

## SYMPOSIUM: DEFINING RACE

### COLORBLIND DIVERSITY: THE CHANGING SIGNIFICANCE OF “RACE” IN THE POST-*BAKKE* ERA

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“If there is one lesson to be learned from our tragic experience in the Civil War and its wake, it is that the question of racial discrimination is never settled until it is settled right. It is not yet rightly settled.”

*Chief Justice Earl Warren*<sup>1</sup>

“Thus, in the long effort to gain equality through integration, blacks have learned that white America will accommodate the interests of blacks and other racial minorities when and *only* when those interests converge with those of whites.”

*Derrick Bell*<sup>2</sup>

#### INTRODUCTION

In 1954, fifty-eight years after the *Plessy v. Ferguson*<sup>3</sup> decision,

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<sup>1</sup> ABRAHAM L. DAVIS & BARBARA LUCK GRAHAM, *THE SUPREME COURT, RACE, AND CIVIL RIGHTS* xiii (1995) (quoting Chief Justice Earl Warren, Civil Rights Lecture at University of Notre Dame (June 2, 1957)).

<sup>2</sup> DERRICK BELL, *Victims as Heroes: A Minority Perspective on Constitutional Law*, *THE DERRICK BELL READER* 290, 294 (Richard Delgado & Jean Stefanic eds., 2005); *see also* DAVIS & GRAHAM, *supra* note 1, at 115.

<sup>3</sup> 163 U.S. 537, 550–52 (1896) (allowing separate facilities for white and black races under “separate but equal treatment” doctrine).

the Supreme Court was afforded another opportunity to revisit the “separate but equal doctrine” in *Brown v. Board of Education of Topeka (Brown I)*.<sup>4</sup> *Brown I* was a consolidation of five civil rights cases from the District of Columbia, Delaware, Kansas, Virginia, and South Carolina that attempted to change race relations in America by affording African Americans *a piece of the pie*.<sup>5</sup> A few other cases soon followed *Brown I*. In 1963, *Goss v. Board of Education of Knoxville*<sup>6</sup> proclaimed that any program that structurally appeared to maintain segregation would be held unconstitutional.<sup>7</sup> And in 1964, *Griffin v. Prince Edward County School Board*<sup>8</sup> announced that *pretense* integration of black children would also violate the Constitution.<sup>9</sup> Despite the Court’s signature announcement of equality of “Negroes,”<sup>10</sup> *Brown I* has not completely altered the inequalities of the past. For that reason, race-conscious policies instituted not only by admissions departments in colleges and universities but also in primary and secondary educational institutions are needed to level the playing field. Since *Brown I*, there have been a number of statutes, court cases and policies that have continued to struggle over the use of race-conscious policies in the goal for racial equality.<sup>11</sup>

Title VI of the Civil Rights Acts of 1964,<sup>12</sup> the governing standard in *Regents of the University of California v. Bakke (Bakke)*,<sup>13</sup> California’s and the state of Washington’s anti-affirmative action propositions,<sup>14</sup> and a number of judicial decisions regarding racial

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<sup>4</sup> 347 U.S. 483, 494–95 (1954) (overruling *Plessy* and forcing the integration of public schools).

<sup>5</sup> *Id.* at 486 & n.1.

<sup>6</sup> 373 U.S. 683 (1963).

<sup>7</sup> *Id.* at 689.

<sup>8</sup> 377 U.S. 218, 225 (1964) (holding that closing public schools to avoid integration of black children violates the equal protection clause of the Fourteenth Amendment).

<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g.*, 347 U.S. at 486, 487.

<sup>11</sup> *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 289–90 (1978).

<sup>12</sup> Title VI of the Civil Rights Act states: “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 subjected to discrimination under any program or activity receiving federal financial assistance.” 42 U.S.C. § 2000(d) (2000). Executive order 11,246 used the term “affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color or national origin.” Exec. Order No. 11,246, 3 C.F.R. 340 (1964–1965), *reprinted in* 42 U.S.C. § 2000e (2000).

<sup>13</sup> 438 U.S. at 287.

<sup>14</sup> Proposition 209 was passed by the California electorate by a 54–46 percent vote on November 5, 1996. It is now Article I, Section 31 of the California Constitution. CAL. CONST. art. I, § 31; S. 1687 2007–08 Leg. Reg. Sess. (Cal. 2007). The key operative provision of this

preferences are persistent themes in the continuing saga over the use of affirmative action and race-conscious programs.<sup>15</sup> Race-conscious programs were enacted for the most part to remedy past transgressions inflicted upon African American citizens and to help them overcome decades of discrimination.<sup>16</sup> The setting for the challenge to the few legal benefits afforded African Americans in higher education came in the *Bakke* case.<sup>17</sup> Unsurprisingly, in a narrowly split decision, Justice Powell announced that while separate benefits designed to attract and matriculate minorities were prohibited, affirmative action plans involving racial

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measure states: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.” CAL. CONST. art. I, § 31(a). For a discussion regarding Proposition 209, see generally LYDIA CHAVEZ, *THE COLOR BLIND: CALIFORNIA’S BATTLE TO END AFFIRMATIVE ACTION* 211–41 (1998). Proposition 200 was passed by the state of Washington by 59–41 percent vote on November 3, 1998. WASH. REV. CODE ANN. § 49.60.400 (West 2008). It is now Title 49, Chapter 49.60, Section 49.60.400 of the Revised Code of Washington. *Id.* The key operative provision mirrors the language of proposition 200: “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” *Id.*

<sup>15</sup> See, e.g., *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979) (requiring affirmative action programs that give preference based on race to be temporary and designed to eliminate “manifest racial imbalance” and to not “unnecessarily trammel the interest of the white employees”); *United States v. Paradise*, 480 U.S. 149, 153, 185 (1987) (upholding “one-black-for-one-white promotion requirement” to remedy past discrimination in entry level hiring); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204, 236–37 (1995) (subjecting affirmative action programs that give preference to race by government contractors to strict scrutiny and must show a compelling interest for those preferences); *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (requiring white applicant alleging reverse discrimination only to prove inability to compete on equal footing); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000) (striking down race-conscious programs because the programs at the University of Georgia were not narrowly tailored to serve a compelling governmental interest), *aff’d*, 263 F.3d 1234 (11th Cir. 2001); *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), *rev’d*, 78 F.3d 932, 944 (5th Cir. 1996) (rejecting *Bakke* as the governing standard because it did not represent the majority opinion of the court), *cert. denied*, 518 U.S. 1033 (1996), *remanded to* 999 F. Supp. 872 (W.D. Tex. 1998), *aff’d in part, rev’d in part*, 236 F.3d 256 (5th Cir. 2000), *cert. denied*, 533 U.S. 929 (2001); *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324 (W.D. Wash. 1998), *aff’d*, 233 F.3d 1188, 1197–98 (9th Cir. 2000) (upholding race-conscious admission programs under the governing standard of *Bakke*), *cert. denied*, 532 U.S. 1051 (2001); *Farmer v. Ramsay*, 159 F. Supp. 2d 873, 887 (D. Md. 2001), *aff’d* No. 01-2039, Slip Op. at 5–6, 2002 WL 1766615 at \*5–6 (4th Cir. Aug. 1, 2002) (holding that suit challenging diversity admission policy would be dismissed for lack of standing if the university can show that the applicant would not have been admitted even if race had played no role in the decision to reject or admit the applicant); *Weser v. Glen*, 190 F. Supp. 2d 384, 406 (E.D.N.Y. 2002) (finding school’s diversity policy to be facially neutral and non-discriminatory because race and gender were not used as factors in the admissions policy).

<sup>16</sup> See BERNARD R. BOXILL, *BLACKS AND SOCIAL JUSTICE* 147–48 (Rowman & Littlefield Publishers 1992) (1984).

<sup>17</sup> See *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 269–70, 272 (1978).

classification were permissible under the Fourteenth Amendment.<sup>18</sup> Ironically, however, what appears to be a permissive judicial decision actually signaled the downward spiral against legal considerations of racial diversity within higher education.

In what follows, I will first argue that while *Bakke* preserved the possibility of race preference, its language of racial neutrality detached the law from the social and historical context of racial inequalities. The language on race is so neutral that it has allowed whites to argue that racial preferences constitute reverse discrimination under the law.<sup>19</sup> This same language that was once used to right past wrongs is now being used to support “white skin privilege.”<sup>20</sup> Second, denying the social and historical context of governing standards like *Bakke* allows society to ignore that white preferences still exist. Because *Bakke* never erased white preferences, diversity must remain a key factor in our implementation of affirmative action programs. Finally, while *Grutter v. Bollinger*<sup>21</sup> reinforced the value of diversity in higher education settings, I contend that diversity is a variable that should be incorporated into affirmative action programs that extend to all levels of education.

## I. HISTORICAL AND SOCIAL CLIMATE

It is important to view court decisions involving affirmative action programs in the context of the social and historical climate in which they were delivered. Unbeknownst to many, the *Bakke* case was not the first decision on race-based admissions policies in higher learning institutions to reach the Supreme Court. The first case was *Defunis v. Odegaard*.<sup>22</sup> Luckily, the issue surrounding whether Marco Defunis, Jr. was the victim of reverse discrimination in this case was rendered moot,<sup>23</sup> leaving intact the spirit of *Brown I* that recognizes group inequalities in their historical context.<sup>24</sup> This

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<sup>18</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (discussing Justice Powell’s opinion in *Bakke*).

<sup>19</sup> *Grutter*, 539 U.S. at 324 (quoting *Bakke*, 438 U.S. at 312–14).

<sup>20</sup> See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127B S. Ct. 2738, 2748 (2007); *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Grutter*, 539 U.S. at 316–17.

<sup>21</sup> *Grutter*, 539 U.S. at 343.

<sup>22</sup> *Defunis v. Odegaard*, 416 U.S. 312, 319–20 (1974) (holding that the issue of reverse discrimination was moot considering that Defunis would graduate with his class no matter what decision the Court reached).

<sup>23</sup> *Id.*

<sup>24</sup> What is meant by “spirit of *Brown I*” is that *Brown I* recognized group inequalities

proved to be a short lived victory, however, because just four years later, Allen Bakke sued the Regents of California Medical School, alleging that he was denied admission twice for what he deemed to be discriminatory reasons.<sup>25</sup> With no majority opinion, the Supreme Court reached its landmark 5–4 decision with “no single one speaking for the Court.”<sup>26</sup> While the *Bakke* decision ruled that universities could not set specific quotas for minority admissions, it left open the possibility that race could be used as a factor to achieve the important goal of diversity on campuses.<sup>27</sup> Under the Court’s strict scrutiny analysis, the governing standard was clear, race-based admissions policies could still be used to matriculate minority students.<sup>28</sup>

The Supreme Court’s preservation of racial preferences in *Bakke* indicates that the Court believed that we had not arrived at our colorblind country. The Court’s seemingly neutral ruling, however, in fact detached the law from the true social and historical context of then-existing racial inequalities. By example, the Court concluded that “[a]s the interest of diversity is compelling in the context of a university’s admissions program . . . .”<sup>29</sup> “Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”<sup>30</sup> By indicating that ethnic diversity may be used as a factor instead of perhaps connecting racial representation to historic oppression, the Court opened the door for anyone to claim racial oppression based on simply having an ethnic identity. This seemingly ambiguous language allowed whites to suggest that their race too must be considered as a factor in a race-based policy. It also gives those identified as white the opportunity to argue for “white skin privilege” under the guise that their civil rights are being violated and that they become the victims of reverse discrimination when policies are created to target truly marginalized minority groups.

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within a historical context. By contrast, *Bakke* utilizes the language of group rights, but does not recognize their historical context.

<sup>25</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 276–78 (1978).

<sup>26</sup> *Id.* at 325 (concurring in the judgment in part and dissenting in part with Justice Powell were Justices Brennan, White, Marshall and Blackmun).

<sup>27</sup> *Id.* at 318.

<sup>28</sup> *Id.* (“No such facial infirmity exists in an admissions program where race or ethnic background is simply one element—to be weighed fairly against other elements—in the selection process.”).

<sup>29</sup> *Id.* at 314.

<sup>30</sup> *Id.*

Likewise, it is clear that

[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else . . . to a person of another color. If both are not accorded the same protection, then it is not equal. . . . [T]he [Fourteenth] Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.<sup>31</sup>

While this may be true, in this country, white people have never been relegated to substandard housing, or subjected to poor health care or limited educational opportunities on the grounds of race. While inequality to white people might come from class, gender or sexual orientation, when one is culturally/legally sanctioned as white in this country, one acquires some variable level of “white skin privilege,” whether the beneficiaries of this privilege realize it or not. The converse is true for African Americans, who confront the ubiquitous consequence of being born into the “black detriment.”

It is obvious that the plurality opinion in *Bakke* at least realized that the consideration of race was also meant to afford minorities at least a seat on the train and not necessarily a free ride to the top.<sup>32</sup> The Court’s language, however, safeguards positions of power for whites. Here again,

this Court has . . . interpret[ed] the Equal Protection Clause . . . assuring to all persons “the protection of equal laws,” in a Nation confronting a legacy of slavery and racial discrimination. . . . [L]andmark decisions . . . arose in response to the continued exclusion of Negroes from the mainstream of American society, [and the decisions] could be characterized as involving discrimination by the “majority” white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that . . . “this Court has consistently repudiated ‘[d]istinctions between citizens solely because of their ancestry’ as being ‘odious to a free people whose institutions are founded upon the doctrine of equality.’”<sup>33</sup>

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<sup>31</sup> *Id.* at 289–90, 293.

<sup>32</sup> *See generally id.* at 387–90, 396–402 (Marshall, J., concurring and dissenting in part) (discussing the history of discrimination and the hypocrisy in the notion that the same constitution that allowed African American subversion cannot now be used to cure its ills).

<sup>33</sup> *Id.* at 293–94 (quoting *Loving v. Virginia*, 388 U.S. 1, 11 (1967)) (citations omitted).

On the surface level, one could applaud this passage as recognition by the Court of past discrimination on the grounds of racial injustice. Under closer analysis, however, a language of neutrality immediately suppresses the original declaration where the Court says that the equal protection decisions “need not be read as depending upon that characterization [(discrimination of blacks by whites)] for their results.”<sup>34</sup> In my mind, this passage becomes the linchpin in turning a conversation about injustice against African Americans, contemplated within its historical and social context, into an abstract conversation about race that could be accessed by anyone despite his or her privileges.<sup>35</sup> So, what was once an issue of racial inequality is transformed into one merely of racial difference. After *Bakke*, it was not inequality on the grounds of racial injustice that conferred rights, but just the simple ownership of a racial identity, whether black or white, which conferred a position of poverty or privilege. It is this passage that reinforced the legal justification for terms like reverse discrimination.

Although the question in *Bakke* boiled down to whether race could be a permissible consideration in admissions policies, the illusion of *Bakke* was that race-conscious affirmative action policies in higher learning institutions provided a practical solution to the exclusion of African Americans from proper representation in society. The purpose of the language of *Bakke* was to insure that minorities are represented in meaningful numbers in our workforce. But as the Court points out, “[n]othing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups.”<sup>36</sup> “[P]referential programs . . . reinforce common stereotypes” and “there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making.”<sup>37</sup> Under this rationale, we deny the historical race-based policies that previously worked to exclude African Americans from federal and state benefits. It is true that some “innocent” whites, who were not even born during slavery, may suffer because of preferential programs. Without these programs, however, the

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<sup>34</sup> *Bakke*, 438 U.S. at 294.

<sup>35</sup> See DERRICK BELL, *CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER* 46, 86, 149 (1994).

<sup>36</sup> *Bakke*, 438 U.S. at 298.

<sup>37</sup> *Id.*

inequity emanating from the remnants of slavery will continue to permeate our social, political, and economic institutions. This, in turn, will continue to marginalize a disproportionate number of minorities. Further, without some form of affirmative action, equally “innocent” African Americans, who are descendants of slaves, will also continue to “bear the burdens of [these] . . . grievances not of their making.”<sup>38</sup> Moreover, while white people may suffer individually from so-called affirmative action programs, as a group, they benefit by not having to engage in a fully competitive marketplace, against both minority and women workers (of all races) in the absence of affirmative action.

In addition, the perpetual language of the Court to disparage race-based policies as harming an “innocent group” is perplexing. While I recognize that some innocent white people are affected by affirmative action programs, “inherent unfairness”<sup>39</sup> to innocent people also exists when a company moves overseas, downsizes, liquidates its company, or when a white woman gets an affirmative action spot on the grounds of gender and not race. Are these white males any less a victim in those circumstances?<sup>40</sup> This language denies that African Americans and other minority groups are innocent victims too. Moreover, while affirmative action policies are deemed unfair, they actually make the marketplace more competitive by including previously excluded groups, including white women.<sup>41</sup> White males, historically, have not had to compete with these groups before. And, the realities of an existing race-based labor market are actually challenged through affirmative action.

It is also understandable that white people feel that “we have rights too, stop victimizing us!” But have White Americans really been victims of a society-endorsed mistreatment as a class of previously enslaved people on the grounds of their racial identity? Clearly not. Additionally, white people who allege reverse discrimination contend that these programs are unfair to them because they allow a less qualified African American to take their

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 294 n.34.

<sup>40</sup> *See, e.g., Johnson v. Transp. Agency*, 480 U.S. 616, 641–42 (1987) (holding that considering sex as one factor in promoting an employee over equally qualified male employee under affirmative action is constitutional).

<sup>41</sup> *See* W.H. Knight, Jr. & Adrien Wing, *Weep Not, Little Ones: An Essay to Our Children About Affirmative Action*, in *AFRICAN AMERICANS AND THE LIVING CONSTITUTION* 208, 212 (John Hope Franklin & Genna Rae McNeil eds., 1995).

spot.<sup>42</sup> This argument is flawed on several grounds: first, it ignores the possibility that the African American could in fact be more qualified; and second, it assumes that the white person would have received the spot even if the history of racism and oppression did not exist. A double-edged sword emerges. On one hand, to introduce the consideration of race and give racial preference would condemn the safe haven of perceived meritocracy. On the other hand, to deny meaningful access and opportunities to higher education would re-fortify segregation and expose meritocracy as a product of racial exclusion. We will never reach an equitable race neutral policy built on a politics of colorblindness because so much of how we live is based on race.

For generations, racial discrimination in the United States has isolated minorities and subjected them to astronomical rates of unemployment, substandard housing, and inferior educational resources. Affirmative action programs were never intended to victimize White Americans, but instead to give equal opportunity to African Americans. The fact remains that no matter how many seats are slated, reserved, or set aside for minorities, the white majority continues to receive the lion's share. So what we are in fact quibbling over is roughly 5–10% of the enrollment at colleges and universities.<sup>43</sup> Minorities still face the reality of being underrepresented in professions across the nation. In 2000, there were roughly 281,000,000 people living in this country.<sup>44</sup> African Americans represented 12% of the population and White Americans represented roughly 75% of the population.<sup>45</sup> In that same year, roughly 72% of the bachelor's degrees, 66% of the master's degrees, and 59% of the doctorate degrees went to White Americans.<sup>46</sup> African Americans only received 8% of bachelor's, 7% of the master's

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<sup>42</sup> See, e.g., Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Come First—The Stigma or Affirmative Action*, 96 CAL. L. REV. 1297, 1334 (2008).

<sup>43</sup> NATIONAL CENTER FOR EDUCATION STATISTICS (NCES), INSTITUTE OF EDUCATION SCIENCES, DESCRIPTIVE SUMMARY OF 2003–04 BEGINNING POSTSECONDARY STUDENTS: THREE YEARS LATER 33–34, 50 (July 2000), <http://www.nces.ed.gov/pubs2008/2008174.pdf>; see generally PETER SCHMIDT, COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION 97–98 (2007) (discussing the generally low percentages of African Americans at top universities and measures taken to combat and offset that image).

<sup>44</sup> U.S. Census Bureau, Statistical Abstract of the United States: 2002 8 tbl.1 (2004), <http://www.census.gov/prod/2003pubs/02statab/pop.pdf>.

<sup>45</sup> See *id.* at 29 tbl.24.

<sup>46</sup> See NATIONAL CENTER FOR EDUCATION STATISTICS, POSTSECONDARY INSTITUTIONS IN THE UNITED STATES: FALL 2000 AND DEGREES AND OTHER AWARDS CONFERRED: 1999–2000 19 tbl.9 (2001), <http://nces.ed.gov/pubs2002/2002156.pdf>.

and 5% of the doctorate degrees in that same year.<sup>47</sup> Proportionally, only in doctorate programs were White Americans significantly below representation. However, even with affirmative action in place, in each degree-bearing category, African Americans were underrepresented.<sup>48</sup> Arguments about black competency notwithstanding, imagine the stark contrast these numbers would reveal in the absence of affirmative action initiatives. The goal of affirmative action programs is to allow a meaningful number of *qualified* minorities to participate in the American republic, and there is no other program that could substitute for affirmative action's impact on making otherwise inaccessible opportunities to minorities within their reach.

Economist Barbara Bergmann provides an effective insight when she quotes a professor at Brown University who says,

I have taught, advised and mentored a good many affirmative action admissions students and not one of them could by any stretch of the imagination have been called an "underachiever." . . . No, affirmative action doesn't allow anyone to get by on the color of his/her skin—we don't give affirmative action grades (except to athletes) no matter how the student got in.<sup>49</sup>

It may be tempting to compare scholarships given to African American athletes to race-based affirmative action programs. But black athletes, who are concentrated in basketball, football and track and field, only make up a small percentage of those who enter universities under athletic affirmative action, compared to the majority of white sports of golf, swimming, hockey, field hockey, baseball, crew, soccer, rowing, lacrosse, volleyball, and gymnastics. The stigma of affirmative action rests on identifying it as a racially-based quota and ignores the pervasive ways in which assistance is granted all along the racial and economic spectrum. This in turn reinforces inequality by normalizing assistance and aid given to white people while casting a cloud over aid given to minorities.

Affirmative action was created in the interest of fairness. It brings equality and opportunity to uprooted African Americans. It

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<sup>47</sup> *See id.*

<sup>48</sup> *See id.* According to this data, the percentage of degrees conferred to African Americans represented 25% less than their overall proportionate representation. *See id.*

<sup>49</sup> BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 119–20 (1996); *see also* Shelby Steele, Op-Ed, *How to Grow Extremists*, N.Y. TIMES, Mar. 13, 1994, at E17 (discussing how oppression can be celebrated and manipulated into a tool for gaining entitlements).

helps to remove established barriers and allows African Americans to be considered equally in all positions. Race-based policies allow considerations for African Americans in areas that were traditionally given to white males out of overt prejudice or the more subtle but equally damaging “good-old-boys” network. Even if we do take race out of policy decisions, we will still have subjective results, which continue to favor the white males who already have the majority of the seats and hence, perpetuate the reality of white racial preferences. And, the contentious issue of white racial preference is at stake in debates about affirmative action and racial diversity.

## II. WHITE SKIN PRIVILEGE

I have had the opportunity to work with many talented students, both black and white. On one occasion, a group of students were conversing in my office about their recent LSAT scores. One white student commented that he was not pleased with his low score, but knew that he would at least get into the state’s law school.<sup>50</sup> When queried how he could be so sure, the student replied, “my uncle will donate a lot of money and I’ll get in, no problem.” This exchange was profoundly disturbing, both for the student’s blatant announcement of privilege and for his apparent lack of embarrassment. It serves to expose the myth of meritocracy, deflates the contention that African Americans play on a level field and highlights the true existence of “white skin privilege.” Realities like this necessitate affirmative action programs.

While the *Bakke* decision preserved the notion of race-based considerations in colleges and university admission policies, I want to reiterate legal scholar Derrick Bell’s argument that it also afforded protection of “white skin privileges.”<sup>51</sup> *Bakke*’s application of race-based categories, without recognition of the qualitatively different ways in which race impacts African American versus white people, wholly disregards the reality that inequalities were not directed at everyone, but at a particular racial group. Hence, the category of race is not experienced equally across the board, which is the point of the term racism.<sup>52</sup> Affirmative action initiates

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<sup>50</sup> In order to protect the identity of this student, the sex and name are withheld.

<sup>51</sup> Derrick A. Bell, Jr., *Racial Realism*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 302, 304 (Kimberlé Crenshaw et. al. eds., 1995).

<sup>52</sup> See Ron Daniels, *Racism: Looking Forward, Looking Back*, in *RACE AND RESISTANCE: AFRICAN AMERICANS IN THE TWENTY-FIRST CENTURY* 1, 1–2 (Herb Boyd ed., 2002).

removal of the white man's privilege of exclusive access. The representation of race as a neutral experience and not a product of socio-economic inequality gives affirmative action programs the appearance of being racially oppressive to white people. While images of a post-civil rights level playing field are seductive, present day calls for racial diversity are not simply to "right" past wrongs, but also to counteract the persistence of "white skin privilege."

Before we move on, let me give you a definition of what I mean by "white skin privilege." Legal scholar Sylvia Law speaks of "white skin privilege" as the "pervasive, structural, and generally invisible assumption that white people define a norm and [African Americans represent the] 'other,' dangerous and inferior."<sup>53</sup> Legal scholar Ian Haney Lopez adds that "white skin privilege" is a social construction which creates a racial bureaucracy where whites exist at the top and African Americans are at the bottom.<sup>54</sup> Finally, scholar George Lipsitz defines "whiteness" as manifested through "white skin privilege" as the creation of a superiority complex based on institutions "created by slavery and segregation, . . . by conquest and colonization."<sup>55</sup> "White skin privilege," therefore, is manifested through the unequal distribution of housing, employment, education and state surveillance and violence (*i.e.*, racial profiling, police brutality) along racial lines that benefit those labeled as "white."<sup>56</sup> Therefore, it is not ironic that many white people consider affirmative action programs to be racist. These programs threaten or at least challenge this racial distribution of advantages.

Why do white people want to protect this privilege? Being white is valuable. White people, as legal scholar Cheryl Harris points out, have a unique interest in the commodification of their skin as property which relegates African Americans to the marginal, subordinate, and disadvantaged race.<sup>57</sup> Consider, for example, the

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<sup>53</sup> Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604 (1999).

<sup>54</sup> IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 163 (1996).

<sup>55</sup> George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the "White" Problem in American Studies*, 47 AMERICAN QUARTERLY 369, 370 (1995); see generally Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in RACE: AN ANTHOLOGY IN THE FIRST PERSON 120, 124-25 (Bart Schneider ed., 1997) (discussing the positive and negative advantages of present hierarchies).

<sup>56</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127B S. Ct. 2738, 2788 (2007) (discussing social and racial hierarchies).

<sup>57</sup> Cheryl I. Harris, *Whiteness as Property*, in CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 276, 281 (Kimberlé Crenshaw et al. eds., 1995); see also Derrick Bell, *The Real Costs of Racial Discrimination*, in AFRICAN AMERICANS AND THE LIVING CONSTITUTION 183, 188 (John Hope Franklin & Genna Rae McNeil eds., 1995)

illuminating experiment undertaken by political scientist Andrew Hacker, who asked white students to determine what would be adequate compensation if they had to “turn black” for the next fifty years.<sup>58</sup> He commented that “most [white students] seemed to feel that it would not be out of place to ask for \$50 million” as compensation for having to “turn black.”<sup>59</sup> This certainly reveals at least the tacit recognition that being white carries significant material benefits. We live in a society that has seen fit to socially construct categories of people by race since the nineteenth century. These social constructions, which in the twenty-first century, are expanded beyond a white and black binary, permeate all institutions of power. That being the case, we cannot ignore that the investment in “whiteness” fortifies, materializes, and naturalizes racial inequalities on the grounds of ahistorical notions of merit or neutrality. The once invisibility of “white skin privilege” is now revealing itself through affirmative action. Haney Lopez observes that: “White supremacy makes whiteness the normative model. Being the norm allows whites to ignore race, except when they perceive race (usually someone else’s) is intruding on their lives.”<sup>60</sup> White people have a vested interest in “whiteness” because they want to believe that the color of their skin is worth more than other skin colors, that they are entitled to increased pay for the same work and desire that cultural and material capital remain in their hands.

How does the language of *Bakke* reinforce “white skin privilege?” *Bakke* helps to maintain current political coalitions by advocating a neutral component to race or ethnic diversity classifications. Race neutrality in policy would, however, require a mythical state of socio-economic parity along racial lines, which has not existed. The fact that *Bakke* allows the doors to open for claims of reverse discrimination ignores the legacy of “whiteness” or “white skin privilege” as it pertains to the legal status, opportunities and equality of African Americans. The neutral language of *Bakke* adds to the benefits of “whiteness” in ways that race-based policies were not intended. The intended goal of affirmative action was to

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(describing how the creation of a sub-class of African Americans in the seventeenth century elevated poor whites).

<sup>58</sup> ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 31–32 (1992).

<sup>59</sup> *Id.*

<sup>60</sup> LOPEZ, *supra* note 54, at 158.

delegitimize white privilege and deny legal protection exclusively to white people. Reverse discrimination claims ignore this history of racial inequality and continue to reward white people for their historical advantages in the labor market, and ensure economic returns to them in the long run. *Bakke*, moreover, has also opened the door for white people, who historically controlled the rewards, resources, and opportunities, to continue to control these areas.

It can be argued that there were degrees of “whiteness” and some white people were oppressed because they were poor.<sup>61</sup> However true this might be, as a whole group, white people were not oppressed in America because they were white people, while all groups defined as black, no matter the degree, were subjected to oppression without a legally sanctioned privilege of color. Furthermore, African Americans are also made to feel embarrassed because affirmative action is thought of as implicitly a “black thing,” when such is not always the case. For example, a friend,<sup>62</sup> who is also an academic, was in a departmental meeting about affirmative action. All faculty members agreed to instigate affirmative action searches, even though many were leery that such focused searches could be “breaking the law.” After the suggestion that affirmative action searches were breaking the law, it was then suggested by women and faculty of color that earlier searches in which they were directed to specifically fill a “Jesuit” and then later a “Catholic” position outside the competitive marketplace, were blatant examples of affirmative action, yet these parameters were considered legal. Many of the members, ambivalent about directed searches, quickly resisted associating these acceptable hires with the branding of affirmative action. The almost militant resistance to this nomenclature exposed the extent to which white people do not want to be associated with affirmative action. White people, however, do receive affirmative action, though not branded with the stigma, through well-established preference in jobs, education, and the “good-old-boys” network.

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<sup>61</sup> For example, consider eugenic sterilization performed on poor white women in the early 1920s. See, e.g., MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE* 125 (1998) (discussing the eugenics program of Arthur Snobcraft, which strongly favored Anglo-Saxons, and which was far from embracing “pan-white supremacism”); DAVID R. ROEDIGER, *WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE: THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS* 60 (2006) (“A debate on fertility rates and immigration restrictions conjured up threats of ‘racial suicide’ if this flow of migrants were not checked and/or the fertility of the native born did not increase.”).

<sup>62</sup> In order to protect the identity of this faculty member, the sex and name are withheld.

Although *Bakke*'s concern for "white skin privilege" is not as blatant as cases such as *Dred Scott v. Sanford*,<sup>63</sup> *Civil Rights Cases*,<sup>64</sup> *Martin v. Wilks*,<sup>65</sup> and *City of Richmond v. J.A. Croson Co.*,<sup>66</sup> it nonetheless reinforces a sense of white entitlement by denying the social and historical context of affirmative action policies directed specifically for "oppressed" and not "all" racial groups. There is a way in which the language of objectivity, neutrality, and meritocracy are associated with the historical experiences of the majority group. In this case, the so-called white interest is seen as being synonymous with neutrality. So the outlook of one group becomes universalized and everyone else is forced to evaluate themselves on those standards. Ironically, race-based policies are posed as a threat to those "standards." Before the *Bakke* decision, race-consciousness was associated with being black and the race of white people was seen as invisible or at best seen as "irrelevant." *Bakke* not only made it politically viable for white people to organize around what had previously been an unattractive race-consciousness; it also gave them the basis to do so. Therefore, after the *Bakke* decision, we witness the proliferation of those who did not previously identify themselves on racial grounds, particularly white males, now arguing on those very grounds. In the post-civil rights era, "whiteness" has resurfaced as acceptable identity politics within the political mainstream. Decisions like

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<sup>63</sup> See 60 U.S. (19 How.) 393, 393–95 (1856) (announcing that members of the "Negro" race were not citizens and were not intended to be included in the Rights and Privilege Clause of the U.S. Constitution), *superseded by statute*, U.S. CONST. amend. XIV.

<sup>64</sup> See 109 U.S. 3, 23–25 (1883) (holding that Congress has no authority to create laws to give "Negroes" equal access to private accommodations and that private citizens (without state authority) can forbid "Negroes" from public accommodations unless the state intervenes).

It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business. Innkeepers and public carriers, by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them. If the laws themselves make any unjust discrimination, amenable to the prohibitions of the Fourteenth Amendment, Congress has full power to afford a remedy under that amendment and in accordance with it.

*Id.* at 24–25.

<sup>65</sup> See 490 U.S. 755, 767–69 (1989) (allowing white firefighters to sue the city, alleging reverse discrimination for hiring less qualified blacks, despite the fact that the city had been ordered to do so through consent decrees in actions in which the white firefighters were not parties).

<sup>66</sup> See 488 U.S. 469, 486 (1989) (holding that setting aside 30% of contracts for blacks discriminates against whites).

*Bakke* helped legitimate “whiteness” as a viable political identity and white people as a part of an oppressed group. Because race continues to handicap African Americans in a manner that it does not handicap whites, however, affirmative action is still necessary to diversify institutions of power that remain profoundly white despite the growing acceptance of reverse discrimination.

### III. BENEFITS OF DIVERSITY

One of the key ways to engage the complex relationship between race and power is a cultural terrain on which this convergence is contested—the meaning of diversity. Diversity has been deployed as a powerful rationale for piercing through the blinding “whiteness” of institutional power. The post-*Bakke* cases have demonstrated how the term diversity has been used by those in power, which in effect decouples the notion of diversity from its historical link to racial inequality. We can only understand affirmative action as reverse discrimination if we ignore the pervasive racial terrain of power relationships in the state apparatus, education, and the workplace. The case of *Bakke* provides us with a legal legacy where diversity maintains its potency as a compelling state interest. But leaving the terms of diversity to the discretion of colleges and universities weakens the intent of the affirmative action mission. Contrary to some popular sentiment, affirmative action does not encourage the matriculation of unqualified students.<sup>67</sup> But it does counter other subjective standards used by colleges and universities which favor white males. The persistence of racial discrimination determines the access of African Americans to important institutions of power including educational and workplace arenas, among others.<sup>68</sup> In my

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<sup>67</sup> *Grutter v. Bollinger*, 539 U.S. 306, 350 (2003) (Thomas, J., dissenting).

<sup>68</sup> According to legal scholars W.H. Knight and Adrien Wing, “[d]ecisions often have been made to provide opportunities on the basis of some preferred set of characteristics [for white males]. Education, alma mater, family history, wealth, political affiliation—all have served as criteria for selecting one person or group over others.” Knight & Wing, *supra* note 41, at 211; *see, e.g.*, MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* 226–27 (2003) (“[T]he color of one’s skin still determines success or failure, poverty or affluence, illness or health, prison or college.”); IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 166 (2005) (discussing the concept of “black isolation” to point out that African Americans continue to suffer from race-based disadvantages); LESLIE MCCALL, *COMPLEX INEQUALITY: GENDER, CLASS AND RACE IN THE NEW ECONOMY* 38, 58 (2001) (discussing the interplay between race, gender, and class in measuring inequality, using an empirical analysis technique); MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW*

estimation, the vagaries of access to these institutions of power produces two major results: first, it determines whether people of color will have meaningful access to cultural and material capital (i.e., education and labor market); second, at the same time, it rejects a diversity of opinion in determining the standards that determine access to this very capital. This allows those in power, who establish the norms, values, and behaviors through these institutions, to create rules of certification, status, and excellence based on their experiences, and hence, reproduce themselves. At best, those in the minority group have to learn the “rules” of the majority and adopt them as their own. It is because of this continual re-concentration of power, and marginalization of people of color from that very power that I will attempt to argue that race-based policies are needed to achieve a diverse student body, not only in a higher education setting, but at all tiers of education. A diverse student body is not simply about creating a more multicultural workplace or educational experience. It is about adding a diversity of voices, opinions, and experiences in the creation of institutions of power and the rules that govern and produce them.

Under the Supreme Court’s strict scrutiny analysis, in order for racial distinctions to be considered constitutional, race-based policies must be narrowly tailored to serve a compelling state interest.<sup>69</sup> The Court has acknowledged that “[i]t is well established that when the government distributes burdens or benefits on the

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PERSPECTIVE ON RACIAL INEQUALITY 174 (1995) (“Whether it be a matter of education, occupation, family, status, other characteristics positively correlated with income and wealth, blacks are likely to come out on the short end of the stick. This is no surprise.”).

<sup>69</sup> See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995) (stating that affirmative action programs which give preference to race by government contractors are subject to strict scrutiny and must show a compelling interest for those preferences); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (“Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect.”); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny.”); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (“Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people . . . . [L]egislative classification or discrimination based on race alone has often been held to be a denial of equal protection.”); see also *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127B S. Ct. 2738, 2752 (2007) (“[T]he school districts must demonstrate that the use of individual racial classifications . . . here under review is ‘narrowly tailored’ to achieve a ‘compelling’ government interest.” (citing *Adarand*, 515 U.S. at 227)); *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (noting that “[c]ontext matters” and “strict scrutiny must take ‘relevant differences’ into account” (citing *Adarand*, 515 U.S. at 228)); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 291 (1978) (“Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”).

basis of individual racial classifications, that action is reviewed under strict scrutiny.”<sup>70</sup> In *Grutter*, the Court recognized that the desire to achieve a cross-cultural or diverse student body is compelling.<sup>71</sup> Fortunately, we do not live in a homogenous society, and therefore, our institutions of power must also reflect our diverse populations. Universities and colleges must foster racial and cultural interactions because the students in these institutions of power will eventually affect the lives, policies, and concerns of the rest of society.<sup>72</sup> Increased exposure to other races and cultures can lead to better race relationships and improved cross-cultural understanding.<sup>73</sup> Moreover, it will at least challenge standard operating procedures in the work place, provide equal opportunity to people of color, and encourage cultural awareness among *all* races.<sup>74</sup>

Unmoved by the diversity argument, Professor John McWhorter argues that race-based policies only serve to give preferential treatment to African Americans, and ultimately, prevent African Americans from “serious competition.”<sup>75</sup> But I argue just the opposite. Race-based considerations give African Americans a foot in the door, so that they can fairly compete.<sup>76</sup> Without this minimum preference, African Americans were more often denied entrance to even “run the race.” Race-based policies allow what white males have continued to receive covertly and even overtly, for a significant number of years. Additionally, other opponents of race-based programs could further argue that we should allow these

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<sup>70</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2751; *see also* *Johnson v. California*, 543 U.S. 499, 505–06 (2005); *Grutter*, 539 U.S. at 326; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003).

<sup>71</sup> *Grutter*, 539 U.S. at 328 (holding that diversity was a compelling state interest in higher education). It is also worth mentioning that the Court in *Parents Involved in Community Schools*, recognized that the state may also use racial classifications to remedy past effects of intentional discrimination. 127B S. Ct. at 2752; *see also* *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (noting that racial classifications may be used when the racial imbalance was caused by intentional discrimination).

<sup>72</sup> *Grutter*, 539 U.S. at 330–31.

<sup>73</sup> Brief for Respondent at 19, *Parents Involved in Cmty. Sch.*, 127B S. Ct. 2738 (No. 05–908), 2006 WL 29229556.

<sup>74</sup> *See* NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 309–11 (2006); PATRICIA GURIN ET AL., DEFENDING DIVERSITY: AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN 110 (2004); BERGMANN, *supra* note 49, at 9–10.

<sup>75</sup> John McWhorter, “Aren’t You in Favor of Diversity?” *White Guilt and University Admissions*, in AUTHENTICALLY BLACK: ESSAYS FOR THE BLACK SILENT MAJORITY 138, 146 (2003).

<sup>76</sup> *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Thomas, J., dissenting). Justice Thomas begins his opinion with a quote from Frederick Douglass, saying “[w]hat I ask for the negro is not benevolence, not pity, not sympathy, but simply justice.” *Id.*

institutions of power to diversify their population without showing preference, by relying on their “good will.”<sup>77</sup> When any institution is simply left to exercise “unfettered freedom” in selecting students, history has shown that the literal complexion of these institutions does not significantly change and consequently, the institutions of power and the rules that govern and reproduce them do not change.<sup>78</sup> In fact, institutionalized racism in job discrimination, wage disparities, and segregated labor markets depends on the ethic of “unfettered freedom” reminiscent of the “states’ rights” arguments made in the civil rights south.<sup>79</sup>

Some scholars and journalists argue that even with diverse student bodies, student populations remain extremely balkanized.<sup>80</sup> McWhorter further points out that the pursuit of diversity is a fallacy, because college campuses are “among the most racially balkanized settings in America.”<sup>81</sup> He charges that African Americans on college campuses tend to stick together and discourage fraternization with the white race.<sup>82</sup> Similarly, in middle and high schools, some notice that the black kids sit together, isolated from their white peers, at the same table.<sup>83</sup> While it is true that in diverse settings some minority students have a vested interest in retaining African American culture and do self-select or discriminate, this should not suggest that we abandon the overall goal of enriching the educational experience through creating a diverse student body. Engagement with multicultural

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<sup>77</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 312, 314 (1978).

<sup>78</sup> See JAMILLAH MOORE, *RACE AND COLLEGE ADMISSIONS: A CASE FOR AFFIRMATIVE ACTION* 196 (2005) (stating that the use of “color-blind policies” by universities do not increase enrollment of African American students and in some cases even result in a reduction in enrollment).

<sup>79</sup> See generally YASUHIRO KATAGIRI, *THE MISSISSIPPI STATE SOVEREIGNTY COMMISSION: CIVIL RIGHTS AND STATES’ RIGHTS* xxiv–xxv (2001) (noting proponents of states’ rights in the south called for less federal government intervention in the states regarding matters of sovereignty); JOSEPH E. LOWNDES, *FROM THE NEW DEAL TO THE NEW RIGHT: RACE AND THE SOUTHERN ORIGINS OF MODERN CONSERVATISM* 30 (2008) (discussing the Dixiecrat Revolt and its focus on states’ rights); MACLEAN, *supra* note 74, at 21–22 (stating employers argued against fair employment legislation believing they should have freedom to do as they wished with their own resources); JASON SOKOL, *THERE GOES MY EVERYTHING: WHITE SOUTHERNERS IN THE AGE OF CIVIL RIGHTS, 1945–1975* 223–25 (2006) (stating that white southerners argued states’ rights and white freedom in opposition of civil rights legislation); DAN R. WARREN, *IF IT TAKES ALL SUMMER: MARTIN LUTHER KING, THE KKK, AND STATES’ RIGHTS IN ST. AUGUSTINE, 1964* 1 (2008) (discussing the “Last Cause Myth” rationale for the Civil War).

<sup>80</sup> McWhorter, *supra* note 75, at 147.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 147–50.

<sup>83</sup> BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE 52 (1997).

opinions in a freshman world history lecture is just as important as pledging an African American sorority like, Delta Sigma Theta.<sup>84</sup> They can both be a part of the college experience, without negating each other. Moreover, established African American institutions do more than just engage black issues. Through the lens of their organizations, they negotiate larger concerns, like academic excellence, community service, and adjustment to the university. Further, if we look at the goal of diversity as simply classroom “aesthetics,”<sup>85</sup> things seem black and white. But this ignores the fact that many African American institutions emerged as a response to white racial exclusion. While African American children may sit at their own table or step in their own fraternity or sorority, by allowing them access to certain educational settings, they will be given the opportunity to read the same books, interact in the same networks, and receive the same certifications as their majority peers. Perhaps in the long run, if we do have affirmative action in primary and secondary educational settings, then a legitimate case could be made that at best we do not need affirmative action at the higher educational level, and at worst the *Grutter* time limit of twenty-five years could reasonably be realized.<sup>86</sup>

Diversity pursued through race-based policies breaks down walls of white preference and institutions of extreme influence that have built a profound level of cultural and economic capital during periods of racial exclusion.<sup>87</sup> Through affirmative action, groups who have previously been excluded on the grounds of race not only have the opportunity to compete based on the theory of leveling the playing field, but also have a policy that recognizes the extreme levels of institutional imbalance that have been accumulated over a

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<sup>84</sup> An African American female sorority chartered on January 13, 1913. Delta Sigma Theta Sorority, Inc.,

<http://www.deltasigmatheta.org/index2.asp> (last visited on Feb. 5, 2009).

<sup>85</sup> *Grutter v. Bollinger*, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting) (noting that the interest in diversity to be merely “aesthetic” rather than truly educational).

<sup>86</sup> Justice O’Connor most famously announces a time limit on race-conscious policies. She declares, “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>87</sup> See generally GEORGE LIPSITZ, *THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS* vii, 6–9 (1998) (discussing the value of whiteness in a variety of contexts); DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 148–50 (1993) (describing the historically imbalanced institutions and how they perpetuated societal inequalities); CHARLES W. MILLS, *THE RACIAL CONTRACT* 10–12 (1999) (discussing how “Racial Contract” theory seeks to explain the “subordinate civil standing” of non-whites in white dominated societies).

long period of time and seeks to take into account, through not just equality but through redistribution.<sup>88</sup> And in the interest of diversity, if it means that some groups are favored over others, “universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas.’”<sup>89</sup> While the Court cases seemed to opine that only institutions of higher education deserve “a special niche in our constitutional tradition,”<sup>90</sup> I posit that we must not only acknowledge that the attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education, but also accept this reason for modeling affirmative action policies in primary and secondary educational settings.<sup>91</sup>

The *Parents Involved in Community Schools v. Seattle School District No. 1 (Parents Involved in Community Schools)* and *Meredith v. Jefferson County Board of Education* cases presented the Court with its first challenge to race preference policies in primary and secondary school education.<sup>92</sup> In a plurality decision authored by Chief Justice Roberts, the Court rejected the school board’s efforts to achieve diversity.<sup>93</sup> Justice Roberts suggested that race-based preferences were only constitutional if the school board could establish a compelling governmental interest that was narrowly tailored to meet that state’s interest.<sup>94</sup> Referencing the Court’s prior cases that dealt with racial classifications, Justice Roberts stated that the only way the Seattle and Kentucky plans would survive strict scrutiny was if the programs either remedied past acts or effects of racial discrimination,<sup>95</sup> or if the plans had as its goal to achieve diversity in the classroom setting.<sup>96</sup> When race-based preferences are used to remedy past acts of racial discrimination, it is only appropriate where there has been legally sanctioned discrimination based on race, and is impermissible when the goal is “to achieve racial balance.”<sup>97</sup> In fact, Justice Roberts states that “the Constitution is not violated by racial imbalance in

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<sup>88</sup> LIPSITZ, *supra* note 87, at vii, 6–9.

<sup>89</sup> *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 313 (1978).

<sup>90</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127B S. Ct. 2738, 2754 (2007).

<sup>91</sup> *See Bakke*, 438 U.S. at 312–13.

<sup>92</sup> *See Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2746.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2752.

<sup>95</sup> *Id.*; *see also Freeman v. Pitts*, 503 U.S. 467, 494 (1992).

<sup>96</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2753; *see also Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

<sup>97</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2753.

the schools.”<sup>98</sup> Since the school district had chosen voluntarily to implement the race-based programs, by definition the plans were not instituted to remedy past racial discrimination. Therefore, according to Justice Roberts’ analysis, the only constitutional justification for such plans would be to diversify the classroom.<sup>99</sup> However, because *Bakke* and then *Grutter* and *Gratz* were cases that involved institutions of higher education, Justice Roberts declined to apply this rationale to primary and secondary institutions.<sup>100</sup>

This paper argues, like the Seattle and Kentucky school boards did, that there are real educational and far-reaching socialization benefits which can materialize if primary and secondary school children are exposed to racially diverse learning environments.<sup>101</sup> Moreover, if an affirmative action plan would reduce concentrated racial populations in certain schools and allow children of color equal access to the best schools available,<sup>102</sup> then the means should justify the end. However, in rejecting these arguments put forth by the school boards, Justice Roberts makes it clear that even if these are valid reasons to use race-based preferences, *Grutter* was *only* talking about diversity in a specific and specialized context of “higher education.”<sup>103</sup> A diversity justification in any other context is inappropriate. Further, Justice Roberts opined that even if the Court were to apply the *Bakke/Grutter* diversity analysis to the Seattle and Kentucky plans, the school board’s programs would still not pass constitutional muster.<sup>104</sup> In *Grutter*, according to Justice Roberts, the Court advocated for a more “holistic” approach<sup>105</sup> to diversity and therefore any attempt to use diversity “to achieve racial balance . . . would be ‘patently unconstitutional.’”<sup>106</sup> While the Court correctly points out that the issue of diversity is not

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<sup>98</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2752 (quoting *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977)).

<sup>99</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2752–53.

<sup>100</sup> The Court found that *Grutter* applied only to institutions of higher education and distinguished institutions of higher education from other educational facilities, stating that “in light of ‘the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.’” *Id.* at 2754 (citing *Grutter*, 539 U.S. at 329) (internal quotation marks omitted).

<sup>101</sup> See *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2755.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 2753–54.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 2753 (citing *Grutter*, 539 U.S. at 337).

<sup>106</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2753 (quoting *Grutter*, 539 U.S. at 330).

simply about *racial* diversity<sup>107</sup> (even though racial diversity in the context of skin color is critically important), the Court misses the mark by narrowing the discussion of racial or ethnic diversity to simply discussions about racial quotas. Affirmative action programs such as these open up access to resources, offer exposures to different perspectives and opinions, and in the context of the United States, allow shared access to power—which is the hallmark of democracy. When one considers the impact that an affirmative action policy would have on primary and secondary institutions, we are talking about more than simply racial balancing. If children of color are given access to predominately white, (read, better) schools,<sup>108</sup> we can envision smaller class sizes, better facilities and access to the power base of the parent association networks.

I advocate in this paper that access to diversity is more than achieving racial balancing; Justice Roberts incorrectly assumes that racial diversity is the same as racial balancing.<sup>109</sup> Perhaps it was the way in which the Seattle and Kentucky school boards defined their plan,<sup>110</sup> but as I see it, racial diversity is about allowing a multicultural or pluralistic approach to a social phenomenon. In order to be racially diverse, a school does not have to reserve a selected number of slots simply for children of color. Instead, it requires that different cultural, racial and ethnic groups are pooled together and given equal access to all of the school's resources. Racial balancing, on the other hand, is akin to a racial quota. It solicits a certain number of slots or seats for children with a certain type of race. Racial balancing counts heads to assure that there are not too many or too few races represented. This is not what is at stake when there is a call for racial diversity. There may be occasions, however, that diversity in the classroom (particularly in primary and secondary learning institutions), may sometimes need a little bit of both. We need racial diversity in order to expose children to different sets of viewpoints, lifestyles, and rituals. But, we also sometimes may need racial balancing to relieve racial isolation and the lone spokesman syndrome.<sup>111</sup> Additionally, I do not agree with the Court when it states that “[a]llowing racial

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<sup>107</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2753.

<sup>108</sup> In *Parents Involved in Community Schools*, the school district made this argument in reliance on their use of race for diversity purposes. *Id.* at 2755.

<sup>109</sup> *See id.* at 2758–59.

<sup>110</sup> *See id.* at 2747–50, 2759.

<sup>111</sup> Lone spokesman syndrome is the condition where, when topics of racial concern of discussed, the lone person is made to speak for the entire race.

balancing as a compelling end in itself would ‘effectively assur[e] that race will always be relevant in American life, and that the “ultimate goal” of “eliminating entirely from governmental decision-making such irrelevant factors as a human being’s race” will never be achieved.’”<sup>112</sup> This incorrectly assumes that under a colorblind approach we can simply ignore that laws, policies and other decisions are influenced by race. And that by simply ignoring race, these laws, policies and other decisions will become race neutral over night. In fact, it is because the Court is unwilling to allow affirmative action policies to remedy past societal discriminatory acts<sup>113</sup> or even to bear witness to the far-reaching effects of this history that “governmental decisionmaking” is influenced by “irrelevant factors as a human being’s race.”<sup>114</sup> And, unfortunately, it is this reason that we cannot wholeheartedly discount the true benefits offered by racial balancing.

Until we can truly say we live in a colorblind society (and I suggest that this will take more than the twenty-five years suggested by Justice O’Connor),<sup>115</sup> affirmative action policies are needed at all levels of higher education. It allows *all* to have meaningful voices in society, not just a select few.<sup>116</sup> It dismantles the *token*, who is made to speak for the entire race, or the juxtaposed Uncle Tom, who is made to feel that he must speak out against racial concerns for African Americans to disprove racial bias.<sup>117</sup> It is not only in the university settings where without any effort toward racial balancing we can identify the *token* or the Uncle

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<sup>112</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2758 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989)).

<sup>113</sup> *Croson*, 488 U.S. at 469, 498–99; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986); *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2758.

<sup>114</sup> *Parents Involved in Cmty. Sch.*, 127B S. Ct. at 2758 (quoting *Croson*, 488 U.S. at 495).

<sup>115</sup> Justice O’Connor most famously announces a time limit on race-conscious policies. She declares, “[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.” *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

<sup>116</sup> See KATZNELSON, *supra* note 68, at xi, xiii, xv, 172 (advocating the extension of affirmative action to eliminate the need for it); Mary Frances Berry, *Affirmative Action: Why We Need It, Why It Is Under Attack*, in THE AFFIRMATIVE ACTION DEBATE 299, 303 (George Curry ed., 1996) (discussing the effectiveness of affirmative action in eliminating discrimination in higher education for women).

<sup>117</sup> See ELIZABETH ARIES, RACE AND CLASS MATTERS AT AN ELITE COLLEGE 2–3, 98–104 (2008) (discussing the respective stereotypes common in different racial groups in higher education); JANE BOLGATZ, TALKING RACE IN THE CLASSROOM 18, 46–47, 53, 55, 86 (2005) (discussing the benefits racial dialogues in educational settings); DVD: THE DEREK BOK CENTER SERIES ON COLLEGE TRAINING: RACE IN THE CLASSROOM: THE MULTIPLICITY OF EXPERIENCE (Spectrum Media 2007) (on file with the Purdue University Library).

Tom, but racial diversity is also critical in primary and secondary classrooms when it is time to discuss the history of slavery or when the month of February ushers in Black History Month. While I agree that university campuses must mirror the populations they will serve, effective service requires access to the best forms of education at all levels. Affirmative action policies were supposed to be used until the larger social economic contexts were evenly distributed. Despite the Court's disdain, this may indeed call for quotas, racial balancing, critical masses or whatever the term of the day might be.

A further legitimate and compelling reason to consider race for diversity purposes at all educational settings is that access to universities and colleges determine whether minorities will have access to equal cultural and material capital. A quick comment should be made about the difference between cultural and material capital. Material capital is obviously the accumulation of wealth.<sup>118</sup> While cultural capital is influenced by income, social markers that include education, membership in certain elite organizations, and learning languages, methods, and techniques that shape the boundaries around inclusion and exclusion are equally important.<sup>119</sup> Increasing the number of diverse groups and races into our institutions of power obviously decreases the disparity of income between the races or, at the bare minimum, increases the wages of these minorities.<sup>120</sup> Ideally, this would allow minority children to have the same access to preparatory aids and produce a more educated citizenry. With a more educated citizenry, the already false claim that minorities are less qualified will surely be debunked. Moreover, diverse decision makers would create new rules of access that extend beyond quantitative methods of testing that have long been exposed to measure little about intelligence and

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<sup>118</sup> 1 KARL MARX, CAPITAL: THE PROCESS OF CAPITALIST PRODUCTION 146 (Federick Engels ed., Samuel Moore & Edward Aveling, trans., International Publishers 7th prtg. 1975) (1867); see also MEIZHU LUI ET AL., THE COLOR OF WEALTH: THE STORY BEHIND THE U.S. RACIAL WEALTH DIVIDE 1–2 (2006); OLIVER & SHAPIRO, *supra* note 68, at 1–3; THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 32–33 (2004).

<sup>119</sup> Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION 241, 243–45, 248 (John G. Richardson ed., 1986).

<sup>120</sup> See Stuart Biegel, *Court-Mandated Education Reform: The San Francisco Experience and the Shaping of Educational Policy After Seattle-Louisville and Ho v. SFUSD*, 4 STAN. J. C.R. & C.L. 159, 160–61 (2008); see Minnesota State Bar Association, *Law Schools in Focus*, 65 BENCH & B. MINN. 14, 14 (August 2008) (explaining that one legal institute's mission is to eliminate discrimination which creates barriers to opportunity for minorities).

more about one's historical access to a certain exclusive cultural world from which the tests pull their standards.<sup>121</sup>

Exposure to other races and cultures is crucial to a multiracial and multicultural America to avoid perpetuating an all-white ruling class and multiracial working poor. Diversity is not exclusively interested in exposure to the conditions of other groups, but exposure to other races and cultures as equals. Allowing primary and secondary educational institutions, along with universities and colleges, to consider race in admissions policies will compel our young people to engage in a diversity of ideas and people. This in turn will build the kind of educated and enlightened citizenry that we all claim to aspire towards in a democratic society. In addition, a more enlightened and educated citizenry should create relatively dynamic shifts in our social structure and at least begin to redistribute wealth and cultural capital accordingly.

#### CONCLUSION

During the Reagan/Bush Administrations, significant limitations were placed on court-approved affirmative action plans, and the caseloads of white litigants who allege reverse discrimination began to climb.<sup>122</sup> This newfound fallacy represents the idea that a huge

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<sup>121</sup> See STEPHEN JAY GOULD, *THE MISMEASURE OF MAN* 232–33 (1996) (discussing the discovery of the shortcomings of standardized testing); NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 155–56 (1999); PETER SACKS, *STANDARDIZED MINDS: THE HIGH PRICE OF AMERICA'S TESTING CULTURE AND WHAT WE CAN DO TO CHANGE IT* 201–02, 218–20 (1999) (discussing how standardized testing favors certain thinking styles); Rebecca Zwick, *Is the SAT a "Wealth Test?" The Link Between Educational Achievement and Socioeconomic Status*, in *RETHINKING THE SAT: THE FUTURE OF STANDARDIZED TESTING IN UNIVERSITY ADMISSIONS* 203, 213–14 (Rebecca Zwick ed., 2004).

<sup>122</sup> Based on an informal search of LexisNexis, between 1980–1992, there were at least two-hundred decisions alleging some form of reverse discrimination claims in the federal court system, compared to approximately eighty such decisions between 1964–1979. More than half of these decisions were from 1980–1988. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 768–69 (1989) (permitting white firefighters to sue the city, alleging reverse discrimination by hiring less qualified blacks, despite the fact that the city had been ordered through consent decrees of which the white firefighters were not parties); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989) (holding that setting aside 30% of contracts for blacks discriminates against whites); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283–84 (1986) (holding that it is reverse discrimination and a violation of equal protection to layoff white teachers when minority teachers with less seniority are not laid off under affirmative action program); see also Aaron Frieweld, *The Mission: Stock Bench*, in *AM. LAW*, May–June 1988, at 6, 8 (special supplement) (stating that during the Reagan Administration, there were 76 conservative appointees to the Court of Appeals, 74 of which were white, 1 black and 1 Hispanic); but see Marcia Coyle, Kirk Victor & Fred Strasser, *Administration Loses Major Round on Reverse Bias*, *NAT'L L.J.*, Apr. 6, 1987, at 5 (discussing the Supreme Court's decision in *Johnson v. Transp. Agency*, 480 U.S. 616 (1987), which allowed affirmative action plans

proportion of society (white males) is being disadvantaged due to the preferential treatment of affirmative action programs. These reverse discrimination cases, however, stop short of showing an identified community that has been legally excluded from society based on their race. The ostensible advantage that affirmative action may give to African Americans is meager considering the countless rewards continuously conferred on White Americans, based solely on race. Surely three-hundred years of slavery, followed by another hundred years of brutality, intimidation, discrimination, and surmounting years of civil rights struggles have not been remedied by the forty years of race-conscious affirmative action laws. And while it is true that affirmative action does not create equality, it helps to demolish de facto discrimination in employment, housing, and education, among other contexts. Because there is a way in which diversity can produce equality and meaningful opportunity for minority groups, we must locate our legal arguments within their true social and historical context. While the text of *Bakke* considered ethnic diversity as a factor in admissions, it should also take into account past social injustices. Unfortunately, the *Bakke* decision has just become language that opens the door to the white race as an oppressed group. When society allows white people to sue based on reverse discrimination, the language of *Bakke* is divorced from its intended historical and social context. This in turn also allows society to ignore that “white skin privilege” still exists.

Therefore, attempts to restructure race-based programs through alternatives—such as class-based polices, equal learning opportunities for minority children, or lowering standards to enter higher education institutions—are limited. With respect to creating class-based policies, it ignores the conditions of racism within a class. If a program is to succeed, race and class must be understood as intersectional and not discrete. Second, concentrating on improving the educational opportunities of African American children ignores the multi-tiered level of racism. The assumption under this alternative is that racism only occurs at an early stage. Networks of influence, access, and acculturation, however, span the spectrum of social experience from childcare to senior citizen homes.

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designed to eliminate “manifest [racial] imbalance[s]”); Ruth Simon & Kathleen Sylvester, *Justice’s Brief in Reverse Bias Case Rejects View of U.S. Rights Units*, NAT’L L.J., Jan. 3, 1983, at 3 (describing how the Reagan Administration joined litigation on behalf of white litigants in a reverse discrimination case).

In addition, the intentions of *Brown I* have never been manifested; schools in African American urban communities are still underfunded and segregated. Finally, if we lower qualifications as one of the current Supreme Court Justices suggested,<sup>123</sup> we ignore the purpose and goal of affirmative action initiatives. The debatable issues here are not about lowering standards, but about redefining what the standards should be. Part of the standards, with the social and historical context of four hundred years of racial discrimination, includes considering race as a legitimate factor for diversity at all tiers of education.

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<sup>123</sup> Transcript of Oral argument at 31, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02–241), 2003 WL1728613 (“[I]f Michigan really cares enough about that racial imbalance, why doesn’t it do as many other State law schools do, lower the standards . . . .”) Transcript of Oral argument at 37, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02–516), 2003 WL 1728816 (“[I]f this is indeed a significant compelling state interest, why don’t you lower your standards?”).