Perhaps because I had initially used Brady Bunch-influenced words like “groovy,” no one other than Alex would sit with me at lunch. Other students were perplexed by us. They would ask us whether Christmas, running water, or television existed in our homelands. They posed questions that demanded*

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effectuating truer equal opportunity. If race-conscious resentment is most greatly voiced by those who are privileged, providing additional consideration to immigrants of all races, including Caucasian ones, might actually reduce any resentment that the privileged native-born whites might feel. After all, they might be less indignant if a protected category includes their own race.

more nuanced answers—such as, how it was possible for foreigners to be “smart”—to our teachers. (At that time, my understanding of the word “smart” was based on a Maybelline commercial for mascara, with their slogan “Smart. Beautiful. Maybelline!” Needless to say, I could not figure out why my classmates were discussing mascara, which I was too young to wear, in an algebra class.)

Alex and I hoped that we would fit in better in high school. As students from another middle school would be joining us then, we thought that we would have more immigrant friends. Almost all were Asian, however, and they seemed to prefer to associate with other Asians. So we continued to feel like outsiders.

Although many norms of the American teenage world would still escape us, we became teachers’ pets as we continued to do well academically. Teachers expected us to succeed, attributing our success to the old-fashioned “immigrant work ethic.” In hindsight, I am not certain whether that motivated us to work harder or took away from our accomplishments. . .

Our parents would glow with pride from the praises that we received. They were scrupulous about attending all PTA conferences, albeit they understood little of what was going on. We found it difficult to relay to them everything that the teachers would discuss because some American concepts were foreign to us too, and our native-language vocabularies had remained at the prepubescent level they were when we had left our homelands. Our communication with our parents often lacked fluidity. We experienced some language blocks when translating documents and interpreting telephone calls for them as many required adult sophistication. And our parents could not easily communicate with us in English.

Despite all the praise, our teachers did not solicit our input when we actually studied Europe in history and social studies classes. Neither my teachers nor my classmates ever asked about my experiences growing up. Except for my close friends, most did not know where I was born and had spent most of my life. Some assumed that I was an exchange student. Many referred to me as “the European girl” or “the foreign girl.” They had cliques, to which I was not privy. In fact, no immigrant at my school was “cool” enough to hang out with the “real” American

*kids. My friends tended to be foreign-born, or at least to have parents who were foreign-born.*

*As I tried my best to figure out what American high school was all about, my parents tried their best to cling to the culture with which they had grown up, seeking comfort of the familiar, and not having the skills to be more American. They also tried to shelter me from American cultural influences that they deemed too permissive or too foreign. I was not allowed to drive myself to school. My involvement in extracurricular activities was curtailed as it would distract me from my studies, which always took center stage. My parents did not understand my classmates' culture, and my classmates did not understand the norms I had to follow. My oscillation between trying to fit in with the "American" kids at school, and adhering to different standards at home required some effort and creativity.*

*It was assumed that I would go to college. After all, one of my parents' reasons for coming here was to provide me with a solid education. In our minds, it was pretty straightforward: If I worked hard and got good grades, I could get into a good college. But the path to college was not that simple. I felt lost, having to do everything on my own. I only found out about private college tutors and SAT-prep courses when one of my Asian friends mentioned—right before our SAT exam—having used both. Researching and applying to colleges was left to me. My parents offered little advice, which is understandable. They were preoccupied with the stresses of their own adjustment, juggling multiple jobs, and suffering a loss of social status. They knew nothing about American high schools, the culture of college preparation, or the college-application process. My parents taught me simple lessons: to respect teachers and not question them; to study hard and go to college. They did not get involved in details. Unlike my classmates' parents, they did not ask me about my friends, social activities, or experiences outside the classroom. Aside from consulting with my guidance counselor—who treated me like all the other students assigned to him—I was alone, adrift, and baffled at times.*

*I was excited about going off to college, hopeful that I would finally meet more of my kind and not feel like an outsider. I had heard that college would be multi-cultural. But I arrived singly, not as a member of a pack. As a product of a public education*

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system, albeit an excellent one, I was the only student from my high school admitted to Yale that year. I had not seen it before enrolling. High-school college tours were a foreign notion to my family. When moving into my dorm, I realized that my parents looked very differently than the well-coiffed parents of my classmates. We knew no one there. And we knew no one who had ever attended Yale, aside from my admissions interviewer. Alex felt the same at MIT.

I met very few students at Yale who had a background similar to mine. I had no one to turn to for support: My roommates were American-born; my family did not understand my college experience; and there were no clubs or programs for students like me. The best I could do was join “international” clubs, populated by foreign students. I aspired to have a sense of community like they did. Given the number of students who arrived in groups from private schools, many of them through legacy admission preferences, I felt like a minority. Yet I was too assimilated to really belong to foreign-student groups, composed of those who had arrived on student visas and for whom “home” was always overseas.

My small circle of friends consisted of first and second-generation immigrants, and other students who did not fit in. Finding other European immigrants was challenging since they easily blended into the white collegiate mass. I felt like I was living on the margins, not being “cool” enough to be asked to participate in sorority rushes. I felt uncomfortable on campus. Tiffany heart-tag charm bracelets, the Hamptons, and Burberry scarves had not been a part of my upbringing. Fancy resumé-stuffing internships obtained through family connections did not fill up my summers. In fact, I did not even know what a CV was until I was about to graduate from college. And I did not speak with an air of authority and confidence that American-born kids had, whenever they spoke about pretty much any subject. I also did not have a sense of entitlement, self-importance, or optimism that they seemed to have had bred into them.

As in high school, my parents approached my college education based on their own experiences: academics only. They strongly discouraged any extracurricular or social involvement, all of which was for after college. They considered college to be a

*professional school, and pressured me to pursue a “practical” major that would help regain the social status they had lost when emigrating. Reacting against what they perceived as an excessively permissive American culture, they raised me with strict rules and little ability to make my own decisions or to network. Having to make my own choices for the first time in my life was at first debilitating. My parents tried to maintain their control over me, but their lack of understanding of the American college system made that difficult and frustrating. Alone, accepted only by other students who did not fit in, and without any on-campus support network, I did not understand why college was supposed to be the best part of my life.*<sup>65</sup>

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65. Despite some mainstream concerns about the anecdotal value of self-revealing narratives, *see, e.g.*, Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992), the use of narrative is particularly common in outsider jurisprudence. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2323 & n. 15 (1989). “In the face of . . . institutional disapproval, outsiders can either conform to the dominant objective mode of discourse or continue telling their stories.” Chang, *supra* note 48, at 1270. After all, “personal or individual experience is part and parcel of dominant cultural, material, and political arrangements.” Valdes, *supra* note 60, at 94. In the face of disempowering rules of scholarly evidence and silence in scholarly discourse, I employ personal narrative in order to more accurately describe the experience of outsiders whose voices cannot be adequately captured within the bounds of dominant discourse. “The stories of outsiders become important because they tell the story from different perspectives, perspectives that may have been excluded when formulating the objective, universal ‘we.’” Chang, *supra* note 48, at 1280. These stories are used by me for their truth, as evidence of legal structures I am discussing. *See, e.g.*, DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1989); RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1996). My identity and life experiences reinforce my right to speak on the topic of this Article through the use of narrative. “Difference . . . must be represented in order to be erased.” Barbara Johnson, *Thresholds of Difference: Structures of Address in Zora Neale Hurston*, in “RACE,” *WRITING, AND DIFFERENCE*, 317, 323 (Henry L. Gates, Jr. ed., 1986). Outsiders’ different knowledge of discrimination or struggle is personal and specific, representing realism which is rarely found in abstract mainstream scholarly discourse. Mari Matsuda, *Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground*, 11 HARV. WOMEN’S L.J. 1, 8-9 (1988). It can provide better insights about legal conditions than academic writing. *Id.* at 14. Furthermore, narrative story-telling has a cathartic experience for the storyteller, serving as a “means of psychic self-preservation.” Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2436 (1989). It can also advance a culture of shared understanding, *id.* at 2414, and promote solidarity as others might more

A. *Privileged Students Benefit From Their Parents' Access to Social Capital*

In addition to understanding the local educational system, American-born middle-class and upper-class parents have access to social and cultural capital due to having family, friend, and employment networks. They are able to shape their children's high school experiences to make them more appealing to college admissions committees that pay attention to character traits, and to make them more ready to fit in socially at college. Moreover, parents inculcate network-building skills in their children, by actively developing not only their intellectual abilities, but also their social and physical capacities.<sup>66</sup> High schools, particularly elite ones, also participate in propelling privileged children toward success at elite colleges, which are perceived by guidance counselors to be culturally a "good fit" for those students.

Privileged children are "socialized to be outgoing, confident 'joiners' who enjoy and are adept at meeting new people and becoming involved in new activities."<sup>67</sup> As a result, they are more comfortable exploring and taking advantage of new social settings<sup>68</sup> such as college. By having a sense of belonging in college—reinforced by their social networks—privileged native-born students actively partake of all that collegiate life has to offer, not only academically, but also socially. The social capital of the privileged class thus becomes replicated.

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easily recognize themselves in stories than in detached scholarly discourse. *Id.* at 2437.

The use of "narrative" includes not only author's personal narratives, but also others' stories which are true or inspired by true events. *See, e.g.,* BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Accordingly, the author's vignette is a compilation of her experiences and the stories others have told her.

Personal narrative is also employed here due to the dearth of formal data. Challenges faced by foreign-born Caucasians in the educational system are not well-documented — due to white immigrants' small numbers, lack of detailed reporting by schools, and some white immigrants' unwillingness to acknowledge any problems they might face. Myslinska, *supra* note 12, at \_.

66. *See generally* ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2003).

67. STUBER, *supra* note 59, at 15.

68. LAREAU, *supra* note 66.



1. Native-Born Students' High School Experience, Guided by Their Parents and Schools, Enables Them to Take Advantage of Their Access to Social Capital

Not surprisingly, the children of U.S.-educated parents who understand how to prepare for standardized tests perform better on standardized tests.<sup>69</sup> But the contribution of parental education and social status is more far-reaching. American-born middle and upper-class parents are knowledgeable, involved, and socially connected, steering their children's high school experiences to increase chances of elite college admissions, while developing their ability to take advantage of their social milieu. Privileged parents not only improve students' academic performance, but also provide their children with social access and skills to propagate their families' privileged social status. Parents' increasing involvement in college preparation—starting as early as kindergarten<sup>70</sup>—reflects an intensified effort to maintain their status, adding to the inequality of opportunity.<sup>71</sup>

American-born parents tend to steer their children's social development, which is crucial to taking advantage of non-academic college opportunities. Parents cultivate their children's independence and academic risk-taking, emphasizing richness of experiences rather than merely grades.<sup>72</sup> Their children are taught to interact with others, and to live independently before going off to college. For example, privileged students tend to attend or work at summer camps, and to travel with their athletic teams or extracurricular clubs.<sup>73</sup> Their parents and social networks also teach them to be more assertive and discriminating during the college-

69. Jennifer M. Chacón, *Race As a Diagnostic Tool: Latinas/os And Higher Education in California, Post-209*, 96 CAL. L. REV. 1215, 1233 (2008).

70. Rachel Toor, *Pushy Parents and Other Tales of the Admissions Game*, CHRON. OF HIGHER EDUC., Oct. 6, 2000, available at <http://chronicle.com/article/Pushy-ParentsOther-Tales/28088>.

71. JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 546 (2005).

72. ESPENSHADE & RADFORD, *supra* note 8, at 9.

73. STUBER, *supra* note 59, at 46.

application process.<sup>74</sup>

The role of privilege affects students' educational experiences from the day they begin their formal education.<sup>75</sup> Middle-class parents who graduated from (American) college are more likely to guide their children through the educational system, steering them toward elite institutions,<sup>76</sup> and improving their subsequent social mobility.<sup>77</sup> Parents' educational attainment and professional, executive, or managerial occupations are correlated with top-college admissions.<sup>78</sup> After all, they have the "cultural capital" to realize how to improve their children's chances of getting accepted by selective colleges, and the willingness to pursue such strategies.<sup>79</sup> They encourage their children's extracurricular involvement because they know that it aids college admissions (especially to selective colleges)<sup>80</sup> and facilitates the replication of their families' social capital.<sup>81</sup> They also have the know-how to enroll their children in schools other than the neighborhood public schools to which they get assigned. This push for their children to attend better schools has been associated with admission to selective colleges.<sup>82</sup>

In addition to interacting effectively with high school guidance counselors,<sup>83</sup> privileged parents spare no expense in making their children more appealing in the eyes of college admissions committees. In addition to hiring private standardized-test tutors and college-admission coaches, some enroll their children in outside-of-school college-preparatory

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74. *Id.* at 39.

75. See, e.g., Jenny Anderson, *Is This The Best Education Money Can Buy?*, N.Y. TIMES, May 5, 2013, at MM46. Privilege also affects children's informal education at home, as parents pass and teach their children how to access social capital.

76. ESPENSHADE & RADFORD, *supra* note 8, at 19.

77. Marc Parry et al., *The Gates Effect*, CHRON. HIGHER EDUC., July 14, 2013, available at <http://chronicle.com/article/The-Gates-Effect/140323/>.

78. ESPENSHADE & RADFORD, *supra* note 8, at 153-55.

79. *Id.* at 61.

80. Valerie Cruice, *Seeking an Early Edge Into Elite Colleges*, N.Y. TIMES, May 28, 2000, at 14CN.

81. STUBER, *supra* note 59, at 29.

82. ESPENSHADE & RADFORD, *supra* note 8, at 124.

83. *Id.* at 19.

courses.<sup>84</sup> Academic enrichment programs, especially if they are sponsored by universities, are considered very valuable by admissions officers.<sup>85</sup> Privileged parents also encourage and pay to prepare their children to take a large number of advanced-level standardized tests,<sup>86</sup> which is correlated with admission to selective colleges.<sup>87</sup> And on a day-to-day basis, American-born parents have the skills and knowledge to be heavily involved: They assist their children with homework, college research, and applications; they keep their children on track in terms of high school activities that will make them succeed in college; and they encourage early-admission applications—which have higher acceptance rates.<sup>88</sup> American parents also take their children on college tours<sup>89</sup>—viewed positively by admission officers.<sup>90</sup> Some parents even take time off from work to assist with the college-preparation and application process.<sup>91</sup> Their college-educated family members and contacts can offer additional guidance.<sup>92</sup> Through all these methods, American families use their social and cultural capital to “guard against losing ground in the status and economic security game.”<sup>93</sup>

Institutions of primary and secondary education propagate and reinforce privileged status and access to social capital of native-born students, who are expected to join the ranks of the group in which they were reared. In addition to offering academic and extracurricular opportunities, schools help to

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84. Tamar Lewin, *How I Spent Summer Vacation: Going to Get-Into-College Camp*, N.Y. TIMES, Apr. 18, 2004, at 1.1; Rachel Hartigan Shea & David L. Marcus, *America's Best Colleges: The Competition is Keener Than Ever; Here's What You Need to Know to Get A Spot at the School You Choose*, U.S. NEWS & WORLD REPORT 131(10): 88-96, Sept. 17, 2001.

85. KATHERINE COHEN, THE TRUTH ABOUT GETTING IN: A TOP COLLEGE ADVISOR TELLS YOU EVERYTHING YOU NEED TO KNOW (2002).

86. ESPENSHADE & RADFORD, *supra* note 8, at 19.

87. COHEN, *supra* note 85.

88. ESPENSHADE & RADFORD, *supra* note 8, at 19.

89. *Id.*

90. STUBER, *supra* note 59.

91. Kate Zernike, *Ease Up, Top Colleges Tell Stressed Applicants*, N.Y. TIMES, Dec. 7, 2000, at A2.

92. ESPENSHADE & RADFORD, *supra* note 8, at 29.

93. PATRICIA M. McDONOUGH, CHOOSING COLLEGES: HOW SOCIAL CLASS AND SCHOOLS STRUCTURE OPPORTUNITY 119 (1997).

determine who attends what type of college. Teachers and guidance counselors act as early gatekeepers,<sup>94</sup> shaping students' expectations as to what academic path is appropriate for them. Private (especially college-preparatory) high schools, which produce the majority of those enrolled at elite colleges,<sup>95</sup> facilitate admissions to selective colleges, even cultivating relationships with admissions officers.<sup>96</sup> Of course, several of the most elite private high schools were created over a century ago to circumscribe access to social privilege, as a response to the threat of dilution of privileged-class power by socially-undesirable Caucasian immigrants.<sup>97</sup> Along with parents, private high schools continue to propagate access to privilege.<sup>98</sup>

## 2. Colleges Valorize Social Capital That Privileged Students Possess

With access to the white privileged class,<sup>99</sup> and the ability to propagate privilege,<sup>100</sup> "elite higher education plays an important role in the intergenerational production and

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94. ESPENSHADE & RADFORD, *supra* note 8, at 20.

95. KARABEL, *supra* note 71.

96. ESPENSHADE & RADFORD, *supra* note 8, at 40-41. The name itself of "college preparatory" schools reveals their orientation. Some elite high schools, such as those belonging to the Ivy Preparatory School League of New York City, emphasize—and take advantage of—their connection to elite colleges. Robert Kennedy, *What Is the Ivy Preparatory School League?*, ABOUT.COM, <http://privateschool.about.com/od/schools/g/ips1.htm> (last visited Jan. 23, 2013).

97. KARABEL, *supra* note 71, at 164. Elite colleges intensified their exclusion of immigrants by imposing higher academic-standard requirements to applicants from public schools. *Id.* at 175, 189. Combined with a strong preference for sons of alumni and those from prestigious boarding schools, top colleges practiced "a policy of vigorous affirmative action for the privileged." *Id.* at 199.

98. GOLDEN, *supra* note 10.

99. For a thorough discussion of the network economic effects of "whiteness," see Brant T. Lee, *The Network Economic Effects of Whiteness*, 53 AM. U. L. REV. 1259 (2004).

100. See generally KARABEL, *supra* note 71; see also Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 957-59 (1996) (noting how the present admissions system "is unfair for people who are neither women nor people of color," and how it "gives preference to candidates who enjoy privileged socioeconomic positions").

maintenance of social inequality in the United States.”<sup>101</sup> In recent years, elite colleges have been transmitting privilege increasingly to children of families who already have access to privilege.<sup>102</sup> Admission policies at top colleges continue to favor those endowed with “cultural capital” that is reproduced by top colleges—over those who are disadvantaged in any way.<sup>103</sup>

The most obvious example of how elite colleges replicate inequality is through admissions preferences for alumni’s children, who tend to be raised in economically and socially privileged families.<sup>104</sup> Legacy applicants are generally at least twice as likely to be accepted as non-legacy applicants.<sup>105</sup> In 2002, for example, legacies were admitted at the ratio 2.4 times higher than non-legacies at Yale, 4.1 at Harvard, and 3.4 at Princeton.<sup>106</sup> The advantage of being a legacy exists even when researchers control other factors such as standardized test scores, racial minority status, and athletic skills.<sup>107</sup>

Beyond legacy preferences, schools have other ways of recognizing and preferring students with access to social capital. The concept of “merit” is heavily concentrated among the scions of the privileged<sup>108</sup>—be it economic, cultural, or social privilege—because it is the privileged who define it. In addition to considering students’ academic potential, colleges spot privileged students by taking into account subjective “character” traits and by trying to predict whether applicants will take advantage of and contribute to campus life.<sup>109</sup> Thus, elite colleges scrutinize letters of recommendation, personal interviews, extracurricular activities, and “highly subjective qualities such as ‘character,’ ‘personality,’ and ‘leadership,’”<sup>110</sup>

101. ESPENSHADE & RADFORD, *supra* note 8, at 338.

102. *Id.* at 380.

103. KARABEL, *supra* note 71, at 549.

104. *Id.* at 506.

105. Jacques Steinberg, *College-Entrance Preferences for the Well Connected Draw Ire*, N.Y. TIMES, Feb. 13, 2003, at A24.

106. KARABEL, *supra* note 71, at 521.

107. Thomas J. Espenshade et al., *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 SOC. SCI. Q. 1422 (2004).

108. KARABEL, *supra* note 71, at 549.

109. ESPENSHADE & RADFORD, *supra* note 8, at 75.

110. KARABEL, *supra* note 71, at 1.

ensuring that those admitted will be assimilable into collegiate life<sup>111</sup> and will form life-long ties with their classmates.<sup>112</sup>

Personal interviews became required at some elite colleges in the 1920s, to screen out those socially undesirable and to prevent the dilution of white privilege.<sup>113</sup> (At that time, they were used to screen out Eastern European Jewish immigrants, considered unacceptable by the privileged native-born white Protestants with Anglo-Saxon backgrounds.)<sup>114</sup> Before then, Yale, Harvard, and Princeton had relied almost exclusively on academic merit as their admissions criterion, like the most prestigious foreign universities continue to do to this day.<sup>115</sup> Through the introduction of an opaque, discretionary admissions system—akin to standards for admission at select private clubs—elite schools adapted to maintain their ties to those with privilege.<sup>116</sup> Since “a university will retain a particular admissions policy only so long as it produces outcomes that correspond to perceived institutional interests,”<sup>117</sup> one wonders what gatekeeping purposes they continue to serve today.

Attending top private high schools matters greatly in elite college admissions. Between 37% and 47% of admits at Yale, Harvard, and Princeton in 2001 were from private schools, even though only approximately 11% of American students graduate from such schools.<sup>118</sup> “[A]t the Big Three . . . the children of the culturally captaled enjoy a massive advantage in the competition for admission,” and those “not so endowed find themselves effectively excluded from the race before it begins.”<sup>119</sup> As one scholar has noted, “institutions of higher education valorize the cultural and social resources of

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111. *Id.* at 90.

112. *Id.* at 86.

113. *Id.* at 131.

114. *Id.* at 1-2.

115. Melissa Stanger, *The Biggest Difference Between Applying To College In The US vs. The UK*, BUS. INSIDER (Oct. 9, 2012), <http://www.businessinsider.com/college-admissions-processes-around-the-world-2012-10>.

116. KARABEL, *supra* note 71, at 2-4.

117. *Id.* at 2.

118. *Id.* at 522.

119. *Id.* at 556.

privileged students. . . .”<sup>120</sup>

The “definition of ‘merit’ . . . expresses the ideals and interests of . . . [the elite] dominant groups.”<sup>121</sup> Given how subjective and flexible college admissions decisions are, that bias can influence various stages of the admissions process: initial recruitment of applicants, application review, interviews (if applicable), and ultimately, admission decisions. At elite colleges, directors of admissions tend to have privileged backgrounds.<sup>122</sup> The most selective colleges include personal alumni interviews as part of the application process.<sup>123</sup> Not surprisingly, admission rates “are generally higher for students from more privileged backgrounds.”<sup>124</sup>

### 3. Privileged Students Are Groomed to Take Advantage Of Collegiate Social Networks, Amplifying Their Families’ Access to Privilege

“[C]ampus life is better characterized as a microcosm of the wider society. . . . the privilege or disadvantage associated with race and social class might not be so easily erased.”<sup>125</sup> High school educational disadvantages are linked to student outcomes in college,<sup>126</sup> which exacerbate academic disadvantages of attending a less-than-stellar high schools. More importantly, social privilege gets propagated and

120. STUBER, *supra* note 59, at 30.

121. KARABEL, *supra* note 71, at 4.

122. Yale’s Dean of Undergraduate Admissions, for example, is a Phi Beta Kappa and *magna cum laude* graduate of Yale College. *Alumnus Jeremiah Quinlan Named Next Dean of Undergraduate Admissions*, YALE NEWS, (Apr. 12, 2013), <http://news.yale.edu/2013/04/02/alumnus-jeremiah-quinlan-named-next-dean-undergraduate-admissions><http://news.yale.edu/2013/04/02/alumnus-jeremiah-quinlan-named-next-dean-undergraduate-admissions>.

123. See, e.g., , *Interviews for Freshmen Applicants*, YALE COLL. UNDERGRADUATE ADMISSIONS, <http://admissions.yale.edu/interviews> (last visited April 28, 2014); *Interviews*, HARVARD COLL., <https://college.harvard.edu/admissions/application-process/what-we-look/interviews> (last visited April 28, 2014).

124. ESPENSHADE & RADFORD, *supra* note 8, at 70.

125. *Id.* at 6.

126. Jason Fletcher & Marta Tienda, *Race and Ethnic Differences in College Achievement: Does High School Attended Matter?*, 627 ANNALS. AM. ACAD. POL. & SOC. SCI. 144, 146 (2010).

multiplied for those with preexisting access to it. For American-born students, “family members who have graduated from college, in general, and from their chosen college, in particular, help[] shape their path to college and enhance[] their understanding of what to expect once they g[e]t there.”<sup>127</sup> This grooming allows student to feel at home upon arrival on campus, which in turn facilitates their making friends and getting involved in social life on campus,<sup>128</sup> reinforcing and expanding any social advantage with which they had arrived.

In addition to easing transition to collegiate life,<sup>129</sup> developing social ties on campus enables students to more fully partake in all the benefits that American college education can impart. Having helped them find a college that is a good social fit,<sup>130</sup> privileged students’ families and friends inculcate in them the value of campus involvement, resume-building, and networking, and often provide invaluable information about specific opportunities.<sup>131</sup> In line with “the culture of intensive extracurricular participation that . . . pervade[s] childhood and adolescence[,] . . . college life in America has come to emphasize extracurricular and social involvements,<sup>132</sup> and resume building through employment and internship opportunities.<sup>133</sup> Students reared in families with social capital are well prepared for this.

Extracurricular engagement benefits students’ learning and personal development, and serves them beyond college.<sup>134</sup> Privileged students have the social and cultural capital to appreciate the value of extracurricular involvement, and the cultural and social skills to partake of it.<sup>135</sup> Confidence and

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127. STUBER, *supra* note 59, at 39.

128. *Id.*

129. *Id.* at 34.

130. *Id.*

131. *Id.* at 76-78. After college, that same support from family members and social networks helps students find employment opportunities appropriate for their social status. KASINITZ ET AL., *INHERITING THE CITY*, *supra* note 46, at 94-95. That, however, is beyond the scope of this Article. For a discussion of some aspects of white immigrants’ experiences in the employment market, see Myslinska, *supra* note 12.

132. STUBER, *supra* note 59, at 2.

133. *See generally id.*

134. *Id.* at 62-65.

135. STUBER, *supra* note 59, at 65-69. Extracurricular involvement relies



comfort with strangers and new environments eases students' way into building new social capital in college.<sup>136</sup> This reproduces their access to social capital as their new friends provide them with information about academic and non-academic aspects of college life.<sup>137</sup> Thus, leaving home with a cultural understanding that college life involves meeting new friends, attending social events, and networking enables privileged students to easily transition into that lifestyle, particularly since they find themselves surrounded by others with similar backgrounds.<sup>138</sup>

Social skills get reproduced through the non-academic aspects of college life.<sup>139</sup> Privileged students arrive on campus with the social<sup>140</sup> and cultural<sup>141</sup> skills and networks that allow them to take advantage of activities such as student government, study-abroad programs, and Greek life. Those involvements facilitate their access to further networking while in college, and to subsequent social and employment opportunities after college,<sup>142</sup> by sharpening skills such as affability and charisma, which the privileged groups value.<sup>143</sup> In this way, social stratification is reproduced,<sup>144</sup> particularly as students tend to seek out others of similar backgrounds.<sup>145</sup>

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on "your ability to have a superficial conversation. It's a lot about selling yourself. . . it's about being able to say, 'Oh, well, I did this in high school.'" *Id.* at 71.

136. *Id.* at 71.

137. *Id.* at 47.

138. *Id.* at 48-50.

139. *Id.* at 4-9.

140. Stuber defines "social capital" as "embodied in students' social networks," and providing "encouragement to participate, knowledge of opportunities, as well as pathways of connections that solidify involvement" in college life beyond academics. *Id.* at 13.

141. Stuber defines "cultural capital" as embodied in "students' beliefs about the desirability, usefulness, or feasibility of cultivating an extensive social life or becoming involved [in] particular activities." *Id.* at 13-14.

142. *Id.* at 4.

143. *Id.* at 13.

144. *Id.* at 6.

145. ESPENSHADE & RADFORD, *supra* note 8, at 7; *see also* TATUM, *supra* note 5, at 55. For a discussion of unconscious preferences for in-group members, *see* WILLIAM G. AUSTIN & STEPHEN WORCHEL, *THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS* (1979); Marilynn B. Brewer, *The Psychology of Prejudice: Ingroup Love Or Outgroup Hate?*, 55 J. SOC. ISSUES 429, 438 (1999); Christopher L. Aberson et al., *Ingroup Bias and Self-Esteem*:

B. *Lack of Access to Social Privilege Negatively Affects White Immigrant Students' School Experiences and Their Ability to Access Social Capital*

Despite having constituted approximately 9-12% of annual permanent immigration to the United States during the last decade,<sup>146</sup> European immigrants are ignored in public and scholarly discussions.<sup>147</sup> Some reasons for this lack of attention might be that they do not inspire the majority's fear of "the Other" like racialized groups do,<sup>148</sup> their relatively small numbers do not evoke nativist responses, and their data indicators tend to be similar to those of native-born whites: They have similar rates of obtaining bachelor's degrees, and higher rates of members with master's degrees;<sup>149</sup> their poverty rates are comparable;<sup>150</sup> they tend to have higher marital rates,<sup>151</sup> and smaller household sizes<sup>152</sup>; and their individual income tends to be comparable, if not slightly higher.<sup>153</sup> Many of them are considered to belong to the "middle-class."<sup>154</sup>

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*A Meta-Analysis*, 4 PERSONALITY & SOC. PSYCHOL. REV. 157, 157-73 (2000).

146. Office of Immigration Studies, *2009 Yearbook of Immigration Statistics*, U.S. DEP'T OF HOMELAND SECURITY (Aug. 2010), *available at* [https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](https://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf); Randall Monger & James Yankay, *U.S. Legal Permanent Residents: 2011*, U.S. DEP'T OF HOMELAND SECURITY (April 2012), *available at* [http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr\\_fr\\_2011.pdf](http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2011.pdf); Joseph Russell & Jeanne Batalova, Migration Policy Inst., *European Immigrants in the United States*, MIGRATION INFO. SOURCE, (July 26, 2012), <http://www.migrationinformation.org/usfocus/print.cfm?ID=901>.

147. Caucasian immigrants themselves inadvertently might be contributing to this silence. Some are uncomfortable acknowledging that they are not fully absorbed into the American norm despite being white. *See, e.g.*, Interview with Philip Nowak in Waterford, N.Y. (Nov. 28, 2012). Furthermore, some might have absorbed the dominant rhetoric of silence in an attempt to assimilate.

148. *See, e.g.*, Alberto Pizano, *Fear of Immigrants: Conservatives Embracing Extremists' Themes*, SANTA BARBARA INDEP (July 27, 2011), <http://www.independent.com/news/2011/jul/27/fear-immigrants/>.

149. *See* Myslinska, *supra* note 12 at \_ n. 88).

150. *Id.* at \_ n. 89).

151. *Id.* at \_ n. 90).

152. *Id.* at \_ n. 91).

153. *Id.* at \_ n. 92).

154. "Middle class" is vaguely defined as falling between upper and working classes, and including professionals and skilled workers who share "common social characteristics and values." *Middle Class Definition*,

One must look beyond numbers alone, however, to fully understand the white immigrant experience. They are not “real” Americans: Every time others notice their foreign heritage, they are culturally marked as foreigners.<sup>155</sup> Their interactions with schoolmates are often characterized by ethnic separation, as we all prefer spending time with those who have the same cultural background and language as we do.<sup>156</sup> Whenever their foreignness becomes visible, their access to white privilege becomes limited, much like it is for “marginal whites.”<sup>157</sup> The elusive “white privilege” affords access to societal resources, advanced educational and employment opportunities, validation of one’s worldview as “normal,” and a sense of entitlement.<sup>158</sup> European immigrants lack consistent access to those perks, whenever they emerge out of invisibility.<sup>159</sup>

But the concept of foreignness has been conflated with non-Caucasian racial overtones.<sup>160</sup> Thus, the educational system overlooks white immigrants’ unique challenges. Compared to American-born parents, all immigrant parents tend to lack social capital and an understanding of the

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MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/middle%20class> (last visited April 28, 2014). In popular parlance, factors indicative of middle-class status include annual family income of between \$40,000 and \$100,000; owning a home; saving for children’s college education; taking vacations; having a secure job; and being able to invest for retirement. See Kim Peterson, *9 Ways to Know If You’re Middle Class*, MSN MONEY (Nov. 30, 2012), [http://money.msn.com/investing/c\\_galleryregular.aspx?cp-documentid=250284193](http://money.msn.com/investing/c_galleryregular.aspx?cp-documentid=250284193).

155. For a discussion of how white immigrants’ identities oscillate between being foreign and having occasional access to the cultural benefits of being the white norm, see Myslinska, *supra* note 12, at \_.

156. NOT JUST BLACK AND WHITE, *supra* note 17, at 11.

157. Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. R. 1497, 1505 (2010).

158. Lisa B. Spanierman & Mary J. Heppner, *Psychosocial Costs of Racism to Whites Scale: Construction and Initial Validation*, 51 J. COUNSELING PSYCHOL. 249, 252 (2004).

159. Ethnic identity is formed through (1) one’s own voluntary identification, and (2) involuntary identification by others. Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 SOC. PROBS. 158, 161 (1994).

160. Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among ‘We the People,’* 76 OR. L. REV. 233, 235 (1997).

educational system, which are instrumental in helping to propel native-born students toward good college education and beyond.<sup>161</sup> High schools tend to be unable to compensate—lacking sufficient resources, ignoring the fact that non-racialized immigrants need extra guidance, or not even realizing that some students are foreign-born (especially if they lose accented speech).<sup>162</sup> With no one to turn to, immigrant students navigate high schools and the college-application process alone, not recognizing some of the traits that American colleges value. College admissions committees value social capital and privilege, which immigrant students lack. By not fully taking into account European immigrants' unique backgrounds and their lesser access to social and cultural capital that is critical in accessing and taking advantage of quality education, schools also ignore these students' ability to contribute to white intra-group diversity.

#### 1. Alienation and Lack of Guidance Mark the High School Experience of Immigrant Students

Learning English is widely acknowledged as critical to immigrants' integration, civic engagement, and access to opportunities.<sup>163</sup> Thus, many school-age immigrants<sup>164</sup> are provided public assistance with learning English.<sup>165</sup> A small

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161. See Part IA, *supra*.

162. Interview with Philip Nowak, *supra* note 147.

163. SCHUCK, *supra* note 3, at 107.

164. For those who emigrate after the completion of their secondary studies, their opportunities to obtain free assistance with learning English become limited. Although universities are beginning to acknowledge that less-than-fluent English might pose difficulties in an academic setting, and thus some provide ESL classes, this assistance tends to be limited to foreign students. 164. Those arriving as adults qualify for free ESL programs only if they are refugees or asylees, and happen to live in areas that provide refugee resettlement assistance programs. See, e.g., *Welcome from IRC New York and New Jersey*, INT'L RESCUE COMM., <http://www.rescue.org/welcome-irc-new-york-and-new-jersey> (last visited April. 28, 2014).

165. See, e.g., Paul J. Hopstock et al., *Descriptive Study of Services to Limited English Proficient Students, Vol. II*, U.S. DEPT OF EDUC. 96 (June 1993). See also Niskayuna Cent. School Dist., *English as a Second Language* (2007-2008), available at <http://fc.niskyschools.org/~dfennelly/ESL%20BROCHURE.PDF>. The 2001 No Child Left Behind Act requires all public schools to help ESL students

percentage—those who are refugees or asylees,<sup>166</sup> and happen to live in select metropolitan areas—might also be provided additional assistance.<sup>167</sup> Unlike racial-minority immigrants,<sup>168</sup> however, Caucasian immigrants are not provided special acculturation support by schools. Such acculturation support can partially compensate for immigrants' lack of social and cultural capital at arrival, and can lessen alienation.

It is true that immigrant children of all races tend to achieve highly academically, especially if they arrive in the United States before they are teens.<sup>169</sup> Academic success is partly attributed to immigrants' straddling two cultures, which makes them faster learners.<sup>170</sup> Moreover, immigrant parents tend to emphasize education as the means to reaching the American Dream.<sup>171</sup> Despite learning English and getting good

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become *proficient* in English, as measured by objective test scores. See 20 U.S.C. § 6913(a)(2) (2002). This allows schools to adopt a variety of approaches. With the recent economic recession, some public schools are electing to “immerse” immigrant children in only-English classes instead of devoting resources to ESL programs. See Grace Chen, *Inclusion or Exclusion? The ESL Education Debate*, PUB. SCH. REVIEW (Apr. 7, 2009), available at <http://www.publicschoolreview.com/articles/95>. Of course, not all ESL programs are successful, and some students remain in them after more than five years. See, e.g., Chancellor's Report on the Education of English Language Learners 7-8 (N.Y.C. Bd. Of Educ., Dec. 19, 2000).

166. Europeans comprise an increasingly small percentage of all refugees and asylees arriving in the United States. Joseph Russell & Jeanne Batalova, Migration Policy Inst., *Refugees and Asylees in the United States*, MIGRATION INFO. SOURCE (Sept. 27, 2012), <http://www.migrationinformation.org/feature/display.cfm?ID=907>.

167. See generally Kirk Semple, *In New York, With 6 Weeks to Adapt to America*, N.Y. TIMES, Aug. 25, 2012, at MB1 (describing the six-week long Refugee Summer Youth Academy for newly-arrived refugee and asylee children in New York City).

168. See generally Jenny Anderson, *Admitted, but Left Out*, N.Y. TIMES, Oct. 21, 2012, at MB1. Many states provide special initiatives for racial-minority students only, overlooking immigrant background per se. See, e.g., Lizette Alvarez, *Florida Officials Defend Racial and Ethnic Learning Goals*, N.Y. TIMES, Oct. 17, 2012, at A20; *Minority Achievement Programs and Services*, ARLINGTON PUB. SCH., <http://apsva.us/Page/2525> (last visited April 28, 2014).

169. Sandra Lilley, *Study: First Generation Immigrant Children Do Better in School than US-Born Kids*, NBC LATINO, Sept. 11, 2012, <http://nbc-latino.com/2012/09/11/study-first-generation-immigrant-children-do-better-in-school-than-us-born-kids/>.

170. *Id.*

171. Telephone Interview with Martina Poon (Dec. 15, 2012); Interview

grades, however, immigrant children feel alienated.<sup>172</sup> Unable to know all of the American childhood cultural nuances of TV shows, toys, games, and pastime activities, they often find it difficult to relate to and to interact with native-born students.<sup>173</sup> Due to their relatively small numbers, European-born children have few classmates to whom they can relate. This sense of alienation often gets reinforced by their families' parenting approaches that emphasize academic performance only. For example, some European-born parents consider traveling overseas with language clubs or with classmates on spring break as overly permissive.<sup>174</sup> Since schools tend to have special support programs only for racial minorities, European-born students' voices remain unheard.

Not having experienced it themselves, their parents are unable to guide them through the American educational system.<sup>175</sup> Used to good-quality public schools in Europe, parents might not even understand the importance of being selective about which high school to attend. Less-competitive high-schools not only have fewer resources to help students, but also get their GPAs discounted in college-admission decisions.<sup>176</sup> Furthermore, immigrant parents' engagement with school environments—which has been shown to be crucial to student success<sup>177</sup>—might be hampered, especially if they do not speak English fluently or come from cultures that show more deference to teachers.<sup>178</sup> In addition, for some immigrant students, communication with their parents becomes hampered

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with Marta Mentrak in Albany, NY (Apr. 3, 2012).

172. Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171.

173. Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171.

174. Interview with Philip Nowak, *supra* note 147; Interview with Martina Poon, *supra* note 171.

175. Educational systems in Europe place greater emphasis on academic performance rather than on extracurricular or social engagement. Stanger, *supra* note 115.

176. KARABEL, *supra* note 71.

177. , *See generally Resources in the Field of Immigrant Education (PreK-12)*, AM. IMMIGRANT POL'Y PORTAL, [www.usdiversitydynamics.com/nj/id9.html](http://www.usdiversitydynamics.com/nj/id9.html) (last visited April 28, 2014).

178. *See, e.g.*, Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171.

after the children adopt some American cultural mores, and because many children stop developing (or even regress) in their native-language ability after emigrating.<sup>179</sup> This distancing might be reinforced by some immigrant couples' marital strife that sometimes results from the stress of immigrating.<sup>180</sup>

In addition to not fully appreciating the importance of extracurricular activities to high school experience and college admissions,<sup>181</sup> immigrant parents are reluctant to allow their children to develop in non-academic ways because some fear American street violence and culture.<sup>182</sup> Children thus find it difficult to engage in non-academic activities, especially if they grow up outside of urban centers that have good public transportation and numerous public events.<sup>183</sup> Parents' long work hours and the frequency of both spouses' working further impede children's ability to get involved in such activities.<sup>184</sup> Thus, immigrant children are more likely to focus on grades and specific careers, rather than on goals such as happiness, popularity, or volunteering.<sup>185</sup> Tending to lack inheritances or networks here, many immigrant parents push their children to succeed academically.<sup>186</sup> Feeling a sense of obligation to their

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179. Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171; Interview with Amila Dzebic in Charlotte, NC (Apr. 11, 2013); Interview with Kirill Fridkin in Falls Church, VA (Oct. 6, 2012).

180. Interview with Iwonna Myslinska in Schenectady, NY (Apr. 5, 2013); Interview with Alicja Nowak in Waterford, NY (Nov. 25, 2012).

181. Interview with Tatiana Fridkin in Falls Church, VA (Oct. 6, 2012); Interview with Iwonna Myslinska, *supra* note 180; Interview with Alicja Nowak, *supra* note 180; Interview with Amila Dzebic, *supra* note 179; Interview with Marta Mentrak, *supra* note 171.

182. Kasinitz, *Becoming American*, *supra* note 43, at 118; Interview with Iwonna Myslinska, *supra* note 180; Interview with Karina Grzegorzewska in Charlotte, NC (Feb. 12, 2013); Interview with Marta Mentrak, *supra* note 171.

183. Kasinitz, *Becoming American*, *supra* note 43, at 128-30.

184. Interview with Marta Mentrak, *supra* note 171; Interview with Philip Nowak, *supra* note 147; Kasinitz, *Becoming American*, *supra* note 43, at 131.

185. Interview with Kirill Fridkin, *supra* note 179; Interview with Philip Nowak, *supra* note 147; Interview with Piero Massimino in New York, NY (May 20, 2012).

186. Interview with Jan Myslinski in Schenectady, NY (July 15, 2012); Interview with Amila Dzebic, *supra* note 179; Interview with Kirill Fridkin, *supra* note 179; Kasinitz, *Becoming American*, *supra* note 43, at 149.

parents for making sacrifices while immigrating (which often results in a visible loss of professional or social status<sup>187</sup>) further pushes students to succeed academically and to overlook other components of their own development.<sup>188</sup>

Although European-born parents tend to support their children's college aspirations, they are unable to offer much advice with the college-search and application process,<sup>189</sup> similarly to American-born parents who are not privileged.<sup>190</sup> In addition, immigrant children tend to have less exposure to collegiate environments before they attend college.<sup>191</sup> Like the children of un-privileged native-born families,<sup>192</sup> they often end up attending specific colleges as a result of accidents rather than of targeted plans of action.<sup>193</sup>

More broadly, immigrant children of all races tend to lack the social capital of the dominant, privileged group which helps to navigate higher education and to be admitted to college.<sup>194</sup> Students' social capital can have two sources: (1) family and friends, and (2) community networks, institutions, and schools.<sup>195</sup> Cultural capital also facilitates access to other types of resources—such as cultural and financial capital—which improve educational, social, and emotional preparation for college.<sup>196</sup> Relationships with family members, friends,

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187. *Id.* at 110; Interview with Kirill Fridkin, *supra* note 179.

188. Andrew J. Fuligni, Migration Policy Inst., *Family Obligation Among Children in Immigrant Families*, MIGRATION INFO. SOURCE (July 1, 2006), <http://www.migrationinformation.org/Feature/display.cfm?ID=410>.

189. Interview with Paul Nowak in Waterford, N.Y. (July 15, 2012); Interview with Marta Mentrak, *supra* note 171; Interview with Kirill Fridkin, *supra* note 179; Interview with Amila Dzebic, *supra* note 179.

190. STUBER, *supra* note 59, at 41.

191. Interview with Philip Nowak, *supra* note 147; Interview with Iwonna Myslinska, *supra* note 180; Interview with Marta Mentrak, *supra* note 171; Interview with Amila Dzebic, *supra* note 179.

192. STUBER, *supra* note 59, at 41.

193. Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171; Interview with Kirill Fridkin, *supra* note 179; Interview with Amila Dzebic, *supra* note 179.

194. *See generally* Omari Scott Simmons, *Lost in Transition: The Implications of Social Capital for Higher Education Access*, 87 NOTRE DAME L. REV. 205 (2011).

195. *Id.* at 225-26.

196. *Id.* at 227-28; *see generally* KASINITZ, *INHERITING THE CITY*, *supra* note 46; KARABEL, *supra* note 71.



teachers, counselors, social service workers, community contacts, and peers play a critical role in students' college selection and application process.<sup>197</sup> Those networks encourage preparation for standardized tests, help formulate college plans, assist in preparing college applications, and shape social and cultural expectations about college life.<sup>198</sup>

Unlike their native-born peers, Caucasian immigrant students experience obstacles in trying to rely on the social capital of their parents or on social networks. European-born immigrant families tend to have little information about the American educational system and have fewer housing options.<sup>199</sup> Many are also overworked, and struggle with their own assimilation process and loss of social status.<sup>200</sup> Unless they are informed by their local networks or by ethnic media,<sup>201</sup> they might remain unfamiliar with the importance of attending a high-performing high school, about the steps that need to be taken to accomplish that, and about how to prepare for college admissions successfully.<sup>202</sup> They tend to have few friends, family members, or colleagues in positions of social power here.<sup>203</sup> With the exception of few ethnically-homogenous enclaves, they also lack community networks that can compensate for lack of access to social capital. Most immigrants never enter the socially-privileged world reserved for native-born families.

Students whose families lack social capital are more likely to rely on high school counselors and teachers to guide them in their college-application process.<sup>204</sup> Similarly, immigrant

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197. Stephen B. Plank & Will J. Jordan, *Effects of Information, Guidance, and Actions on Postsecondary Destinations: A Study of Talent Loss*, 38 AM. EDUC. RES. J. 947, 950-51 (2001).

198. *Id.* at 951.

199. KASINITZ ET AL., INHERITING THE CITY, *supra* note 46, at 150.

200. Interview with Jan Myslinski, *supra* note 186; Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171.

201. KASINITZ ET AL., INHERITING THE CITY, *supra* note 46, at 152.

202. Interview with Marta Mentrak, *supra* note 171; Interview with Amila Dzebic, *supra* note 179.

203. Interview with Jan Myslinski, *supra* note 186; Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171.

204. Simmons, *supra* note 194, at 229.

children are forced to rely more on school-based resources.<sup>205</sup> In addition to often being overburdened by the large number of students assigned to them, public high-school counselors lack the appropriate training and awareness to help alleviate students' lack of social capital.<sup>206</sup> Moreover, Caucasian immigrant children who lose external markings of foreignness are sometimes mistaken for natives, so school administrators and teachers are unaware of their special needs.<sup>207</sup> Even at private or at better-funded schools, counselors tend to encourage students from more privileged backgrounds to attend more selective colleges.<sup>208</sup> Inadequate high-school counseling has been linked with challenges in the college application and enrollment process, college under-matching, and haphazard college choices among even highly-achieving, yet vulnerable (i.e., lacking access to social capital) students. This has led to the "reinforcement of two distinct higher education systems[:] a selective higher education market serving the privileged and a less selective market serving the underprivileged."<sup>209</sup> Many immigrant students are relegated to the latter.

2. Lack of Access to Social Capital of Foreign-Born Students and Lesser Extracurricular Involvement Compromise Their Ability to Gain Admission to Colleges, Which Value "Character" Traits

Although going to college is commonly expected among European-American families,<sup>210</sup> college preparation and the application process are daunting for immigrant students. Like non-white students,<sup>211</sup> immigrants have little accumulated

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205. Interview with Philip Nowak, *supra* note 147; Interview with Iwonna Myslinska, *supra* note 180; Interview with Marta Mentrak, *supra* note 171.

206. Simmons, *supra* note 194, at 241-44.

207. Interview with Philip Nowak, *supra* note 147.

208. Simmons, *supra* note 194, at 229.

209. *Id.* at 213-18.

210. Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* 171.

211. Some scholars have noted certain commonalities in the experience of all immigrant groups and Afro-Americans, which affect having a sense of

social wealth, and they receive little parental guidance. Despite their high academic achievement, gaining admission to college presents a challenge for immigrants: Legacy-based and networking-based admissions are just two options typically not available to them. Furthermore, the more elite the college, the more it seeks students with appropriate “character,” non-academic pursuits, and with access to social capital,<sup>212</sup> which immigrants lack.

Colleges look to applicants’ engagement in extracurricular activities, work experience, plans for social involvement in college, and presence of family members with ties to the school.<sup>213</sup> In looking beyond academics, Yale considers “a lot of little things,” presumed to indicate who is likely to “make the most of Yale’s resources” and to “contribute most significantly to the Yale community.”<sup>214</sup> Ultimately, Yale inquires into applicants’ “character,”<sup>215</sup> the trait initially implemented to ensure access to only the privileged elite and to close the doors to immigrants and other “undesirables.”<sup>216</sup> And, admissions officers look to predictors of good social fit.<sup>217</sup> Immigrant

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belonging and participatory citizenship. See, e.g., Jennifer Gordon & R. A. Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, 75 *FORDHAM L. REV.* 2493, 2512 (2007).

212. See *Id.* at PartIA2.

213. See *The Common Application for Undergraduate College Admissions*, COMMON APPLICATION, [https://www.commonapp.org/CommonApp/Docs/DownloadForms/2013/2013A ppFY\\_download.pdf](https://www.commonapp.org/CommonApp/Docs/DownloadForms/2013/2013A ppFY_download.pdf) (last visited April 30, 2014); see also *Harvard Application Supplement*, HARVARD UNIV., [https://admissions.college.harvard.edu/apply/forms/supplement\\_1213.pdf](https://admissions.college.harvard.edu/apply/forms/supplement_1213.pdf) (last visited April 30, 2014); *The Common Application Login*, COMMON APPLICATION, <https://www.commonapp.org/Login> (last visited April 30, 2014); *Harvard College Admissions & Financial Aid*, HARVARD COLL., <https://college.harvard.edu/admissions/apply> (last visited April 30, 2014). *Application Instructions & Components*, YALE COLL. UNDERGRADUATE ADMISSIONS, <http://admissions.yale.edu/instructions> (last visited April 30, 2014).

214. *What Yale Looks For*, YALE COLL. UNDERGRADUATE ADMISSIONS, <http://admissions.yale.edu/what-yale-looks-for> (last visited April 29, 2014).

215. *Advice on Putting Together Your Application*, YALE COLL. UNDERGRADUATE ADMISSIONS, <http://www.admissions.yale.edu/advice-putting-together-your-application> (last visited April 29, 2014).

216. KARABEL, *supra* note 71.

217. *Alumni Schools Committee*, YALE UNIV., <https://students.yale.edu/asc/ascdocs/guidelines/interview.jsp#thoughts> (last visited April 29, 2014) (noting the importance of factors such as applicants’

students tend to struggle with these criteria because they are reared to focus on academics, have small social networks, and lack guidance in how to appear more appealing to colleges.

It is true that American cultural acknowledgement of diversity “finds no parallel in any other society or culture in the world today.”<sup>218</sup> Multiculturalism<sup>219</sup> is a stated goal at many universities. Admissions diversity policies often encompass religion, sexual orientation, geographic location, class, age, physical ability, and mental ability.<sup>220</sup> Schools also view racial minorities and sometimes “ethnic minorities” as contributing to diversity, and thus, to be given special consideration in admissions.<sup>221</sup> This focus on diversity, however, does not equally benefit all students who deviate from the white privileged norm, and instead, it reflects dominant socio-

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verbal facility, enthusiasm, and openness). Interviews themselves screen students who possess cultural and social privilege, as they have greater cultural facility in communicating with the interviewers. *Id.*

218. ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS*, 18-19 (1997). Some note that diversity “has joined ‘family values’ and ‘good medical care’ as something that everyone is for. . . .” Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L. 573, 578 (2000). Other countries also pay attention to student-body diversity, defining it in unique culturally and politically-driven ways. For example, in India, disadvantaged castes are secured a specific percentage of university spots. Geeta Anand & Amol Sharma, *For India's Lowest Castes, Path Forward Is 'Backward,'* WALL ST. J., Dec 9, 2011. At South Korean law schools, at least 30% of admitted students must have majored in college in subjects other than pre-law. Rosa Kim, *The “Americanization” of Legal Education in South Korea: Challenges and Opportunities*, 38 BROOK. J. INT'L L. 49 (2012).

219. For a general discussion of the role of multiculturalism, see ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* 98-104 (1998).

220. See, e.g., *Diversity: Columbia Undergraduate Admissions*, COLUMBIA UNIV., <http://www.studentaffairs.columbia.edu/admissions/learn/studentlife/diversity> <http://www.studentaffairs.columbia.edu/admissions/learn/studentlife/diversity> (last visited April 29, 2014) [hereinafter *Diversity, Columbia Undergraduate*] (listing “ethnicity” as a factor to consider in admissions); see also *Diversity Action Plan—The Ohio State University*, OHIO STATE U., <http://www.osu.edu/diversityplan/index.php> (last visited April 29, 2014) [hereinafter *Ohio State, Diversity*] (listing “Ethnic minorities,” defined as Asians, Hispanics, Blacks, and Native Americans, as contributors to its goal of diversity).

221. See, e.g., *Diversity: Columbia Undergraduate*, supra note 220; see also *Ohio State, Diversity*, supra note 220.

political pressures.<sup>222</sup> Some scholars note how “diversity talk in America today is superficial and largely tactical.”<sup>223</sup> Since elite schools see no benefit from admitting students who lack social capital, white immigrants are easily overlooked. Only a few schools seek a broader goal of attaining “cultural” diversity or consider foreign origin as an attribute of multiculturalism and a factor in admissions.<sup>224</sup>

Depending on the institution, Caucasian immigrants might be considered to be just plain “white,” with no special attention given to their unique experiences or national origins, which can contribute<sup>225</sup> to diversity,<sup>226</sup> a compelling interest.<sup>227</sup> European-born students have experiences and multicultural knowledge

222. SCHUCK, *supra* note 3, at 4.

223. *Id.* at 7.

224. *See, e.g., Diversity at Rutgers*, RUTGERS UNIV., <http://diversityweb.rutgers.edu/mission.php> (last visited April 29, 2014) [hereinafter *Rutgers, Diversity*] (noting that it aims to increase diversity in terms of attaining a “broad spectrum of nations, [and] cultures,” paying attention to applicants’ “ethnicity, culture, . . . [and] national origin,” among other factors); *see also Equity and Diversity—Spokane Community College*, SPOKANE COMTY. COLL., <http://www.scc.spokane.edu/?edc> (last visited April 29, 2014) [hereinafter *Spokane, Diversity*] (mentioning “diverse backgrounds” and variety of “cultural perspectives” as contributing to multiculturalism).

225. The Common Application does inquire about students’ and their parents’ places of birth. The effect of this information on admissions decisions is not clear. Some admissions officers might consider foreign background to increase diversity; others might perceive it as indicative of not fitting in culturally on their campuses.

226. Unlike Caucasian immigrants, non-white immigrants have been shown to benefit from affirmative-action programs, although this effect is limited to immigrants with access to social capital. *See, e.g., DOUGLAS S. MASSEY ET AL., THE SOURCE OF THE RIVER: THE SOCIAL ORIGINS OF FRESHMEN AT AMERICA’S SELECTIVE COLLEGES AND UNIVERSITIES* (2002); Kate Carroll, *Study: Universities Prefer Foreign Black Students*, DAILY PRINCETONIAN (Mar. 7, 2007), available at <http://www.dailyprincetonian.com/new/2007/03/study-universities-prefer-foreign-black-student/> (noting that, although African immigrants comprise less than 1% of America’s population, first and second-generation black immigrants—who tend to be wealthy, attend private schools, and come from privileged backgrounds—constitute 41% of all black students at Ivy League schools). Latina/o immigrants are likewise overrepresented through affirmative-action admission policies for Hispanics. *Id.* This trend of attracting middle-class immigrants with access to cultural capital increases merely *facial* “diversity.” Philip Kasinitz, *Race, Assimilation and “Second Generations,” Past and Present*, in NOT JUST BLACK AND WHITE 278, 290 (hereinafter “Kasinitz, *Race, Assimilation and “Second Generations.”*).

227. *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

that set them apart from American-born white students. Furthermore, they often lack access to social capital, which sets them apart from economically comparable white American-born students. But their deviation from the white norm tends to be “white”-washed as our culture subscribes to the white-monolith myth, and as schools—especially elite ones—prefer to reward students with preexisting access to social privilege in order to maintain their own social status.

### 3. Immigrant Students Are Not Groomed to Take Advantage of College Opportunities That Propagate Social Capital and Privilege

Although college education helps to predict social mobility,<sup>228</sup> students who lack access to social capital are not well positioned culturally or socially to take advantage of that effect. Access to social capital and to information, and presence of symbolic cues that determine who belongs where in the social hierarchy—all of which are acquired through family socialization—get reinforced in college.<sup>229</sup> Social stratification reproduced in college results in hierarchies not only in later income or occupation, but also in cultural resources.<sup>230</sup> Thus, students socialized with privileged groups have a “leg up” on those who are only just becoming familiar with the culture of schools and the dominant classes.”<sup>231</sup> Immigrant students are not groomed to take advantage of all the socialization opportunities offered by college. Social isolation and the stress of not fitting in further hinder them. As schools lack special programs to support them, whatever access to social capital they possess when entering college tends not to get replicated.

Being a racial minority student<sup>232</sup> or belonging to a lower socioeconomic class has been found to be stressful for students.<sup>233</sup> All groups other than the dominant norm tend to

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228. STUBER, *supra* note 59, at 5.

229. *Id.* at 10.

230. *Id.*

231. *Id.*

232. TATUM, *supra* note 5, at 77.

233. See, e.g., ALFRED LUBRANO, LIMBO: BLUE-COLLAR ROOTS, WHITE-COLLAR DREAMS (2004); MICHAEL D. GRIMES & JOAN M. MORRIS, CAUGHT IN

be “labeled as defective or substandard in significant ways” by their peers.<sup>234</sup> Thus, all immigrant children experience stress on college campuses. Although they might feel academically prepared, European-born students are socially and culturally disadvantaged.<sup>235</sup> Like other “students and academics from less-privileged backgrounds [who] describe themselves as feeling alienated due to their lack of familiarity with the cultural codes and competencies of the privileged classes,”<sup>236</sup> immigrants find the social and extracurricular aspects of college life bewildering.<sup>237</sup> In response to alienation, some students elect not to participate in the social settings that prompt them to feel this isolation.<sup>238</sup> Many immigrants approach college in this way: Having experienced alienation in high school, and lacking familiarity with the trappings of the majority of their classmates, they withdraw.<sup>239</sup>

This isolation is reinforced by immigrants’ lack of preparation for the social component of college life. Like working-class students, who lack advice about what they should do to acclimate to college,<sup>240</sup> European-born students find the transition to college life difficult.<sup>241</sup> On the other hand, privileged students come to college equipped with the knowledge and skills to make new friends, get involved with campus activities, expand their social networks, and easily adapt to college life.<sup>242</sup> This adjustment is more difficult for European-born students,<sup>243</sup> who have trouble finding a niche on

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234. TATUM, *supra* note 5, at 23.

235. Interview with Paul Nowak, *supra* note 189; Interview with Amila Dzebic, *supra* note 179; Interview with Marta Mentrak, *supra* note 171.

236. STUBER, *supra* note 59, at 15.

237. *Id.* at 25.

238. *Id.* at 15.

239. Interview with Marta Mentrak, *supra* note 171; Interview with Kirill Fridkin, *supra* note 179; Interview with Amila Dzebic, *supra* note 179.

240. STUBER, *supra* note 59, at 35.

241. Interview with Marta Mentrak, *supra* note 171; Interview with Amila Dzebic, *supra* note 179; Interview with Kirill Fridkin, *supra* note 179; Interview with Paul Nowak, *supra* note 189.

242. STUBER, *supra* note 59, at 45.

243. Interview with Marta Mentrak, *supra* note 171; Interview with Amila Dzebic, *supra* note 179; Interview with Paul Nowak, *supra* note 189.

campus, particularly at elite schools that attract privileged students, and leave many immigrants feeling out of place.<sup>244</sup> Students who are not the privileged, white norm report the highest levels of dissatisfaction.<sup>245</sup> After all, “[w]hen feelings . . . are invalidated, most people disengage.”<sup>246</sup> The more privileged the other students are, the less they interact with social “outsiders” who deviate from their norm.<sup>247</sup> One of the most snobbish examples of this are the continuing restrictions on access to secret societies at elite schools, limited to the most elite white Protestants of Anglo-Saxon heritage,<sup>248</sup> as they have always been.<sup>249</sup> Thus, immigrant and racial-minority students are especially isolated at *elite* universities, which incidentally propagate access to privilege the most.

Immigrants’ focus on academics gets reinforced by, and reinforces, their social isolation. Similarly to American-born non-privileged students,<sup>250</sup> immigrants focus on academic work, as they did in high school. They do not consider extracurricular or social aspects of collegiate life important.<sup>251</sup> Also, like unprivileged white American-born students,<sup>252</sup> European-born students value study-abroad and resume-building opportunities less than privileged students do.<sup>253</sup>

Immigrants tend to lack guidance to take advantage of all the extra-academic benefits college can offer. “[T]echnically everybody can take advantage of everything college has to offer-regardless of background-if you really worked for it. But

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244. Interview with Amila Dzebic, *supra* note 179; Interview with Marta Mentrak, *supra* note 171; *see also* KASINITZ ET AL., INHERITING THE CITY *supra* note 46, at 166 (describing the culture shock experienced by some immigrant students in college).

245. ESPENSHADE & RADFORD, *supra* note 8, at 322.

246. TATUM, *supra* note 5, at 59.

247. ESPENSHADE & RADFORD, *supra* note 8, at 190.

248. Interview with Kirill Fridkin *supra* note 179.

249. KARABEL, *supra* note 70, at 113 (noting how Jews had been totally excluded from Yale’s senior societies).

250. STUBER, *supra* note 59, at 52-55.

251. Interview with Philip Nowak, *supra* note 147; Interview with Amila Dzebic, *supra* note 179; Interview with Marta Mentrak, *supra* note 171.

252. STUBER, *supra* note 59, at 72-73.

253. Interview with Philip Nowak, *supra* note 147; Interview with Amila Dzebic, *supra* note 179; Interview with Marta Mentrak, *supra* note 171.



in practice, that's not really do-able. You need people pushing you, steering you in the right direction. You need people who are in the know to help you out, and that's usually parents."<sup>254</sup> But, as in high school, immigrant parents emphasize academics and prefer that their children pursue "practical" majors to secure employment.<sup>255</sup> Researchers have noted how parental education level impacts students' educational experiences.<sup>256</sup> This effect, however, is limited to parents who obtained higher education in the United States.

Colleges fail to compensate for the social disadvantages faced by immigrants. European-born children have very few faculty role models, few courses that address their concerns, and few groups or centers that focus on their unique circumstances. When faced with the stress of not belonging<sup>257</sup> to the dominant class on campus, having a group with a shared identity to which one can turn for support is important for coping.<sup>258</sup> Due to their small numbers, cultural and linguistic differences, and partial invisibility, few European-born students find such support in one another.<sup>259</sup> Although special school programs and student groups exist for racial minorities, such support rarely exists for foreign-born Caucasians.<sup>260</sup> International-student groups offer some solace, although their members come from all corners of the world, and lack any attachment to America as their "home." European immigrants

254. STUBER, *supra* note 59, at 80.

255. Interview with Kirill Fridkin *supra* note 179; Interview with Marta Mentrak, *supra* note 171; Interview with Amila Dzebic, *supra* note 179; KASINITZ, *INHERITING THE CITY*, *supra* note 46, at 164.

256. STUBER, *supra* note 59, at 22.

257. See Brené Brown, *The Power of Vulnerability*, TED TALK (June 2010), *available at* [http://www.ted.com/talks/brene\\_brown\\_on\\_vulnerability.html](http://www.ted.com/talks/brene_brown_on_vulnerability.html) (discussing an innate drive to belong and connect with others.).

258. C. M. Pierce, *Mundane Extreme Environment and its Effects on Learning*, in *LEARNING DISABILITIES: ISSUES AND RECOMMENDATIONS FOR RESEARCH* 112 (S. G. Brainard ed., 1975).

<sup>259</sup>Interview with Philip Nowak, *supra* note 147; Interview with Marta Mentrak, *supra* note 171; Interview with Amila Dzebic, *supra* note 179.

260. One minor exception to the lack of special programs for white immigrants might be community colleges. See Joanna Chau, *Community Colleges Are Urged to Take Innovative Steps to Serve Immigrant Students*, *CHRON. HIGHER EDUC.*, Jan 16, 2012, *available at* <http://chronicle.com/article/Community-Colleges-Are-Urged/130364/>.

are left straddling two worlds—American yet outsider, not fitting smoothly into either—as opportunities to increase their access to social capital pass them by.

## II. Institutional Support for Immigrant Students Can Help Compensate For Their Deviation From The Norm, While Enabling Them to Contribute to Intra-Group Diversity

Law and policies define and shape how we are perceived, how we relate to others, and how we come to perceive ourselves.<sup>261</sup> The nostalgic myths of white immigrant<sup>262</sup> strife, suffering, and perseverance a century ago<sup>263</sup> get superimposed on contemporary European immigrants. Thus, their individual challenges—stemming to a large extent from their lack of access to social capital—are ignored in the educational system. Furthermore, their contribution to intra-group diversity gets overlooked. The effect of immigrant background—beyond issues of race or class—needs to be acknowledged and addressed in public discussions and in educational policies in order to benefit all immigrants, and in turn, all Americans.

### A. *Immigrant Students Require High School Support That Goes Beyond Their Academic Outcomes*

In order to be able to more fully participate in higher learning and in socio-political structures, immigrant students require special attention during their primary and secondary schooling. Whereas young children can learn English in only a few months, they take much longer to adapt culturally and to learn the non-academic skills that can facilitate their acquisition of social capital.<sup>264</sup> Learning English and

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261. NOT JUST WHITE & BLACK, *supra* note 17, at 16; Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 866 (2008).

262. In one study conducted in 1984-85, about 80% of U.S.-born whites were shown to experience some sort of—at least symbolic—ethnic identity, by partaking of some aspects of rituals and cultures of their European ancestors. See RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* (1992).

263. Vargas, *supra* note 16, at 1522-23.

264. See sources cited in *supra* note 259.

performing well academically are not synonymous with appreciating the extra-academic component of the educational system, which is critical to maximizing student engagement, increasing chances of acceptance by elite colleges, and improving student ability to take advantage of collegiate social-capital propagation.

Newcomer classes that focus on language skills alone overlook a critical component that contributes to students' well-being and education: having a sense of cultural belonging. Because today's European immigrants tend to live in heterogeneous neighborhoods<sup>265</sup> and attend schools where they are a numerical minority, neighborhood-wide programs addressing their needs are not appropriate.<sup>266</sup> Instead, schools should incorporate cultural-education materials into ESL classes for all immigrants (or create separate culture classes for those already fluent in English). If resources are limited, student or teacher mentors can be assigned to immigrant children to help them feel more accepted, and to aid them in better understanding the culture of their new home. Online learning resources can also facilitate this process,<sup>267</sup> especially if faculty members guide students' use of such resources.

Special school programs targeting racial minority or underperforming students have helped them integrate into all aspects of the educational system, beyond just academics.<sup>268</sup> All

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265. There are very few notable exceptions to this, such as the Brooklyn neighborhoods of Brighton Beach (heavily populated by Russian immigrants), and Greenpoint (heavily populated by Polish immigrants). Many racialized immigrants, on the other hand, live in more homogeneous neighborhoods, and are thus able to rely on strong community networks to help their children achieve social and academic success. *COLOR LINES*, *supra* note 26, at 24.

266. This can be contrasted with special initiatives for neighborhoods with very high immigrant concentrations, such as in the special-education zones in Paris. The Institut d'Etudes politiques de Paris, for example, has increased the percentage of students admitted from these zones, benefiting immigrants directly. Suzanne Daley, *Elite French College Tackles Affirmative Action*, N.Y. TIMES, May 4, 2001, at A4.

267. See, e.g., TEACH CHILDREN ESL, <http://www.teachchildrenesl.com> (last visited April 29, 2014); ESL-KIDS, <http://www.ESL-kids.com> (last visited April 29, 2014); ESL FOR KIDS, <http://www.esl-for-kids.com> (last visited April 29, 2014).

268. See, e.g., *Minority Achievement Programs and Services*, *supra* note 168.

children—regardless of their race—who lack full access to white privilege would benefit from similar initiatives. If school resources are limited and programs for minorities or underperforming students are well-developed, immigrant children might also benefit from participating in such already existing programs since all “outsiders” share some commonalities in not fitting in culturally with the norm. By proposing these measures, I am not suggesting that immigrants or others who do not fully belong to the norm should be expected to assimilate or lose aspects of their ethnic and cultural background. Instead, they should be provided with opportunities to access the system that currently disproportionately benefits those in positions of power.

Before any school programs can become effective, of course, schools must be made aware of how immigrant background *per se* affects student experience. Teachers, counselors, and staff should be trained to more easily recognize issues common to immigrant students, and how best to address them. Those issues span various interrelated concerns—practical (such as confusion about the college-application process), cultural (such as the importance of extracurricular and social involvement), and emotional (such as alienation). Schools should also facilitate more meaningful parental involvement. Immigrant parents should be enabled to mingle with native-born parents, in order to expand their social capital. Native-born parents should be encouraged to socialize with their foreign-born counterparts, by perhaps pairing families to create informal support networks or assigning parents of various backgrounds to small task groups. If parents’ poor English skills make engagement difficult, written materials could be prepared in their native languages. Finally, schools could pay attention to hiring educators who can relate to immigrant concerns.

Having mentors who understand their concerns and having special support programs would enable immigrant students to gain a voice and to feel less alienated.<sup>269</sup> Likely

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269. A similar initiative for black students in a formerly-segregated Boston suburban school had a dramatic impact on students’ emotional well-being, social behaviors, and academic performance. See B.T. Tatum et al., *Student Efficacy Training: An Evaluation of One Middle School’s Programmatic Response to the Eastern Mass. Initiative*, Apr. 9, 1996

results would include better adjustment, increased ability to contribute to their classmates' learning process, and greater readiness for college. Gaining a voice would increase their active participation in their own educational pursuits and in their civic engagement for years to come.

Some additional initiatives could include training teachers and counselors to recognize alienation and challenges with access to social capital; ongoing one-on-one teacher and guidance-counselor meetings with students; involvement of college-student "coaches" in high schools; extra-school advising for vulnerable students<sup>270</sup> (expanded to include all students who are not the norm); designating select counselors to college-counseling only<sup>271</sup>; and detailed data collection and reporting. If schools addressed immigrants' lack of social resources outside of school, they would help to ensure greater equality of opportunity in schools and beyond.

*B. Lacking Access to Social Capital, Immigrants Are Disadvantaged in Terms of Their Attractiveness to Admissions Committees, Despite Having the Ability to Contribute to Diversity*

Lacking social capital, immigrant students lack guidance in being steered toward social-skill and "character" building activities that colleges find appealing. Secondary schools tend to neglect this. All students who deviate from the norm need extra support in schools to become more appealing to colleges, which are the gatekeepers and propagators of social capital. Colleges also need to recognize that European-born immigrant

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(presented at the Am. Educ. Research Ass'n Annual Mtg., New York). The targeted students met every day as a group with two trained staff members to discuss homework and social issues, instead of attending physical education, home education, or study hall. *Id.* These meetings resulted in greater student engagement, improved self-esteem, less social isolation, and higher grades. *Id.*

270. *History of the Federal TRIO Programs*, U.S. DEPT OF EDUC., [www2.ed.gov/about/offices/list/oep/trio/triohistory.html](http://www2.ed.gov/about/offices/list/oep/trio/triohistory.html).

271. Whereas the vast majority of private schools have counselors devoted solely to college admissions, only about a quarter of public high schools do. Laura W. Perna et al., *The Role of College Counseling in Shaping College Opportunity: Variations Across High Schools*, 31 REV. HIGHER EDUC. 131, 153 (2008).

students make campuses more multicultural, increasing intra-group diversity.

1. Immigrant Students Require Guidance in Making Their Non-Academic "Character" Appealing to Colleges

Collegiate emphasis on factors beyond academic performance places immigrant students at a disadvantage. They lack access to well-established social networks of the dominant privileged group, which facilitates access to social skill-building volunteering, internship, and employment opportunities. Whereas participation in extracurricular activities is encouraged by native-born parents, European-born parents tend to undermine non-academic aspects of schooling.<sup>272</sup> That attitude can be attributed to European educational systems, which attach less importance to extra-academic experiences. Parents who have lesser access to the dominant social networks and are less acculturated are especially unlikely to appreciate the importance of non-academic experience.<sup>273</sup> Thus, high schools' role becomes critical at encouraging non-academic involvement, explaining the college-application process, steering students toward elite schools, and helping them emphasize on their applications what colleges value.

Although colleges give admissions preferences based on factors beyond high-schools' control (such as legacy, athleticism, and underrepresented geographical areas),<sup>274</sup> other factors that impede immigrants' road to college can be addressed. School staff and teachers need to be especially trained to address immigrant students' special challenges. Devoting designated counselors to students (and their parents) who do not fit the norm can make this process more efficient. In addition, parents should be advised about what matters to college-admissions committees and about how the process works. Ultimately, high schools should be involved in shaping

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272. See sources cited in *supra* note 259.

273. Interview with Philip Nowak, *supra* note 147; Interview with Iwonna Myslinska, *supra* note 180.

274. JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: SPORTS AND EDUCATIONAL VALUES* 40-41 (2001); SCHUCK, *supra* note 3, at 144.

student “character,” so as to help overcome immigrants’ deficiencies in social capital, making them more appealing to colleges. In the process, high schools can also acculturate immigrants to better take advantage of networking opportunities that colleges offer, thus enabling them to participate in at least some of the privilege-propagation that occurs in college.

## 2. European-Born Students Increase Intra-Group Diversity Due to Their Unique Experiences And Their Lack of Access to Social Capital

### a. *Current Jurisprudence and Scholars Find Within Group Diversity on College Campuses to be a Compelling Interest*

After *Fisher*, the most recent Supreme Court case to address college admissions preferences, student diversity remains a compelling interest.<sup>275</sup> Expanding on *Bakke* and *Grutter*, the Court noted that, although schools are to be given deference in deciding whether diversity constitutes a compelling interest,<sup>276</sup> once they do so, they must adopt narrowly-tailored means to meet that goal. Under strict scrutiny, each applicant must be “evaluated as an individual and not in a way that makes an applicant’s race or ethnicity the defining feature of his or her application.”<sup>277</sup> In line with *Grutter*,<sup>278</sup> diversity (often conflated with race or ethnicity<sup>279</sup>)

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275. The Court vacated and remanded the case to the Circuit Court, to apply strict scrutiny in evaluating whether University of Texas’s reasons for racial classification are “clearly identified and unquestionably legitimate.” *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. at 2419.

276. *Id.*

277. *Id.* at 2414 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003)).

278. *Grutter* held that schools may use race as a factor, in order to admit a critical mass of minority students. *Grutter*, 539 U.S. at 333. Thus, *Grutter* adopted Justice Powell’s concurrence in *Regents of the University of California v. Bakke*, which, for the first time, noted that diversity in education is a compelling interest. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12 (1978). Since then, the Justices have underscored the importance of diversity. In a commentary on the decision, Justice Scalia emphasized the importance of diversity, understood by him as being different from the advantaged societal norm. See Antonin Scalia, *The Disease as Cure*:

continues to be a compelling interest.<sup>280</sup>

Increasing within-group diversity can help achieve this compelling interest. Attaining critical mass of diverse opinions and experiences—which breaks down stereotypes and facilitates understanding among students of various backgrounds—is facilitated through having a diversity of members *within* racial groups.<sup>281</sup> Scholars have tended to focus on increasing within-group diversity of racial minorities only,<sup>282</sup> despite the fact that “the differences *within* [all] conventionally defined groups are often at least as significant as those that

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“*In Order to Get Beyond Racism, We Must First Take Account of Race*” 1979 WASH. U. L. REV. 147, 156 (1979) (“I strongly favor . . . what might be called . . . affirmative action programs of many types to help for the poor and disadvantaged.”) Justice Thomas also noted that class and disadvantage, as opposed to just race, should be considered in admissions decisions. See Hearing of the Senate Judiciary Committee, Federal News Service, Sept. 10-13, 1991 (“I think you can measure a person by how far that person has come and by what that person has overcome to get there. And I think we all know that all disadvantaged people aren’t black, and all black people aren’t disadvantaged.”); see also Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough*, 5 YALE L. & POL’Y REV. 402, 410-11 (1987) (“any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals’ paths, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true disadvantage.”) (citation omitted). This approach is consistent with the more recent focus on intra-group diversity. *Bakke*, as now understood, stands for the proposition that only diversity (as opposed to redressing historical disadvantage) may serve as a compelling interest, to be determined based on a variety of factors. *Fisher v. Univ. of Texas*, 133 S. Ct. at 2417.

279. *Id.*

280. *Id.* at 2418.

281. See, e.g., Harpalani, *supra* note 57.

282. See, e.g., Kevin Brown & Jeannine Bell, *Demise of the Talented Tenth: Affirmative Action and the Increasing Underrepresentation of Ascendant Blacks at Selective Higher Educational Institutions*, 69 OHIO ST. L.J. 1229, 1231 (2008) (questioning admissions policies “that lump[] all blacks into a single-category approach that pervades admissions decisions of so many selective colleges, universities, and graduate programs”); SCHUCK, *supra* note 3, at 163; Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141, 1213 (2007) (noting that, in light of *Grutter*, “consideration of ancestral heritage in a college’s admissions program is central to achieving the type of diversity at the heart of many institutions’ missions,” which focus on “the promotion of learning outcomes, preparation for citizenship, and preparation for leadership, all of which are advanced through diversity—the consideration of ancestral heritage in the admissions programs of schools not only moves forward each of these objectives but also is essential to them.”).



mark the boundaries between them.”<sup>283</sup> Caucasians in America are, in fact, a very heterogeneous group, and white immigrants tend to have more in common in certain respects with racialized immigrants than they do with American-born whites who are the norm.

Although some schools list “ethnic” diversity as a consideration in realizing student diversity,<sup>284</sup> in practice, that factor appears to be emphasized only for nonwhite groups. “Diversity” within Caucasians refers predominantly to athletes, unique extraordinary skills, geographical location, and socioeconomic status.<sup>285</sup> Judicial precedent calls for a more expansive view of diversity. Justice Powell noted in *Bakke* that educational institutions that purport to pursue diversity must include diversity that looks beyond racial-minority groups.<sup>286</sup> The seminal case of *Grutter*, in fact, draws attention to the significance of increasing diversity *within* racial groups.<sup>287</sup> Similarly, arguments made by proponents of affirmative action in *Fisher* are compatible with increasing *intra*-group diversity.<sup>288</sup> Thus, a holistic evaluation of students should note all of the attributes that set them apart from the norm—including immigrant status, and limited access to the social and cultural capital of the privileged white norm.

Before *Grutter* and *Fisher*, courts tended to conflate the concepts of “race” (implying, non-white race) and “ethnicity,” in effect subsuming the latter and making it irrelevant in the case of white students.<sup>289</sup> Courts have also tacitly approved blending

283. SCHUCK, *supra* note 3, at 28-29.

284. See, e.g., *Diversity*, DAVIDSON COLL., <http://www.davidson.edu/about/diversity> (last visited April 29, 2014); Yale College, *Promoting Diversity and Equal Opportunity at Yale University: Policies, Resources, and Procedures* (Feb. 2009), available at <http://yalecollege.yale.edu/sites/default/files/equalopportunitypolicies2009.pdf>.

285. STUBER, *supra* note 59.

286. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978). *Bakke* ended the admissions quotas (which were in place for blacks, Mexican-Americans, Native Americans, and Asians) at the University of California at Davis Medical School.

287. *Grutter v. Bollinger*, 539 U.S. 306, 494-95 (2003).

288. See Transcript of Oral Argument at 1, *Fisher*, 132 S. Ct. 1536 (No. 11-345).

289. See, e.g., *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 473

of the two concepts by schools.<sup>290</sup> Scholars, schools, and commentators have tended to focus on affirmative action initiatives that are race-<sup>291</sup> (and, more recently, class-)<sup>292</sup> based. Such an approach is too reductionist to reflect the realities of who actually belongs to the white norm, and is based on conceptions that are hard to define or validate. Both race and class are social constructs,<sup>293</sup> with amorphous boundaries. By focusing on intra-group diversity as critical in admissions preferences of all (races of) students, *Grutter* and *Fisher* appear to implicitly recognize the fact that various “races” are not monolithic.

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(1982) (noting that “[a]ttending an ethnically diverse school” could help prepare “minority children” for better societal participation, while “teaching members of the racial majority to live in harmony and mutual respect with children of minority heritage.”); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist., No. 1*, 426 F.3d 1162, 1166 (2005) (“We conclude that the District has a compelling interest in securing the educational and social benefits of racial (and ethnic) diversity, and in ameliorating racial isolation . . . by ensuring that its assignments do not simply replicate . . . segregated housing patterns.”); *United States v. Texas Educ. Agency*, 467 F.2d 848, 871 (5th Cir. 1972) (“[W]hile precise racial or ethnic balance in each school is not required, and there may even be schools of one race that pass the *Swann* test,” schools must eradicate “all vestiges of segregation. . . One-race schools . . . will require ‘close scrutiny’ . . .”)

290. See, e.g., *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 32 F. Supp. 2d 1370, 1375 (S.D. Ga. 1999) (“UGA considers an applicant’s race “Ethnic Diversity”); *Parents Involved*, 426 F.3d at 1174 (noting how the board of education defines the benefits of diversity because it “increases the likelihood that students will discuss racial or ethnic issues, and be more likely to socialize with people of different races”); *DeRonde v. Regents of the Univ. of Cal.*, 625 P.2d 220, 222-24 (Cal. 1981) (noting how “ethnic minority” status was defined by the school to include blacks, Native Americans, Filipinos, Asians, and Chicanos).

291. See generally Bridgette Baldwin, *Colorblind Diversity: The Changing Significance of “Race” in the Post-Bakke Era*, 72 ALB. L. REV. 863 (2009).

292. See generally Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity*, (Univ. of Colo. Law Legal Studies Research Paper No. 12-18, Aug. 27, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2137126##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2137126##).

293. See generally Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994). The boundaries of socio-economic classes are poorly defined and tend to be malleable. See, e.g., TERESA A. SULLIVAN ET AL., *THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT* (2000).

b. *White Immigrants Increase Intra-Group Diversity in Terms of Their Multiculturalism and Limited Access to Social Capital*

Since today diversity is the central justification for affirmative action in higher education, European immigrants' unique contributions to diversity and multiculturalism should be taken into account in admission decisions. A holistic approach that considers a variety of factors—without using mechanical formulas, assigning fixed weights to any one factor, or using numerical quotas<sup>294</sup>—can increase diversity within the Caucasian group, while acknowledging the unique contributions that all immigrants and “borderline whites” can make to an academic environment. Including more white students who deviate from the norm helps to fulfill the stated goals of diversity: (1) increased student knowledge due to diverse viewpoints; (2) better preparation for employment and civic participation in an increasingly multicultural, diverse society; and (3) creation of leadership opportunities for members of all ethnic groups.<sup>295</sup> Increasing diversity among minority-group members aims to break down racial stereotypes and promote cross-cultural understanding by including a variety of viewpoints and experiences that exist among members of the same racial groups.<sup>296</sup> Those goals can be furthered by increasing intra-group white diversity. Taking into account the unique experiences and the precarious relationship of Caucasian immigrants to white privilege can advance those goals.

Including more “marginal” whites would also contribute to the actual benefits of diversity, which have been well-documented. Students learn better, exhibit more personal growth, improve social skills, and increase their civic engagement<sup>297</sup> when exposed to others with backgrounds and

294. Such numerical quotas were struck down in *Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003), as violating the Fourteenth Amendment's Equal Protection clause and 42 U.S.C.A. § 1981 (West 2012).

295. See *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 219 (5th Cir. 2011).

296. See Harpalani, *supra* note 57, at 471-83. See also *Grutter v. Bollinger*, 539 U.S. 306, 319-21 (2003).

297. See generally ESPENSHADE & RADFORD, *supra* note 8.

viewpoints that differ from theirs. A significant part of that learning happens informally, through casual student interactions. Having students of diverse ethnic and racial backgrounds has been shown to be especially beneficial to the learning of racial-minority students,<sup>298</sup> who are more likely than native-born whites to interact with students outside their racial group.<sup>299</sup> Thus, interacting with white students who do not fit the privileged norm is important to the learning environment of *all* students. Collaboration among those with different experiences leads to better learning and problem-solving.<sup>300</sup> On-campus diversity has also been correlated with greater student satisfaction for all students.<sup>301</sup> White immigrants also force other students—of all races—to break down their assumptions about white homogeneity.

Caucasian immigrants contribute to multiculturalism, and can facilitate the fulfillment of benefits sought from diverse student bodies. All immigrants have different backgrounds and experiences than those who are born and raised in the United States. Their inclusion at institutions of higher learning can contribute to “intellectual pluralism,”<sup>302</sup> and prepare American-born students to live and work in a more diverse, global world. These benefits extend to students at schools in all geographical settings. In areas where European immigrants are rare, providing other students with an opportunity to interact with them might expose some for the first time to contemporary white immigrants. In areas where European immigrants are prevalent, it will better prepare students to interact with them outside college gates.

More fundamentally, immigrant students are “diverse” because they differ from the stereotypical privileged norm. At its core, “diversity” means difference from those who belong to the dominant group. Groups traditionally considered diverse—

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298. *Id.* at 310.

299. *Id.* at 311.

300. Lani Guinier, Keynote Address at the Pennsylvania State University College of Education “Education & Civil Rights” Conference (June 6, 201).

301. *Id.*

302. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD STORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 158 (2005).

including racial minorities, and students of low socioeconomic status—are “diverse” precisely because they deviate from the norm and its access to social capital. On the other hand, some racial-minority members (such as later-generation white Latinos) are considered “phantom minorities,” precisely because they do not lack the social capital and privileges associated with being part of the dominant class.<sup>303</sup> Justice Scalia pointed out more than 30 years ago that children of Eastern European refugees, for example, whose parents are blue-collar workers despite high educational attainment in their home countries, deserve admissions preferences more than phantom racial minorities do.<sup>304</sup> Redefining the concept of diversity by focusing on access to the sociocultural privileges associated with having full access to the social capital of the dominant class would ensure that the stated benefits of diversity become accomplished. It would also encourage greater consideration of all immigrant students’ backgrounds, no matter what their race or ethnicity.

Interestingly, proponents of affirmative action for racial or socio-economic minorities point to those groups’ not being part of the white privileged norm—and thus being underrepresented and having a different outlook on life than an average middle-class white American.<sup>305</sup> This observation also applies to Caucasian immigrants. All whites are not created equal.

White immigrants’ unique backgrounds and experiences cannot be reduced to statistical data about their parents’ salaries or educational levels, or to the color of their skin. Before they assimilate into the presumptively homogeneous fabric of white privileged America, they straddle two worlds and two cultures, shifting between privilege and the lack thereof. Similarly, non-white students often negotiate two cultural spheres,<sup>306</sup> shifting between privileged and

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303. See, e.g., Edward C. Thomas, *Racial Classification and the Flawed Pursuit of Diversity: How Phantom Minorities Threaten “Critical Mass” Justification in Higher Education*, 2007 BYU L. Rev. 813 (2007).

304. Scalia, *supra* note 278, at 154.

305. See Mari Matsuda, *supra* note 65. See also Thomas, *supra* note 302, at 815.

306. See generally RENATO ROSALDO, *CULTURE & TRUTH: THE REMAKING OF SOCIAL ANALYSIS* (2d ed. 1993).

underprivileged communities,<sup>307</sup> which admission committees prize.<sup>308</sup> This attribute should similarly be valued in admission considerations of European-born students.

Of course, immigrant background does not automatically add to diversity. There is a great difference between these university applicants, for example: (1) one who was born in Germany and arrived here as a one-year old, is named “William,” was raised by a Harvard administrator and a business executive, whose friends are predominantly American academics’ children, and (2) one who was born in Italy and arrived here as a 12-year old, is named “Guido,” was raised by an Italian cook and a housewife, whose friends are marginal whites. As required under *Fisher*, a holistic evaluation of each immigrant student would ensure that colleges consider not only how an immigrant background can enrich multiculturalism, but also how it relates to lack of access to social capital. Thus, schools should look to factors such as accent, country of upbringing, parents’ backgrounds and current employment, and involvement in non-academic communities—indicative of how the immigrant experience had affected student’s ability to be competitive in college admissions.

To facilitate this review, the Common Application (used by more than 430 colleges)<sup>309</sup> and/or supplemental individual college applications could be revised to give immigrant students the option to describe how their immigrant background had affected their college preparation, high-school experiences, and social involvement, and how they feel that they differ from native-born students. On the flip side, admissions officials should take into account how privileged students benefit from their privilege. For example, students

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307. See Matsuda, *supra* note 60; see generally STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

308. See, e.g., *Multicultural Recruitment Committee*, COLUMBIA UNDERGRADUATE ADMISSIONS, <https://undergrad.admissions.columbia.edu/learn/studentlife/diversity/mrc> (last visited April 29, 2014).

309. The Common Application already asks for the applicant’s place of birth and the parents’ places of birth, foreign-language proficiency (including an indication of native language, and a language spoken at home), and the length of time during which the student has lived in the United States.

could be asked about their test preparation, private tutors, mentoring at school, support from family, and their social network. In order to ensure accuracy of any such responses, guidance counselors, high-school staff, and recommenders could also be asked to address this issue. If reporting of such information were standardized, any additional burden on both high schools and college admissions committees could be minimized. Moreover, since many schools already consider national origin in their evaluations<sup>310</sup> and the Common Application already asks for some information about it, colleges would not face much of an increased burden, but rather, would be prompted to evaluate with greater awareness each applicant's unique experiences and position in society. Finally, given the increasing importance of quality education, and the emphasis on achieving true intra-group diversity, the benefits would far outweigh the costs.

c. *None of the Criticisms Traditionally Leveled  
Against Affirmative Action Admission  
Preferences Apply to Immigrants*

None of the criticisms traditionally used to attack race-based affirmative action or other admission preferences apply to increasing within-group diversity, especially if it is accomplished through a holistic analysis that pays attention to differences in access to privilege and social capital. Affirmative-action opponents such as Dinesh D'Souza list the following main objections: (1) stigmatizing beneficiaries as inferior,<sup>311</sup> and reducing admissions standards,<sup>312</sup> (2) causing social divisiveness,<sup>313</sup> and leading to "reverse discrimination" so that the majority group becomes discriminated against,<sup>314</sup> and (3)

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310. See, e.g., *Davidson Reaffirms Commitment to Diversity*, DAVIDSON COLL., (Mar. 9, 2012), <http://www.davidson.edu/news/news-stories/120309-davidson-reaffirms-commitment-to-diversity>.

311. Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 580-94 (2002).

312. KATZNELSON, *supra* note 301, at 158.

313. *Id.*

314. John Aubrey Douglass, *Anatomy of Conflict: The Making and Unmaking of Affirmative Action at the University of California*, in COLOR LINES 118, 140 (1998).

fostering dependency among beneficiaries.<sup>315</sup> Other critics also complain that such plans (1) are indefinite, (2) are overinclusive,<sup>316</sup> (3) would lead to too many groups seeking it, and (4) are difficult to implement because of subjective evaluations. Finally, some object to immigrants' eligibility for any preferences as unfair because they had arrived in the United States only recently.<sup>317</sup>

Most of these arguments are not valid today given jurisprudential focus on admission preferences as a tool to increase diversity, not to remedy any prior injustices suffered by the group. The small numbers of European-born students are unlikely to cause social divisiveness.<sup>318</sup> Given their Census metrics, educational performance, and parental emphasis on education, it is also unlikely that admission standards would be lowered,<sup>319</sup> or that such students would become overly dependent on the system. Increasing diversity within racial groups would also automatically foreclose any over-inclusiveness arguments, by weeding out phantom members of all races through individual, holistic evaluation of each applicant. Holistic evaluation of numerous factors such as English fluency and accented speech, age at arrival, well-acclimated relatives, and broader social networks would facilitate admission committees' ability to evaluate each student's contribution to diversity and lack of social capital, helping to ensure that the determination is not haphazard or subjective. Incidentally, other prized "diversity" factors such as artistic talent or leadership potential are also difficult to measure, yet have not inspired public criticism.

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315. *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 32 F. Supp. 2d 1370, 1373 (S.D. Ga. 1999) (citing Dinesh D'Souza, *Improving Culture to End Racism*, 19 HARV. J.L. & PUB. POL'Y 785 (1997)).

316. George R. La Noue & John C. Sullivan, *Deconstructing Affirmative Action Categories*, in COLOR LINES 71, 83 (1998).

317. See, e.g., David Seminara, *Failed Campaign Slogan # 108: "Affirmative Action for Immigrants!"*, Center for Immigration Studies (Aug. 17, 2011), available at <http://www.cis.org/seminara/affirmative-action-for-immigrants>.

318. See generally Siegel, *supra* note 64.

319. Moreover, even student groups with slightly lower test scores and GPAs who did not retake standardized tests or take preparatory courses often do better in college than those with slightly better scores who have had access to all those resources. LIPSITZ, *supra* note 5, at 222.



Some critique the diversity rationale itself, as reinforcing notions of white innocence, false meritocracy, and individualism that is devoid of societal power differences.<sup>320</sup> Increasing intra-group diversity of all groups eviscerates any such concerns, helping to accomplish diversity's goals and to effectuate its benefits, instead of making student bodies merely superficially diverse.

Furthermore, since white immigrant students oscillate between visibility (whenever they deviate from the dominant norm) and invisibility (when only their skin color is noticed), greater acknowledgment of their diversity is necessary to give all students a voice, and all Americans the opportunity to fully contribute to and take advantage of belonging to this democracy.

Any additional white-immigrant admissions that would displace native-born Caucasian students would be insignificant, and would be in line with the Court's emphasis on increasing within-group diversity. (In addition, I do not argue that a European-born applicant who is less qualified—however a school defines that—should be given preference over a better qualified American-born applicant. I am merely suggesting that, given comparable metrics, attention should be given to the unique contributions, experiences, and challenges that the European-born applicant has faced.) Even if not impacted numerically, native-born Caucasians might develop a stronger “us-versus-them” attitude, which is more likely to come to the foreground when resources are scarce<sup>321</sup>—such as in the selective-college admissions process. Any potential stigmatization or scapegoating is unlikely in this context, however, because of the small numbers at issue and due to white immigrants' partial invisibility. Moreover, making Caucasian immigrant students more visible would produce benefits: giving them a voice, making their concerns known, helping them find support from other students who are not the norm, and encouraging schools to provide programs and support uniquely catering to their needs.

Some might express apprehension that schools might

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320. See, e.g., James, *supra* note 50.

321. Rich, *supra* note 157, at 1593 n.70; see generally Nagel, *supra* note 159, at 161.

continue to admit preexisting numbers of white American-born students, in addition to giving a boost to qualified European-born students, thus disadvantaging racial-minority students. Such an effect, however, can be minimized if admissions officers review applications holistically, paying attention to intra-group differences of applicants of all races.

Finally, some oppose the notion that immigrants can qualify for admissions preferences as soon as they step on American soil.<sup>322</sup> This argument stems from misunderstanding the purpose of admission preferences to be to remedy past discrimination, and from the fear that immigrants will reduce admissions of American-born racial minorities.<sup>323</sup> Current jurisprudence has foreclosed the remedial rationale and racial quotas. Thus, neither of those concerns applies. Some critics, however, argue more generally that—since immigrants come here by choice<sup>324</sup>—they are less deserving of policies benefiting them over those who are American-born.<sup>325</sup> Aside from the fact that we pride ourselves on being a “nation of immigrants,”<sup>326</sup> this argument is difficult to apply to refugees forced to flee their countries, and to those who arrive here as children directed by their parents’ decisions. Moreover, any immigrant who becomes an American citizen, pledging allegiance and making contributions to this new home, is deserving of all the benefits that apply to native-born citizens.<sup>327</sup>

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322. See, e.g., Seminara, *supra* note 316..

323. *Id.*; James S. Robb, *Affirmative Action for Immigrants: The Entitlement Nobody Wanted*, 6 SOC. CONTRACT 87 (Winter 1995-96) (internal citations omitted), available at <http://www.thesocialcontract.com/pdf/six-two/affirm.pdf>.

324. See SCHUCK, *supra* note 3, at 157.

325. See generally Seminara, *supra* note 316.

326. See generally JOHN F. KENNEDY, *A NATION OF IMMIGRANTS* (1959).

327. For additional arguments regarding why immigrants should be included in affirmative-action programs, see Frank H. Wu, *The Limits of Borders: A Moderate Proposal for Immigration Reform*, 7 STAN. L. & POL’Y REV. 35, 52 (1996).

C. *Once in College, Immigrant Students Require Institutional Support To Be Able To Tap Into Social-Capital Transmission and To Help Schools Realize Goals of Diversity*

The “ideology of equality of opportunity is so central to the legitimacy of the American social order . . . [that] universities are particularly susceptible to . . . to policies of inclusion.”<sup>328</sup> However, “the mere achievement of ensured equal opportunity does not magically produce instant proportionality.”<sup>329</sup> “A college degree . . . does not always yield substantial or uniform payoffs,” and it is the “socializing, and participating in extracurricular activities . . . [that enables students] to acquire valuable resources – namely, social and cultural resources that are valued by the dominant classes.”<sup>330</sup> Thus, to attain the benefits associated with education and diversity, immigrants must be provided resources to integrate into their collegiate communities, thus facilitating their gain of non-academic benefits (such as access to social capital), while allowing other students to learn from their multiculturalism and from the challenge they pose to the white-race monolithic stereotypes.

1. Assisting Immigrant Students with Fitting In

“Because educational institutions are structured. . . in ways that reflect the social and cultural presumptions of the dominant classes, students who enter higher education with the social and cultural tools of the dominant classes are likely to have greater success . . . [and are thus better] positioned to increase their stock of social and cultural capital.”<sup>331</sup> Students who are not the norm experience limitations in acquiring social and cultural capital,<sup>332</sup> which can be overcome if they are integrated meaningfully into their college communities. “It is not enough for students of various racial/ethnic ancestries to be present at an institution; they must feel welcome if affirmative

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328. KARABEL, *supra* note 71, at 6.

329. DeRonde, 1980 Cal. App. LEXIS 1481, at \*18.

330. STUBER, *supra* note 59, at 163.

331. *Id.* at 164.

332. *Id.* at 180.

action is to fulfill its purpose as an equalizer in higher education.”<sup>333</sup> Only through this integration can white immigrants take a fuller advantage of college. In that process, they effectuate the aims of diversity by ensuring multiculturalism’s educational benefits for others, while at the same time having an opportunity to access social capital with which college education helps to endow students.

Immigrant students generally feel out of place at elite colleges due to a cultural disconnect.<sup>334</sup> Their transition can be eased by community organizations that target them specifically.<sup>335</sup> Most European immigrants today, however, lack access to a well-networked ethnic host community that facilitates the flow of social capital—in part due to cultural, linguistic, and religious differences among numerically-small groups of various European immigrants who live in heterogeneous neighborhoods.<sup>336</sup> Furthermore, public-assistance programs are reserved for refugees, who comprise a very small percentage of today’s European immigrants. Immigrants are also not provided much help on college campuses.

Colleges frequently provide summer transition courses or ongoing support programs for racial-minority students or those from lower socioeconomic backgrounds.<sup>337</sup> Racial minorities’

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333. Annette B. Almazan, *Looking at Diversity and Affirmative Action Through the Lens of Pilipono/a American Students’ Experience at UCLA and Berkeley*, 9 U.C.L.A. ASIAN PAC. AM. L.J. 44, 63 (2004).

334. Kasinitz, *Becoming American*, *supra* note 43, at 255.

335. *Id.* at 259 (discussing the role of Jewish campus groups in the lives of Russian Jewish students).

336. Interview with Philip Nowak, *supra* note 147; Interview with Karina Grzegorzewska, *supra* note 182; Interview with Amila Dzebic, *supra* note 179; Interview with Marta Mentrak, *supra* note 171; Interview with Jan Myslinski, *supra* note 186.

337. STUBER, *supra* note 59, at 44; Jessica Schuster, *8 College Resources for Minority Students*, COLL. EXPLORER (Feb. 25, 2014), <http://www.campusexplorer.com/college-advice-tips/19389228/8-College-Resources-for-Minority-Students>. In addition to individual college programs offering ongoing support to racial-minority or poor students, federally-funded TRIO programs also provide academic, financial, and social support for underrepresented groups, such as racial minorities, people with disabilities, and first-generation college students. *Federal TRIO Programs*, *supra* note 270; *see also* STUBER, *supra* note 59, at 109-13.

woes have been discussed by scholars and the media,<sup>338</sup> and schools have undertaken efforts to ease their challenges—through the establishment of special programs, groups, or support networks targeted at specific racial minorities.<sup>339</sup> Some schools also have special initiatives and programs for “first-generation” college students, whose parents did not attend college. These efforts often include orientation programs and ongoing workshops.<sup>340</sup> Low-income students have also been given a voice as scholars engage in class-crit,<sup>341</sup> and the media<sup>342</sup> documents their struggles. Caucasian immigrants are invisible, on the other hand. Their white skin makes others erroneously assume that they partake of white privilege, and impedes their ability to find others who resemble them and can offer support.

They need to be given a voice and support at schools.

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338. See, e.g., Darlene C. Goring, *Private Problem, Public Solution: Affirmative Action in the 21<sup>st</sup> Century*, 33 AKRON L. REV. 209 (2000); Ronald W. Saufley et al., *The Struggles of Minority Students at Predominantly White Institutions*, in NEW DIRECTIONS FOR TEACHING AND LEARNING 3-15 (J.H. Cones III et. al. eds. 1983); Evan Thomas & Pat Wingert, *Minority Report: American Universities are Accepting More Minorities than Ever. Graduating them is another Matter*, NEWSWEEK (Feb. 19, 2010), available at <http://www.legacycreators.org/files/minority%20report.pdf>.

339. See, e.g., *Minority Advisory Council*, YALE UNIV., [www.yale.edu/diversity/mac/](http://www.yale.edu/diversity/mac/) (last visited April 29, 2014) (advising the University president on “issues relating to the welfare of minority groups at Yale”). Yale student groups include two Afro-American interest groups, nine Asian-interest groups, five Hispanic-interest groups, and two European-interest groups (Nordic, and Polish). See *Student Organizations*, YALE UNIV., [www.yale.edu/oldYaleInfo/studentorgs.html](http://www.yale.edu/oldYaleInfo/studentorgs.html) (last visited April 29, 2014). It also has cultural centers devoted to Asians, blacks, Latinos, and Native Americans. See Yale Univ. *Campus Life*, Office of Int’l Students & Scholars, YALE UNIV., [www.yale.edu/oiss/life/campus/centers/index.html](http://www.yale.edu/oiss/life/campus/centers/index.html) (last visited April 29, 2014).

340. STUBER, *supra* note 59, at 87-92; Travis Reginal, *Reflection on the Road to Yale: A First-Generation Student Striving to Inspire Black Youth*, N.Y. TIMES (July 30, 2013), [http://www.nytimes.com/2013/08/04/education/edlife/a-first-generation-student-striving-to-inspire-black-youth.html?\\_r=0](http://www.nytimes.com/2013/08/04/education/edlife/a-first-generation-student-striving-to-inspire-black-youth.html?_r=0).

341. See, e.g., Gaertner, *supra* note 292.

342. See, e.g., Jason DeParle, *For Poor, Leap to College Often Ends in a Hard Fall*, N.Y. TIMES (Dec. 22, 2012), <http://www.nytimes.com/2012/12/23/education/poor-students-struggle-as-class-plays-a-greater-role-in-success.html?pagewanted=all>. Interestingly, two of the three students interviewed were Hispanic, so that the article addresses the intersection of low socio-economic class and race issues.

Institutions of higher education should keep track of immigrant students based on their countries of birth, and then make that information available to others. Cultural events and curricular awareness should reflect not only groups that are far removed from the norm, but also those that oscillate between two worlds. School-organized groups can help all immigrant students cope with their unique issues. Such initiatives would help European-born students feel welcomed, and thus more eager to actively contribute to the diversity and multiculturalism of their institutions, sharing their unique experiences and stories with others. Well-trained and engaged faculty members (preferably including at least some from marginal backgrounds), made sensitive to the needs of these students, are critical in helping to effectuate such institutional support.

More specifically, colleges that have first-generation programs should expand them to include all students whose parents did not attend *American* colleges, enabling such students to enlarge their social networks, find support, acclimate to college, and start building cross-ethnic coalitions. Orientation programs should explain the importance of extracurricular involvement and internships opportunities,<sup>343</sup> and relevant information should be widely disseminated and made more appealing (for example, through the use of guest speakers, and connecting non-academic endeavors to various academic pursuits). A cross-cultural course requirement could be imposed on all students, and they could be given incentives for joining diverse student groups or participating in their events.

Whereas racial-minority groups sometimes help other racial minorities feel less isolated,<sup>344</sup> European-born students need specific support that targets them because non-whites (especially native-born) are likely to perceive them as simply “white,” while American-born white students are likely to

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343. Many schools already have such initiatives for incoming students, either preceding the beginning of the freshman year or continuing during the first year. STUBER, *supra* note 59, at 97; Reginal, *supra* note 339.

344. See generally *United Minorities Council*, UNIV. OF PENN. <http://unitedminoritiescouncil.org/> (last visited April 29, 2014); NYU LAW SCHOOL, <http://law.nyu.edu> (last visited April 29, 2014).

exclude them as outsiders. Assigning all immigrant (and other marginal students) to peer mentors—preferably other “outsiders”—and requiring integrated residential living would further facilitate students’ social integration, while offering them support. Small support groups comprised of both students who are outsiders and those who have full access to the social and cultural capital of the dominant class could reinforce this process.

Since many schools already provide similar resources for racial-minority students, creating comparable programs for all immigrant students should not pose a great administrative or financial burden, especially given the numbers of European-born students. Furthermore, schools have an obligation to provide equal access to opportunities for all their students, who will then, in turn, enrich the learning environment of their peers.

## 2. Realizing Benefits of Diversity for Other Students

Immigrants’ ability to fully engage in their schools’ environments can benefit privileged whites, marginal whites, racial minorities, and other outsiders, all of whom can learn about others and about themselves from immigrants’ unique experiences. Interacting with students of different backgrounds reduces prejudice and contributes to greater awareness, satisfaction, and student development.<sup>345</sup> Taking ethnic-studies classes and participating in ethnic-student activities further aid cross-ethnic understanding and interacting.<sup>346</sup> Thus, schools should encourage all students to learn about ethnicities other than their own, and to participate in cross-cultural activities and communities on and off-campus.<sup>347</sup>

To truly take advantage of diversity, schools need to manage diversity, not just tolerating those who are different, but also celebrating their differences and being inclusive. Awareness, education, and celebration of differences are just

345. ESPENSHADE & RADFORD, *supra* note 8, at 176.

346. *Id.* at 177, 194-98.

347. *Diversity Web*, ASSOC. OF AM. COLL. & UNIV. [http://www.diversityweb.org/diversity\\_innovations/student\\_development/inter\\_intra\\_group\\_relations/urban\\_engagement.cfm](http://www.diversityweb.org/diversity_innovations/student_development/inter_intra_group_relations/urban_engagement.cfm) (last visited April 29, 2014).

the beginning, however. "A good diversity plan links the goals of diversity with other components of the institutional mission, such as instruction, research and service, and weaves these objectives into the fabric of campus priorities."<sup>348</sup> For example, curricular requirements, faculty and staff representation, and campus-wide diversity activities would make integration more meaningful. Also, requiring all students to attend multiculturalism training, and encouraging diverse student groups to collaborate would help effectuate the purpose of diversity on campus.

### Conclusion

Various constructions of race which progressive scholars have offered to replace the black-white analytical paradigm<sup>349</sup> do not fully address all types of subordination<sup>350</sup>—such as deviating from the norm by being foreign-born. Legal scholarship and public discussions have focused on racialized immigrants as foreigners—emphasizing their race.<sup>351</sup> White

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348. Katrina Wade-Golden & John Matlock, *Ten Core Ingredients for Fostering Campus Diversity Success*, 15(1) CHANGING CURRENCY OF DIVERSITY 4 (2007), available at <http://www.calvin.edu/admin/provost/multicultural/documents/campusdiversity.pdf>

349. The black-white dichotomy stems from colonial times, internal black migration in the 1900s, immigrants' attempts to position themselves above blacks in the social hierarchy, and ethnic immigrants' eventual absorption into the "white" race. John Tehranian, Note, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817 (2000); MATTHEW FRYE JACOBSON, WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE 14 (1998). Scholars have acknowledged the limitations of this dichotomy, and some have moved beyond it. See, e.g., NOT JUST BLACK AND WHITE, *supra* note 17; Rachel F. Moran, *Neither Black Nor White*, 2 HARV. LATINO L. REV. 61 (1997).

350. Paulette M. Caldwell, *The Content of Our Characterizations*, 5 MICH. J. RACE & L. 53, 67 (1999).

351. See, e.g., Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CALIF. L. REV. 863 (1993); FRANK H. WU, YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE 79-129 (2002); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965, 977 (1995); Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849, 853-63 (1995) (tracing the causes of nativist sentiments towards various immigrant groups—



immigrants get overlooked, despite straddling two worlds: Like many outsider groups, they do not fit into the white American norm and do not benefit from its social capital; yet, at times, they are considered as belonging to the white American majority, and might even be the beneficiaries of white privilege. They are denied adequate antidiscrimination protections because they are assumed to neatly fall within just one side of the white-black or privileged-minority dichotomy.<sup>352</sup>

A closer look at their experiences reveals inadequacies in the construction of whiteness and of various analytical binaries. Contemporary European-born immigrants enable us to deconstruct the concept of monolithic whiteness and to better understand the scope of white privilege, from an angle not addressed adequately in scholarship. Looking at their experiences also provides an example of and accentuates the importance of intra-group diversity. They also expose the significance that being an immigrant has on one's access to social and cultural capital—as replicated and amplified in the educational system—regardless of race.

Immigrants' challenges in the educational system can be eased—and made to benefit native-born Americans—by recognizing their lack of social capital, and by providing them with cultural and institutional support to help compensate for those challenges. In line with *Fisher*, a holistic and nuanced approach to college-application evaluations should take into account not only their multicultural backgrounds, but also the importance of having access to social capital (which overlaps with white privilege) in the definition of “diversity.” Aided by institutional support in college, immigrant students can then partake of some of the social privilege that gets replicated in college, instead of having their inequality amplified. In the process, their collegiate engagement can provide other students with the benefits of intra-group diversity. Such an approach is neither race-conscious nor race-blind; instead, it looks beyond the race of white students.

Four of the concurring Justices in *Bakke* reasoned that policies which are race-blind make access to education

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primarily Asians and Latinos).

<sup>352</sup>. Myslinska, *supra* note 12.

extremely challenging for racial minorities in a race-conscious country.<sup>353</sup> Similarly, policies that do not acknowledge all immigrants' challenges in accessing and taking advantage of all that education has to offer—both academically, and beyond—deprive immigrants of having equal footing with native-born students. If schools are indeed to be the great equalizers as they have been envisioned, all students need to be provided with equal access to all of education's opportunities. Hindrance in access to all the benefits of higher education is not limited to racial minorities or economically disadvantaged students. It is to our nation's benefit to develop all students to their maximum potential, no matter how they deviate from the white privileged norm. Thus, the forward-looking diversity rationale can result in real educational and social benefits, particularly given the "central role of higher education in helping students become active citizens and participants in a pluralistic democracy."<sup>354</sup>

Policies which are blind to privilege and social capital impede access to all the benefits of higher education for European immigrants and for other groups which do not belong to the dominant class, especially since access to social privilege heavily influences the definition of "merit." "[W]hile courts have said a lot about why we have affirmative action (i.e., which rationales are constitutionally compelling) and how we should do it (preferably not via quotas), they have said very little about who gets included."<sup>355</sup> This modest proposal suggests that access to social and cultural privilege of the dominant class, with all of its trappings, is an important factor to consider.

Of course, no matter what the law is, colleges have broad discretion to determine whether diversity presents a compelling interest for them. However, talking about the issue of intra-group white diversity, the circumscribed scope of white privilege, immigration, and race is the first step. After all, as James Baldwin once said, "[n]ot everything that is faced can be changed. But nothing can be changed until it is faced."<sup>356</sup>

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353. *Bakke*, 438 U.S. at 355.

354. *Lawrence*, *supra* note 10, at 934.

355. *Pager*, *supra* note 34, at 299.

356. Nathaniel Norment, Jr., *Quantitative and Qualitative Analyses of*

Moreover, even the most selective colleges—which wield great power in controlling and reinforcing access to social capital—do benefit from increased white student diversity, as it contributes to the learning and growth of all students.

Colleges have tended to promote a generalized, superficial sense of diversity, presuming that all blacks, for example, are similar.<sup>357</sup> This facial diversity obscures the problem of social, cultural, and economic inequality. Taking into account intra-group differences within *all* racial groups will also help to reduce the problem of phantom minorities. After all,

“[i]f diversity is really the goal, university administrators should do away with the artificial ‘Asian-American’ category altogether and start considering each group separately. (Southeast Asian) Indian-Americans, for example, have socioeconomic and educational attainment strikingly higher than Cambodian-Americans.<sup>358</sup> They also tend to have better-established social networks than Cambodian-Americans do. Schools should do the same for the many groups usually lumped together as ‘white’ or ‘Hispanic.’ A university that already has a critical mass of native-born-WASPS might well not have a critical mass of Utah Mormons or Eastern European immigrants.”<sup>359</sup>

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*Textual Cohesion in African American Students’ Writing in Narrative, Argumentative, and Expository Models*, in READINGS IN AFRICAN AMERICAN LANGUAGE: ASPECTS, FEATURES, AND PERSPECTIVES, VOL. 2 (NATHANIEL NORMENT, JR., ED., 2005)

357. COLOR LINES, *supra* note 26.

WALTER BENN MICHAELS, THE TROUBLE WITH DIVERSITY: HOW WE LEARNED TO LOVE IDENTITY AND IGNORE INEQUALITY (2006).

358. Pager, *supra* note 34, at 308; see also P.N. Kiang, *We Could Shape It: Organizing for Asian Pacific American Student Empowerment*, UNIV. OF MASS. INSTIT. FOR ASIAN AM. STUDIES (1996), available at [http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1022&context=iaas\\_pubs](http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1022&context=iaas_pubs). All Asians, however, tend to be perceived through the “model minority” myth. WU, *supra* note 350.

359. Ilya Somin, *Asian-Americans, Affirmative Action, and Fisher v. Texas*, THE VOLOKH CONSPIRACY, May 31, 2012, 10:20 AM, <http://www.volokh.com/2012/05/31/asian-americans-affirmative-action-and-fisher-v-texas/> (“many current affirmative action policies are a travesty from

Exposing weaknesses in the social and legal construction of whiteness threatens its existence.<sup>360</sup> By re-contextualizing heterogeneous whiteness, I also hope to more closely circumscribe the concept of white privilege,<sup>361</sup> prompting all whites who do not fully partake of it to recognize shared areas of concern and to find common grounds with others who are not the norm.<sup>362</sup> “The process of finding oneself in the face of invisibility, silence, and stereotype is not an easy one.”<sup>363</sup> Only by increasing their self-awareness and knowledge, however, can marginal groups take the first step to benefit from jurisprudential emphasis on intra-group diversity.<sup>364</sup>

The “multiethnic and immigrant nature of American society will play an increasingly important role in the affirmative action debate.”<sup>365</sup> This Article discusses just one

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the standpoint of either compensatory justice *or* promoting diversity”).

360. The Supreme Court itself noted that, if various Caucasian minority groups were to receive preferential treatment, only the white Anglo-Saxon Protestants would be left as the white norm. *See* Bakke, 438 U.S. at 295-96.

361. Similarly, “[s]cholarship that speaks more generally about white privilege without attention to the contingent access some whites are granted threatens to alienate the numerous white ethnics currently being offered partial access to white privilege.” Rich, *supra* note 157, at 1588.

362. Some whites who experience oppression based on non-racial traits become more attuned to anti-racism concerns and to challenges faced by other groups lacking access to white privilege. Jennifer L. Eichstedt, *Problematic White Identities and a Search for Racial Justice*, 16 SOC. F. 445, 463 (2001).

363. TATUM, *supra* note 5, at 164.

364. Attention to intra-group diversity in academia should go beyond admissions. Scholars have addressed affirmative action in faculty hiring based on race as a proxy for lack of political power. *See, e.g.*, Duncan Kennedy, *supra* note 60, at 705. Any such initiatives should be broader, taking into account within-group diversity of all racial groups, and noting how foreign-born white faculty applicants lack the social capital that US-born whites have access to. Furthermore, it is difficult for faculty members from non-privileged milieus to fit into academic environments created by those with social power, unless schools provide special tools and opportunities to do so. *See, e.g.*, Kimberlé W. Crenshaw, *Critical Race Theory Beyond Post-Racialism*, Speech at Berlin’s Critical Race Theory Europe Symposium (June 16, 2013), available at <http://vimeo.com/66981721>. True diversity should also be a factor taken into account in school rankings. Moreover, there is social value in having law review articles editors with diverse backgrounds, and in selecting diverse authors for publication. A full discussion of these issues is beyond the scope of this Article, however.

365. Deborah C. Malamud, *Affirmative Action and Ethnic Niches: A*

aspect of it, addressing it through the lens of white privilege and social capital. My goal is that it will encourage additional discussions about the place of immigrants in affirmative action. Since the experiences of all those lacking complete access to the dominant group's privilege have some commonalities, even if their origins differ,<sup>366</sup> I also hope to encourage coalition-building that cuts across class and race. After all, part of our identity stems from how others see us—or overlook us—and all groups who are not the norm are perceived as “the other” by those who belong to the privileged norm. I also aspire to prompt greater critical consciousness of the dominant privileged whites, by making them question their cultural assumptions.

True change can be brought only through a confluence of laws, cultural attitudes, and self-transformation.<sup>367</sup> Efforts to improve access to education must look beyond law, consider today's culture and society, and encompass political action and popular opinion so that policies at *private* schools can be affected as well. To achieve substantive equality, we must not only break various cycles of disadvantage and promote respect for dignity, but we must also accommodate difference and facilitate full participation (social, economic, and political) of all through structural and institutional changes and the imposition of positive duties.<sup>368</sup> Likewise, research and scholarship addressing access to education needs to be

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*Legal Afterword*, in *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 313, 339 (John David Skrentny ed. 2001).

366. J. B. Miller, *Domination and Subordination*, in *TOWARD A NEW PSYCHOLOGY OF WOMEN* 3-9 (1976). For example, racial-minority students often experience social and cultural isolation, and lack pertinent knowledge in a manner resembling the experiences described in this Article. See, e.g., Reginal, *supra* note 339; Justin Porter, *Reflections on the Road to Harvard: A Classic High Achiever, Minus Money for a College Consultant*, N.Y. TIMES (July 30, 2013), <http://www.nytimes.com/2013/08/04/education/edlife/a-classic-high-achiever-minus-money-for-a-college-consultant.html>. American-born first-generation college students also share similar experiences. STUBER, *supra* note 59, at 5-6.

367. B.S. Chimni, *Global Futures: Fragments of a Vision*, Keynote Address at the Osgoode Hall Law School Forum: Law, Culture, Critique (May 11, 2013).

368. SANDRA FREDMAN, *DISCRIMINATION LAW* (2d ed. 2011) (noting how both the causes and the potential solutions to inequality must be considered in their political, historical, and social contexts).

interdisciplinary and multi-faceted. Supported by better future data gathering,<sup>369</sup> I hope to spark re-thinking in all these areas, bringing about greater equality. After all, “[t]reating unequals as though they were equal is just as much a violation of

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369. Better data collection and analysis are needed to further develop this discussion. Data compilations and studies tend to lump all foreign-born Americans together, and segregate groups based on their race only. Even the Census, despite asking its respondents to specify the country of their birth, presents aggregate data of “foreign-born” populations based only on their “world region of birth.” See, e.g., TABLE: EDUCATIONAL ATTAINMENT OF THE FOREIGN-BORN POPULATION BY WORLD REGION OF BIRTH AND SEX, U.S. CENSUS BUREAU (Mar. 1999). Partly due to the potential public divisiveness over affirmative action and issues of race, studies of immigration have tended not to include affirmative action data, and vice versa. GRAHAM, *supra* note 20, at 3-4. Data that is available tends to overlook Caucasian immigrants. See, e.g., ESPENSHADE & RADFORD, *supra* note 8, at 25 tbl. 2.2, 107 tbl. 3.7 (addressing statistics for blacks, Hispanics, and Asians only, despite having corresponding data for whites as well). More detailed data is also needed about foreign-born students’ performance. Studies tend to focus on English-language proficiency only. See, e.g., Migration Policy Inst., *Early Childhood and K-12 Education*, NAT’L CENTER ON IMMIGRATION INTEGRATION POLICY, *Education PK-12*, available at [www.migrationinformation.org/integration/education.cfm](http://www.migrationinformation.org/integration/education.cfm). Moreover, college application and acceptance rates for Caucasian immigrants and for non-white immigrants need to be reported. So far, proposals for more nuanced data collection have been made for black students only. See, e.g., Kevin Brown, *Should Black Immigrants Be Favored Over Black Hispanics and Black Multiracials in the Admissions Processes of Selective Higher Education Programs?*, 54 HOW. L.J. 255, 264 (2011). And also for those historically underrepresented and in discrete educational settings. See, e.g., Kevin Brown & Tom I. Romero, II, *The Social Reconstruction of Race & Ethnicity Of the Nation’s Law Students: A Request to the ABA, AALS, and LSAC for Changes in Reporting Requirements*, 2011 MICH. ST. L. REV. 1133 (2011). The Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the United States Department of Education, first implemented in 2010-11, required institutions of higher education for the first time to separate black students into several categories (black Hispanics, black multi-racials, and black African-Americans), albeit it did not include a category for foreign-born blacks. See Final Guidance on Maintaining, Collecting, and Reporting Racial and Ethnic Data to the U.S. Department of Education, 72 Fed. Reg. 59,266 (Oct. 19, 2007). For its analysis, see Kevin Brown, *Now is the Appropriate Time for Selective Higher Education Programs to Collect Racial and Ethnic Data on its Black Applicants and Students*, 34 T. MARSHALL L. REV. 287 (2009). Furthermore, schools tend not to report specific numbers of white immigrants who get admitted, and who subsequently matriculate. Author’s calls to the admissions offices of Yale University, Harvard University, Princeton University, University of Pennsylvania, Columbia University, and Georgetown University went unanswered. More analysis is also needed of any special programs that exist for immigrants in primary, secondary, and tertiary education.

equality as treating equals unequally.”<sup>370</sup>

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370. Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711, 1717 (1995).