

3-1-2004

After Grutter v. Bollinger Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy

L. Darnell Weeden

Follow this and additional works at: <https://digitalcommons.law.byu.edu/jpl>

 Part of the [Civil Rights and Discrimination Commons](#), and the [Education Law Commons](#)

Recommended Citation

L. Darnell Weeden, *After Grutter v. Bollinger Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy*, 19 BYU J. Pub. L. 161 (2004).

Available at: <https://digitalcommons.law.byu.edu/jpl/vol19/iss1/3>

This Article is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Brigham Young University Journal of Public Law by an authorized editor of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

After *Grutter v. Bollinger* Higher Education Must Keep Its Eyes on the Tainted Diversity Prize Legacy

L. Darnell Weeden*

In *Grutter v. Bollinger*,¹ the United States Supreme Court was asked to decide whether utilizing race as a factor in law student admissions by the University of Michigan Law School (“Law School”) to advance diversity is a constitutionally permissible compelling state interest under its *Bakke* opinion.² The highly regarded and prestigious Law School made a commitment to achieve a diverse student body by considering race among other factors in the admission process. The Law School articulated a goal of admitting students from a variety of backgrounds and experiences in order to promote an exchange of ideas and mutual intellectual respect. The Law School’s diversity program highlighted an applicant’s academic ability coupled with a flexible evaluation of the applicant’s ability to expand the learning environment of other individuals in the law school community and legal profession.³

Unfortunately, the day has not come when America has reached a point of cultural and racial maturity in the context of higher education to abandon the governmental use of race-based laws to benefit or burden an individual. The *Grutter* opinion was a wake-up call for Americans that the day to end race discrimination in higher education has not yet come. After reading the Supreme Court’s critical statement, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the [diversity] interest approved today,”⁴ it should be concluded that diversity based on racial discrimination should end now and not after twenty-five years of racially flawed codependence. Because

* Professor, Thurgood Marshall School of Law; Texas Southern University: B.A., J.D., University of Mississippi. The author would like to thank Attorney Ahunanya Anga, Registrar, Thurgood Marshall School of Law for her valuable comments concerning earlier drafts of this article, and Trung Chi Tran and Simeon Coker, both Research Assistants at Thurgood Marshall School of Law Class of 2005 for their research help. The author would additionally like to thank the organizers of the 2003 Midwestern People of Color Legal Scholarship Conference for allowing him to present some of his ideas contained in this article as a work. This opportunity to present to a community of legal scholars has provided the author with intellectual insight and consideration even though many participants at the conference strongly disagreed with the author’s theory on some of the issues presented.

1. 123 S. Ct. 2325 (2003).
2. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
3. *Grutter*, 123 S. Ct. at 2325.
4. *Id.* at 2347.

race-based diversity policy promotes notions of racial superiority and racial inferiority, a race-based diversity program is inherently flawed.

Part I of this article portrays the implication of race-based slavery for the current race-based diversity debate in higher education. Part II of this article describes the racially perceptive setting and procedural history of the issues presented in *Grutter* and puts forward the reasoning of the majority opinion. Part III raises the question of whether *Grutter's* treatment of Justice Powell's opinion in *Bakke* as binding precedent for diversity that discriminates on the basis of race is intellectual conjecture not supported by prior decisions of the Court. Part IV addresses whether the Supreme Court's heightened judicial scrutiny applies to disfavored whites as individuals. Part V discusses whether the Supreme Court's holding in *Grutter* has a negative impact on African-Americans because the opinion may have sent a message that racial diversity equals accommodating racial inferiority. Part VI analyzes the implication of race-neutral college legacy preferences for family members in the context of affirmative action. Part VII contends that the whites-only scholarship is an unfortunate foreseeable consequence of race exclusive scholarships for other racial groups. Part VIII notes the elusive search for an equitable public policy that narrows the education achievement gaps between historically disadvantaged students and middle class non-minority students.

I. THE IMPLICATION OF RACE-BASED SLAVERY FOR THE CURRENT RACE-BASED DIVERSITY DEBATE IN HIGHER EDUCATION

Although diversity in higher education is important, the use of race-conscious discriminatory laws in the United States should not be utilized because neither the local, state, or federal government is sensitive enough to the goals of diversity to fairly use the race card. The real intellectual diversity issue is whether historical race-based slavery and sequential racial discrimination for more than 130 years have a continuing impact on higher education opportunities for African-Americans. In a recent interview, Professor Ronald Ferguson of Harvard, and an African-American parent, stated that the racial gap in academic achievement between blacks and whites in affluent upper middle class integrated suburbs exists because of economics, and "the human damage from two centuries of slavery plus legalized segregation that persisted until the mid-1960's will simply not be undone in a generation, not even in suburbia."⁵

5. Michael Winerip, *In the Affluent Suburbs, an Invisible Race Gap*, N.Y. TIMES, June 4, 2003, available at <http://www.nytimes.com/2003/06/04/education/04EDUC.html?ex=1370145600&>

Race-based diversity preferences in higher education are not adequate compensation for historical race-based slavery, and laws that discriminated against African-Americans because of their race and race-based preferences are too politically and racially sensitive to be assigned to government officials or the American public. All Americans committed to diversity in higher education must thoughtfully monitor the diversity blueprint to determine whether educational diversity is best achieved through a race-conscious admission method or by using an approach that is free of racial discrimination. The Supreme Court in *Grutter*⁶ has delayed the day when American leaders must apologize to African-Americans for America's race-based pro-slavery history⁷ and current social policies of racial stereotyping and instead embark on a diversity policy without racial discrimination designed to serve the best interest of the descendants of its former African-American slaves. Less than three weeks after the decision in *Grutter*, during a tour of Africa, President George W. Bush may have taken an unintended small step toward an official apology for slavery by condemning the American slave trade as "one of the greatest crimes in history."⁸

President Bush's recognition of black Americans' continuing raw wound from the continuing vestiges of slavery is rare among white Americans.⁹ By reciting the particulars of America's shameful history of

en=e75e089899966773&ei=5007&partner=USERLAND. Winerip reports:

[Ferguson's] research shows that in the years before school, white parents spend more time reading to their children, while blacks devote more to song and play – the start of the gap. Professor Ferguson writes, "As a black parent, I acknowledge there might be differences in what we do with our preschool children that would put them on a more equal footing with whites on the first day of kindergarten."

Id.

6. *Grutter*, 123 S. Ct. at 2325.

7. *See id.* at 2347 (Ginsburg, Breyer, JJ., concurring). "[I]t was only 25 years before *Bakke* that this Court declared public school segregation unconstitutional, a declaration that, after prolonged resistance, yielded an end to a law-enforced racial caste system, itself the legacy of centuries of slavery." *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *cf. Cooper v. Aaron*, 358 U.S. 1 (1958)).

8. Tamara Lipper, *Alternative Motive, Maybe?*, NEWSWEEK, July 21, 2003, available at 2003 WL 8639475. Lipper reports:

On his whirlwind tour of Africa last week, President George W. Bush pledged \$15 billion to fight AIDS, denounced the American slave trade as "one of the greatest crimes in history," toured a wildlife park, met with African leaders and publicly weighed sending troops to help suffering Liberians. In the words of one GOP official, the trip was intended to "catch people's attention," reminding them that the war in Iraq hasn't diminished Bush's desire to be seen as a compassionate conservative. With next year's elections approaching, Bush aides were especially eager to use the trip to improve his standing with African-American voters, who have a "perception problem with the Republican Party," says one official. (Two still sore points: the Trent Lott debacle and the president's own stand against affirmative action).

Id.

9. *Id.*

slavery, President Bush made the story of America's African slaves more widely known.¹⁰ "Between 1 million and 2 million captives were shipped out to the New World from the Senegambian region, of which Goree's door of no return was the main point of embarkation. Conservative estimates put the total numbers exiled from their African homeland between 10 million and 12 million."¹¹ A race sensitive diversity essay question for all applicants to America's elite colleges may ask all potential students to discuss whether the American slavery issue has impacted their personal view on diversity in higher education. President Bush's speech on slavery during the summer of 2003 at Goree Island in Senegal probably surprised a number of Americans.¹²

College applicants may also be challenged to explore whether historical racial slavery has a continuing economic¹³ impact on one's ability to receive an effective education in America today.¹⁴ "To understand racism and its deep-seated roots in American society, one must have a knowledge and understanding of history."¹⁵

10. *Id.*

11. *Id.* ("Before the massive European immigration of the late 19th and early 20th centuries, more Africans than Europeans entered the Americas. By the time the American Civil War broke out in 1861, the largest enslaved population in the world lived in the United States.")

12. Neil Irvin Parker, *Bush at Goree: Words don't Heal Slavery's Wound*, HOUSTON CHRONICLE, July 13, 2003, Outlook Section 1, available at 2003 WL 57427708.

13. *Id.* Mr. Parker explains that:

Bush mentioned the trauma of transportation and sale. He listed the main economic handicaps related to enslavement: Unpaid labor, restrictions on marriage and, therefore, on inheritance, no property, no accumulation of wealth, and virtually no education meant black people were penniless at emancipation.

When blacks became U.S. citizens in the 1860s, they started at economic ground zero. For three or four subsequent generations, racial discrimination and exclusion from public life kept black people the poorest people in the nation. The era of legal segregation ended . . . but the enduring lack of wealth keeps black people the poorest in the nation.

Id.

14. *Id.* Mr. Parker states that:

Perhaps the power of that chilling place awakened Bush to the viciousness of the institution that created the American political economy. Most of the founding fathers were slave owners, including Benjamin Franklin. And the power of slavery shaped the compromises of the constitutional convention, the United States Constitution and the first half of the 19th century. Slavery, as Bush noted, was no little thing.

Echoing slave owner Thomas Jefferson, Bush tallied up the usually forgotten costs of slavery to the owners: "Years of unpunished brutality and bullying and rape produced a dullness and hardness of conscience. Christian men and women became blind to the clearest commands of their faith and added hypocrisy to injustice."

Id.

15. Jeffrey J. Wallace, *Ideology vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 AKRON L. REV. 693, 697 (2003). Wallace states:

George Santanya [sic] once wrote, "Those who cannot remember the past are condemned to repeat it." An understanding of the past is critical in interpreting the present, with the hope of resolving problems in the future. There is a legacy in America of anti-Black sentiment, White superiority, and Black inferiority. There is a stigma of racism and a

Each applicant should be given an opportunity to discuss diverse perspectives on the issue of the relationship of slavery to diversity in higher education in order to promote the intellectual dexterity appropriate for attendance at one of America's elite colleges or universities. To truly promote the intellectual diversity and historical perspective, all applicants seeking admissions to a school with a race-based diversity admission plan might consider whether they agree with one commentator's view that the Declaration of Independence refused to condemn African-American slavery because the leaders of the American Revolution supported America's anti-black attitude.¹⁶ "This anti-Black sentiment, based on historical memory, stereotypes, and blatant racism continues to plague our society and prevents us from honestly and openly dealing with race in America today."¹⁷ If *Grutter*¹⁸ is truly about engaging in a robust exchange of ideas, it is appropriate that elite colleges engage in a robust debate about whether it is fair to characterize America as having either an anti-black or pro-white way of thinking about racial diversity in higher education. Diversity based on racial discrimination negatively impacts America's effort to become a society free of racial discrimination.

Justice O'Connor, the author of the *Grutter* opinion, was appointed to the Supreme Court "through affirmative action."¹⁹ According to some commentators, Justice O'Connor returned the affirmative action favor in *Grutter* by taking a leadership role "in the most important affirmative-action case in decades."²⁰ Justice O'Connor's vote to support the Law School's race-based diversity plan is generally regarded as the decisive tiebreaker.²¹ It is generally believed that the Supreme Court's decision in the Law School "affirmative-action case was squarely in line with the opinions of most editorial writers and business and academic leaders."²²

failure to learn from the past, which prevents the achievement of true equality. If we as a nation are going to live up to our values of freedom, equality, and social justice, then we must open our minds and our hearts to accept the truth of our convictions and be true to our values and ideals.

Id.

16. *Id.* at 697-98.

17. *Id.* at 699.

18. 123 S. Ct. 2325 (2003).

19. Evan Thomas, Stuart Taylor Jr., Debra Rosenberg & Eleanor Clift, *Center Court; She Helped America Seek a Middle Ground on the Thorny Subject of Race. Sandra Day O'Connor's Brand of Justice*, NEWSWEEK, July 7, 2003, available at 2003 WL 8639381.

20. *Id.*

21. *Id.*

22. *Id.* *Newsweek* reported that:

Corporations and universities flooded the court with briefs arguing that affirmative action has been a success at providing diversity on campus and in the workplace. Nonetheless, O'Connor's reasoning was a little slippery or muddy, as several columnists, like Slate's

However, before the proverbial ink was dry on the landmark *Grutter* decision, both opponents and supporters of racial preferences in higher education were preparing for the next battle over race-based affirmative action in higher education.²³

During July 2003, approximately fifty college presidents met at Harvard to honor the Supreme Court's decision supporting race-based diversity in higher education.²⁴ However, the celebration honoring the *Grutter* decision was guarded as officials analyzed how to address the next wave of litigation and constitutional referendums.²⁵ In the same month, Ward Connerly, an African-American, started a ballot initiative in Michigan to make racial preferences in admissions illegal under state law.²⁶ Connerly used the ballot initiative approach in California and Washington to outlaw race-based admissions in higher education.²⁷ Because diversity without racial discrimination in higher education is an idea whose time has come, this article will attempt to give thoughtful consideration to the issue of race-based affirmative action versus affirmative action free of racial discrimination in higher education in a post-*Grutter* world.

II. THE RACIALLY PERCEPTIVE SETTING AND PROCEDURAL HISTORY OF *GRUTTER V. BOLLINGER*

The Michigan Law School diversity policy mandated admissions representatives to review each applicant's file. The individual assessment of the applicant's file included consideration of a personal statement, letters of recommendation, and an essay that addressed how the applicant would add to the existing diversity at the Law School.²⁸ In appraising an

Michael Kinsley, pointed out. (An angry Clarence Thomas, the court's black conservative, castigated O'Connor for following the "faddish slogans" of the "cognoscenti.")

Id.

23. Pat Wingert & Debra Rosenberg, *Just the Beginning*, NEWSWEEK, July 28, 2003, available at 2003 WL 8639524.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Wingert and Rosenberg reported that:

The Center for Equal Opportunity has filed three complaints with the Department of Education's Office of Civil Rights, arguing that programs designed to boost minority enrollment at the Massachusetts Institute of Technology, St. Louis University and Virginia Tech violate the law. At the same time, it has written letters to some 30 other schools, threatening to file more complaints if the schools don't make changes in "race exclusive" scholarship and out-reach programs—a strategy that could serve as a model for future attacks.

Id.

28. *Grutter*, 123 S. Ct. at 2332.

applicant's file, admissions representatives looked at the applicant's undergraduate grade point average ("GPA") and Law School Admissions Test ("LSAT") score because they serve as significant forecasters of academic success in law school.²⁹ The Law School's race-conscious diversity plan emphasized that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."³⁰ The flexible diversity admission plan declared that having the highest possible score would not guarantee admission to the Law School. On the other hand, a low score did not automatically disqualify an applicant under the diversity plan because the soft, intangible, less-than-objective variables may foretell that an applicant is a strong candidate to "contribut[e] to the intellectual and social life of the institution."³¹

To its credit, the Law School's diversity plan is based on the broad concept of educational enrichment. To achieve this goal, the Law School does not limit the diversity contribution entitled to substantial weight in its admission procedure to racial and ethnic status alone as the plan includes other factors for diversity admissions.³² The Law School asserts in unequivocal terms its dedication to racial and ethnic diversity with particular attention given to the inclusion of African-American, Hispanic, and Native American students because of their long history of being victims of racial and ethnic discrimination.³³ The Law School believes that without a race-conscious component in its diversity plan African-Americans, Hispanics, and Native Americans would not be present in its student body in meaningful numbers.³⁴

In 1996, Barbara Grutter, a white female citizen of Michigan with a 3.8 grade point average and an LSAT score of 161 was denied admission to the Law School.³⁵ In December 1997, Grutter filed a reverse discrimination lawsuit in federal district court against the Law School and other University of Michigan officials alleging that the Law School intentionally discriminated against her because she was a member of the white race in violation of the Fourteenth Amendment's prohibition against racial discrimination. Grutter also contended in the lawsuit that Title VI of the Civil Rights Act of 1964³⁶ and 42 U.S.C. § 1981³⁷

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. 42 U.S.C. § 2000d (2004) provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be

prohibit the Law School's race-conscious factors.³⁸ Grutter asserted that she was denied admission because the Law School's use of race as a predominant factor benefited specific preferred racial minority group candidates at the expense of white candidates with similar credentials of those candidates from minority racial groups.³⁹

The district court conducted a bench trial concerning the degree to which race was a factor in the Law School's admission process.⁴⁰ The district court also analyzed whether the Law School's use of race in its admission process constituted an illegal race-based double standard.⁴¹ Throughout the fifteen-day bench trial the litigants presented a wide range of evidence regarding how the Law School made use of race in its admissions process.⁴² In an effort to measure the degree to which the Law School actually used race in the admission process, Grutter's expert Dr. Kinley Larntz evaluated the Law School's "admissions grids" for 1995-2000.⁴³ Dr. Larntz concluded that race was not the predominant factor in the Law School's admissions process.⁴⁴ Following Dr. Larntz's concession, it was constitutionally plausible for the court in following the Supreme Court's rationale used in the majority-minority congressional district cases to conclude that race may be used as a factor in governmental decision making in certain limited circumstances where race is not the predominant motivating factor.⁴⁵

Dr. Stephen Raudenbush, the Law School's expert, stated during the trial that removing race as a motivating factor in the Law School's admission process would have an extremely harmful impact on diversity admissions.⁴⁶ According to Dr. Raudenbush, a race-neutral admissions process would have reduced the number of race-based diversity applicants admitted from thirty-five percent to ten percent in 2000.⁴⁷ Dr. Raudenbush testified that under a race-neutral plan, the underrepresented

subjected to discrimination under any program or activity receiving Federal financial assistance."

37. 42 U.S.C. § 1981 (2004) states:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

38. *Grutter*, 123 S. Ct. at 2332.

39. *Id.* at 2332-33.

40. *Id.* at 2333.

41. *Id.*

42. *Id.*

43. *Id.* at 2334.

44. *Id.*

45. *See Easley v. Cromartie*, 532 U.S. 234 (2001).

46. *Grutter*, 123 S. Ct. at 2334.

47. *Id.*

minority students would have constituted only four percent of the entering class in 2000 as opposed to the 14.5 percent who were actually admitted.⁴⁸ At the conclusion of the trial, the federal district court held that the Law School's utilization of race as a factor in its admission process was illegal under the strict scrutiny standard.⁴⁹ The district court ruled that the Law School's interest in creating and maintaining student diversity was not compelling because racial diversity was not a compelling interest under the rationale of *Bakke*.⁵⁰ The district court also stated that even if racial diversity in higher education were a compelling interest, the Law School's use of race as a factor to advance that interest was not constitutionally permissible because it was not narrowly tailored.⁵¹ The district court agreed to Grutter's demand for declaratory relief and prohibited the Law School from considering race as a factor in its admission process.⁵²

The Sixth Circuit Court of Appeals stayed the injunction pending an appeal.⁵³ The Sixth Circuit reversed the district court's ruling, set aside the injunction, and held that Justice Powell's opinion in *Bakke* created racial diversity as a valid compelling state interest.⁵⁴ The court also ruled that the Law School's treatment of race was narrowly tailored for the reason that race was simply a "potential 'plus' factor" and because the Law School's diversity admission process was "virtually identical" to the Harvard diversity admission process portrayed favorably by Justice Powell.⁵⁵ The Supreme Court granted certiorari⁵⁶ to decide the disputed issue of whether diversity is a compelling enough interest to justify a narrowly tailored treatment of race in selecting applicants for admission to public universities.⁵⁷

48. *Id.*

49. *Id.* at 2335.

50. *Id.* (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).

51. *Grutter*, 123 S. Ct. at 2335.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Grutter*, 123 S. Ct. at 2335.

57. *Id.* ("Compare *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (*Hopwood I*) (holding that diversity is not a compelling state interest), with *Smith v. Univ. of Wash. Law School*, 233 F.3d 1188 (9th Cir.2000) (holding that it is).").

III. WHETHER *GRUTTER V. BOLLINGER*'S TREATMENT OF JUSTICE
POWELL'S OPINION IN *BAKKE* AS BINDING PRECEDENT FOR DIVERSITY
THAT DISCRIMINATES ON THE BASIS OF RACE IS INTELLECTUAL
CONJECTURE NOT SUPPORTED BY PRIOR DECISIONS OF THE COURT

According to Justice O'Connor, the Supreme Court previously attended to the issue of race-conscious admissions in public higher education twenty-five years earlier in the landmark *Bakke* decision.⁵⁸ *Bakke* involved a racial set-aside admissions program that allotted sixteen out of one hundred places in a medical school class for individuals from specified minority groups.⁵⁹ Justice Powell supported the state court's ruling invalidating the set-aside program, but he did not affirm the state court's injunction prohibiting the use of race in the admission process.⁶⁰ The Supreme Court in *Bakke* held that a "State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."⁶¹ In *Bakke*, the Court overruled the component of the state court's judgment that forbade the university from using race as a factor for any applicant.⁶² Because Justice Powell's opinion in *Bakke* announced the fractured ruling of the Court, his opinion has served as the benchmark for constitutional analysis of permissible race-conscious admissions policies.⁶³

The Court in *Grutter v. Bollinger* discussed the Powell opinion in detail and treated his opinion in *Bakke* as if it were the opinion of the Court, not because of any binding legal precedent, but because elite colleges had relied on Justice Powell's opinion in adopting their diversity policies.⁶⁴ The Supreme Court acknowledged in a classic understatement that its fractured decision in *Bakke* created a circumstance where the lower courts made a great effort to determine whether Justice Powell's racial diversity rationale articulated in *Bakke*, without support from any other Justice, was binding precedent under the holding in *Marks*.⁶⁵ In *Marks*, the Supreme Court stated "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest

58. *Id.*

59. *Id.*

60. *Id.* at 2335-36.

61. *Id.* at 2336 (citation omitted).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 2337 (citations omitted).

grounds.”⁶⁶

The Supreme Court avoided its responsibility to decide in *Grutter* whether Justice Powell met the *Marks* test because the test is hard to apply to the issue of racial diversity in higher education.⁶⁷ The Court’s refusal to decide whether Justice Powell’s racial diversity rationale is binding Supreme Court precedent under *Marks* creates the impression that the Court was predisposed to reach a specific result on race-based diversity in higher education without giving adequate consideration to the natural and logical legal consequence of applying *Marks* to the issues presented in *Grutter*. The Supreme Court’s treatment of the *Marks* test in *Grutter* left unresolved the question about the value of the test as legal precedent in future cases involving race-based diversity.⁶⁸

Although *Marks* may be binding precedent in other areas of the law, the Court’s decision in *Grutter* has implicitly created an exception to the *Marks* fractured opinion rationale in cases involving an issue of racial diversity in higher education. The Court in *Grutter* could have limited the *Marks* splintered opinion narrowest ground rationale to those cases, like *Marks*, where all the federal appellate courts are in agreement that a plurality opinion represents the holding of the United States Supreme Court without extending the *Marks* inquiry to a logical extreme.⁶⁹ Although the Supreme Court refused to decide whether Justice Powell’s opinion supporting racial diversity as a compelling interest in higher education is binding under *Marks*, one commentator concluded that the Ninth Circuit got it right and that Justice Powell’s opinion in *Bakke* is binding precedent under *Marks*.⁷⁰

66. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)). “Three Justices agreed with the prevailing opinion in *Memoirs*. Two others, Mr. Justice Black and Mr. Justice Douglas, consented on more extensive grounds in reversing the judgment below.” *Id.* at 193. Mr. Justice Black and Mr. Justice Douglas repeated their well-known view that the First Amendment grants an absolute shield against governmental action designed to restrain obscenity. Mr. Justice Stewart also acquiesced in the judgment because he believed that only “hardcore pornography” may be censored. In *Marks*, the Supreme Court apparently concluded that the opinion of the *Memoirs* plurality represented the holding of the Court and supplied the governing standards because every Court of Appeals that has adjudicated the question between *Memoirs* and *Miller* properly concluded that *Memoirs* was controlling precedent. Under the *Memoirs* standard, provocative words and pictures were deemed to be constitutionally protected unless the prosecution demonstrated that they were “utterly without redeeming social value.” *Id.* at 193-94.

67. *See Grutter*, 123 S. Ct. at 2337 (citations omitted).

68. *Id.* (citation omitted).

69. *Marks*, 430 U.S. at 194.

70. Joelle A. Marty, Comment, *Affirmative Action In Higher Education: Federal Circuit Court Split Over Bakke’s Diversity Rationale*, 36 U.C. DAVIS L. REV. 505, 528 (2003). Marty states: Applying *Marks v. United States*, Justice Powell’s decision is binding precedent because it represents the narrowest grounds upon which *Bakke* could rest. That is, Justice Powell’s ‘plus factor’ approach rests on more narrow grounds than a broad race-based possibility. Therefore, under Supreme Court precedent, Justice Powell’s opinion controls,

IV. THE SUPREME COURT'S HEIGHTENED JUDICIAL SCRUTINY APPLIES
TO DISFAVORED WHITES AS INDIVIDUALS

In the context of racial diversity and higher education, the Supreme Court in *Grutter v. Bollinger*⁷¹ by necessary implication extended its heightened judicial scrutiny rationale of footnote four in *United States v. Carolene Products Co.*⁷² to disfavored white individuals that are not members of an insular and discrete minority.⁷³ According to Professors Farber and Frickey, under the traditional understanding of Justice Stone's well-known footnote four, strict judicial scrutiny was needed to protect insular and discrete racial minorities because of their lack of voice in the political process.⁷⁴ While it is unpersuasive that *Carolene Products* did not properly conclude in footnote four that racial minorities were in need of judicial intervention to protect them from a racially hostile political process,⁷⁵ footnote four of *Carolene Products* is best understood as protecting every individual from racial discrimination by the state in the

irrespective of the Brennan Group's failure to join the portion of Justice Powell's opinion that discussed diversity.

Id. (citing *Smith v. Univ. of Wash.*, 233 F.3d 1188, 1199-1200 (9th Cir. 2000)).

71. 123 S. Ct. at 2333.

72. 304 U.S. 144, 152 n.4 (1938). (“[W]hether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”)

73. *Id.*

74. Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 686 (1991) (citations omitted).

75. *Id.* at 687. Farber and Frickey also state:

Third, by focusing on political powerlessness, the conventional rationale can lead to more “searching judicial inquiry” whenever positive political theory suggests that some group is systematically disadvantaged in the political process. The theory has thus been subject to Justice Scalia’s ironic invocation of it, not as a shield protecting racial minorities against discrimination, but as a sword against affirmative action measures. If Justice Scalia is right, *Carolene Products* is defunct as a justification for protecting racial minorities, whom he characterizes as organized groups that politicians are eager to please. Indeed, Justice Scalia’s argument flips *Carolene Products* completely: it is the members of the majority who are politically powerless and in need of judicial protection.

Justice Scalia’s argument finds apparent support in an influential article by a highly unlikely ideological bedfellow, Bruce Ackerman. Drawing on the writings of public choice theorists, Ackerman argued that *Carolene Products* was wrong in suggesting that discrete minorities need special protection from the political process; instead, it is diffuse, large groups whose interests are likely to be underrepresented. Ackerman did not seem to have had affirmative action in mind, but his theory fits Justice Scalia’s assertions well, and Ackerman’s critique may have the unintended results of justifying a more relaxed judicial approach to discrimination against racial minorities and supporting Justice Scalia’s stance toward affirmative action.

Id. at 687-88 (citations omitted).

absence of a compelling justification.⁷⁶ As a result of not restricting suspect racial classifications to insular and discrete minorities, the Supreme Court has granted people of all races strict scrutiny equal protection.⁷⁷

The Supreme Court's holding in *Grutter*⁷⁸ rejected the argument that under *Carolene Products*,⁷⁹ more exacting judicial scrutiny standards, the State of Michigan did not have to demonstrate a "compelling interest to justify [its] use of race in the admissions process."⁸⁰ In *Grutter*, the Supreme Court stated, "[t]oday we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."⁸¹ In 1991, Professors Farber and Frickey predicted that the future of race-based affirmative action or racial diversity could be decided by the role eventually assigned to the *Carolene Products* suspected category rationale.⁸² Professors Farber and Frickey believed *Carolene Products* promised groups traditionally "excluded from full membership in the political community will receive an inviting reception from the judiciary" to protect their interest.⁸³ One of the most fascinating aspects of Justice O'Connor's opinion in *Grutter* resides in her bold declaration that the rationale for racial diversity in higher education is to promote higher education's interest in a robust exchange of intellectual ideas, and not to correct any historical educational or social deficits of traditionally excluded insular and discrete minorities.⁸⁴

76. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211-23 (1995).

77. *See id.*; *see also* L. Darnell Weeden, *How to Establish Flying the Confederate Flag with the State as Sponsor Violates the Equal Protection Clause*, 34 AKRON L. REV. 521 (2001).

78. 123 S. Ct. at 2337.

79. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

80. *Grutter*, 123 S. Ct. at 2333.

81. *Id.* at 2337.

82. Farber & Frickey, *supra* note 74, at 718.

83. *Id.* at 726.

84. *Grutter*, 123 S. Ct. at 2336. Justice O'Connor states:

In Justice Powell's view, when governmental decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Id.*, at 299, 98 S. Ct. 2733. Under this exacting standard, only one of the interests asserted by the university survived Justice Powell's scrutiny.

First, Justice Powell rejected an interest in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession" as an unlawful interest in racial balancing. *Id.*, at 306-307, 98 S. Ct. 2733. Second, Justice Powell rejected an interest in remedying societal discrimination because such measures would risk placing unnecessary burdens on innocent third parties "who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered." *Id.*, at 310, 98 S. Ct. 2733. Third, Justice Powell rejected an interest in "increasing the number of physicians who will practice in communities currently underserved," concluding that even if such an interest could be compelling in

Justice O'Connor's statement in *Grutter*⁸⁵ that Justice Powell's support for racial diversity in higher education twenty-five years ago in *Bakke*⁸⁶ was intended to serve the interest of the predominantly white university's interest in intellectual diversity is consistent with Professor Derrick Bell's⁸⁷ assertion that racial equality for African-Americans, whether it is called diversity or affirmative action, will only be attained when racial equality serves an overriding interest of whites. Under Professor Bell's interest convergence theory⁸⁸ African-Americans interest in achieving racial diversity has no independent value separate from the interest of white elites.⁸⁹

In a recent critique of the Supreme Court's *Grutter* opinion, Professor Bell maintains that the *Grutter* opinion is a "definitive example" of his "I-C interest convergence theory."⁹⁰ Professor Bell asserts his rationale for arguing that *Grutter* is a prime example of his interest convergence theory is based on Justice O'Connor's historical and rather rigid opposition to race-based affirmative action in the economic

some circumstances the program under review was not "geared to promote that goal." *Id.*, at 306, 310, 98 S. Ct. 2733.

Justice Powell approved the university's use of race to further only one interest: "the attainment of a diverse student body." *Id.*, at 311, 98 S. Ct. 2733. With the important proviso that "constitutional limitations protecting individual rights may not be disregarded," Justice Powell grounded his analysis in the academic freedom that "long has been viewed as a special concern of the First Amendment." *Id.*, at 312, 314, 98 S. Ct. 2733.

Id.

85. *Id.*

86. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

87. Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980). Professor Bell states:

What accounted, then, for the sudden shift in 1954 away from the separate but equal doctrine and towards a commitment to desegregation?

. . . [T]he decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation . . . [T]he decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples.

Id.

88. *Id.* at 523. Professor Bell explains that:

Translated from judicial activity in racial cases both before and after *Brown*, this principle of 'interest convergence' provides: The interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites. However, the fourteenth amendment, standing alone, will not authorize a judicial remedy providing effective racial equality for blacks where the remedy sought threatens the superior societal status of middle and upper class whites.

Id.

89. *Id.*

90. Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003).

arena of government contracts and public sector employment.⁹¹ Justice O'Connor, according to Professor Bell, has generally disapproved of race-based affirmative action when she believes the interests of whites will be harmed in the areas of employment and government contracts.⁹² Professor Bell believes that Justice O'Connor only supported race-based diversity in legal education because O'Connor apparently believes that race-based diversity is a benefit and not a burden to whites.⁹³ It is Professor Bell's opinion that under the Court's holding in *Grutter*, blacks and Hispanics are the fortuitous beneficiaries of a Court opinion designed to benefit members of the nonminority elite.⁹⁴ "When she perceived in the Michigan Law School's admission program an affirmative action plan that minimizes the importance of race while offering maximum protection to whites and those aspects of society with which she identifies, she supported it."⁹⁵ Professor Bell believes that Justice O'Connor supported diversity in *Grutter* because diversity is an expedient means for admitting predominantly white children of wealth and privilege while admitting a critical mass of selected minorities.⁹⁶ If white children of privilege and wealth admitted to elite schools are generally required to have higher grades and LSAT scores than African-Americans and Hispanics, the Court in *Grutter* has reinvented a new age de facto separate but unequal doctrine in a poorly camouflaged effort to hide what Professor Bell⁹⁷ correctly describes as an elite class-based bias in favor of the children of wealth and privilege.

Some commentators conclude that *Grutter* will have little impact on the average African-American because only a small number of African-Americans apply to selective colleges like the University of Michigan.⁹⁸ It is suggested by some that *Grutter* was "concerned with creating more black leaders by opening places for them in elite schools."⁹⁹ One may ask what interest of the white upper class and middle classes could be served by assuring that a critical mass of black leaders attends elite schools. One plausible answer may be that many racial minorities who attend elite schools tend to share the race-based elite focus of promoting racial diversity as a symbol of racial progress without providing any meaningful solutions to the persistent problem of economic and social

91. *Id.* at 1625-26.

92. *Id.* at 1626.

93. *Id.*

94. *Id.* at 1625.

95. *Id.*

96. *Id.* at 1632.

97. *Id.*

98. Thomas, Taylor, Rosenberg & Clift, *supra* note 19.

99. *Id.*

disparity between African-Americans and whites.¹⁰⁰ What makes the huge investment of ingenuity and resources in the defense of Michigan's racial preferences disappointing is that the investment is grotesquely disproportionate to any good it will do the African-American community. But by the logic of the diversity rationale for preferences, doing good for African-Americans is an afterthought.¹⁰¹

The cruel constitutional incongruity of the *Grutter* rationale is that the decision is intended to impose a racially discriminatory hardship on specific white individuals without really benefiting rank-and-file African-Americans as a group, while unnecessarily prolonging future litigation about race-based affirmative action in college admissions.¹⁰²

100. George F. Will, *Race-norming in Michigan; At Issue is the Racial Goal of Overthrowing a Core Principle of Our Open Society – that Rights Inhere in Individuals, not Groups*, NEWSWEEK, June 23, 2003, available at 2003 WL 8639237. Will states:

Michigan's supposed solicitude for minorities is an aspect of a national scandal. Nationwide, 45 percent of African-American young people have their life chances irrevocably blighted by never receiving high-school diplomas. In 2000 only 2 percent of Michigan's African-American eighth graders registered as "proficient" on the National Assessment of Educational Progress math test. Five percent is the national average for African-American eighth graders. For whites, the average is 34 percent proficient.

Yet what are the nation's educational and opinion-forming elites obsessing about? The defense of Michigan's racial preferences.

Racial preferences for diversity pur-poses [sic] matter only at selective colleges, the minority of four-year institutions that do not have, essentially, open admissions – open to any high-school graduate and, in many cases, nongraduates. Such preferences matter greatly only at highly selective institutions – those that receive at least twice as many applications as they accept. There are fewer than 100 such institutions.

. . . The real purpose of socially engineered diversity is to somehow – there is scant evidence as to just how this supposedly works – improve the educational experience for all students attending elite institutions. Which means diversity preferences are intended primarily for the benefit of nonminorities.

The preferred minorities – mainly African-Americans but also Hispanics – are being used as seasoning ingredients for elite institutions. These institutions do not dwell on certain amply documented and discomfoting facts. As Taylor notes, the preferred minorities have high failure and dropout rates and cluster disproportionately in the bottom quarter of their classes. And of those who try to use their degrees from elite institutions as passports to elite professional schools, most again are admitted on the basis of schools' racial double standards, and "shockingly high percentages" of preferentially admitted students "end up flunking their medical boards and bar exams."

Id.; see also, Michelle A. Whitham, *Defining the Job: Understanding Job Descriptions*, 1 DRAFTING EMPLOYMENT DOCUMENTS IN MASSACHUSETTS HANDBOOK SUPPLEMENT § 7.5 (Massachusetts Continuing Legal Education, Inc., 2002). Race norming, or "within-group scoring," is the practice of adjusting employment test scores so that a minority test taker's score is compared to other test takers of the same race, not to the general population of all test takers. Race norming is the only type of conduct the 1991 Civil Rights Act specifically prohibits. This prohibition reflects the growing national debate over affirmative action in general, and racial preferences and reverse discrimination in particular. *Id.*

101. Will, *supra* note 100.

102. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2349 (2003) (Scalia, J., dissenting) (with whom Thomas, J. joins, concurring in part and dissenting in part). "Unlike a clear constitutional holding that racial preferences in state educational institutions are impermissible, or even a clear anti-constitutional holding that racial preferences in state educational institutions are OK, today's

Justice Scalia does an excellent job in identifying some of the constitutional issues that will be litigated in the future because of the inherently flawed Supreme Court race-based constitutional analysis used in *Grutter* to justify reverse race-based discrimination.¹⁰³ Justice Scalia states that the *Grutter* future litigation roadmap will, at a minimum, include the following six issues:¹⁰⁴ (1) whether the race-based diversity discrimination actually evaluates the individual predominately on the merits or is the individual being evaluated under the separate but unequal admission track for racial minority students who fall below the normal admission criteria required of whites as a group;¹⁰⁵ (2) whether the race-based discriminatory diversity purpose of obtaining a critical mass of minority race students is in fact an unconstitutional quota system because race is actually the predominant factor in identifying the critical mass of benefited racial minorities;¹⁰⁶ (3) whether the race-based diversity discrimination is a cause in fact of any traditional educational benefits;¹⁰⁷ (4) whether a university or college is truly committed to the race-based discriminatory diversity approved by the Court in *Grutter* (Justice Scalia has appropriately concluded that a university accommodating reverse self imposed racial segregation by minority race students with their “minority-only” activities as not being true to the principle of multiculturalism and racial diversity);¹⁰⁸ (5) whether the college’s discriminatory racial diversity preference is in compliance with the mystical critical minority racial mass concept identified in *Grutter*;¹⁰⁹ and (6) whether a college’s race-based diversity discrimination will make it liable to minority groups that are “intentionally short changed in the institution’s composition of its generic minority ‘critical mass.’”¹¹⁰

No one should be surprised that the opinion in *Grutter* will generate a great deal of future litigation because there are Americans who have the belief that the government should never discriminate on the basis of

Grutter-Gratz split double header seems perversely designed to prolong the controversy and the litigation.” *Id.*

103. *Id.*

104. *Id.* at 2349-50.

105. *Id.* at 2349.

106. *Id.*

107. It is important to note that the educational benefits issue was not contested in *Grutter*.

108. *Id.* at 2349-50. Scalia states:

Tempting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.

Id.

109. *Id.* at 2350.

110. *Id.*

race.¹¹¹ Unfortunately, Justice Scalia's conclusion that "[t]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception,"¹¹² is also incorrect because the Supreme Court has consistently allowed the government to discriminate on the basis of race for compelling reasons.¹¹³ However, if the Court were to treat race as the forbidden governmental classification¹¹⁴ the government would be prohibited from ever treating any group or individual differently because of race. One must remember that in 1944 after adopting its so called very rigid strict scrutiny standard for race-based classification in *Korematsu*,¹¹⁵ the Supreme Court gave its approval to Congress's decision to detain Japanese-Americans because of their race. While dissenting in *Korematsu*, Justice Murphy properly described the federal government's denial of civil rights to Japanese-Americans as racist.¹¹⁶ When America is at war or facing a serious national problem, the only constitutional rule that will save an individual or a group from state-approved racial discrimination is a law that unequivocally prohibits any governmental entity from treating a person differently because of his or her race.¹¹⁷

V. THE SUPREME COURT'S HOLDING IN *GRUTTER V. BOLLINGER* HAS A NEGATIVE IMPACT ON AFRICAN-AMERICANS BECAUSE THE OPINION MAY HAVE SENT A MESSAGE THAT RACIAL DIVERSITY EQUALS ACCOMMODATING RACIAL INFERIORITY

Regardless of whether one agrees with Professor Bell's¹¹⁸ theory that

111. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 354 (1949).

112. *Grutter*, 123 S. Ct. at 2350. (Scalia, J., dissenting, with whom Thomas, J. joins, concurring in part and dissenting in part).

113. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228 (1995) (holding that any law classifying people based on race is subject to the compelling interest and strict scrutiny requirement despite the fact that the law is intended to help, rather than harm, minorities); see *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (In *Wygant*, Justice Powell's plurality opinion represented the rationale of a majority of the Court in concluding that providing minority role models for students because of societal discrimination was not a compelling state interest under the strict scrutiny standard); see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW HORNBOOK NO. 639 (6th ed. West 2000) (stating that in a strict scrutiny review, "the Court will not uphold [a government] classification unless the Justices reached the conclusion that the classification is necessary, or narrowly tailored, to promote [the government's compelling interest]").

114. Tussman & tenBroek, *supra* note 111, at 354.

115. See *Korematsu v. U.S.*, 323 U.S. 214, 223 (1944) (dismissing racial prejudice as an underlying motivation for the government action, and instead framing the issue as one requiring immediate attention to the "real military dangers which were presented" by Japanese aggression).

116. *Id.* at 233 (Murphy, J., dissenting).

117. See Tussman & tenBroek, *supra* note 111, at 354.

118. Bell, *supra* note 87, at 524.

equality for African-Americans will only be achieved if it serves the interest of the white ruling class, it is debatable whether Justice O'Connor's interpretation of the equal protection clause¹¹⁹ in *Grutter v. Bollinger*¹²⁰ promotes racial equality for African-Americans. According to Professor Bell, the *Grutter* race-based diversity opinion is a serious distraction in the continuing efforts to attain equal racial justice for the following four reasons.¹²¹ First, Professor Bell believes *Grutter*'s rationale for diversity is bad public policy because it allows decision makers to avoid confronting the real issues of race and class-based discrimination that denies a student an equal opportunity to compete for a college admission.¹²² Second, Professor Bell states that race-based college diversity programs invite future litigation because there is no real legal basis for approving diversity in college admissions while denying race-based preferences in the areas of employment and public contracts.¹²³ Justice Scalia's dissent correctly observes that there is no principled basis for expanding the *Grutter* race-based diversity discrimination rationale to public sector employment and other life experiences.¹²⁴ Third, Professor Bell emphasizes race-based diversity in college bestows undeserved validity to traditional college admission criteria that predominately favors affluent whites.¹²⁵ Fourth, Professor Bell declares the incredible attention given to race-based diversity in college admission programs virtually repels any consideration of wealth discrimination as a barrier to college admission.¹²⁶

119. U.S. CONST. amend. XIV, § 1.

120. *Grutter*, 123 S. Ct. at 2337.

121. Bell, *supra* note 90.

122. Bell, *supra* note 90.

123. Bell, *supra* note 90.

124. *Grutter*, 123 S. Ct. at 2349 (Scalia, J., dissenting, with whom Thomas, J. joins, concurring in part and dissenting in part). Scalia states:

If it is appropriate for the University of Michigan Law School to use racial discrimination for the purpose of putting together a "critical mass" that will convey generic lessons in socialization and good citizenship, surely it is no less appropriate—indeed, *particularly* appropriate—for the civil service system of the State of Michigan to do so. There, also, those exposed to "critical masses" of certain races will presumably become better Americans, better Michiganders, better civil servants. And surely private employers cannot be criticized—indeed, should be praised—if they also "teach" good citizenship to their adult employees through a patriotic, all-American system of racial discrimination in hiring. The nonminority individuals who are deprived of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand.

Id.

125. Bell, *supra* note 90.

126. Bell, *supra* note 90. Bell states:

With government at every level struggling to manage huge deficits, many colleges are suffering deep budget cuts that mean higher tuition and less money available for financial aid. A Century Foundation study estimates that if the nation's most selective colleges abandoned affirmative action and looked only at grades and test scores, about 5,000

Though Professor Bell's position that at the end of the day the *Grutter* opinion is bad public policy because it fails to aid in the fight against racial injustice,¹²⁷ the opinion also violates the spirit of the *Brown v. Board of Education*¹²⁸ decision because the Law School's race-based diversity classification "stamp[s] minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled to preferences.'"¹²⁹ One of the goals of the equal protection clause is to prohibit states from denying "any person within its jurisdiction the equal protection of the laws."¹³⁰ In theory, the equal protection clause is supposed to be a personal right enjoyed by an individual regardless of his or her racial group status because "government may treat people differently because of their race only for the most compelling reasons."¹³¹ In contemporary America, when race is articulated as an intangible factor in the higher education admission process for an individual African-American, the merit of the individual African-American's application is lost or marginalized because of presumed stereotypical perceptions that his or her racial group status was the predominant factor in the admission process.¹³² Justice O'Connor's race-based diversity rationale is not understood as promoting equality for African-Americans by a significant number of Americans because they believe that diversity is simply a pretext for a racial preference.¹³³

The irony of the Court's race-based diversity holding in *Grutter* is

fewer black and Hispanic students would make the cut each year; but next year, officials estimate that because of budget cuts at least 20,000 black and Hispanic students will be shut out of California's 108 community colleges. One can easily imagine the nationwide attrition figures.

Bell, *supra* note 90, at 1632.

127. *See id.*

128. 347 U.S. 483, 494 (1954).

129. *Grutter*, 123 S. Ct. at 2362 (Thomas, J., with whom Scalia, J., joins as to Parts I-VII, concurring in part and dissenting in part) (internal citations omitted).

130. U.S. CONST. amend. XIV, § 1.

131. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

132. *See* Thomas, Taylor, Rosenberg & Clift, *supra* note 19, available at 2003 WL 8639381. "The [*Grutter v. Bollinger*] ruling does not really represent a consensus of popular opinion. Most Americans say they favor 'affirmative action' and oppose 'quotas'—both loaded terms. But asked more neutrally whether they approve 'racial preferences,' the answer from both blacks and whites is overwhelmingly no." *Id.*

133. *Id.* The *Newsweek* article states:

O'Connor voted with five other justices to strike down the numerical system used to admit Michigan undergraduates. Assigning a twenty-point bonus for skin color seemed to smack of quotas. But O'Connor and four others voted to uphold the law school's admission system, which is less blatant but nonetheless affords a clear racial preference. An African-American with a B-minus average in college has about the same chance of admission to Michigan Law as a white or an Asian with an A average.

Id.

that it may have breathed new life into the harmful message¹³⁴ that African-Americans are academically inferior¹³⁵ and cannot compete at elite colleges.¹³⁶ Fifty years ago in *Brown*,¹³⁷ the Supreme Court made it clear that states were not to send any messages to students that they were inferior in the education process because of their race. The real foreseeable harm caused by African-Americans leaders insisting on race-based affirmative action is the harmful message of racial inferiority that we are passing on to the next generation of African-Americans. William Raspberry, a highly regarded African-American journalist, has also expressed concern about whether race-based affirmative action sends a message of racial inferiority to young African-Americans.¹³⁸ Because Mr. Raspberry is probably in denial about the harmful side effects of race-based discrimination in the name of affirmative action, he will not fully accept his own preliminary conclusion “that because their elders and advocates insist on racial preferences as a policy far into the future, our young people may be internalizing a sense of racial inferiority.”¹³⁹

134. Cynthia Tucker, *Defeating Prejudices of Critics*, TIMES UNION (Albany, NY), July 1, 2003, Three Star Edition, at MAIN A9, available at LEXIS, Major Newspaper, MAJPAP File. Ms. Tucker states:

Occasionally, critics of affirmative action will try to persuade me to drop my support for affirmative action programs, contending that such efforts taint me and other black professionals with assumptions of incompetence. No matter how talented or accomplished I may be, they say, some will always wonder whether I was given good jobs simply because I'm black.

With the Supreme Court's ruling last week backing affirmative action in college admissions, that argument is once again making the rounds. Indeed, Justice Clarence Thomas, who disagreed with the court's majority, holds the view that affirmative action taints its beneficiaries.

In his dissent, he quoted black abolitionist Frederick Douglass to make the point: “And if the negro (sic) cannot stand on his own legs, let him fall also. . . . Let him alone! . . . Your interference is doing him positive injury.”

Id.

135. *Id.* (“[S]uccessful blacks . . . have been subject to the slander of inferiority for the last 400 years, well before the term ‘affirmative action’ became part of the political lexicon.”)

136. *Id.* Less than a decade ago, two whites, Richard Herrnstein and Charles Murray, wrote an 845-page screed, “The Bell Curve,” arguing that blacks are intellectually inferior. *Id.*

137. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954). The Court in *Brown* stated:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.

Id.

138. William Raspberry, Editorial, *Affirmative Approach*, WASH. POST, Jan. 5, 2004 at A17, available at 2004 WL 55829210.

139. *Id.* Raspberry relates the following:

I recently asked my black students at Duke University how long they thought racial preference would be necessary. To my amazement, several of them answered, in essence, “Forever.” What—perhaps over extrapolating from a tiny—sample could account for this new pessimism? Two things, I suspect. First, we black Americans have changed our

Some college students are using race-based affirmative action policies in the higher education admission process at elite colleges to advance the view that African-Americans are not paying their merit dues by receiving special accommodation because of the diversity academic handout given in the admission process to African-Americans in spite of their inferior grades and substandard test scores.¹⁴⁰ On September 24, 2003, Southern Methodist University closed down a bake sale that sold cookies for different prices based on the buyer's race or gender.¹⁴¹ "The sign said white males had to pay \$1 for a cookie. White women: 75 cents. Hispanics: 50 cents. Blacks: a quarter. The event Tuesday at Southern Methodist University was no PTA bake sale."¹⁴²

The point of allowing an African-American to buy a cookie for one-fourth of what a white has to pay for the same cookie is designed to send

measure of success. A quarter century ago, we looked to the achievable goal of a substantial decrease in racial discrimination. Today, we look to the far more difficult goal of eliminating racism. The second, though less certain in my own mind, is that because their elders and advocates insist on racial preferences as a policy far into the future, our young people may be internalizing a sense of inferiority. They respond by displacing the responsibility for their shortcomings to the white dominated society. But the implication is that [African-Americans] are permanently damaged goods, in permanent need of special concessions.

Id.

140. Lynda K. Wertheimer, *SMU Halts Race-Based Bake Sale; To Protest Affirmative Action, Group Set Prices Using Ethnicity, Gender*, DALLAS MORNING NEWS, Sept. 25, 2003, Second Edition, at METRO 1B, available at LEXIS, Major Newspaper, MAJPAP File.

141. *Id.*

142. *Id.* Wertheimer reported that:

The Young Conservatives of Texas chapter ran its so-called affirmative action bake sale to protest the use of race or gender as a factor in college admissions. Other groups have held similar sales at colleges around the country since February.

...Matt Houston, a sophomore, said the group's sign, which listed prices for the treats according to the race and sex of buyers, was not a learning tool. It was offensive, he said.

"My reaction was disgust because of the ignorance of some SMU students," said Mr. Houston, who is black. "They were arguing that affirmative action was solely based on race. It's not based on race. It's based on bringing a diverse community to a certain organization."

He and Kambira Jones, a 20-year-old junior, both expressed their concerns to SMU officials. "When I saw this, I was like, 'I can't believe they let you guys post this,'" she said. "I felt they were attempting to make Hispanics and blacks feel inferior. We jumped over the same hoops to get there."

SMU's freshman class this year is one of its most diverse ever – 20 percent of students are minorities. Overall, minority enrollment among the school's 10,000-member student body is 19 percent.

Before the bake sale brouhaha, SMU already was planning a forum so students and other could debate the aftermath of the recent U.S. Supreme Court ruling on affirmative action. The court ruled in June that universities could use race as a factor in admissions under limited conditions. The ruling changes the landscape in Texas, where universities have been banned from using race as a factor since 1996.

Id.

a message symbolizing the educational and economic inferiority of the African-American group in higher education in a manner similar to the way the separate but equal race-based laws were “usually interpreted as denoting the inferiority of the [African-American] group.”¹⁴³ The cookie sale on college campuses is designed to equate racial diversity with racial inferiority in higher education for specific minorities while simultaneously characterizing more affluent whites as the innocent victims of reverse racial diversity discrimination.

While keeping one’s eyes on the value of the tainted racially discriminatory diversity prize in higher education and its mixed message of academic racial inferiority and token racial educational reparations poorly disguised as racial diversity, the Supreme Court’s decision in *Grutter* is further complicating the concept of evaluating African-American educational advancement without offering a practical solution free of race discrimination. Historically, “one of the most fiercely contested issues in education”¹⁴⁴ has been how to calculate African-American progress.¹⁴⁵

African-Americans supporting diversity in higher education based on race are in denial about the general nature of many white Americans toward African-Americans as a group. Based on traditional cultural heritage, and economic and social dynamics, white Americans see African-Americans as a group as presumptively possessing all of the negative stereotypes associated with being black in America. Because many whites view African-Americans as a group as inherently

143. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

144. R. Scott Baker, *The Paradoxes of Desegregation: Race, Class, and Education, 1935-1975*, AM. J. EDUC., May 2001, at 321.

145. *Id.*

More than a century later, measuring African-American progress has become one of the most fiercely contested issues in education. Surveying an educational landscape defined by greater access for advantaged blacks and the continued isolation of most African-Americans, scholars tend to emphasize one of these realities at the expense of the other. Optimists argue that African-Americans have made dramatic and durable educational progress. The most significant gains, David Tyack and Larry Cuban (1995) show, have been fueled by the desegregation of schools, colleges, and universities. Drawing on a generation of scholarship in sociology, Amy Stuart Wells and Robert Crain contend that African-Americans who attend predominantly white educational institutions achieve more and “are more likely to go on to college and secure high-status jobs” (Wells and Crain 1997, p.1). Pessimists reject this portrait of unproblematic progress, arguing that desegregation may well have done more harm than good. Vanessa Siddle Walker (2000) contends that during the first half of the twentieth century African-Americans fashioned educational environments that motivated students to excel and achieve their highest potential. Harold Cruse (1987) and Derrick Bell (1992) assert that because these nurturing educational environments were dismantled, desegregation failed to narrow educational gaps or alter educational status of most blacks. Where optimists see progress pessimists find regress.

Id.

intellectually inferior to whites as a group it is educational suicide for African-Americans as a group to endorse a race-based policy of educational preference for blacks on the presumptive theory that African-Americans are intellectually inferior because of either their grades or scores on standardized tests. If reasonable African-Americans can accept the theory that many whites engage in the presumption that African-Americans as a group possess the stereotypical trait of being intellectually inferior to whites, African-Americans should not be shocked by the conclusion that many whites support race-based affirmative action as a necessary evil to accommodate the presumed intellectually inferior status of African-Americans.¹⁴⁶

According to Professor Freedman, a journalism professor at Columbia University, affluent parents created the affirmative action or diversity concept to allow racial minorities to enter elite universities on a separate but unequal admission standard because those minorities admitted were presumed to be inferior.¹⁴⁷ The conservative Justice Thomas has also consistently tried to warn the African-American community that race-based affirmative action programs like the one established by the Law School classify African-Americans as inferior.¹⁴⁸

Author Ellis Cose is a supporter of race-based affirmative action.¹⁴⁹ Cose tells an eloquent story about the plight of a hypothetical brown boy that suffered racial harassment because he was given a five-yard advantage at the start of a race.¹⁵⁰ Cose's story makes the case against race-based preferences for people who want to trade the long-term harmful psychological message to their children of the racial inferiority generally associated with race-based affirmative action for the immediate benefit of a very small number of selected African-American race-based affirmative action admittees.¹⁵¹ In Cose's hypothetical, a brown

146. Samuel G. Freedman, 'Legacy' Admissions Ban Highlights Flaws in System, *USA TODAY*, Jan. 22, 2004, at A15, available at 2004 WL58549864. Samuel Freedman is a professor of journalism at Columbia University and has lately written, *Jew vs. Jew: The Struggle for the Soul of American Jewry*. Freedman serves on the *USA TODAY*'s board of contributors. He has stated:

Affluent parents collectively have paid hundreds of millions of dollars to enroll their children in test-prep classes, buying the appearance of merit. At the other end of the process, college officials found themselves torn between the rhetoric of meritocracy and the reality that blacks and Hispanics scored far below whites on standardized tests. So, under the names of 'affirmative action' or 'diversity,' they cooked up a parallel admissions track premised on pity, meaning minorities who entered their institutions did so with the presumption of inferiority.

Id.

147. *See id.*

148. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2363-64 (2003) (Thomas, J., with whom Scalia, J., joins as to Parts I-VII, concurring in part and dissenting in part).

149. Ellis Cose, *The Rage of a Privileged Class*, 111-33 (Harper Perennial 1995).

150. *See id.* at 132-33.

151. *Grutter*, 123 S. Ct. at 2362 (Thomas, J., concurring in part and dissenting in part).

unpopular child has a goal of becoming a runner.¹⁵² The brown child's peers decline to allow him to practice running on their track.¹⁵³ One day a track official observes the troubles of the brown boy and chooses to give the boy an opportunity to run in the scheduled public races.¹⁵⁴ The track official states the other children are not required to let the brown boy practice with them but they are required to let the brown boy run in the scheduled races.¹⁵⁵ Because the brown boy was not allowed to practice running with the other children the track official required the other children to provide the brown boy with a five-yard head start.¹⁵⁶ The story explains that:

Though the official has given a very public and heartfelt explanation for the special treatment, loudmouths in the bleachers focus increasingly on the unfairness of brown kid's head start. Why is it necessary? . . . Could he be genetically inferior? . . . Is something in his culture keeping him from keeping up?¹⁵⁷

Loving and caring parents in Cose's hypothetical would not knowingly subject the brown boy to such racial harassment and unnecessarily assume the risk of creating an inferiority complex in the brown boy for a temporary advantage at the expense of the brown boy's self respect. The African-American experience has demonstrated time and time again that African-Americans have excelled and won the respect of others when they have performed beyond the expectations of others in spite of racial discrimination when given an opportunity to compete on an equal basis of nondiscrimination. For example, in an age of tremendous racial

Thomas states:

It is uncontested that each year, the Law School admits a handful of blacks who would be admitted in the absence of racial discrimination. See Brief for Respondents *Bollinger et al.* 6. Who can differentiate between those who belong and those who do not? The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as undeserving. This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the "beneficiaries" of racial discrimination. When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement. The question itself is the stigma—because either racial discrimination did play a role, in which case the person may be deemed "otherwise unqualified," or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.

Id.

152. Ellis Cose, *The Rage of a Privileged Class*, 132-33 (Harper Perennial 1995).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 133.

prejudice in the 1930s, an African-American sports hero Jesse Owens¹⁵⁸

158. Mark Heisler, *Atlanta 1996 / 50 Days To The Games Brothers in Sport Despite Differences, Jesse Owens, Luz Long Struck up Friendship at 1936 Berlin Olympics*, L.A. TIMES, May 30, 1996, available at 1996 WL 10506653. Heisler describes Owens' achievements as follows:

The lessons of history, as Marge Schott reminds us, are soon forgotten. It's been 60 years since Jesse Owens' performance at the Berlin Olympics, an event that now seems as much a part of our national lore as the Pilgrims landing at Plymouth Rock, and as distant.

It began as a Nazi pageant and turned into a drama that seemed to presage the American triumph in World War II Owens winning the 100 meters . . . Adolf Hitler snubbing him . . . a German long jumper named Luz Long daring to openly befriend the black American . . . Owens massing four gold medals in a powerful advertisement of the glory of a free society.

"He just had that kind of carriage," says Owens' widow, Ruth, wistfully. "Look how long he's lasted. Jesse's been dead for 16 years and he gets more publicity now than a lot of athletes who are participating this year.

"Sometimes I have to just sit and tears come to my eyes when I think about it. You say to yourself, 'Well, gee, he had to be a heck of a fellow to last this long.'"

Owens was, indeed, special. He set an indoor sprint record that lasted 40 years. He set a long jump record that lasted longer than Bob Beamon's. But he was more than an athlete. For a moment, Owens embodied the spirit of a rising young nation and the things he saw and did will never be forgotten.

. . . .
In the first place, the United States in 1936 was only "free" or "open" in a relative sense.

American society was still widely segregated. The armed services wouldn't be integrated for 12 more years and until then there were quotas for black enlistees, who were often steered away from combat. In segments of the country, blacks went to "separate but equal" schools; the Supreme Court wouldn't mandate integration for 18 more years.

. . . .
Baker's biography, "An American Life," notes that just before Owens arrived in 1933, the NAACP had sued Ohio State, claiming that two black students had been denied campus housing.

. . . .
. . . Owens never lived in campus housing, boarding with other black students and, after he and Ruth married, moving in with her cousin, Fannie. Blacks could not eat in the restaurants along High Street, adjacent to the university, nor attend the movie theaters. . . .

Owens, a prodigy, made the Olympic team in his junior year. There was growing uneasiness among competing nations about the political overtones but if Jesse was worried about it, he gave no sign.

. . . .
"He was very young and he had to work very hard to make the Olympic team. I don't think Hitler or anything else could have kept him away. You know athletes, they don't see color. And he had been an athlete all his life."

. . . .
Nazi party newspapers predicted German Olympic victories that would confirm Hitler's race theory. The blacks on the American team were called "black auxiliaries."

. . . .
Owens won the 100 meters.

. . . .
Owens won his second gold in the long jump.

. . . .
Owens won his third gold medal in the 200 meters, then ran the leadoff leg of the

did not need a five-yard advantage; he only needed an opportunity free of race discrimination to compete as one athlete among equals.¹⁵⁹ One can only imagine Jesse Owens's fate in the 1936 Olympics if he had asked for a five-yard advantage in the 100 meters and the 200 meters events because he was a victim of racial discrimination and "[t]he son of sharecroppers and grandson of slaves."¹⁶⁰ All Americans should now be grateful that Jesse Owens did not ask for a five-yard affirmative action advantage at the 1936 Olympics in Hitler's Germany.¹⁶¹ In 1936, I would have rejected the argument that African-Americans are inferior athletes and in 2004 I equally reject the contention that African Americans are academically inferior.

The brown boy in Cose's¹⁶² story should follow the lead of Jesse Owens. Jesse Owens ran a good race in life without asking for a five-yard advantage while living in a presumptive racist society in America. Cose has placed his brown boy in a race with a five-yard race-based advantage that the boy can only accept if he is willing to assume the risk of losing confidence in himself and his self-respect.¹⁶³ Unlike the brown boy, Jesse Owens was never at risk of losing his self-respect because he never received a five-yard advantaged America in 1936 that was disrespectful to Jesse Owens by giving him "a ticker tape parade when he returned to America but had to ride the freight elevator to a reception in his honor at the Waldorf-Astoria."¹⁶⁴ Cose concludes that the brown boy realizes that he will never win his race even with a five-yard start

400-meter relay for the fourth. The Southern-born Wolfe, watching the 200 in the box of the American ambassador, let out a loud whoop.

"Owens was black as tar," Wolfe was later quoted by his biographer, Andrew Turnbull, "but what the hell, it was our team and I thought he was wonderful."

Id.

159. Gerald Tebben, *Ohio MilePosts*, Aug. 9, 1936; *Jesse Owens Defeats The Nazis*, THE COLUMBUS DISPATCH (Ohio), Aug. 9, 2003, at 3B, available at 2003 WL 59884554. Tebben states:

The son of sharecroppers and grandson of slaves, Jesse Owens was an Ohio State University student in 1936 when he won a berth on the U.S. Olympic Team and a ticket to Berlin. Adolf Hitler planned to make the Olympics a showplace of Aryan superiority. When black athletes showed early signs of dominating some events, he retreated.

On the first morning of competition, Hitler received German and Finnish gold-medal winners in his private box to the roaring approval of the crowd. That afternoon, U.S. black athlete Cornelius Johnson won the high jump. Before the national anthem could be played, Hitler left the stadium. Aides said the departure had been prearranged. The New York Times headlined it as a snub.

Id.

160. *See id.*

161. *Id.*

162. Ellis Cose, *The Rage of a Privileged Class*, 133 (Harper Perennial 1995).

163. *Id.*

164. *Id.* "When I came back to my native country, after all the stories about Hitler, I couldn't ride in the front of the bus," Owens said. "I had to go to the back door. I couldn't live where I wanted." *Id.*

because of the hostile reaction of the crowd to him having the five-yard advantage.¹⁶⁵ According to Cose, his brown boy “doesn’t know whether he should ask for a bigger lead, give up the one he has, or simply abandon the race.”¹⁶⁶

What recommendations should be given to the little brown boy? First, the little brown boy should not ask for a bigger lead because it will only generate more hostility from the mob watching from an artificial advantage.¹⁶⁷ Second, the little brown boy should receive a brief black history lesson and be told not to abandon his race in 2004 because Jesse Owens did not abandon his race.¹⁶⁸ Third, the little brown boy should give up the false five-yard advantage at that elite track field because that false advantage may serve as a pretext to destroy his confidence and self-respect. Finally, the little brown boy needs to be taken by his hands to a loving and caring coach. The coach’s job is to take the little brown boy to good track fields that may not be elite but on those track fields he can train free of racial discrimination to be the next Jesse Owens with honor and respect for his African-American heritage.

VI. THE IMPLICATION OF RACE-NEUTRAL COLLEGE LEGACY PREFERENCES FOR FAMILY MEMBERS IN THE CONTEXT OF AFFIRMATIVE ACTION

As a general rule, whites who openly oppose race discriminatory affirmative action do not oppose race-neutral preferences. In the context of higher education, legacy may be defined as an admissions label utilized by the majority of private colleges and a number of public universities for hopeful candidates who received a certain amount of preferential treatment because family members previously attended the school.¹⁶⁹ Over the last three decades many thoughtful Americans have considered college admissions as a rather simple offer. Many in the silent majority believed that whites were admitted to colleges based on merit because of their superior standardized test scores. One could be admitted based on a racial preference if she is not white. For thirty years we were led to believe that college admission decisions were either based on test scores or skin color.¹⁷⁰

165. *Id.*

166. *Id.*

167. *See id.*

168. Tebben, *supra* note 159.

169. Danna Harman, *Family Ties: An Unfair Advantage? Amid Debate over Racial Preferences, Legacy Admissions are Suddenly Cast in a Harsher Light*, CHRISTIAN SCIENCE MONITOR, Feb. 6, 2004, available at <http://www.csmonitor.com/2004/0206/p13s01-legn.html>.

170. *Id.*

The recent decision by Texas A&M University to discontinue awarding race-neutral legacy preferences to the relatives of alumni has introduced a needed dose of truth serum into the conversation about the impact of preferences in college admissions.¹⁷¹ The Texas A&M family legacy debate provides an opportunity to inform most Americans that there are all sorts of unearned advantages in the admission process with legacy status being one of the most common.¹⁷² According to one commentator, the Texas A&M family legacy preference program raises questions about our college admission system that is riddled with cynicism and deceit.¹⁷³

As a nation we have to ask whether the emphasis on supposed merit in college admissions has been a lie, a failure, or both.¹⁷⁴ A significant number of whites are opposed to race-based preferences for African-Americans in the higher educational arena because they equate racial preferences with providing an opportunity for a specific racial minority who did not measure up according to the accepted normal academic standards.¹⁷⁵ Whites opposing race-based reverse discrimination often view race-based affirmative action as the road to career success for unqualified African-Americans.¹⁷⁶

However, many whites that support race-based affirmative action also support race-neutral legacy affirmative action based on family

171. *Id.*

172. *Id.*

173. Freedman, *supra* note 146.

174. Freedman, *supra* note 146.

175. Will, *supra* note 100.

176. Cose, *supra* note 149, at 111. Cose states:

When the talk turns to affirmative action, I often recall a conversation from years ago. A young white man, a Harvard student and the brother of a close friend, happened to be in Washington when the Supreme Court ruled on an affirmative action question. I have long since forgotten the question and the Court's decision, but I remember the young man's reaction.

He was not only troubled but choleric at the very notion that "unqualified minorities" would dare to demand preferential treatment. Why, he wanted to know, couldn't they compete like everyone else? Why should hardworking whites like himself be pushed aside for second-rate affirmative action hires? Why should he be discriminated against in order to accommodate *them*? His tirade went on for quite a while, and he became more indignant by the second as he conjured up one injustice after another.

When the young man paused to catch his breath, I took the occasion to observe that it seemed more than a bit hypocritical of him to rage on about preferential treatment. A person of modest intellect, he had gotten into Harvard largely on the basis of family connections. His first summer internship, with the White House, had been arranged by a family member. His second, with the World Bank, had been similarly arranged. Thanks to his nice internship and Harvard degree, he had been promised a coveted slot in a major company's executive training program. In short, he was already well on his way to a distinguished career—a career made possible by preferential treatment.

Cose, *supra* note 149, at 111 (emphasis in original).

ties.¹⁷⁷ Race-neutral reverse affirmative action is “a practice as old as colleges themselves, and is intended to boost alumni support and donations and foster a sense of community.”¹⁷⁸ Senator John Edwards, the Democratic vice presidential candidate, has repeatedly criticized legacies as an aristocratic birthright that is not consistent with American democracy and he argues that the legacy practice should be prohibited.¹⁷⁹ After the 2003 *Grutter* decision giving limited approval to race-conscious affirmative-action admissions, lawmakers are now beginning to evaluate whether legacy is a form of “reverse affirmative action, which gives an edge to those whose parents and grandparents went to selective colleges at a time when most minorities there were few and far between.”¹⁸⁰ Senator Edward Kennedy of Massachusetts has been classified as a member of the Harvard legacy¹⁸¹ and is not a champion of the legacy practice.¹⁸² Kennedy has proposed federal legislation commanding colleges to reveal the race and economic rank of first-year students with family ties to alumni.¹⁸³ The Massachusetts Senator anticipates that his legacy disclosure law “would force colleges to reveal how the preferences disproportionately benefit affluent white students, and might embarrass them into limiting such preferences on their own.”¹⁸⁴

Race-neutral legacies should not automatically be ended as a form of

177. Danna Harman, *Family Ties: An Unfair Advantage? Amid Debate over Racial Preferences, Legacy Admissions are Suddenly Cast in a Harsher Light*, CHRISTIAN SCIENCE MONITOR, Feb. 6, 2004, available at <http://www.csmonitor.com/2004/0206/p13s01-legn.html>.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.* Harman explains that:

Then, last month, Texas A&M University, under pressure to review its legacy policies after it dropped its affirmative-action program, announced that the school would not wait for a law to tell it what to do - and abolished the practice, fueling the debate even further.

....

Texas A&M's legacy policy is far from unique. Amherst College in Massachusetts, for example, accepts nearly half of alumni children who apply, compared with 17 percent of all applicants. Sons and daughters of alumni make up more than 10 percent of students at Harvard, Yale, and Princeton and a whopping 23 percent at Notre Dame. While legacy students are becoming more diverse, reflecting the surge in minority enrollment in the 1970s, whites still make up the vast majority. At Harvard last year, only 7.6 percent of legacy applicants accepted were black, Hispanic or Native American, compared with 17.8 percent of all successful applicants.

But, far from following A&M's lead, most universities across the country are chafing at the idea of additional restrictions on their admissions policies and speaking out against the Kennedy bill.

Id.

reverse discrimination favoring whites. The traditional legacy concept should be expanded to include nontraditional students on a basis that does not include race-based discrimination. For example, those with family ties to economically disadvantaged athletes could be awarded “super legacy points.” Family members of former college athletes who played in sports that generate super profits for the college should be entitled to super legacy points.¹⁸⁵ Those colleges and universities with an established tradition of awarding legacy points may find other creative ways to give super legacy points free of practicing race discrimination to relatives of athletes. At Penn, the legacy practice is taken seriously; at Michigan, a legacy status will earn you extra points; Harvard admits that the legacy issue is not ignored; and Notre Dame concedes that it is very legacy friendly.¹⁸⁶ If Penn, Michigan, Harvard, and Notre Dame announced that they were awarding super legacy points to family members of former athletes who entered their respective schools as economically disadvantaged, others might follow their lead. Duke University Provost Peter Lange contends that establishing alumni loyalty with a legacy admissions policy helps universities to fund plans that increase racial diversity.¹⁸⁷

By awarding super legacy points to the relatives of economically disadvantaged athletes, colleges with a traditional legacy program will simply be creating one more athletic-related exception to the concept of true merit criteria in the admission process.¹⁸⁸ One who rejects the advocacy of super legacy points for economically disadvantaged athletes as lacking academic merit based on standardized test scores and grades might warm up to super legacy points because such an advocate of “true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to “merit”¹⁸⁹ based on test scores and grades. According to Justice Thomas, the national debate about the use of racial preferences in higher education reveals that elite colleges and universities use “‘legacy’ preferences to give the children of alumni an

185. Julia Silverman, *College Spending on Sports Under Fire*, ASSOCIATED PRESS, Feb. 10, 2004, available at http://story.news.yahoo.com/news?tmpl=story&u=/ap/20040210/ap_on_sp_co_ne/fbc_spending_on_sports_1. The Silverman article states:

Supporters of college athletics . . . [argue] that college sports are big business, like it or not. Moneymaking sports like men’s football and basketball often underwrite other college athletic teams, from squash to soccer. And universities say fancy stadiums, arenas and locker rooms help them recruit star athletes and attract fans and donors.

Id.

186. Harman, *supra* note 169.

187. Harman, *supra* note 169.

188. *Grutter v. Bollinger*, 123 S. Ct. 2325, 2359 (2003) (Thomas, J., with whom Scalia, J., joins as to Parts I-VII, concurring in part and dissenting in part).

189. *Id.*

advantage in admissions.”¹⁹⁰ Justice Thomas identified legacy preference as one type of exception to “true” meritocracy that allows him to conclude that merit admissions are “not the order of the day at the nation’s universities.”¹⁹¹ Justice Thomas appears not to endorse legacy preferences because he describes them as “unseemly.”¹⁹²

Although Justice Thomas suggests that legacies are not appropriate, he said, “I will not twist the Constitution to invalidate legacy preferences.”¹⁹³ In an ideal world, the concept of legacy preferences might not be preferred, but legacy preferences that include a preference for relatives of disadvantaged athletes because the Equal Protection Clause does not prohibit the traditional race-neutral legacy program.¹⁹⁴ The Equal Protection Clause would only prohibit an arbitrary legacy admission preference program that treated similar situated legacies differently because the lack of any conceivable reasonable state interest would violate equal protection principles under the Court’s rationale articulated in *City of Cleburne v. Cleburne Living Center, Inc.*¹⁹⁵

VII. WHITES-ONLY SCHOLARSHIP IS AN UNFORTUNATE FORESEEABLE CONSEQUENCE OF RACE EXCLUSIVE SCHOLARSHIP FOR THE BENEFIT OF OTHER RACIAL GROUPS

As a southern African-American male and native of Mississippi, I disapprove of all state sponsored race-based discrimination. I am not at all surprised that some white students dislike reverse discrimination by the government when they are asked to bear the burden of race discrimination in the name of diversity. For example, students at Roger Williams University are proposing a scholarship for only white students.¹⁹⁶ The students contend that the whites-only scholarship is intended to protest race-based affirmative action in higher education.¹⁹⁷ “Jason Mattera, 20, who is president of the College Republicans, said the group is parodying minority scholarships. ‘White kids are at a handicap,’ Mattera told the Providence Journal. ‘Handing out scholarships based on someone’s color is absurd.’”¹⁹⁸ Mattera has Puerto Rican ancestry and is

190. *Id.*

191. *Id.* at 2360.

192. *Id.*

193. *Id.*

194. *Id.*

195. 473 U.S. 432 (1985).

196. *Student Group Offers Whites-Only Scholarship*, AP, WASH. POST, Feb. 16, 2004, at A7, available at <http://www.washingtonpost.com/wp-dyn/articles/A44488-2004Feb15.html>.

197. *Id.*

198. *Id.* “The application for the \$250 award requires an essay on ‘why you are proud of your white heritage’ and a recent picture to ‘confirm whiteness.’ ‘Evidence of bleaching will disqualify

the beneficiary of a \$5,000 scholarship available for minority students.¹⁹⁹ “No matter what my ethnicity is, I’m making a statement that scholarships should be given out based on merit and need,” he said.²⁰⁰

Affirmative action scholarships based on criteria that do not include racial discrimination are favorable. Unlike Julian Bonds, the Chairman of the National Association for the Advancement of Colored People, the goal of affirmative action is not “about removing the preferences that white people have enjoyed for centuries.”²⁰¹ Affirmative action should expand the preferences traditionally enjoyed by whites to include African-Americans and other historically disadvantaged groups based on criteria free of racial discrimination. Historically, white colleges with elite college sports programs have been successful in recruiting African-American athletes on a race-neutral basis to serve on their money-making sports teams. If historically white colleges can succeed in recruiting minority athletes on a race-neutral basis, America’s elite colleges can also succeed in recruiting non-athlete African-American college students to their college campuses on a race-neutral basis if they act in good faith. Though Julian Bonds is misguided about the goal of race-based affirmative action, Bonds is correct in the view that “it has been only a short 39 years that all black Americans have exercised the full rights of citizens, only 39 years since legal segregation was ended nationwide, only 39 years since the right to register to vote was universally guaranteed.”²⁰² It is clearly implausible to conclude “those 39 years have been enough”²⁰³ to overcome the historical vestiges of racial slavery. But the remedy for racial slavery and racial discrimination is to

applicants,” says the application, issued by the university’s College Republicans.” *Id.*

199. *Id.*

200. *Id.*

201. Clarke Morrison, *Civil Rights Pioneer Bond: ‘Righteous War’ Must Continue; NAACP Chairman Defends Affirmative Action During UNCA Speech*, ASHVILLE CITIZEN-TIMES (NC), Feb. 7, 2004, at 1, available at 2004 WL 60195897.

202. *Id.*

203. *Id.* Clarke Morrison states:

“American slavery was a human horror of staggering dimensions,” Bond said. “The profits it produced endowed great fortunes and enriched generations.” Centuries of slavery were followed by 100 years of state sanctioned discrimination, reinforced by public and private terror, ending only after a protracted struggle in 1965.”

When the 20th century began, black people were slaves in every way but legally, he said. Most couldn’t vote and attended inadequate, segregated schools. Few owned the land they farmed or the homes they lived in.

The landmark *Brown v. Board of Education* court decision in 1954 outlawing racial discrimination in public schools was the civil rights movement’s “greatest legal victory . . . the quest for meaningful equality had begun.” The ruling gave license to common people to declare segregation immoral and made passage of the Civil Rights Act in 1964 possible, which was “democracy’s finest hour.”

Id.

pursue a course of nondiscrimination coupled with a pragmatic plan to bridge the economic and education gap between America's historically disadvantaged citizens.

The inherent danger in requesting scholarship for historically disadvantaged African-American students based on race is that it allows some members of the historically advantaged white group, or a representative of the group, to characterize whites as the new victims of reverse invidious discrimination.²⁰⁴ “[I]t is white students today who are feeling the backlash of discrimination wielded against them by scholarships for non-whites,”²⁰⁵ according to Mattera. Whites who may have been embarrassed to articulate the need for a whites-only scholarship before *Grutter v. Bollinger* in a post-*Grutter* world have been given ammunition to declare the white group currently disadvantaged by race preferences.²⁰⁶ Although commentator Clarence Page is correct in saying there is nothing new about whites-only scholarships, he misses the point that the new rationale for whites-only scholarships is to symbolize the need to protect whites from the backlash of reverse racial discrimination.²⁰⁷ Although some would treat the whites-only scholarships as a joke,²⁰⁸ Americans should decline to treat any race-based discrimination by one group of Americans against another group as a laughing matter and should look forward to the day when America will say “no” to all race exclusive scholarships.²⁰⁹ That is not to say that there should be opposition for scholarships based on reasonable preferences that do not include race, scholarships for the poor, and scholarships for athletes, band members, hard working students with reasonable grades, and for left-handed students. There are so many race-neutral ways to grant scholarship and admission preferences to

204. Clarence Page, *There's Nothing New about Whites-Only Scholarship*, CHICAGO TRIB., Feb. 18, 2004, available at 2004 WL 69248720.

205. *Id.*

206. *Id.* Clarence Page relates the following about Mattera:

“We think that, if you want to treat someone according to character and how well they achieve academically, then skin color shouldn't really be an option,” [Mattera] told the Journal.

Yet, Mattera, who is of Puerto Rican descent, is himself a recipient of a \$5,000 Sallie Mae Fund scholarship for Hispanic students.

How does he square accepting a scholarship for non-whites with his opposition to preferential treatment for non-whites. Well, Mattera apparently believes the myth that only unqualified people benefit from affirmative action. He told CNN's Daryn Kagan, for example, that his Hispanics-only scholarship was OK because he earned it with his excellent grade point average, not “just because I'm Puerto Rican.”

Id.

207. *Id.*

208. *Id.*

209. *Id.*

students²¹⁰ that only an instigator of reverse racial preferences would find race to be a necessary factor in the decision making process. The Rhode Island Republican Party correctly disapproves of the whites-only scholarship because of its racist overtones.²¹¹ However, all race exclusive scholarships and admission practices should be condemned because of their racist connotations.²¹²

210. *Id.* Clarence Page describes the following scholarships:

Take a look at just a few of the other groups that FinAid.com found receive preferences under currently available scholarships simply as a consequence of their condition of birth:

Left-handed students: The Frederick and Mary F. Beckley Scholarship will award up to \$1,000 to attending Juniata College, Huntingdon, Pa.

Little people: The Little People of America association offers for its members, who must be 4-foot-10 or less in height.

Tall people: Tall Clubs International offers a \$1,000 scholarship to women who are at least 5-foot-10 and men who are at least 6-foot-2, presumably in their stocking feet.

Just-average people: The David Letterman Scholarship, established by the late-night TV star, awards scholarships to telecommunications students at his alma mater, Ball State University, who are "average students who nevertheless have a creative mind."

Catholics named Zolp: The aptly-named Zolp Scholarship offers full tuition for four years at Loyola University in Chicago for Catholic students whose last name happens to be Zolp, as documented by their birth certificate and confirmation certificate. First-name Zolps need not apply.

Anyone named Scarpinato: Full attendance at Texas A&M University is available for anyone whose last name is Scarpinato—by birth or by marriage, so you still have a chance to marry into this scholarship.

Descendants of alumni: There are lots of these, of course, but one of the more unusual enables selected incoming freshmen at Hood College in Frederick, Md., the opportunity to pay the same first year tuition as their alumnus parent or grandparent. Without inflation.

Twins and triplets: Lots of these too. But one of the more unusual is offered by Lake Erie College in Painesville, Ohio, where each twin gets the scholarship in alternate years.

Id.

211. Jennifer Styles, *Whites-Only Scholarship Generates Controversy*, Feb. 18, 2004, available at <http://www.cnn.com/2004/EDUCATION/02/18/whites.only.scholars/index.html>. Styles reported the following:

"It all began two weeks ago as a way for the college Republican groups to express their opposition and tell people they are against race-based scholarships and affirmative action," June Speakman, faculty adviser for the College Republicans told CNN.

"We never expected such an overwhelming response of e-mails and media attention."

The scholarship is for \$250, but College Republicans president Jason Mattera said he has received donations and pledges totaling \$4,000 for future whites-only scholarships.

Id.

212. L. Darnell Weeden, *Just Say No to Race Exclusive Scholarships: From an Afrocentric Perspective*, 20 T. MARSHALL L. REV. 205 (1995).

VIII. THE ELUSIVE SEARCH FOR AN EQUITABLE PUBLIC POLICY THAT
NARROWS THE EDUCATION ACHIEVEMENT GAPS BETWEEN
HISTORICALLY DISADVANTAGED STUDENTS AND MIDDLE CLASS NON-
MINORITY STUDENTS

Those committed to finding appropriate means for better educating the masses of African-American children should not be afraid to reconsider long-held views about the effectiveness of race-based affirmative action and racial discrimination as opposed to nondiscrimination coupled with a policy of economic equity in education for historically disadvantaged children. On Tuesday February 17, 2004, Professor John Brittain, my colleague at Texas Southern University, “one of the country’s prominent civil rights lawyers and integrationists dropped a bombshell”²¹³ by announcing “he is considering abandoning his advocacy of integrated public schools.”²¹⁴ Brittain now suggests the focus for quality education for minority school children should consider devoting scarce resources in neighborhood schools while making the case for affordable housing in communities located in the suburbs.²¹⁵

Professor Brittain may be reconsidering his life-long commitment to school integration as the primary tool for providing African-Americans with a quality education. Fifty years after the *Brown v. Board of Education* decision made segregation by law illegal, the objective evidence from a current Harvard study²¹⁶ indicates that the *Brown* decision has not been very successful in ending school segregation and inferior education for a majority of African-American children. Fifty years after the Supreme Court outlawed school segregation; a contemporary Harvard University study concludes “that America’s public schools are re-segregating at a pace that brings us back to the 1960s. And while the academic achievement gap between white and minority students began to narrow in the 1980s, it is widening again.”²¹⁷

213. Stan Simpson, *An Advocate of Integration Reconsiders*, HARTFORD COURANT, Feb 18, 2004, available at <http://www.freespeech.com/archives/002004.html>.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* Stan Simpson reports:

John Brittain, the former lead plaintiff’s attorney in Connecticut’s historic *Sheff vs. O’Neill* desegregation lawsuit, said . . .

. . . .

“The resources, time, money and effort such as we put into *Sheff vs. O’Neill*, we should really invest in trying to improve educational achievement even in all one-race, non-white schools. . . . We’ve almost come back to *Plessy vs. Ferguson*. Separate, and trying to make it equal.”

Wow! Quite a turnaround for a guy who for most of his career insisted that a quality education begins with an integrated classroom.

During a February 2004 forum analyzing the *Brown* decision, Richard L. Schwab, the University of Connecticut Dean of Education, presented research showing that the National Assessment of Educational Progress has determined “that the average African-American and Latino 17-year-old has the equivalent education of a 13-year-old white kid in math and reading.”²¹⁸ As we attempt to close the educational achievement gap between white, African-American, and Latino students, we must seriously consider the economic affirmative action remedy of equitable school financing for all students regardless of the property value in their economically inferior urban neighborhood or rural community.²¹⁹ A level playing field for all of America’s school children demands economic affirmative action to reform school financing to insure all American children have an equitable education that is at least competitive with that of the average middle class white school child in the affected state.²²⁰

...
 ... [Britain] still values integration and is by no means promoting separatism. He’s simply saying that the lack of progress in public school integration in the past 50 years is giving him pause.

Id.

218. *Id.*

219. Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications For Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 134 (2003). Shavers states:

Nearly fifty years have passed since the Supreme Court issued its decision in *Brown*, yet many children continue to be deprived of an equal education opportunity. . . . In this effort to receive an equal education opportunity for students who have been deprived of that right, lawsuits have been commenced in all but 5 of the 50 states. These challenges on the basis of a denial of equal education opportunity to students in the state have moved from a focus on racial discrimination, to the state-created finance formulas that determine how much each school district has to spend on education. Traditionally, the funding formula that provides basic state aid to school districts consists primarily of property taxes imposed at the local level.

Id. (citation omitted).

220. *See id.* Shavers explains:

The amount available for per-pupil expenditure generally depends upon two main components: (1) the amount contributed to each school district from the state collected revenue and (2) the amount generated from taxable real estate in the local school district. The claim in school finance litigation has been that equalization of educational opportunities requires the establishment of a financing system that does not directly link a district’s per pupil expenditure to its taxable wealth. While in response to claims of denial of equal education opportunity, the states could demonstrate that they had not deliberately configured school districts to maintain racially separate schools and schools that were noticeably inferior if attended by minority students, challengers asserted they could demonstrate that states created financing systems that resulted in an inferior education to students in districts that had less real property wealth than those with more real property wealth. Often the argument was that minority children resided in the property poor districts. The references here to school finance concern education revenue and payments for instruction, support services, and other activities for kindergarten through high school (K-12). This includes the operation of public schools, teachers’ salaries, construction of school buildings, the purchase and operation of school buses, and

While campaigning for the Democratic Presidential nomination, Senator John Edwards of North Carolina described “2 Public School Systems” in America as wrong.²²¹ According to Senator Edwards, America has “two public school systems, one for the haves and one for everybody else.”²²² Public schools in poor communities do not perform as well as those in rich communities.²²³ At least one commentator believes that “Mr. Edwards has won praise for sticking so doggedly to his standard theme of two Americas divided by class.”²²⁴

Justice O’Connor’s statement in *Grutter v. Bollinger* that “the use of racial preferences” to support racial diversity in higher education will no longer be necessary in twenty-five years²²⁵ is a pipe dream unless America is willing to equitably finance a top quality public education system for all of its children including those in the educational diversity pipeline from pre-kindergarten thru high school. Race-based affirmative action will still be necessary under Justice O’Connor’s rationale²²⁶ if America continues its current two public schools systems for the affluent and financially disadvantaged because the students in the under-funded, predominately poor and minority school pipeline will still not be competitive with those who have attended elite public schools from pre-kindergarten until high school graduation.

Professor Suzanne E. Eckes has taken the position that the *Grutter* rationale that diversity is a compelling state interest for purposes of race-based college admissions should apply to K-12 educational admission programs.²²⁷ Applying the race-based diversity admission program to K-12 students is not likely to promote an end to the race-based admission programs at the college level in the year 2028. Substituting race-based classifications that are not compelling is a poor substitute for a rational, adequately funded program, free of racial discrimination designed to

other services.

Claims of lack of equity developed around the theory that all districts should receive a relatively equal level of resources, based on relative need. The need for, and complexities of, school finance reform has been considered by numerous scholars, advocates and economists.

Id. at 134-35.

221. Jim Rutenberg, *The AD Campaign : Edwards Highlights His Theme of Two Americas*, N.Y. TIMES, Feb. 27, 2004, available at <http://www.nytimes.com/2004/02/27/politics/campaign/27ADBO.html?n=Top%2fNews%2fWashington%2fCampaign%202004%2fCandidates%2fJohn%20Edwards>.

222. *Id.*

223. *Id.*

224. *Id.*

225. 123 S. Ct. 2325, 2347 (2003).

226. *Id.*

227. Suzanne E. Eckes, *How Will the Grutter and Gratz Affirmative Action Decisions Impact K-12 Diversity Plans?*, 29 T. MARSHALL L. REV. 1 (2003).

insure a quality education for all of America's children. Chief Justice Rehnquist's dissent correctly and appropriately accused the Court in *Grutter* of reciting the strict scrutiny analysis for race-based classifications, but failing to apply strict scrutiny because the Equal Protection Clause prohibits the means actually used by law schools.²²⁸ Justice Kennedy is absolutely correct in concluding that the Court simply fails to apply the strict scrutiny standard. "By trying to say otherwise, it undermines both the test and its own controlling precedents."²²⁹

Anyone serious about ending race-based affirmative action under the Court's *Grutter* rationale must address social issues far broader than equity in financing public schools so as to create competitive educational opportunities for all students.²³⁰ To make Justice O'Connor's dream of ending race-based affirmative action for college admission a reality by the year 2028, Lisbeth B. Schorr estimates "that it would cost between \$110 billion and \$125 billion a year" if one excludes the cost of universal health care.²³¹ Schorr believes that it is necessary to have universal health care if race-based affirmative action discrimination is to end in 25 years.²³² Schorr refers to Justice O'Connor's goal of ending the need for race-based affirmative action in colleges in 25 years as the O'Connor project.²³³ Schorr properly concludes that America can end racial discrimination in affirmative action with an effective race-neutral policy for ending racial disparities if it is willing to invest the financial resources necessary to eliminate racial disparities at critical stages in a person's life.²³⁴

228. *Grutter*, 123 S. Ct. at 2366, 2370 (Rehnquist, C.J., dissenting) (with whom Scalia, J., Kennedy, J., Thomas, J. join dissenting).

229. *Id.* at 2370 (Kennedy, J., dissenting). Justice Kennedy states:

The Court, in a review that is nothing short of perfunctory, accepts the University of Michigan Law School's assurances that its admissions process meets with constitutional requirements. The majority fails to confront the reality of how the Law School's admissions policy is implemented. The dissenting opinion by THE CHIEF JUSTICE, which I join in full, demonstrates beyond question why the concept of critical mass is a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas. An effort to achieve racial balance among the minorities the school seeks to attract is, by the Court's own admission, "patently unconstitutional." *Ante*, at 2339; see also *Bakke*, 438 U.S., at 307, 98 S. Ct. 2733 (opinion of Powell, J.). It remains to point out how critical mass becomes inconsistent with individual consideration in some more specific aspects of the admissions process.

Id. at 2371.

230. William Raspberry, Editorial, *Affirmative Approach*, WASH. POST, Jan. 5, 2004 at A17, available at 2004 WL 55829210.

231. *Id.*

232. *Id.*

233. *Id.*

234. Lisbeth B. Schorr, *The O'Connor Project*, 15 AM. PROSPECT 30, Jan. 1, 2004, available at 2004 WL 63582826.

Schorr identifies five concrete proposals that will make race preferences in higher education unnecessary in twenty-five years. According to Schorr, the O'Connor project for eliminating racial preferences as a method of achieving diversity requires eliminating racial disparities in the following five situations:²³⁵ (1) in birth outcomes; (2) in school readiness; (3) in the opportunities provided at the elementary, middle, and high school levels; (4) in the chance for teenagers to make a proper changeover to the responsibility of being a young man or woman; (5) in the abilities that families have to provide their children with a solid foundation in life.²³⁶ Schorr states:

To bring the nation's actions in line with our best intentions, in just the ways that Justice O'Connor's decision implies, requires action on an agenda that is coherent, bold and difficult. But don't let anybody tell you that it can't be done or that we don't know how to do it.²³⁷

Schorr is right to suggest America knows how to develop a race-neutral agenda to make race discrimination unnecessary.²³⁸ Schorr believes America could follow a model used in Great Britain in making race-based affirmative action unnecessary for minorities to achieve a competitive education.²³⁹

Justice Ginsburg's and Breyer's comments in *Grutter v. Bollinger* entail the suggestion that rank racial discrimination in this nation impairs

235. *Id.*

236. *Id.* Schorr states:

THE LEADERSHIP AND THE FINANCIAL AND INTELLECTUAL resources for such an ambitious undertaking as the O'Connor Project would have to come from a broad partnership, including government and public officials at all levels, philanthropy, the professional and academic communities, and the local groups throughout the country that are already working to make their communities a better place to live.

While we seek a wide base of support for committing the necessary resources, one model we could look to as a way to begin is the one now flourishing in Great Britain. When Prime Minister Tony Blair took office, the long-standing gap between the least and most advantaged populations was continuing to increase. He committed his government to eliminating poverty among children, to radically reducing income-based health disparities, and to narrowing the gap between deprived neighborhoods and the rest of the country all within 20 years. Funding from both government and philanthropy has mobilized an extraordinary array of Britain's most daring and able individuals into the service of achieving these objectives. In the United States today, the challenge to embrace similarly lofty aspirations may seem particularly daunting, and even unrealistic. At a time of philanthropic retrenchment and fierce cuts in federal, state and local human-service budgets, how can the American public be expected to support an agenda as bold as the O'Connor Project contemplates?

Id.

237. *Id.*

238. *See id.*

239. *Id.*

the ability of America to adequately prepare African-American children in the pipeline with a competitive white middle class education for purposes of college admission.²⁴⁰ Rank racism is still alive and well in America and one cannot cure that racism by invoking offensive and divisive race-based preferences in the college admission process.²⁴¹ Rather than engage in a temporary race-based admission formula as articulated by the Court in *Grutter*, the Court should have challenged the nation to adopt a comprehensive plan similar to the one outlined by Schorr.²⁴² I shall “firmly forecast”²⁴³ that unless this nation commits the appropriate financial resources to neutralize the continuing effects of racial discrimination, Justices O’Connor, Ginsburg, and Breyer only hope in vain that over the next generation race-based affirmative action will not be necessary.²⁴⁴

Unless a comprehensive plan that addresses the social and economic gaps that exist between whites and other historically disadvantaged racial minorities in those five situations identified by Schorr,²⁴⁵ Justice Thomas’s conclusion that the majority’s twenty-five-year time limitations for race-based preferences will prove to have been based on mere speculation rather than objective evidence will become a self-evident prophecy.²⁴⁶ In the absence of funding to implement a comprehensive plan addressing Schorr’s racial disparity gaps, one may conclude that Justice Thomas has reasonably predicted that “the gaps in credentials between black and white students”²⁴⁷ will not disappear in twenty-five years.²⁴⁸

IX. CONCLUSION

I object to racially discriminatory governmental action because neither the local, state, nor national government has the ability to discriminate against an individual or any group fairly based on race. Race-based discrimination should not serve as a predominant factor in

240. See *Grutter v. Bollinger*, 123 S. Ct. 2325, 2347-48 (2003) (Ginsburg, Breyer, JJ., concurring).

241. *Id.*

242. Schorr, *supra* note 234.

243. See *Grutter*, 123 S. Ct. at 2348 (Ginsburg, Breyer, JJ., concurring).

244. *Id.*

245. Schorr, *supra* note 234.

246. *Grutter*, 123 S. Ct. at 2363-64 (Thomas, J., with whom Scalia, J., joins as to Parts I-VII, concurring in part and dissenting in part).

247. *Id.* at 2364.

248. *Id.* “No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years. Nor is the Court’s holding that racial discrimination will be unconstitutional in 25 years made contingent on the gap closing in that time.” *Id.*

the American political and legal psyche.²⁴⁹ Professors Joseph Tussman and Jacobus tenBroek correctly recommended in 1949 that all courts including the Supreme Court deal with race as one of those “traits which can never be made the basis of a constitutional classification.”²⁵⁰ As we keep our eyes on the racially-tainted diversity prize in law school admissions, Americans must never forget that in America, when the law classifies on the basis of race, we all lose. All Americans are defeated by race-based classifications because the predominant rationale for their use in America has been to either promote the natural superiority of whites or to promote the inborn inferiority of America’s former black slaves. Brown University has made a decision to examine its historical relationship with America’s slave trade.²⁵¹ One commentator declares that America has a legacy of an anti-Black reaction.²⁵² If the legacy of *Grutter v. Bollinger* proves to be that race-based diversity was deemed necessary by elite colleges because African-Americans are deemed to be inherently intellectually inferior to whites, the *Grutter* decision simply renews the debate about whether America continues to be an anti-Black society.²⁵³ America’s debate about using the race of African-Americans in making decisions about college admissions only highlights the need for America to search for an appropriate and equitable means to move

249. L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding A Fatal Constitutional Attraction Because Of Race And Sex*, 21 SEATTLE U. L. REV. 281, 286 (1997).

Given America’s history with race-based classification schemes, it is not reasonable to believe that America can justify a race-based benefit or burden that does not violate the natural equality of all human beings. There was a natural law of equality before the legislature began to place artificial labels on groups of people to further governmental notions of racial superiority and official racial suppression of that class of people deemed to be of an inferior race.

Id.

250. Tussman & tenBroek, *supra* note 111, at 354.

251. Pam Belluck, *Brown University to Examine Debt to Slave Trade*, N.Y. TIMES, Mar. 13, 2004, available at <http://www.nytimes.com/2004/03/13/education/13BROW.html?th>. Belluck reports:

When Ruth J. Simmons became the president of Brown University nearly three years ago, one striking fact could not be overlooked.

A great-granddaughter of slaves, Dr. Simmons was the first African-American president of an Ivy League university. But the 240-year-old university she was chosen to lead had early links to slavery, with major benefactors and officers of it having owned and traded slaves.

....

Now, Dr. Simmons, whose office is in a building constructed by laborers who included slaves, has directed Brown to start what its officials say is an unprecedented undertaking for a university: an exploration of reparations for slavery and specifically whether Brown should pay reparations or otherwise make amends for its past.

Id.

252. Wallace, *supra* note 15, at 697.

253. See Wallace, *supra* note 15, at 697.

beyond its history of legalized racial slavery and de jure racial discrimination.²⁵⁴ Brown University's brave decision to revisit the issue of race-based slavery will hopefully help America close the economic disparities between some of the descendants of its former slaves based on a social justice program free of racial discrimination.²⁵⁵

A number of the descendants of America's former slaves need economic justice not because of their race, but because of their inferior economic status. Several of the descendants of former slaves need economic justice because, but for the forced slavery of their ancestors, it is fair to presume that they would have achieved an economic status similar to the average white middle class person. On the other hand, one may presume that African-Americans who have economic status and education experiences similar to the average white middle class person may not be entitled to an individual economic justice remedy because it is fair to assume that the continuing effects of slavery are not the proximate cause of his or her failure to be competitive in the educational arena. Affirmative action or diversity in education for African-Americans, or any other American, should be premised on the concept of economic justice, free of race discrimination after taking into account that person's current individual status, as well as any historical economic disadvantage associated with one's group status that is similar to slavery or involuntarily servitude.²⁵⁶

254. See Belluck, *supra* note 251. Belluck reports Dr. Simmons of Brown University stated: "How does one repair a kind of social breach in human rights so that people are not just coming back to it periodically and demanding apologies," she said, "so that society learns from it, acknowledges what has taken place and then moves on. What I'm trying to do, you see, in a country that wants to move on, I'm trying to understand as a descendant of slaves how to feel good about moving on."

Belluck, *supra* note 251.

255. Belluck, *supra* note 251.

256. See U.S. CONST. amend. XIII, § 1. "Neither slavery nor involuntary servitude . . . shall exist within the United States."