

Contention, Context and the Constitution: Riding the Waves of the Affirmative Action Debate

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I. INTRODUCTION

2003 proved to be a watershed year for the United States Supreme Court. In that year, the Court took a stand after almost twenty-four years of silence on one of the most contentious issues in the history of the United States Constitution. The issue was whether or not state universities could use race-based criteria to determine the admissibility of applicants. Whether in the selection of government funded contractors, employees, or students applying to educational institutions, programs that employ such criteria, commonly called affirmative action programs (AAPs), have a long history that dates back to the post-Civil war era. Their goal has traditionally been to remedy the unfair effects of systemic prejudice, most notably racism and sexism. In *Grutter v. Bollinger*,¹ the Court ruled that state university AAPs are constitutional under the equal protection clause of the Fourteenth Amendment, as long as they are narrowly tailored to achieve the compelling government interest of cultivating racial and ethnic diversity on campus.²

The University of Michigan Law School, whose policies were under attack in the case, relied on what it considered to be a flexible yet relevant set of factors to assess the qualifications of its applicants. In addition to college grades and student scores on standardized tests, the university also looked at the race of candidates in order to fulfil its “longstanding commitment to . . . ‘racial and ethnic diversity.’”³ Writing for the majority, Justice Sandra Day

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1. 539 U.S. 306 (2003).
2. *Id.* at 334.
3. *Id.* at 316.

O'Connor stated that AAPs of the type used by the University of Michigan Law School promote racial diversity, which "helps to break down racial stereotypes, and 'enables [students] to better understand persons of difference races.'"⁴ According to O'Connor, "[t]hese benefits are not theoretical but real, as major American businesses have made it clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."⁵

Needless to say, public reaction to *Grutter* has been divided. Twenty-nine prominent higher education organizations, including the American Association of University Professors and the American Council on Education, applauded the decision.⁶ "[T]he court not only upheld racial and ethnic diversity as a compelling state interest," their jointly issued statement said, "but also reaffirmed the importance of giving colleges and universities leeway in the admissions process."⁷ Critics of the decision, however, like the American Civil Rights Institute, complained that *Grutter* "opens the door to more preferences, and to . . . greater animosity and bitterness between those students who won't get preferences and those who will."⁸

Given the continued presence of systemic racism in America, AAPs of the type used by the Law School remain an important although somewhat limited tool for remedying the problem. As pioneering African-American intellectual, sociologist, and philosopher W.E.B. DuBois said in his 1903 book, *THE SOULS OF BLACK FOLK*, "the problem of the Twentieth Century is the problem of the color-line."⁹ Unfortunately, the prevalence of racial profiling by the police, glaringly disparate racial impacts in the criminal sentencing process and in application of the death penalty, racially segregated work places and public schools, and underfunded minority school systems in which young people of color have internalized the negative stereotypes perpetuated about them by the society at large, makes DuBois' observations still relevant today. Hopefully, *Grutter* can be used to diminish the power of the color line, a line that has tenaciously resisted any and all efforts to erase it to date.

My enthusiasm for *Grutter*, however, is tempered by the fact that Justice O'Connor treated affirmative action as if it were an island isolated from the realities of American history, culture, and politics. She endorsed the use of race as a plus factor in admissions in order to foster intellectual diversity on campus, but not to remedy the effects of historical and contemporary

4. *Id.* at 330 (quoting App. to Pet. for Cert., at 246a).

5. *Grutter*, 539 U.S. at 330 (listing benefits of diverse education environment).

6. Peter Schmidt, *Affirmative Action Survives, and So Does the Debate*, *CHRON. OF HIGHER EDUC.*, July 4, 2003, at 1.

7. *Id.*

8. *Id.* (quoting Edward J. Blum, director of legal affairs for the American Civil Rights Institute).

9. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* v (Dover 1994).

discrimination.¹⁰ O'Connor therefore ignored the fact that we had and continue to have a serious national problem when it comes to the issue of race in this country. The Court's refusal to acknowledge this, however, is nothing new. The idea that the nation as a whole bears significant responsibility for ameliorating the plight of blacks and other racial and ethnic minorities harmed by racism has always been contentious. The earliest debates about this issue date back to the post-Civil War era, when southern whites resisted Congressional efforts to reform our legal system to accomplish these goals.

It should also be noted that, although affirmative action is largely associated in the public mind with special preferences given to African-Americans, members of other disadvantaged groups have also been its beneficiaries. Indeed, women, most especially white women, have gained the most from AAPs in both the business and education sectors.¹¹ This is in part because courts apply a much less rigorous constitutional standard to gender-based AAPs than they do to those based on race, making it easier for AAPs that favor women to withstand legal attack.¹²

This article will focus on the pros and cons of affirmative action, the historical, cultural and legal context out of which it arose, and the future of affirmative action, especially in the field of education. Particular emphasis will be placed on the relationship between affirmative action and race and racism, although from time to time its connection to sexism will be addressed.

Part II of this article will explain what affirmative action is and how it works in the contemporary world, in business, government and educational settings. Part III will cover what makes affirmative action so contentious, focusing on arguments for and against it by leading thinkers in this area today. Part IV will place the debate about affirmative action in its historical context, showing how these arguments find their roots in political debates dating back to the post-Civil War era, when legislation like the Freedman's Bureau Acts and the Fourteenth Amendment to the United States Constitution were adopted. In many ways, the debates during that era set the tone and stage for one hundred and fifty years of argument and dissent about the responsibility of all Americans to eradicate the devastating and lasting effects of slavery.

Part V includes a discussion of the landmark 1954 Supreme Court case, *Brown v. Board of Education*,¹³ (Brown I), the 1944 case, *Korematsu v. United States*,¹⁴ and the 1967 case, *Loving v. Virginia*,¹⁵ in which the Court made some of its most important and earliest pronouncements about the extent to which

10. *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

11. Sidney Buchanan, *Affirmative Action: The Many Shades of Justice*, 39 HOUS. L. REV. 149, 157-61 (2002); Joseph H. Brown, *Sisters, Wives and Mothers Benefit Too*, TAMPA TRIB., Feb. 27, 2000, at 6.

12. Buchanan, *supra* note 11, at 157.

13. 347 U.S. 483 (1954).

14. 323 U.S. 214 (1944).

15. 388 U.S. 1 (1967).

government race-based policies or laws should be allowed to pass constitutional muster. Additionally, Part V will highlight the key Supreme Court cases that shaped the field of affirmative action law leading up to *Grutter*, starting with the 1978 case, *Bakke v. Regents of the University of California*,¹⁶ and ending with the 1995 case, *Adarand Constructors, Inc. v. Pena*.¹⁷ Part V will pay particular attention to the Court's efforts to strike a balance between the rights of previously disenfranchised African-Americans and the belief held by many whites, and some minorities, that America is a meritocracy in which race does not and should not play a role in individual advancement or success.

Part VI will analyze the legal impact of the *Grutter* decision. It will examine post-*Grutter* political developments, including how public and private institutions are grappling with the implementation of "Grutterized" AAPs, and how anti-affirmative action advocates are shifting their fight from the federal courts to the state house. Part VII will present my conclusions. There I will argue that the courts should allow educational institutions to use affirmative action as a form of reparations for past wrongs targeted against African-American slaves and their descendants. Schools should also be able to use affirmative action to remedy the effects of current systemic racism on African Americans, as well as other racial and ethnic minorities in cases where it can be shown that they too are subjected to it. Schools should never forget, however, that African American students deserve special consideration during the admissions process because of the unique and unwilling role that African Americans played in this country's "peculiar"¹⁸ institution of slavery. To ignore this fact during the college admissions process belittles the experiences of the descendants of slaves and their ancestors, and contravenes the purpose and spirit of the 14th Amendment.

II. WHAT IS AFFIRMATIVE ACTION?:¹⁹ THE JOHNSON EXECUTIVE ORDER OF 1965 AND THE CIVIL RIGHTS ACT OF 1964

Although the fight for African-American equality dates back to when the first slaves were brought to North America, the term "affirmative action" did not come into common usage until 1964. Three years earlier, Democratic President John F. Kennedy issued an Executive Order establishing the

16. 438 U.S. 265 (1978).

17. 515 U.S. 200 (1995).

18. Slavery in American is often referred to as the "peculiar institution." See Wikipedia – The Free Encyclopedia, "Peculiar Institution," at http://en.wikipedia.org/wiki/Peculiar_institution (last visited on June 22, 2005).

19. Please note that, except where certain sources are cited in this section, the Article's general discussion about the nature of affirmative action and arguments for and against it, is based on my own knowledge as a longstanding consultant, teacher and scholar in the field of discrimination law.

“Committee on Equal Employment Opportunity.”²⁰ The Order charged the Committee with the job of ensuring that federally funded contractors took “affirmative action” to reduce racially motivated hiring and employment practices.²¹ A year after Kennedy’s assassination, Democratic President Lyndon Johnson issued another Executive Order, which required that federal contractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin.”²² Johnson extended this order to cover women in 1967. Republican President Richard Nixon also initiated an AAP in 1969, which used the City of Philadelphia as a test case in order to promote fairness in the construction industry.²³ The plan mandated the use of minority employment goals and timetables (although not quotas), and required that federal contractors demonstrate that they had taken “affirmative action” to achieve those goals.²⁴

Johnson also signed the most sweeping legislation relating to affirmative action - the Civil Rights Act of 1964.²⁵ Title VI of the Act denies federal financial assistance to schools that discriminate based on race, color, religion, sex or national origin.²⁶ Title VII of the Act makes it illegal for private or government employers to discriminate based on race, color, sex, national origin, or religion in employment.²⁷ Enacted against the backdrop of the fight for racial justice championed by people like Martin Luther King, Jr., Johnson hoped the law would be an effective tool in the fight for racial equality.²⁸ As he said in a 1965 speech delivered at Howard University:

In far too many ways American Negroes have been another nation: deprived of freedom, crippled by hatred, the doors of opportunity closed to hope. . . . [They have] peacefully protested and marched, entered the courtrooms and the seats of government, demanding a justice that has long been denied. . . . [I]t is a tribute to America that, once aroused, the courts and the Congress, the President and most of the people, have been the allies of progress.²⁹

20. Exec. Order No. 10,925, 3 C.F.R. § 448 (1959-1963) (superseded by Exec. Order No. 11,246, 3 U.S.C. § 339 (1964-1969)), *reprinted as amended in* 42 U.S.C. § 2000e (2005).

21. *Id.*

22. Exec. Order No. 11,246, 3 C.F.R. § 339 (1965), *reprinted as amended in* 42 U.S.C. § 2000e (2005).

23. Borgna Brunner, *Timeline of Affirmative Action Milestones*, at <http://www.infoplease.com/spot/affirmativetimeline1.html> (last visited Mar. 16, 2005).

24. *Id.*

25. Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000e-17 (2005).

26. 42 U.S.C. §§ 2000d to 2000d-7.

27. 42 U.S.C. §§ 2000e-17.

28. See President Lyndon Johnson, To Fulfill These Rights—Commencement Address at Howard University (June 4, 1965), *available at*

<http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

29. *Id.*

However, just as whites debated the merits of awarding freed slaves compensation for their years of servitude during slavery, many also were not happy with the newly gained rights of African-Americans some one hundred years after slavery's end. As Charles and Barbara Whalen illustrate in their book, *THE LONGEST DEBATE*, about the Congressional debates leading up to the passage of the 1964 Act, Southern Congressmen were particularly disdainful about the prospects of giving African-Americans and women legal rights.³⁰ Echoing the post-Civil War states' rights arguments to be discussed in more detail later, many believed that only the states had the right to decide how the question of race should be handled within their borders. Also, many who were invested in the system of white supremacy complained that Congress was wrongly allowing itself to be blackmailed into passing a law motivated by fear of African-American violence.³¹ As Mississippi Democrat William Colmer complained, "Is the Congress to comply by legislation with the demands and even riots of every organized minority group in the country?"³²

The Civil Rights Act could not have been passed, however, without the support of many northern legislators and some southern legislators, the latter risking re-election by crossing partisan lines in the name of progress.³³ Conservative Republican Congressman Bill McCulloch from Ohio, who was ostracized and picketed at home because he supported the law, particularly stands out in this regard. In a speech he gave on the floor of Congress in 1964, he said, "I . . . believe that an obligation rests with the national government to see that the citizens of every state are treated equally without regard to their race or color or religion or national origin. . . . Not force or fear, then, but belief in the inherent equality of man induces me to support this legislation."³⁴ According to the Whalens, it was "this deep moral conviction of a conservative like themselves that persuaded fence-sitting Republicans to follow him. Liberals like [Republican] John Lindsay [of New York] . . . could not have done it."³⁵

Ironically, the Civil Rights Act does not specifically mention "affirmative action," and the only time it addresses the topic by implication is in the negative. 42 U.S.C. § 2002-2(j) of the Act says that companies cannot be required to grant preferential treatment to people in the groups covered by the Act.³⁶ Partly in response to political pressure from the Civil Rights Movement, partly in order to avoid potential lawsuits, and partly to be at the forefront of socially enlightened business practices, many companies voluntarily decided in

30. CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE* 102 (1985).

31. *Id.* at 102, 195.

32. *Id.* at 102.

33. *Id.* at 156.

34. Whalen & Whalen, *supra* note 30, at 105.

35. Whalen & Whalen, *supra* note 30, at 106.

36. 42 U.S.C. § 2000e-2(j).

the 1960s and 1970s to adopt AAPs in order to correct longstanding patterns and practices of race and sex-based segregation. For example, Kaiser Steel put an AAP into effect that granted preferences to blacks in company training programs so that the number of blacks in certain job categories ultimately reflected the number of blacks in the local labor force. More senior white employees who were passed over for the training program sued.

The Supreme Court ruled in the now famous 1979 case, *United Steelworkers of America, AFL-CIO-CLC v. Weber*,³⁷ that Kaiser's plan was constitutional because it: 1) had the purpose of remedying old and entrenched patterns of racial segregation; 2) did not unnecessarily "trammel" the rights of white workers because it was not indefinite in design and did not lead to the firing of whites in order to replace them with blacks; and 3) most importantly, it was the very thing that Congress had envisioned as a potential remedy for situations in which discrimination and forced segregation had occurred.³⁸ In addition, the Court held that because Congress could have prohibited the voluntary use of AAPs, but did not, voluntary AAPs were therefore legal.³⁹

A. Affirmative Action at Work and in College

In light of the above, affirmative action has been generally equated with the active attempt to eliminate discriminatory practices based on race, ethnicity, gender or some other disadvantaged identity category, and to reverse the effects of those practices. If applied effectively, AAPs create a more balanced population of people in business or educational settings than would otherwise be the case. For instance, consider a corporation in which the large majority of the managers have been men and all of the administrative assistants have been women for decades because of management's unwillingness to treat women fairly. A new male CEO might decide that he wants to create a more balanced work force by adopting a special training program for women that helps them cultivate the managerial skills needed to move up the professional ladder.

The *Weber* case discussed earlier represents this type of AAP. Another well-known court case that endorsed the use of an AAP to promote greater gender balance in the work place is *Johnson v. Transportation Agency, Santa Clara, California*.⁴⁰ *Johnson* involved a traditionally segregated government job classification—"skilled craft jobs"—in which women were significantly underrepresented.⁴¹ The government agency in question adopted a voluntary AAP that allowed managers to consider the race and sex of respective

37. 443 U.S. 193 (1979).

38. *Id.* at 208.

39. *Id.* at 205.

40. 480 U.S. 616 (1987).

41. *Id.* at 621.

applicants along with other relevant selection criteria.⁴² The AAP did not require the use of numerical goals or quotas.⁴³ When the agency hired a woman instead of man for one particular position (a position occupied by 238 men and no women), the man challenged the legality of the AAP in court.⁴⁴ The Supreme Court ruled that “substantial evidence shows that the Agency . . . sought to take a moderate, gradual approach to eliminating the imbalance in its workforce . . . which visits minimal intrusion on the legitimate expectations of other employees.”⁴⁵

AAPs take many forms, depending on the employer or educational institution, and whether or not the program is mandated by law or conducted voluntarily. For instance, laws applying to federal contractors require them to conduct a self-analysis of the impact of their employment practices on women and minority workers, to monitor the results of those practices through the use of statistics, and to take corrective action, if needed.⁴⁶ Actually, aside from the mandatory nature of federal contractor AAPs, pretty much all government and private sector AAPs, whether voluntary or mandatory, tend to rely on one or more of a certain set of options.⁴⁷ Those options are discussed immediately below and are loosely ordered in terms of their relative level of political and legal controversy, beginning with the least controversial.

First, one of the main elements of any AAP is the elimination of intentional and overt forms of discrimination in hiring, promotion and firing decisions, as well as in educational admissions. This involves the issuance of gender or race neutral recruitment literature, and the cessation of blatantly racist or sexist application or interview criteria. AAPs can also involve the development of more inclusive recruitment strategies that expand the pool of qualified applicants so that the kind of “word-of-mouth” hiring typically employed by many companies is not the main recruitment strategy. Word-of-mouth hiring involves the recruitment of candidates who the recruiters know personally or know about through personal contacts. This usually produces a pool of candidates who are the same race as the recruiters because people tend to know and socialize mostly with members of their own race. Casting a wider recruitment net can counter this racialized result and produce “applications for each kind of job in reasonable numbers from qualified people from previously excluded groups.”⁴⁸ The casting could involve such things as advertising in minority and women’s professional magazines, and attending specially

42. *Id.*

43. *Id.* at 622.

44. *Johnson*, 480 U.S. at 623-24.

45. *Id.*, at 640.

46. M.V. Lee Badgett & Heidi Hartmann, *The Effectiveness of Equal Opportunity Policies*, in *Economic Perspectives on Affirmative Action* 61-62 (Margaret C. Simms, ed. 1995).

47. *Id.*

48. BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION 11 (1996).

organized minority and women's recruitment fairs.

A second AAP approach involves the development of training and apprentice programs specifically designed for women and disadvantaged racial or ethnic minorities. A third would allow decision makers to consider a candidate's sex, or membership in a disadvantaged racial or ethnic minority as a "plus factor" in the selection process. Here the candidate's membership in one of these categories, along with other criteria like grades (in the case of education), previous work experience or level of education (in the case of employment), would be considered a legitimate and relevant decision making factor. Another approach that has been used in the past, but which Congress rejected in contemporary times, is the use of test scoring. Test scoring involves adjusting scores on qualifying tests, or setting different cut off scores, so that members of a particular race, sex, religion, national origin or religion are favored. Congress rendered test scoring illegal when it passed the 1991 amendments to the Civil Rights Act of 1964.⁴⁹

Finally, some AAPs use quotas to accomplish their goals. Quotas are set numerical goals that companies or schools adopt during the hiring and admissions process so that a target number of minorities or women is reached. For example, certain organizations might try to adopt quotas that reflect the extent to which a particular group represents a certain proportionate share of the population at large. For instance, the CEO in the original hypothetical in this section might try to higher women exclusively until they comprise 51% of his work force.

Congress revised the law in 1991 to make it clear that companies do not have to adopt quotas in order to be in compliance with the Civil Rights Act.⁵⁰ Today, while still legal in certain extremely limited circumstances, courts are generally unwilling to sanction the use of quotas. These limited circumstances arise most often when a defendant has a proven, dire record of longstanding discrimination that a court feels can only be remedied by mandating the application of quotas to correct the problem. For instance, in the 1970 case, *United States v. Paradise*,⁵¹ the Supreme Court ruled that it was constitutional

49. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105, 105 Stat. 1071 (1991) (codified at 42 U.S.C. 1981).

50. 42 U.S.C. § 2000e-2(j) (1991). Section 2000e-2(j) provides that:

Nothing contained . . . [here] shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

51. 480 U.S. 149 (1987).

for a court to order the state of Alabama Department of Public Safety to adopt a quota system requiring their hiring of one African-American for every white person hired until African-Americans occupied 25% of upper level positions.⁵² The Court allowed these use of quotas in this case because of the longstanding history of race discrimination and resistance to change that plagued the Department, emphasizing that the agency had refused to hire qualified black state troopers for its entire thirty-seven year history.⁵³ The *Paradise* case is very old, however, and there are virtually no reported federal cases mandating quotas in recent times.

III. THE PROS AND CONS OF AFFIRMATIVE ACTION

A. Arguments for Affirmative Action

1. The Past and Present Systemic Prejudice Argument

Proponents of affirmative action tend to believe that the racial or gender imbalances of the kind described in the above in hypothetical or in the *Johnson* case, are not a statistical accident. They believe that these imbalances are the result of either intentional or unconscious prejudice on the part of individual decision makers and/or the result of a current society wide, systemic problem in which people are hindered from advancing because of inappropriate but commonly held stereotypes about their inferiority. Another possible motive for systemic prejudice is the desire on the part of people in the majority culture to maintain racialized or gendered monopolies in certain segments of society, like managerial positions in organizations or attendance at elite schools of education. As writer Barbara R. Bergmann argues:

Much of the poverty, social disorganization, welfare dependency, and crime our country suffers is rooted in discrimination against people based on race and sex and in the deprivation and feelings of exclusion, hopelessness, and resentment it causes. If we could make progress in overcoming discrimination on the job, many of our social problems would ease.⁵⁴

One of the starkest effects of systemic racism and the poverty associated with it are the gross disparities that exist in the American education system, especially at the kindergarten through twelfth grade level. During 2000-2001, for instance, public schools across the nation were significantly segregated by race, with 76.3% of Hispanic children and 71.6% of African-American children

52. *Id.* at 185.

53. *Id.* at 153-54.

54. BERGMANN, *supra* note 48, at 15.

attending schools in which minorities constituted the majority of the student body.⁵⁵ Studies have shown that segregation like this negatively affects minority student performance in school.⁵⁶ The problem is further compounded by the fact that urban, minority schools are grossly under funded when compared to their white suburban counterparts.⁵⁷

Affirmative action advocates also point to the devastating effects of slavery and the longstanding legal, cultural and political resistance by whites to embrace their African-American brothers and sisters as full equals. Law scholar Kim Forde-Mazrui notes:

[F]or the hundred years following emancipation, America not only failed to redress the effects of slavery, but it permitted and engaged in the continuing subjugation of black people. . . . By the time of the Kerner Commission report in 1969, the condition of blacks was so inferior to that of whites as to justify the report's characterization of America as "moving toward two societies, one black, one white—separate and unequal."⁵⁸

While the last five decades of the Twentieth Century witnessed the demise of many of these laws and the lessening of widespread, overt expressions of racist beliefs and customs, their real and practical effect has not disappeared. Sociologists John Hope Franklin and Alfred Moss consider economic and social upheavals in disadvantaged black communities, such as AIDS, unemployment, crime, and drugs, as direct byproducts of historical racism.⁵⁹ Furthermore, whether it is in access to credit, housing, public accommodations or employment opportunities, study after study show that both conscious and unconscious racism fuel much of the decision making that directly affects the lives of African-Americans in significant ways.

For example, research shows that car dealers offer white males significantly

55. Erica Frankenberg et al., *A Multiracial Society With Segregated Schools: Are We Losing the Dream?* 77 (Jan. 2003), at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (setting forth percentage of minorities in minority schools).

56. Ira K. Thomas, *The Real Affirmative Action Fight Still Remains: Racial Inequality in American Education and Society*, *2 at <http://www.aacte.org/programs/multicultural/realaffirmativeaction.pdf> (last visited Mar. 22, 2005) (discussing correlation between segregation and academic performance). Thomas cited to a paper prepared for the Resegregation in Southern Schools conference at the University of North Carolina-Chapel Hill (August, 2002). R. Rumberger & G. Palardy, *The Impact of Student Composition on Academic Achievement in Southern High Schools* (Aug. 2002).

57. See *Grutter v. Bollinger*, 539 U.S. 306, 345 (2003) (Ginsburg, J., concurring) (discussing lack of resources available for educational needs).

58. Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 703 (2004) (quoting REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS I (1968)).

59. JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* 551-52 (6th ed. 1994).

better prices than either women or black men.⁶⁰ After accounting for such factors as income, credit history, professional and educational qualifications, residency of record and bargaining styles, white women still end up paying 40% more than white men, black men pay more than twice as much as white men, and black women pay more than three times as much as white men.⁶¹ The overall result is that blacks pay \$150 million more per year for new cars than do white males.⁶² In addition, one major study conducted by the National Opinion Research Center at the University of Chicago (“NORC”) in the late 1980s revealed that over half of the whites surveyed ranked blacks less intelligent than whites, and more than 60% rated them as less hard working.⁶³ Of course, this has important implications for employment opportunities for blacks, because as law scholar David Oppenheimer explains:

[S]tereotypes may become self-fulfilling prophecies by way of suggestion; . . . all persons are prone to see what they expect to see. . . . [A white] employer is thus likely . . . to subscribe to a belief in the principle of equal . . . opportunity . . . yet is nonetheless more likely than not to view black employees and applicants as less intelligent and hard working than white employees and applicants.⁶⁴

A well-known study of the auditing industry conducted by the Urban Institute in the 1980s drives home the extent to which conscious and unconscious stereotyping can have a negative impact on the ability of minorities to earn a living.⁶⁵ The Institute sent out a group of white and black “testers”, adult job applicants who were chosen because their resumes reflected the same level of education and job qualifications, and whose job interview styles and demeanor were the same.⁶⁶ The testing program uncovered that, during the interview process, potential employers tended to give blacks more negative feedback than whites and to make blacks wait longer than whites for the interviews to take place.⁶⁷ With respect to interviews, for instance, blacks were told that they would be working for demanding supervisors, while whites

60. Ian Ayres, *Fair Driving: Gender, Race and Discrimination in Retail Car Negotiations* 104 HARV. L. REV. 819, 819 (1991).

61. *Id.*

62. *Id.* at 872

63. HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 118 Tbl. 3.4, and 9 Tbl. 1. (1988); see also David Benjamin Oppenheimer, *Negligent Discrimination*, 141 U. PA. L. REV. 899, 907-8 (1993).

64. Oppenheimer, *supra* note 63, at 909.

65. Oppenheimer, *supra* note 63, at 914-15 (citing MARGERY A. TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: RACIAL DISCRIMINATION IN HIRING (1991)).

66. Oppenheimer, *supra* note 63, at 914-15.

67. Oppenheimer, *supra* note 63, at 914-15.

were told about the job's perks.⁶⁸ This was especially true for blacks applying for the high end jobs that required a great deal of customer contact.⁶⁹

Finally, there seems to be a troubling gap between the articulation of equality espoused by many whites and their willingness to see it actualized. Survey data shows that while almost all whites say that they believe in equal employment opportunity for people of all races, only slightly more than one-third say that they support the federal government's enforcement of employment discrimination laws to achieve that result.⁷⁰

2. *The Risk of Stigma Problem Is Exaggerated Argument*

Pro-affirmative action advocates often analogize the relationship between whites and blacks in the United States to the relationship between creditors and debtors. The late civil rights leader Martin Luther King, Jr. was one of the first people to espouse this view. In a 1968 speech, he stated that “[t]hey say the negro must lift himself by his bootstraps. . . . The people who say this never stop to realize that the nation made the black man's color a stigma. But beyond this they never stop to realize the debt they owe a people who were kept in slavery for two hundred and forty-four years.”⁷¹

Affirmative action advocates maintain that minorities and women are only nominally stigmatized as a result of affirmative action. Instead of having doubts about their abilities, it is therefore more likely that newly hired minority employees or college admitees would instead ask: “Has affirmative action created derogatory feelings about blacks in people who would otherwise have had perfectly friendly feelings toward them? Or would those who stigmatize the blacks . . . citing affirmative action, have found some other reason to run them down?”⁷² I would add that before AAPs were used as a remedy to combat discrimination, most whites already believed that blacks were inferior. Blacks were therefore not welcome to any significant degree in white businesses or university settings, especially in the South. Thus, to say that affirmative action causes whites to view blacks negatively begs the question, because those views were already present to begin with. As one writer observes, “if the stigma blacks experience were really about affirmative action itself rather than race, legacy students like, say, George Bush would share . . . [the same concerns about being stigmatized].”⁷³ Clearly, they do not.

68. Oppenheimer, *supra* note 63, at 914-15.

69. Oppenheimer, *supra* note 63, at 915.

70. Oppenheimer, *supra* note 63, at 905 (citing HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS xii (1988)).

71. Martin Luther King, *Remaining Awake Through A Great Revolution*, available at <http://www.africanamericans.com/MLKRemainingAwakeThroughGreatRevolution.htm> (last visited Mar. 25, 2005).

72. BERGMANN, *supra* note 48, at 28.

73. Bill Keller, *Mr. Diversity*, N.Y. TIMES, June 26, 2003, at A15 (referencing comments by Lani Guinier

3. *The Flawed Meritocracy Argument*

Also critical to any pro-affirmative action position is the idea that America is not a meritocracy in which people are chosen for employment or educational positions because they are the best and most qualified candidates. Merit-rooted evaluative approaches are always suspect, according to law scholar Richard Delgado, because “[n]o conquering people ever took a close look at the conquered, their culture, ways, and appearance, and pronounced them superior to their own versions. Those in power always make that which they do best the standard of merit.”⁷⁴ Furthermore, Delgado observes that until “1964 white males benefited from old-fashioned laws that cut down the competition by eliminating blacks and women. They also benefited from old-boy networks by which they helped each other. . . . [M]erit today is a principal means by which [they] . . . ensure that they and their class remain in charge.”⁷⁵

Delgado also asserts that it is important to examine how the idea of merit relates to American history.

The old kind [of racism] is overt and takes the form of laws and social practices that expressly treat blacks and others of color worse than whites. . . . But there is another kind evident in facially neutral laws and practices that require the decision maker to ignore history, context, and things that everybody knows are important. [M]erit is a prominent example of such a mechanism⁷⁶

President Lyndon Johnson addressed this concern in a now famous 1964 speech at Howard University supporting the passage of the 1964 Civil Rights Act. He stated: “You do not take a person who, for years, has been hobbled by chains and liberate him . . . and then say ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”⁷⁷

In addition, at the very least, the common definition of merit should be expanded to encompass equally meaningful alternative definitional factors. For instance, one study shows that minority law school graduates tend to become more actively engaged in pro bono work than do their white counterparts after they graduate from school.⁷⁸ So why not have a category relating to merit that includes an applicant’s potential to contribute to society? Surely, this is more important than being the child of an alumnus.

of Harvard Law School).

74. RICHARD DELGADO, *THE COMING RACE WAR AND OTHER APOCALYPTIC TALES OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE* 71 (1996).

75. *Id.* at 73-74.

76. *Id.* at 69.

77. President Lyndon B. Johnson, To Fulfill These Rights—Commencement Address at Howard University (June 4, 1965), available at

<http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

78. Keller, *supra* note 73, at A15 (referencing study of University of Michigan graduates).

4. *The Legacy Argument*

Affirmative action is also needed to counter the widespread and unfair use of nepotism and university legacy programs that largely benefit whites. Legacies are university policies in which the children of alumni are admitted even when their qualifications would normally rank them behind other candidates. Whites engage in the greatest of hypocrisies when they simultaneously attack the fairness of AAPs and willingly benefit from legacies. Barbara Bergman notes that in such cases, “fairness to the displaced ‘best’ candidate is seldom an issue.”⁷⁹ In fact, legatees, who are largely white, “have a two-to-four times better chance than regular applicants of being admitted to Harvard, Penn, and Princeton.”⁸⁰ Even President George W. Bush, Jr.’s status as a legatee helped him get admitted to Yale despite the fact that he had the equivalent of a “C” average on his high school transcript.⁸¹ The noted private school, Phillips Academy in Massachusetts, also admitted Bush because he was the son of an alumnus and because the school wanted to promote regional diversity by bringing in students from the south.⁸² President Bush supported the brief submitted by the parties who challenged the University of Michigan Law School’s AAP.⁸³ He said that AAPs are “unfair and impossible to square with the Constitution . . . the motivation for such an admissions policy may be very good, but its result is discrimination and that discrimination is wrong.”⁸⁴ Ironically, in response to a question posed to him by a group of journalists of color after the *Grutter* decision was rendered, President Bush said he thought legacies should be abolished.⁸⁵ It will be interesting to see if he holds fast to this view.

5. *The Race and Class Argument*

One important question that relates to affirmative action is what role class status should play in determining whether or not a person is qualified to get a job or into a university. Many believe that economic disadvantage, not racism, is the chief cause of the social problems described by John Hope Franklin and Alfred A. Moss, Jr., above.⁸⁶ They assert that poor people, regardless of their race, should be the main targets of affirmative action.⁸⁷ President Lyndon

79. BERGMANN, *supra* note 48, at 25.

80. Derrick Z. Jackson, *Will Bush Truly Renounce Privilege in Admissions?*, BOSTON GLOBE, Aug. 7, 2004, at A11.

81. *Id.*

82. Nicholas D. Kristof, *A Boy and His Benefits*, N.Y. TIMES, Jan. 24, 2003, at A23.

83. Jackson, *supra* note 80.

84. Jackson, *supra* note 80.

85. Jackson, *supra* note 80.

86. FRANKLIN & MOSS, *supra* note 59.

87. MARK SATIN, ED., “ECONOMIC CLASS BASED AFFIRMATIVE ACTION – THE ELITES LOATHE IT, THE PEOPLE WANT IT” (JULY/AUG. 2003) RADICAL MIDDLE NEWSLETTER, AT [HTTP://WWW.RADICALMIDDLE.COM/X_AFFIRMATIVE_ACTION.HTM](http://www.radicalmiddle.com/x_affirmative_action.htm).

Johnson, however, spoke eloquently about the fact that racism and poverty are intertwined in complex and significant ways that can not be ignored and for which government intervention is needed. In the Howard University speech mentioned above, Johnson stated:

We know the causes [of racial inequality] are complex and subtle. . . . First, Negroes are trapped—as many whites are trapped—in inherited, gateless poverty. . . . But there is a second cause . . . more deeply grounded, more desperate in force. It is the devastating heritage of long years of slavery; and a century of oppression, hatred, and injustice. For Negro poverty is not white poverty. . . . [Whites and other immigrants] did not have the heritage of centuries to overcome, and they did not have a cultural tradition which had been twisted and battered by endless years of hatred, and hopelessness, nor were they excluded . . . because of race or color—a feeling whose dark intensity is matched by no other prejudice in our society.⁸⁸

I agree that AAPs should incorporate class-based considerations in order to counter the devastating effects of poverty on both people of color and whites alike. Some of this will be taken up in more detail in my recommendations at the end of this article. Long after Johnson's 1965 speech, however, it should not be forgotten that race still is used as a proxy for class in America, the assumption being that if you are black, you are less educated and therefore less qualified. Researchers interviewing white business owners have documented that many of them hold these attitudes.⁸⁹ Even highly educated black professionals encounter these stereotypes and are penalized as a result. This is the reason why philosopher and intellectual Cornel West views affirmative action as a compromise approach to the dual and interlocking problems of prejudice and poverty in America. He says:

We should see . . . [affirmative action] as primarily playing a negative role—namely, to ensure that discriminatory practices against women and people of color are abated. . . . Even if affirmative action fails significantly to reduce black poverty or contributes to the persistence of racist perceptions in the workplace, without affirmative action black access to America's prosperity would be even more difficult to obtain and racism in the workplace would persist anyway.⁹⁰

Furthermore, Stanford psychology professor Claude Steele's work on

88. President Lyndon Johnson, To Fulfill These Rights—Commencement Address at Howard University (June 4, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.

89. See generally Joleen Kirschenman & Kathryn M. Neckerman, "We'd Love to Hire Them, But . . .": *The Meaning of Race for Employers*, in *THE URBAN UNDERCLASS* (Christopher Jencks and Paul E. Peterson eds., 1991) (analyzing significance of race and ethnicity for employers).

90. CORNEL WEST, *RACE MATTERS* 95 (1994).

minority student test performance shows that black students of all class backgrounds internalize the stereotypes held about them and are negatively affected as a result. In his study comparing the test performance of a comparable group of high achieving whites and blacks, he found that black students do not perform as well as white students because they are afraid that they might unintentionally do something that confirms negative racial stereotypes held about them.⁹¹ Steele explains that “[i]n situations where one cares very much about one’s performance or related outcomes—as in the case of serious students taking the SAT—this threat of being negatively stereotyped can be upsetting and distracting. . . when this threat occurs in the midst of taking a high stakes standardized test, it directly interferes with performance.”⁹² Minority students from all social classes fall prey to this dynamic, which Steele calls “stereotype threat.”⁹³ College level AAPs should thus continue to include middle class black students, since poor, working class and middle class students of color all suffer the effects of stereotype threat.

6. *The Diversity Enhances Intellectual Growth and Academic Freedom Argument*

One of the most popular arguments in favor of affirmative action is that it promotes “diversity,” a kind of cultural and intellectual mix of people from different backgrounds and experiences that contributes to a heightened sense of knowledge and understanding about how the world, and the people in it, work. Justice Powell, one of the chief proponents of the diversity argument, said in the 1978 *Bakke* decision that “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. . . . ‘[T]he Nation’s future depends upon leaders trained through wide exposure’ to the ideas and mores of students as diverse as this Nation of many peoples.”⁹⁴

A recent study indicates the accuracy of Powell’s intuition about the relationship between racial diversity and critical thinking. Stanford University professor Anthony Lising Antonio found that racially diverse groups of college students engaging in small group discussions demonstrate more complex problem solving skills and reasoning than do their more homogenous counterparts.⁹⁵ Even though more homogenous groups tend to have a stronger sense of “solidarity and cohesiveness, these same positive effects may . . .

91. Claude Steele, “Expert Report of Claude, Steele,” at <http://www.umich.edu/~urel/admissions/legal/expert/steele.html> (last viewed July 9, 2005).

92. *Id.*

93. *Id.*

94. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 (1978).

95. Anthony Lising Antonio et al, *Effects of Racial Diversity on Complex Thinking in College Students*, July 22, 2004, at www.stanford.edu/~aantonio/psychsci.pdf.

lead . . . [them] to be ultimately less productive.”⁹⁶

7. *The Business and National Security Argument*

The military and the business communities are two of the greatest supporters of affirmative action. These groups argue that AAPs benefit the American economy and our national security.⁹⁷ Some of the nation’s leading corporate and military leaders, such as Ford Motor and 3M, signed the amici briefs submitted in support of the University of Michigan Law School’s AAP in the *Grutter* case.⁹⁸ As previously mentioned, Justice O’Connor summarized the business and military community view in her majority opinion in *Grutter* when she wrote that

[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people . . . [and] high-ranking retired officers and civilian leaders of the United States military assert that . . . a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission. . . .’⁹⁹

B. *Arguments Against Affirmative Action*

1. *The Conservative Law and Economics Free Market Theory Argument*

Conservative law and economics scholars sometimes concede that systemic prejudice does still exist, but that, in an economic sense, there are good reasons for its presence. For instance, free market scholar and federal judge Richard Posner thinks that it is a completely rational economic behavior when a white employer relies on his internalized negative stereotypes about blacks or women to determine who is the most qualified to be hired or promoted.¹⁰⁰ Posner thinks such an “employer would be justified in picking the white applicant because blacks as a group are believed to be statistically less productive than whites, and it would be unduly costly to make the employer have to research the qualifications of that particular black applicant. This form of discrimination

96. *Id.*

97. See generally Brief for General Motors Corporation as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516); Brief of 3M et. al, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 01-1447).

98. *Id.*

99. *Grutter v. Bollinger*, 539 U.S. 306 at 330-31 (2003) (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al., at *29, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241, 02-516).

100. Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513, 513-16 (1987) (commenting on John Donahue’s article calling Civil Rights Act labor market intervention).

is called statistical discrimination.”¹⁰¹

2. *The Inferiority Argument*

While Posner does not actually say whether he believes himself that women or minorities are less capable than white men, there are others who are quite willing to admit the same. They argue that inferior ability, as well as the fact that women and minorities “do not strive as hard as white men” enables white men to “win out in the competition for the best jobs because they are the best applicants.”¹⁰² People in this camp often point to books like Richard J. Herrnstein and Charles Murray’s *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE*, where the authors discuss studies they believe indicate that African-Americans and non-Caucasian immigrants have genetically lower levels of intelligence than whites.¹⁰³ The authors warn that “something worth worrying about is happening to the cognitive capital of the country”¹⁰⁴ because the latter are being allowed to enter the U.S. and grow in numbers.

3. *The Systemic Prejudice Problem Is Exaggerated Argument*

Some people opposed to affirmative action actually *do* believe that unfair discrimination still occurs, although they tend say that the problem is greatly exaggerated. To these individuals, the extreme forms of racism present during the Jim Crow era of the first half of the Twentieth Century hardly ever occur today, and whites today, especially young whites, are much more in favor of equal rights for blacks than the preceding generation.¹⁰⁵ Thus, because the problem is not as widespread as it used to be, there is no need for affirmative action to correct it. Further, some people in this camp argue that the best way to solve the problem is to support public policies that improve minority schools and families, while only using lawsuits to fight specific incidents of proven discrimination on an individual, case by case basis.¹⁰⁶ For example, Terry Eastland writes that “[t]he best we can humanly do as a society is not to presume institutions guilty of . . . racial discrimination, and then resort to preferences that breed resentment . . . but to remain focused on actual instances

101. Toni Lester, *Efficient But Not Equitable: The Problem with the Law and Economics Paradigm to Interpret Sexual Harassment in the Work Place*, 22 VT. L. REV. 519, 527 (1998) (citing David Strauss, *The Law and Economics of Racial Discrimination*, 79 GEO. L.J. 1619, 1622-23 (1991)).

102. BERGMANN, *supra* note 48, at 18 (detailing affirmative action opponents rationale for denying discrimination exists).

103. See generally RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* 364 (1994).

104. *Id.* at 364.

105. TERRY EASTLAND, *ENDING AFFIRMATIVE ACTION: THE CASE FOR COLORBLIND JUSTICE* 152 (1996) (citing HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA* (Harvard Univ. Press, 1988) and William Raspberry, *What Actions Are Affirmative?* WASH. POST, Aug. 21, 1995, at A21.).

106. See BERGMANN, *supra* note 48, at 19.

of discriminatory behavior and demand vigorous law enforcement action against it.”¹⁰⁷

4. *The Guilt Should Not Be Inherited and America Is a Meritocracy Argument*

The notion that we are a creditor and debtor society, racially speaking, is also anathema to many who oppose affirmative action. Even if it is true that historically, America has never had a color-blind meritocracy, proponents of this argument assert that one does exist today, albeit imperfectly. Our efforts should therefore be focused on strengthening that meritocracy, not creating unfair racial preferences that undermine it. Those who hold this belief often say that it is unfair to expect white men and women who are the descendants of slave owners to pay for the transgressions of their ancestors.

Supreme Court Justice Clarence Thomas, a beneficiary of affirmative action throughout his career and the only African-American currently on the Supreme Court, is a strong endorser of this perspective. In his concurring opinion in, *Adarand Constructors, Inc. v. Peña*,¹⁰⁸ Thomas said: “I believe that there is a ‘moral [and] constitutional equivalence’ . . . between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality.”¹⁰⁹ His intellectual comrade, Justice Scalia, addressed the issue even more directly, stating that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination in the opposite direction. . . . Individuals who have been wronged . . . should be made whole; but under our Constitution there can be no such thing as either a creditor or debtor race.”¹¹⁰

5. *The Risk of Stigma Argument*

The stigma argument also has great currency in anti-affirmative action thought. Terry Eastland points out that the existence of AAPs “will lead some people to think that every minority . . . would not have won opportunity without preferential treatment, a judgment that strips people of the respect due them as individuals. . . . Tragically, this process of . . . inference trails the many minorities—perhaps the majority—who make their way without the ‘help’ of any preferential treatment.”¹¹¹ Justice Thomas, in the *Adarand Constructors, Inc.* case, weighed in on the stigma issue as well.¹¹² He stated that AAPs, “stamp minorities with a badge of inferiority. . . . [They are] just as

107. EASTLAND, *supra* note 105, at 153.

108. 515 U.S. 200 (1995).

109. *Id.* at 240 (Thomas, J., concurring) (quoting Thomas’s comparison of laws meant to subjugate and benefit races).

110. *Id.* at 239 (Scalia, J., concurring).

111. EASTLAND, *supra* note 105, at 197-98.

112. *Adarand Constructors, Inc.*, 515 U.S. at 240-41.

noxious as discrimination inspired by malicious prejudice.”¹¹³

6. *The Benefits of Legacies Argument*

Many universities favor legacies because they are important tools for facilitating economic growth and vitality, even when the students in question would not have normally been admitted under other circumstances. A story recounted to me by one of my own students illustrates this point. The student, a young white man from a well to do professional family, told me that he had asked the Dean of the private high school he attended why the school relied on legacies. The Dean told him that legacies are good for the bottom line, because they facilitate the development of school loyalty, which translates into money down the road. This is why people like Lawrence Summers, President of Harvard University have argued that, “[l]egacy admissions are integral to the kind of community that any private educational institution is.”¹¹⁴ Ironically, most major universities today frustrate both sides of the affirmative action debate by favoring legacies *and* the use of race-based criteria, believing that each are relevant and worthy “plus” qualifying factors when it comes to the admission process.

7. *The Benefits of Diversity Are Greatly Exaggerated Argument*

Probably articulating the anti-diversity argument better than anyone else, Justice Scalia, in *Grutter*, criticized attempts by colleges to promote diversity as dangerous and misguided attempts to “convey generic lessons in socialization and good citizenship” in a setting designed to educate students about more important, concrete topics and skills.¹¹⁵ Diversity “is not . . . an ‘education benefit’ on which students will be graded on their Law School transcript . . . or tested by bar examiners. . . . For it is a lesson of life rather than law. . . . [I]t is surely not one that is either uniquely relevant to law school or uniquely ‘teachable’ in a formal educational setting.”¹¹⁶ Scalia believes that tolerance and compassion are better taught in the home, the church, the mosque or the temple.¹¹⁷ Finally, Justice Thomas, a very vocal critic of diversity, complained in *Grutter* that people of color are used for just that—color.¹¹⁸ In his dissenting opinion in the case he said that “the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting in them.”¹¹⁹ For Justice Thomas, “diversity

113. *Id.* at 241.

114. Jackson, *supra* note 80 (referring to comments from a Wall Street Journal interview).

115. *Grutter v. Bollinger*, 539 U.S. 306, 348 (2003) (Scalia, J., concurring in part and dissenting in part).

116. *Id.* at 347-48 (Scalia, J., concurring in part and dissenting in part).

117. *See id.* at 346-49 (Scalia, J., concurring in part and dissenting in part).

118. *Id.* at 354-56 (Thomas, J., concurring in part and dissenting in part).

119. *Grutter*, 539 U.S. at 355, n.3 (Thomas, J., concurring in part and dissenting in part).

means the black man as decor.”¹²⁰

As the discussion below will show, the arguments for and against affirmative action just outlined are not new. In fact, strikingly similar arguments were made right at the end of the Civil War about the moral and fiscal responsibility of the federal government, acting as a proxy for the nation as a whole to compensate African-Americans for their harsh and demeaning treatment during the slavery era. Many of those debates took place during Congress’ consideration of the passage of several post-Civil war laws in the late 1860s, including the Freedman’s Bureau Acts and the Fourteenth Amendment.¹²¹ Since courts today look to the Fourteenth Amendment to determine the efficacy of affirmative action, it is important to examine the historical, political, and legal context out of which the amendment arose.

IV. THE HISTORICAL AND LEGAL CONTEXT FOR AFFIRMATIVE ACTION

A. *The Freedman’s Bureau Acts and the Civil Rights Act of 1866*

The fact that the Fourteenth Amendment and other post-civil war legislation were enacted to protect the rights of recently-freed African-Americans should come as no surprise. These laws were designed to give moral, legal, and financial compensation to men and women who had been forced to work for no wages under threat of torture or worse for almost three hundred years. They were also designed to counter heated white southern resistance to black freedom guaranteed by the Thirteenth Amendment, which abolished slavery in 1864.¹²² Resistance took many forms, most notoriously the emergence of hate groups like the Ku Klux Klan (KKK), who terrorized freed men.¹²³ The KKK was especially effective in using terror tactics to keep African-American men away from the voting booth, which in turn enabled the KKK to secure political control for its southern white constituencies.¹²⁴

While many white southerners did not condone the KKK’s use of extreme forms of racial violence, most believed that blacks were inferior and did not want to walk amon-gst them as equals. These shared understandings about the nature of black ability and equality enabled the KKK and other white terrorist groups to thrive in southern white communities in ways that would not have been possible otherwise.¹²⁵ This environment, along with a heavily-biased legal and police system, created an untenable climate of fear and persecution in

120. Keller, *supra* note 73, at A15.

121. See *infra* notes 147-77 and accompanying text.

122. U.S. CONST. amend. XIII.

123. *Ku Klux Klan*, in ENCYCLOPEDIA.COM, at http://www.encyclopedia.com/html/section/KuKluxKl_TheFirstKuKluxKlan.asp (last visited Mar. 24, 2005).

124. *Id.*; see also Forde-Mazrui, *supra* note 58, at 699-703.

125. See Forde-Mazrui, *supra* note 58, at 702 (detailing KKK’s substantial political influence).

which freed southern blacks were subjected to police brutality, executions based on racially biased criminal prosecutions, and lynching.¹²⁶ Lynching, a particularly gruesome and vicious form of violence, often involved mutilation, setting people on fire, murder and hangings.¹²⁷

Law scholar Kim Forde-Mazrui says that “[l]ynching and other forms of extra-judicial violence have . . . played an integral role in the punishment of blacks ever since their arrival in the New World.”¹²⁸ There were 2,500 documented lynchings committed by whites, against mostly blacks, in the last sixteen years of the Nineteenth Century.¹²⁹ One thousand one hundred more occurred from then until the start of World War I.¹³⁰ As blacks began to migrate north in greater numbers, the number of lynchings increased.¹³¹ And during the years following World War I, black servicemen fighting for equality overseas who returned expecting it to be available to them at home found that they were instead subjected to race-related violence.¹³² In the year just after the end of the War, the KKK had 100,000 members, and over seventy blacks were lynched, ten of them soldiers.¹³³ In addition, lynchings and mob violence injuring or killing mostly blacks erupted periodically across the country, while white hostility toward blacks in the North increased as blacks migrated from the South.¹³⁴

States in the South also enacted a series of laws after the Civil War, called “black codes,” in order to secure their power over blacks.¹³⁵ These codes barred blacks from freely engaging in even the most basic aspects of every day life.¹³⁶

Blacks were residentially segregated; required to labor for whites who exercised control over them akin to that of slaveholders; fined, imprisoned, or leased as convict labor for a variety of minor crimes, including vagrancy, ‘insulting gestures,’ and violating curfew; and were denied meaningful access to fair judicial process and to the ballot.¹³⁷

126. See Forde-Mazrui, *supra* note 58, at 699-702 (outlining society’s continued poor treatment of African-Americans notwithstanding prohibition on slavery).

127. *Lynching in* ENCYCLOPEDIA.COM, at <http://www.encyclopedia.com/html/l/lynching.asp> (last visited Mar. 24, 2005).

128. Forde-Mazrui, *supra* note 58, at 702 (describing various forms of extra-judicial violence incurred by African-Americans after abolition of slavery).

129. Forde-Mazrui, *supra* note 58, at 702.

130. Forde-Mazrui, *supra* note 58, at 702.

131. See Forde-Mazrui, *supra* note 58, at 702.

132. Forde-Mazrui, *supra* note 58, at 702.

133. Forde-Mazrui, *supra* note 58, at 702.

134. Forde-Mazrui, *supra* note 58, at 702.

135. Forde-Mazrui, *supra* note 58, at 699-700.

136. Forde-Mazrui, *supra* note 58, at 700.

137. Forde-Mazrui, *supra* note 58, at 700 (citing FRANKLIN & MOSS, *supra* note 59, at 225).

W.E.B. DuBois's assessment of this time period captures the tenor and tone of the day. "There was scarcely a white man in the South," he said, "who did not honestly regard Emancipation as a crime, and its practical nullification as a duty."¹³⁸

A few years after the end of the Civil War, Congress passed a series of concurrent legislative initiatives on behalf of the country's newly-recognized black citizens, including the Freedman's Bureau Acts, the Civil Rights Act of 1866, and the Fourteenth Amendment to the United States Constitution.¹³⁹ Congress did so to make clear that black citizens had the right not just to be free from bondage, but to participate as equal citizens in all aspects of American life. The Freedman's Bureau legislation tried to establish a series of social welfare programs that benefited blacks.¹⁴⁰ One bill, the 1864 Freedman's Bureau Act, endorsed the creation of a new national agency, called the Bureau of Freedmen's Affairs, whose purpose was to help blacks enforce lease and work contracts negotiated with whites, and to help rent blacks land that the Union Army had confiscated during the Civil War.¹⁴¹ Congressman Thomas Eliot of Massachusetts, a proponent of the 1864 bill, argued that,

After a life of servitude, inherited from slave ancestors stolen from their homes and subjected by force to the control of their masters, these freedmen . . . have this right, which will not be denied by any theorist of any party; that is to say, the right to earn among us their own subsistence.¹⁴²

Congressman Eliot also said that the bill would "enable the Government to help into active, educated, and useful life a nation of freedmen who otherwise would grope their way to usefulness through neglect and suffering to themselves, and with heavy and needless loss to us."¹⁴³ Congress rejected the 1864 Freedman's Bureau Act that same year.¹⁴⁴

In 1865, however, Congress passed, and President Lincoln signed, the 1865 Freedman's Bureau Act.¹⁴⁵ The 1865 Freedman's Bureau Act created the Bureau of Refugees, Freedmen and Abandoned Lands and charged the new

138. DUBOIS, *supra* note 9, at 23.

139. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754-88 (1985) (describing series of post-Civil War legislation adopted by Congress and enactment of Fourteenth Amendment).

140. Act of July 16, 1866, ch. 200, (14 Stat. 173).

141. See Schnapper, *supra* note 139, at 755-56 (explaining proposed responsibilities of Bureau of Freedmen's Affairs).

142. See Schnapper, *supra* note 139, at 758 (citing Cong. Globe, 38th Cong., 1st Sess. 574 (1864) (statement of Rep. Eliot)).

143. Schnapper, *supra* note 139, at 759 (citing Cong. Globe, 38th Cong., 1st Sess. 572-73 (1864) (statement of Rep. Eliot)).

144. Schnapper, *supra* note 139, at 759.

145. Act of March 3, 1865, ch. 90, (13 Stat. 507) 508.

agency with providing clothes and food to freedmen and poor white refugees made homeless by the war.¹⁴⁶ The 1865 Act also authorized the Bureau to help freedmen and white refugees secure forty acres of abandoned land.¹⁴⁷ In practice, however, the agency made it a priority to help blacks, and not whites, with respect to real estate disputes, fair treatment in the criminal justice system, and access to medical care.¹⁴⁸

Over the next few years, Congress hotly debated legislation designed to continue and/or expand the work of the Freedman's Bureau. Rhetoric used by opponents of the Bureau foreshadowed much of the rhetoric employed by anti-affirmative action activists today. Opponents argued that the Bureau's programs were the type that rest solely within the purview of the states, not the federal government, and that whites disadvantaged by their social class or lack of education, as well as confederate whites who lost property during the War, should also benefit from the law's programs.¹⁴⁹ Opponents also rejected the notion that whites, especially disadvantaged whites, should have to shoulder the cost by paying taxes exclusively for the benefit of blacks.¹⁵⁰ Senator McDougall, who believed in the inferiority of the black race, complained that the law would "make the negro in some respects their superior . . . and gives them favors a poor white boy in the North cannot [get]."¹⁵¹ Objecting to what he believed was the federal government's inappropriate favoritism of blacks over whites, President Andrew Johnson vetoed a new version of the Freedman's bill in 1866.¹⁵²

Approximately a month later, President Johnson vetoed the Civil Rights Act of 1866.¹⁵³ This time, however, Congress overrode Johnson's veto and passed the Civil Rights Act of 1866.¹⁵⁴ Congress then attempted to enact a new Freedmen's Bureau bill, which allowed blacks to own southern land abandoned after the war, provided special education programs for freedman, and gave other aid to blacks in the form of special courts designed to handle land disputes between freedmen and former white slave owners.¹⁵⁵ Much of the agency's activities were funded by rents it received from freedman property owners.¹⁵⁶ Congressman LeBlond, one of the most outspoken critics of the laws, maintained that "it was 'the duty of . . . Congress to strike down that

146. Schnapper, *supra* note 139, at 760.

147. Schnapper, *supra* note 139, at 760.

148. Schnapper, *supra* note 139, at 761.

149. Schnapper, *supra* note 139, at 763-67.

150. Schnapper, *supra* note 139, at 763-67.

151. Schnapper, *supra* note 139, at 765 (citing Cong. Globe, 39th Cong., 1st Sess. 401 (1866) (statement of Sen. McDougall)).

152. Schnapper, *supra* note 139, at 768.

153. Schnapper, *supra* note 139, at 771.

154. Schnapper, *supra* note 139, at 771.

155. Schnapper, *supra* note 139, at 771-73.

156. Schnapper, *supra* note 139, at 771-73.

system at once, leaving these colored people, free as they are, to make a living the same way that the poor whites of our country are doing.”¹⁵⁷ Congressman Elliott, however, argued that the law was long overdue.¹⁵⁸ He said: “We owe something to these freedman. . . . We have done nothing to them . . . but injury. . . . We reduced the fathers to slavery. . . . Now, then, we have struck off their chains. Shall we not help them find homes?”¹⁵⁹

In 1869, Congress approved an extension for some of the Bureau’s activities, but failed to approve its continuation as a collector of land rents or an enforcer of new freedman land ownership.¹⁶⁰ Congress finally abolished the Bureau in 1872, only seven years after being established—hardly a significant amount of time to fulfill its vast and important mission.¹⁶¹ That is why the goals of the Freedman’s Bureau—providing freedmen access to education, abandoned land, a fairly administered legal system, and credit—were never fully achieved, except in the most limited and temporary of circumstances. Many have written about the Freedman’s Bureau’s demise, but W.E.B. DuBois’s astute observations perhaps explain it best.¹⁶² He said that the Bureau’s “successes were the result of hard work, supplemented by the aid of philanthropists and the eager striving of black men. Its failures were the result of bad local agents, the inherent difficulties of the work, and national neglect.”¹⁶³

In addition to the Freedman’s Bureau legislation, Congress passed the Civil Rights Act of 1866, only months after the passage of the Thirteenth Amendment.¹⁶⁴ Section one of the Civil Rights Act of 1866 gave all citizens, regardless of their race, color, or previous enslavement, the same rights to enter into and enforce contracts, sue, purchase property, testify in court, “and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens.”¹⁶⁵ Section one was necessary because blacks were denied these kinds of rights both before and after slavery ended. For instance, before Congress passed the Act, blacks in most southern states could not testify against whites even when they were the victims of crimes perpetuated by whites.¹⁶⁶ Two years later, Congress passed the Fourteenth Amendment, from which all affirmative action law descends.¹⁶⁷

157. Schnapper, *supra* note 139, at 773 (citing Cong. Globe, 39th Cong., 1st Sess. 2780 (1866) (statement of Rep. LeBlond)).

158. Schnapper, *supra* note 139, at 774.

159. Schnapper, *supra* note 139, at 774 (citing Cong. Globe, 39th Cong., 1st Sess. 2779 (1866) (statement of Rep. Elliot)).

160. Schnapper, *supra* note 139, at 783.

161. Schnapper, *supra* note 139, at 783.

162. DuBois, *supra* note 9, at 19-24.

163. DuBois, *supra* note 9, at 22.

164. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified in 42 U.S.C. §§ 1981-82).

165. *Id.*

166. See generally *Blyew v. United States*, 80 U.S. 581 (1872) (discussing Kentucky law preventing blacks and Native Americans from testifying against whites in civil suits).

167. U.S. CONST. amend. XIV.

B. The Fourteenth Amendment and the Early Recognition of the Rights of Freedmen

The Fourteenth Amendment provides that “no state shall make or enforce any law which . . . deprive[s] any person life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”¹⁶⁸ Although the Amendment does not specifically state that it was designed exclusively to protect the rights of freed slaves, this was clearly its main purpose. That is why in the *Slaughter-House Cases*¹⁶⁹ from the 1870s, when a group of white butchers relied on the Fourteenth Amendment to challenge a Louisiana monopoly law that excluded them as a group from making a livelihood,¹⁷⁰ the Court ruled against the plaintiffs and stated: “We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.”¹⁷¹ The Supreme Court articulated a similar interpretation in the 1879 case *Strauder v. West Virginia*,¹⁷² where the Court decided that the state of Virginia harmed equal protection rights when state prosecutors purposefully excluded blacks from serving on a jury that would decide the fate of a black defendant.¹⁷³

It can not be overstated that the legislative intent of both the Fourteenth Amendment and the Freedman’s Bureau Acts was to remedy past and present wrongs against African-Americans. Southern legislators consistently objected to the Freedman’s Bureau’s focus on improving the plight of blacks, but a majority of Congress—the very same Congress that passed the Fourteenth Amendment—endorsed that focus nevertheless.¹⁷⁴ Indeed, Eric Schnapper, author of the seminal article on this period, maintains that Congress enacted the Fourteenth Amendment in part to give constitutional backing to both the Civil Rights Act of 1866 and the Freedman’s Bureau Acts.¹⁷⁵ This, of course, has important implications for the affirmative action debate taking place in today’s courts. As Schnapper argues, “Congress . . . regarded the race-conscious assistance programs of the Freedman’s Bureau as *furthering* rather than violating the principle of equal protection.”¹⁷⁶ He contends that, “This history [therefore] strongly suggests that the framers of the amendment could not have

168. *Id.* at § 1.

169. 83 U.S. 36 (1872).

170. *Id.* at 44-45.

171. *Id.* at 80.

172. 100 U.S. 303 (1879).

173. *Id.* at 310.

174. Schnapper, *supra* note 139, at 763-67.

175. Schnapper, *supra* note 139, at 784-85.

176. Schnapper, *supra* note 139, at 787 (emphasis added).

intended . . . [the Fourteenth Amendment] generally to prohibit affirmative action for blacks.”¹⁷⁷ The extent to which certain members of the Supreme Court and critics of affirmative action have ignored this important fact in the contemporary legal context will be discussed later.

In addition to the early Fourteenth Amendment decisions discussed above, there are two other mid-twentieth century, noteworthy cases in which the Fourteenth Amendment was used to level the playing field for African-Americans. Those cases are the 1954 case, *Brown v. Board of Education of Topeka*¹⁷⁸ (*Brown I*), and the 1964 case, *Loving v. Virginia*.¹⁷⁹ From the 1880s to the 1960s, white sentiments of disdain and prejudice against African-Americans were codified into so-called “Jim Crow” laws in which a majority of the states that mandated separation of the races in all aspects of society.¹⁸⁰ Those laws made it illegal for blacks and whites to be served in the same room in restaurants, buried in the same cemeteries, or seated together in theatres, movie houses, public libraries, and on buses and trains.¹⁸¹ Jim Crow laws also prevented whites from renting housing to blacks in predominantly white areas, attending the same schools, or intermarrying blacks.¹⁸²

The Supreme Court ruled in the 1896 case, *Plessy v. Ferguson*,¹⁸³ that a Louisiana law barring blacks from sitting in white only passenger cars on trains was constitutional as long as blacks had access to similar but racially segregated cars.¹⁸⁴ The Court stated in *Plessy*, “we think the enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment.”¹⁸⁵ Rebuffing the plaintiff’s claims that blacks living and working in segregated worlds would internalize common stereotypes of inferiority about themselves, the Court held that intolerance and bias cannot be eliminated by legislative action, and that forced integration would not solve the problem.¹⁸⁶ “If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other’s merits, and a voluntary consent of individuals.”¹⁸⁷

It should be noted that government sanctioned segregation was not limited to

177. Schnapper, *supra* note 139, at 754.

178. 347 U.S. 483 (1954).

179. 388 U.S. 2 (1967).

180. *Jim Crow Laws*, Martin Luther King National Historic Site, at http://www.nps.gov/malu/documents/jim_crow_laws.htm (last visited Mar. 26, 2005).

181. *Id.*

182. *Id.*

183. 163 U.S. 537 (1896).

184. *Id.* at 548.

185. *Plessy*, 163 U.S. at 548.

186. *Id.* at 551-52.

187. *Id.* at 551.

the South. Under President Woodrow Wilson, the federal government adopted segregationist policies that required blacks and whites to occupy separate office space, eat in different sections of government cafeterias, and sit in separate sections of the Congressional gallery.¹⁸⁸ Even during World War II, blacks were put into separate military units.¹⁸⁹ As result of both state and federal hostility, it became virtually impossible for African-Americans to get equal and fair access to public transportation, public facilities, bathrooms, hotels, as well as jobs and educations.¹⁹⁰

Brown I relied on the Fourteenth Amendment to overturn the separate but equal laws *Plessy* had condoned sixty years earlier.¹⁹¹ Cities in Kansas, South Carolina, Virginia, Delaware and the District of Columbia still had such laws.¹⁹² In terms of tangible factors like teacher salaries, school buildings, and curricula, the Court noted that the quality of white and black schools in these cities were at least theoretically equal, or for its purposes, sufficiently on their way to becoming equal.¹⁹³ Delivering the opinion for the Court, however, Chief Justice Warren cited studies that established that black students who attended all black schools tended to have lower self-esteem than their white counterparts and believed that they were inferior to whites.¹⁹⁴ Thus, Chief Justice Warren asked, “Does segregation of children in public schools solely on the basis of race, even though . . . ‘tangible’ factors may be equal, deprive . . . [minority children] equal educational opportunities? We believe that it does.”¹⁹⁵

Forecasting sentiments that would be taken up in the *Bakke* affirmative action case over twenty years later, Chief Justice Warren observed that education is comprised of many tangible and objectively immeasurable qualities, including the extent to which students can talk to and share their views with one another.¹⁹⁶ “To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in ways unlikely ever to be undone.”¹⁹⁷ In fact, Chief Justice Warren maintained, legally sanctioned segregation sends the message that blacks are inferior to whites, which in turn negatively affects a child’s educational and psychological

188. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 394 (1978) (Marshall, J. dissenting) (describing federal government segregation under President Wilson).

189. *Id.*

190. *Id.* (citing RICHARD KLUGER, *SIMPLE JUSTICE* 91 (1975)).

191. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 495 (1954).

192. *Id.* at 483-487.

193. *Id.* at 492 (concluding Court cannot base decision on tangible differences between black and white schools).

194. *Id.* at 493-94.

195. *Brown*, 347 U.S. at 493.

196. *Id.* at 483-94 (citing *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)).

197. *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 494 (1954).

development.¹⁹⁸ “Separate educational facilities,” he concluded, “are inherently unequal.”¹⁹⁹ In 1955, the Supreme Court revisited the *Brown I* decision in order to determine the time frame for its implementation.²⁰⁰ The 1955 case, *Brown v. Board of Education of Topeka*, (*Brown II*) will be addressed later in this article.

In 1967, a little over a decade after *Brown I*, the Supreme Court struck down a Virginia state anti-miscegenation law in the 1967 case, *Loving v. Virginia*.²⁰¹ The state law made it a crime punishable by imprisonment for whites and blacks to marry.²⁰² The plaintiffs in the case, Mildred Jeter, a black woman, and Richard Loving, a white man, got married in the District of Columbia. When they moved to Virginia they were arrested, convicted, and sentenced to one year in prison.²⁰³ The judge suspended the sentence in return for them agreeing to leave Virginia and not return for twenty-five years.²⁰⁴ He justified his decision by asserting that, “[a]lmighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.”²⁰⁵

The couple then moved to Washington, D.C. and brought their claim to the Supreme Court of Appeals of Virginia.²⁰⁶ The Supreme Court of Appeals of Virginia found that the law was constitutional, ruling that states had the right under the Tenth Amendment “to preserve the racial integrity of its citizens,” and to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride.”²⁰⁷ The court also noted that marriage is a subject that should fall under the jurisdiction of the states, not the federal government, pursuant to the Tenth Amendment.²⁰⁸ The U.S. Supreme Court, however, disagreed. Speaking for the majority of the Court, Justice Warren stated that if racial classifications are ever to be enforced, “they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.”²⁰⁹ In this case, the Court noted, the

198. *Id.* at 495 (citing studies regarding psychological effect of segregation).

199. *Brown*, 347 U.S. at 495.

200. *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955).

201. 388 U.S. 1, 12 (1967).

202. *Id.* at 3.

203. *Id.* at 2-3.

204. *Id.* at 3.

205. *Loving*, 388 U.S. at 3 (quoting language used by trial judge).

206. *Id.* at 3-7.

207. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (citing *Naim v. Naim*, 87 S.E.2d 749, 756 (1955)).

208. *Id.*

209. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

state's only basis for the law was to maintain white supremacy, since all the restrictions applied to who could and could not marry white people.²¹⁰ The Court therefore concluded that the law was not constitutional.²¹¹

In keeping with the original intent and purpose of the Fourteenth Amendment, the *Brown I* and *Loving* decisions stood for the proposition that African-Americans could not be treated as second-class citizens. Even before these two decisions were rendered, however, a predominantly white American judiciary had already begun to allow non-black claimants to rely on the Amendment to cover circumstances that were never contemplated by its Framers.²¹² For instance, in 1944 the Supreme Court allowed a Japanese-American to use the Amendment to challenge a California state law that allowed the state to intern Japanese-Americans because the military viewed them as a threat to national security during World War II.²¹³ In *Korematsu v. United States*,²¹⁴ the military maintained that race could be equated with disloyalty, regardless of the presence or absence of evidence to that effect.²¹⁵ Because it would have been too cumbersome to make individual determinations of guilt, the military reasoned, it should be allowed to do so.²¹⁶ The Supreme Court agreed.²¹⁷

The U.S. Congress formally apologized to the Japanese-American community in 1988 for what is now believed to be a regretful chapter in American history. However, because the Court has never overturned the *Korematsu* decision, it is still "good law." This controversial fact is particularly relevant in post-September 11th and Patriot Act America, where the U.S. government is requiring that adult male Arab-American immigrants from certain countries be finger printed because it is believed that their countries of origin make them justifiable targets of suspicion for terrorist activity.²¹⁸

The *Korematsu* decision is also important because the language used by the Court to describe the standard of review for Fourteenth Amendment racial classification cases is the language we most commonly associate today with this subject. The Court stated:

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately *suspect*. That is not to say

210. *Id.* at 12.

211. *Id.*

212. See *infra* notes 213-217 and accompanying text.

213. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

214. 323 U.S. 214 (1944).

215. *Id.* at 218-21.

216. *Id.* at 218-19.

217. *Id.* at 223-24.

218. Jim Lobe, *ACLU Calls For Congress To Investigate Arab, Muslim Detentions*, Common Dreams News Center, Jan. 14, 2003, at <http://www.commondreams.org/headlines03/0114-03.htm>.

that all such restrictions are unconstitutional. It is to say that courts must subject them to the most *rigid scrutiny*. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.²¹⁹

While this language has evolved slightly over time, its basic message—that racial classifications should receive that most heightened level of scrutiny possible—has remained unchanged.

In addition to expanding the meaning of race under Fourteenth Amendment, courts have also allowed non-race-related claims to be brought under the Amendment. They have been able to do this because, as Justice Powell in the *Bakke* case (to be discussed below) said, “the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.”²²⁰ Thus, he observed, the law eventually “flourished as a cornerstone in the Court’s defense of property and liberty of contract [So by then] it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority.”²²¹ Justice Powell noted that these guarantees had become “universal in their application, to all persons . . . without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”²²² Of course, scholars like Eric Schnapper and myself would not have so easily allowed that shift to take place, without serious consideration being given to the negative impact this would have on the rights of freed men and women, and their descendants.

Beginning in the mid to late 1900s, the next line of contention regarding the Fourteenth Amendment was whether or not it could also be used to protect and further the rights of whites, in addition to blacks and other racial and ethnic minorities. This continued into the current century, as debates about the efficacy of government backed programs designed to exclusively benefit blacks and so-called “reverse discrimination” suits brought by whites against blacks, made their way into the courts. These are the issues that were in dispute in the 2003 case, *Grutter v. Bollinger*,²²³ and in its 1978 predecessor, *Regents of the University of California v. Bakke*.²²⁴

219. *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

220. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 293 (1978).

221. *Id.* at 292; see *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 381 (1949); M. JONES, AMERICAN IMMIGRATION 177-246 (1960).

222. 438 U.S. at 292-93 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

223. 539 U.S. 306 (2003).

224. 438 U.S. 265 (1978).

V. THE DEVELOPMENT OF AFFIRMATIVE ACTION LAW BEFORE *GRUTTER*: A LESSER STANDARD FOR NONRACIAL MATTERS; THE MOST STRINGENT STANDARD FOR RACIAL MATTERS

No doubt, the Congressmen who adopted the Fourteenth Amendment would be surprised to learn how it is being used today. The following is a brief explanation of the legal standards used to assess the constitutionality of the various situations that now give rise to Fourteenth Amendment claims, with most of the analysis focusing on situations involving race-based AAPs. Courts today require higher or lesser levels of justification for differential group treatment, depending on the types of circumstances involved. For instance, if the discriminatory treatment relates to business regulation, the standard applied to determine if the regulation is valid is called the “rational basis test.”²²⁵ This is the least stringent test used. Here, courts essentially will uphold a law if: 1) there is a legitimate government purpose for the discrimination, and 2) the means used by the government to achieve that purpose are rationally related to it.²²⁶ This approach would be applied, for example, to uphold laws requiring psychiatrists (as opposed to pastoral counselors) to be licensed in the state where they do business, since the states have a legitimate interest in protecting the public health and welfare of their citizens, and licensing is a reasonable way to serve that interest.²²⁷

The “strict scrutiny test” is the most stringent test used of all the three tests. It covers situations in which “fundamental rights,” such as the right to practice one’s religion or the right to privacy are being infringed upon, or in cases involving racial classifications. The strict scrutiny test requires that in such instances, the government must have a compelling interest in engaging in this kind of discrimination, and that the means to advance that interest must be narrowly tailored to accomplish its ends.²²⁸ As mentioned earlier, antecedents of the strict scrutiny test can be found in cases like *Korematsu*, where the Court concluded that such classifications were “suspect” and should be held to the most “rigid” of standards.²²⁹ Government AAPs that use race as a plus factor are subject to the strict scrutiny test.²³⁰ If, however, the differential treatment is based on gender, there is a different standard employed.²³¹ This standard, called the “intermediate scrutiny test” is more rigorous than the rational basis test and less rigorous than the strict scrutiny test.²³² Applying the latter test, if a

225. OTIS H. STEPHENS, JR. & JOHN M. SCHEB II, *AMERICAN CONSTITUTIONAL LAW* 739 (2d. edition, 1999).

226. *Id.*

227. *Id.*

228. STEPHENS & SCHEB, *supra* note 225, at 739-40.

229. *See supra* notes 213-219 and accompanying text.

230. KENNETH CLARKSON ET AL., *WEST’S BUSINESS LAW*, 90 (9th ed. 2004).

231. *Id.*

232. *Id.*

law that discriminates based on a person's sex is "substantially related to important government objectives," it will be upheld.²³³

Using these last two standards of review, the Court has recognized that ending society-wide economic disparities between men and women is a sufficiently important government objective to justify AAPs that benefit women, but that ending systemic racism is not a sufficiently compelling reason to justify AAPs that benefit blacks.²³⁴ This has led to the ironic, and I believe unfair, result that "may fairly be described as paradoxical . . . because, from an historical viewpoint, the Fourteenth Amendment's original and primary purpose was to protect and uplift the black race, a purpose clearly at the core of racially-oriented affirmative action plans."²³⁵

What follows next is a more detailed discussion of how the just discussed application of the strict scrutiny test to race-based AAPs came to pass prior to the *Grutter* decision in 2003. The cases to be examined are *Brown v. Board of Education* (Brown II) (1954),²³⁶ *Regents of the University of California v. Bakke* (1978),²³⁷ *Wygant v. Jackson Board of Education* (1986),²³⁸ *Richmond v. J.A. Croson Co.* (1989),²³⁹ and *Adarand Constructors, Inc. v. Peña* (1995).²⁴⁰

A. From Brown II to Adarand: Systemic Racism and the Steady March to Ignore It

As the discussion in Part Two shows, there are many practical and theoretical differences in how pro and anti-affirmative action thinkers frame the affirmative action debate. These key areas of contention are directly reflected in the conflicting views expressed by the majority and dissenting opinions in the Supreme Court's leading affirmative action decisions. It should come as no surprise that one of the most contested areas relates to whether the Court should or should not recognize that systemic racism still exists. If found to exist, the Court must also determine its extent, consider the requisite proof claimants relying on the systemic racism argument need to offer to satisfy the Court, and, most problematically, decide whether this issue is even relevant to begin with. As the discussion below will show, through a series of cases dating back to the 1950s, the Supreme Court has mistakenly backed away from acknowledging that it needs to use its power to correct the inequities created by this phenomenon.

233. *Id.*

234. Buchanan, *supra* note 11, at 158 (2002) (citing *Califano v. Webster*, 430 U.S. 313, 317 (1977)).

235. Buchanan, *supra* note 11, at 157.

236. 348 U.S. 886 (1954).

237. 438 U.S. 265 (1978).

238. 476 U.S. 267 (1986).

239. 488 U.S. 469 (1989).

240. 515 U.S. 200 (1995).

1. *Brown v. Board of Education* (“*Brown II*”) (1955)

When most people think of the *Brown v. Board of Education* case, they think of the 1954 decision overturning state-based separate but equal laws.²⁴¹ However, there were actually two *Brown* cases – the first one just mentioned, and the second one in 1955, in which the Court tackled the question of how the school desegregation process would be enforced and under what time frame.²⁴² In *Brown II*, the Supreme Court, bowing in to pressure from anti-integrationists, ruled that desegregation should take place “with all deliberate speed.”²⁴³ The phrase, which comes from the Latin, “*festina lente*” (meaning, “mak[ing] haste slowly”)²⁴⁴ connotes what turned out to be the slow, drawn out process during which anti-integrationists were allowed to buy enough time to regroup and “find a vast array of legal and extra legal means to defeat the objectives of *Brown I*.”²⁴⁵ *Brown II* therefore significantly diminished the impact of *Brown I*, and as a result, turned what many hoped would represent the beginning of a downhill fall into an uphill climb for equal rights never fully realized. As Harvard law scholar Charles Olgetree opines:

Brown I should be celebrated for ending de jure segregation . . . a blight that lasted almost four hundred years and harmed millions of Americans of all races [However], short-term gains have been replaced by setbacks engendered by new forms of racism. School districts, briefly integrated, have become resegregated Subsequent courts do not even seem to recognize integration as an imperative. And that, perhaps, is the worse indictment of the *Brown* decisions: their faith in progress and their failure to see how quickly people of a different mind could not only resist but, once the tide had turned, even reverse the halting progress toward a fully integrated society.²⁴⁶

2. *Regents of University of California v. Bakke* (1978)

Perhaps the most symbolic example of the Court’s rollback of its recognition of the problem of systemic racism can be found in Justice Lewis Powell’s opinion in the *Bakke* case in 1978.²⁴⁷ Originally heralded by many as a champion of race-based affirmative action, Powell’s decision also held the seeds of affirmative action’s possible and ultimate demise.

One of the most important aspects of *Brown I* was that it rendered

241. See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 495-96 (1954).

242. See *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 298 (1955).

243. *Brown II*, at 294, 301 (1955).

244. CHARLES J. OLGETREE, JR., ALL DELIBERATE SPEED 11 (2004) (quoting Abraham Lincoln).

245. John C. Walter, *The Brown Decision, 50 Years Later*, SEATTLE TIMES, May 16, 2004, at M8.

246. Olgetree, *supra* note 244, at 311.

247. See generally *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

unacceptable overtly racist policies that denied blacks admission to all white schools and universities.²⁴⁸ There were schools that admitted blacks even before *Brown I*, however, albeit rarely. Ogletree describes the climate that existed for blacks, other minorities and women at universities like Berkeley and Harvard at the time the *Bakke* case was under review, and why these colleges wanted to change that climate.²⁴⁹ Harvard had a “reputation for liberalism [which] had always been overstated,” he notes, “given its policies of denying admittance to women, its tendency to discriminate against racial minorities and especially Jews, its reliance on the legacy admissions systems, its focus on attracting a variety of athletes, and its concentration of men from northeastern United States.”²⁵⁰ Ogletree further observed, however, that Harvard was “engaging in a massive project of social engineering that benefited not only African-Americans but, even more, the many white women now permitted to attend these formerly all-male bastions of education, privilege, and power.”²⁵¹ In assessing the acceptability of AAPs such as Berkley’s, Ogletree notes that the Court in *Bakke* had a chance to revisit some of the same questions Congress faced in the late 1800s, namely, whether it should fight racial injustice in a *color blind* or a *color conscious* manner?²⁵² The Court’s answer to that question formed the basis for either applause or disappointment for the next thirty years.

In *Bakke*, the Supreme Court was asked to review a University of California (at Davis) state medical school program in which members of minority groups (i.e., blacks, chicanos, Asians, and American Indians) were rated by a separate special admissions committee set up for this purpose.²⁵³ The committee had the option of recommending candidates from these groups to the general admissions committee even if they did not meet the 2.5 grade point average cut off set for other applicants.²⁵⁴ The school also reserved a certain number of seats for minority students, such that “to the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants.”²⁵⁵ The school maintained that the program was needed to counter the longstanding history of discrimination against blacks that had taken place in higher education.²⁵⁶ Allan Bakke, a white male who applied to the medical school, was rejected for admission.²⁵⁷

248. See generally *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

249. Ogletree, *supra* note 244, at 148-49.

250. Ogletree, *supra* note 244, at 148.

251. Ogletree, *supra* note 244, at 148.

252. Ogletree, *supra*, note 244, at 149.

253. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 269-71, 274-75 (1978).

254. *Id.* at 274-75.

255. *Id.* at 289.

256. *Id.* at 306-10.

257. *Bakke*, 438 U.S. at 276-77.

He argued that he was passed over in favor of minority students admitted under the school's special admissions program with lesser qualifications, and that the action was illegal under the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964.²⁵⁸

The Court was extremely divided in the *Bakke* case. Four members of the Court, headed by Justice Stevens, concluded that the school's AAP was illegal under Title VI.²⁵⁹ Four other members, lead by Justice Brennan, believed that the program was constitutional under the Equal Protection Clause.²⁶⁰ Each respective group, however, signed on to different parts of an opinion that was written by Justice Powell.²⁶¹ It is Powell's plurality opinion that has become the most influential of all the opinions in the case.²⁶² Citing the *Korematsu* decision, Justice Powell stated that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."²⁶³ Pointing out that "[t]he clock of our liberties . . . cannot be turned back to 1868,"²⁶⁴ he went on to note that today, all people, regardless of race, are entitled to avail themselves of the Fourteenth Amendment, including white people.²⁶⁵ Although Powell conceded that systemic discrimination against blacks and other ethnic groups did exist, he summarily rejected the claim that the medical school's AAP was a justifiable and benign approach to correcting that problem.²⁶⁶ Instead, he reasoned, the school would have to have showed that it had engaged in a pattern of discriminatory practices against blacks in order for the plan to be valid.²⁶⁷

Justice Powell also criticized the school's plan for reinforcing commonly held stereotypes that blacks cannot get admitted to college without the aid of special protections designed to give them an unfair advantage.²⁶⁸ Partly echoing complaints made by southern Congressmen about the Freedman's Bureau's tax on whites for the benefit of blacks in the 1800s, Justice Powell also stated that it was unfair for whites, such as Bakke, who were not responsible for discrimination to bear the burden of remedying it.²⁶⁹ Finally, Powell dismissed the argument that holding racial classifications to a higher

258. *Id.* at 277-78.

259. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 408-21 (1978) (Stevens, J., concurring in the judgment in part and dissenting in part).

260. *Id.* at 355-79 (Brennan, J., concurring in the judgment in part and dissenting in part).

261. *See id.* at 281-320 (Powell, J., announcing the judgment of the Court).

262. Jeffrey D. Grossett, Note, *Upholding Racial Diversity in the Classroom as a Compelling Interest*, 52 CASE W. RES. L. REV. 339, 342 (2001) (citing *Bakke*, 438 U.S. at 320, 361, 413).

263. *Bakke*, 438 U.S. at 291 (Powell, J., announcing the judgment of the Court).

264. *Id.* at 295 (Powell, J., announcing the judgment of the Court).

265. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 295 (1978) (Powell, J., announcing the judgment of the Court).

266. *Id.* at 297 (Powell, J., announcing the judgment of the Court).

267. *Id.* at 300 (Powell, J., announcing the judgment of the Court).

268. *Id.* at 298 (Powell, J., announcing the judgment of the Court).

269. *Bakke*, 438 U.S. at 298 (Powell, J., announcing the judgment of the Court).

standard than sex-based ones was an inherently unfair privileging of women over racial minorities.²⁷⁰ Offering a reason for which he provided no evidence, he simply stated “[g]ender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria.”²⁷¹

The only argument submitted in support of the school’s AAP that Justice Powell did accept was that race-based AAPs were good because they promoted intellectual and cultural diversity on campus.²⁷² Justice Powell stated that universities should be able to pick students who will contribute to the “robust exchange of ideas” championed by the First Amendment’s guarantee of freedom of speech.²⁷³ For instance, he observed that “[a]n otherwise qualified medical student with a particular background – whether it be ethnic, geographic, culturally advantaged or disadvantaged – may bring to a professional school . . . experiences, outlooks, and ideas that enrich the training of its student body.”²⁷⁴ It is not acceptable, however, to reserve a set number of seats for minority students to achieve this goal, Powell noted.²⁷⁵ Instead, schools that simply use race as a “plus factor”, wherein race is not so much a decisive factor in the admissions process as it is a “qualit[y] more likely to promote beneficial educational pluralism,” may do so with impunity.²⁷⁶

Justice Brennan offered the dissenting opinion in the *Bakke* case. He was joined by Justices White, Blackmun, Stevens, and Marshall.²⁷⁷ Brennan first attacked the notion that systemic racism was a thing of the past and no longer in need of a remedy.²⁷⁸ Citing the Court’s decision in *Brown I*, Justice Brennan noted that twenty- four years after the decision was rendered, *Brown I*’s hope that schools would no longer be racially segregated or unequal had still not been realized.²⁷⁹ “[E]ven today,” Justice Brennan stated, “officially sanctioned discrimination is not a thing of the past.”²⁸⁰ That is why, he said, “we cannot . . . let color blindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”²⁸¹

Justice Marshall, who was the lead NAACP attorney in the *Brown I* and

270. *Id.* at 302-03 (Powell, J., announcing the judgment of the Court).

271. *See* *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 302-03 (1978) (Powell, J., announcing the judgment of the Court).

272. *Id.* at 311-13 (Powell, J., announcing the judgment of the Court).

273. *Id.* at 313 (Powell, J., announcing the judgment of the Court).

274. *Id.* at 314 (Powell, J., announcing the judgment of the Court).

275. *Bakke*, 438 U.S. at 314-17 (Powell, J., announcing the judgment of the Court).

276. *Id.* at 317.

277. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 328-79 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).

278. *Id.* at 327 (Brennan, J., concurring in part and dissenting in part).

279. *Id.* at 327 (Brennan, J., concurring in part and dissenting in part).

280. *Id.* at 327 (Brennan, J., concurring in part and dissenting in part).

281. *Bakke*, 438 U.S. at 327 (Brennan, J., concurring in part and dissenting in part).

Brown II, authored an additional dissenting opinion in *Bakke*.²⁸² While he supported Powell's diversity argument, he also thought that there was nothing wrong with the university setting aside a certain number of seats for blacks.²⁸³ Given the compelling nature of the problem of systemic racism, he believed that Fourteenth Amendment condoned such measures.²⁸⁴ "[D]uring most the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro," Justice Marshall noted.²⁸⁵ "Now, when a State acts to remedy the effects of that legacy . . . I cannot believe that this same Constitution stands as a barrier," he complained.²⁸⁶ He also asked the Court not to forget America's long and unseemly history of constructing barriers to black education, since under slavery, it was illegal to teach slaves to read, but not to kill them.²⁸⁷

Further, the courts, along with the "combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War."²⁸⁸ Justice Marshall also pointed out that the negative effects of this history were long lasting and directly related to the drastic disparities in wealth, health, employment, and educational opportunities between blacks and whites.²⁸⁹ Thus, he lamented, "it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible."²⁹⁰

In what would probably be to the great dismay of the late Justice Marshall, who passed away in 1991, only Powell's diversity argument has stood the test of time, since this was also the argument in support of AAPs made by Justice O'Connor in her majority opinion in the *Grutter* case. But Powell's view was fortified even before *Grutter*, in cases like *Wygant v. Jackson Board of Education* (1986),²⁹¹ *Richmond v. J.A. Croson Co.* (1989),²⁹² and *Adarand Constructors, Inc. v. Peña* (1995).²⁹³

3. *Wygant v. Jackson Board of Education* (1986)

In *Wygant*, a state school board tried to implement a layoff plan that favored qualified minority teachers over more senior, qualified white teachers in order

282. *Id.* at 387-402 (Marshall, J., dissenting in part).

283. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 387 (1978) (Marshall, J., dissenting in part).

284. *Id.* at 387 (Marshall, J., dissenting in part).

285. *Id.* (Marshall, J., dissenting in part).

286. *Id.* (Marshall, J., dissenting in part).

287. *Bakke*, 438 U.S. at 387 (Marshall, J., dissenting in part) (citing FRANKLIN & MOSS, *supra* note 59).

288. *Id.* at 390 (Marshall, J., dissenting in part).

289. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 395-96 (1978) (Marshall, J., dissenting in part).

290. *Id.* at 400 (Marshall, J., dissenting in part).

291. 476 U.S. 267 (1986).

292. 488 U.S. 469 (1989).

293. 515 U.S. 200 (1995).

to ensure that minority students had role models.²⁹⁴ The school board maintained that the layoff plan was necessary in order to counteract a longstanding and historical problem of systemic racism that had led it to its current predicament – only a few junior minority teachers worked in the system, while most of the senior teachers were white.²⁹⁵ Justice Powell, again writing the decision for a plurality of the Court, stated that the layoff plan was unconstitutional because reducing the effects of societal discrimination was not a compelling government interest.²⁹⁶ “No one doubts that there has been serious racial discrimination in this country,” he explained, “[b]ut as a basis for imposing discriminatory *legal* remedies that work against innocent people, society discrimination is insufficient and over-expansive.”²⁹⁷ Justice Powell also said that a public employer can only implement a voluntary AAP for the stated purpose of remedying past discrimination if there was evidence submitted to show that the school in question had engaged in prior discrimination.²⁹⁸ The school system could not simply state that such discrimination occurred, it had to prove it.²⁹⁹ Powell also suggested that, in terms of whether or not the plan unnecessarily trammelled the rights of the white claimants, the layoff plan had a much more deleterious effect on senior white workers than an AAP that could have been designed to focus exclusively on hiring goals.³⁰⁰ “While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals,” he noted.³⁰¹ “That burden,” Justice Powell concluded, “is too intrusive.”³⁰²

Justice Marshall, along with Justices Brennan and Blackmun, complained in a dissenting opinion that the Court refused to recognize that proof had in fact been submitted to show that the school district had engaged in instances of proven, prior discrimination.³⁰³ All of this was reflected, they asserted, in a ruling rendered by the Michigan Civil Rights Commission prior to the Court’s review of the case.³⁰⁴ He also stated that, even if no such specific proof was available, the school should not be required to produce it, since, in his mind, *Brown I* stood for the proposition that minorities should not have to sue each and every school system in America in order to force nationwide integration.³⁰⁵

294. *Wygant*, 476 U.S. at 269-71.

295. *Id.* at 272-75.

296. *Id.* at 275 (plurality opinion).

297. *Id.* at 276 (plurality opinion).

298. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (plurality opinion).

299. *See id.* (plurality opinion).

300. *Id.* at 283 (plurality opinion).

301. *Id.* (plurality opinion).

302. *Wygant*, 476 U.S. at 283 (plurality opinion).

303. *Id.* at 295-97 (Marshall, J., dissenting).

304. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 297 (1986) (Marshall, J., dissenting).

305. *Id.* at 305-06 (Marshall, J., dissenting).

Why now punish the school system for trying to fulfill *Brown I*'s mandate by admitting to its past mistakes and attempting to voluntarily correct them?³⁰⁶ Justice Marshall also noted that minorities tended to be the last people hired because of past discrimination, and, because they had less seniority, the first to be fired in a layoff.³⁰⁷ Thus, the minority community in Jackson was being forced to "painfully . . . watch[] the hard-won benefits of its integration efforts vanish as a result of massive layoffs."³⁰⁸

4. *City of Richmond v. J.A. Croson Co. (1989)*

The Court also belittled the problem of systemic discrimination in *City of Richmond v. J.A. Croson Co.*,³⁰⁹ where claimants challenged the City of Richmond, Virginia's special set aside program for black-owned companies.³¹⁰ The program reserved 30% of the city's construction awards for minority owned businesses.³¹¹ The city justified the set asides on the grounds that the construction industry in Richmond had engaged in a longstanding practice of discriminating against blacks, but the city did not submit specific proof of this discrimination.³¹² The Court ruled that AAPs like this can only withstand constitutional attack if they are adopted to remedy a problem of widespread and proven discrimination in a particular industry.³¹³ The Court decided that strict scrutiny needed to be applied in order to " 'smoke out' illegitimate uses of race by assuring that the [government] is pursuing a goal important enough to warrant use of a highly suspect tool."³¹⁴ The Court concluded that the city's claims were too vague and unsubstantiated, and thus could not be supported.³¹⁵

5. *Adarand Constructors, Inc. v. Peña (1995)*

In *Adarand Constructors, Inc. v. Peña*,³¹⁶ the Supreme Court considered the constitutionality of a Small Business Administration (SBA) set aside program for minority-owned businesses.³¹⁷ The program provided that government funded general contractors could only receive additional compensation if they hired socially and economically disadvantaged small businesses, certified as such by the SBA pursuant to the Small Business Act.³¹⁸ The Act defined a

306. *Id.* at 304, 313 (Marshall, J., dissenting).

307. *Id.* at 297-300 (Marshall, J., dissenting).

308. *Wygant*, 476 U.S. at 307 (Marshall, J., dissenting).

309. 488 U.S. 469 (1989).

310. *Id.* at 477.

311. *Id.*

312. *Id.* at 480-81.

313. *J.A. Croson Co.*, 488 U.S. at 510-11.

314. *Id.* at 493.

315. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510-11 (1989).

316. 515 U.S. 200 (1995).

317. *Id.* at 204-05.

318. *Id.* at 205.

socially disadvantaged person as anyone who, because of membership in a particular group, had ““been subjected to racial or ethnic prejudice or cultural bias . . . without regard to their individual qualities.””³¹⁹ Economically disadvantaged people were defined as ““socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.””³²⁰ Small businesses that were 51% owned by African-Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans were all presumed to be socially and economically disadvantaged within the meaning of the law.³²¹ This presumption, however, could be rebutted by someone who wanted to challenge a particular minority awardee on the grounds that the awardee was neither economically or socially disadvantaged.³²²

Adarand Constructors, Inc., a Colorado highway construction company, submitted the lowest bid to a general contractor whose project was being funded by the SBA program.³²³ Because the general contractor selected an SBA certified company that submitted a higher bid than Adarand, Adarand sued, arguing that its Fourteenth Amendment Equal Protection rights (applied to state action via the Fifth Amendment) were being denied.³²⁴ The Court of Appeals found in favor of the SBA, but Justice O’Connor, delivering the opinion for the Supreme Court, disagreed with its reasoning and remanded the case for further consideration.³²⁵ Applying the strict scrutiny test, she said that the only time race-based government policies are allowable is when those policies further a compelling interest. Furthermore, she argued, even if such an interest does exist, the means used to serve it must be narrowly tailored.³²⁶ The Court of Appeals, in her opinion, failed to determine that there was a compelling interest that justified the creation of the SBA program.³²⁷ It also failed to suggest, she complained, that there were other less drastic, racially neutral ways to achieve the agency’s objectives.³²⁸ Finally, Justice O’Connor criticized the SBA for neglecting to recognize that the program needed to have an expiration date, one that reflected a timeframe during which the set aside

319. *Id.* at 206 (quoting § 8(a)(5) of the Small Business Act, 15 U.S.C. § 637(a)(5)).

320. *Adarand Constructors, Inc.*, 515 U.S. at 206 (citing § 8(a)(6)(A) of the Small Business Act, 15 U.S.C. § 637(a)(6)(A)).

321. *Id.* at 205 (citing § 8(a) of the Small Business Act, 15 U.S.C. § 637(d)(2), (3)), and 207 (citing 13 C.F.R. Sec. 124.103 (1994)).

322. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 208 (1995) (citing 12 C.F.R. § 124.111(c)-(d), 123.602-124.609 (1994)).

323. *Id.* at 205.

324. *Id.* at 204.

325. *Id.* at 204-05.

326. *Adarand Constructors, Inc.*, 515 U.S. at 237-39.

327. *Id.*

328. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237-38 (1995).

program was supposed to come to an end.³²⁹

By not overtly stating that systemic discrimination could never be used as a justification for the SBA program, Justice O'Connor left the door open for the Court of Appeals to condone such a reason on remand.³³⁰ She also left open the question of how long an AAP could last before it would be considered too long.³³¹ Thus, while on the surface the opinion seemed to announce the death of government set aside programs for minorities, lower courts still had a lot of room within which to maneuver in order to preserve those programs – something Justice Scalia was not happy about.³³² Noting what he believed was the inherent danger in O'Connor's open-ended decision, Justice Scalia forcefully announced in his concurring opinion that “government can never have a ‘compelling interest’ in discriminating on the basis of race in order to ‘make up’ for past racial discrimination.”³³³ He further stated: “[t]o pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce . . . for future mischief the way of thinking that produced race slavery . . . and race hatred. In the eyes of the government, we are just one race here. It is American.”³³⁴

Like Justice Scalia, Justice Thomas also agreed that the proper standard of review in such instances is the strict scrutiny test.³³⁵ And also like Scalia, Thomas expressed his disapproval for the SBA program in very forceful terms.³³⁶ “[T]he paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution,” he complained.³³⁷ “[R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination.”³³⁸

Citing some of the research discussed earlier in this article on the prevalence of society wide discrimination, Justice Ginsburg, joined by Justice Breyer, in her dissenting opinion, launched a comprehensive attack on the majority's logic in the *Adarand* case.³³⁹ Discrimination is manifested “in our workplaces,

329. *Id.*

330. *See generally id.*

331. *See generally id.*

332. *See Adarand Constructors, Inc.*, 515 U.S. at 237 (Scalia, J., concurring in part and concurring in the judgment).

333. *Id.* at 239 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989)) (Scalia, J., concurring in part and concurring in the judgment).

334. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

335. *Id.* at 240-41 (Thomas, J., concurring in part and concurring in the judgment).

336. *Id.* (Thomas, J., concurring in part and concurring in the judgment).

337. *Id.* at 240 (Thomas, J., concurring in part and concurring in the judgment).

338. *Adarand Constructors, Inc.*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment).

339. *Id.* at 271-76 (Ginsburg, J., dissenting).

markets, and neighborhoods,” she said.³⁴⁰ Justice Ginsburg added:

Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race. White and African-American consumers still encounter different deals. People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders . . . [And] bias both conscious and unconscious, reflecting traditional and unexamined habits of thought, keeps up barriers that must come down if equal opportunity and non-discrimination are ever genuinely to become this country’s law and practice.³⁴¹

Ginsburg also noted that “to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression is to trivialize the lives and deaths of those who have suffered under racism.”³⁴² In other words, she lamented, the effect of this thinking is to “pretend that history never happened and that the present doesn’t exist.”³⁴³

Justice Ginsburg’s concerns in *Adarand* are not overstated. As my discussion earlier showed, Beginning with cases like *Brown II* and *Bakke*, the Court has consistently backed away from the original and most important purpose of the Fourteenth Amendment. It has refused to allow school systems to retain qualified minority teachers during layoffs in order to provide needed role models for minority students. It Court has also overturned government contracting programs specially designed to support minority owned businesses traditionally excluded from such programs. And the Court now makes it virtually impossible for claimants to prove the presence and effect of systemic discrimination. As a result, the Court has successfully undermined the very meaning of its own decision in *Brown I*, and, as a consequence, the original promise of the Fourteenth Amendment. Furthermore, while the *Grutter* case does preserve certain nominal aspects of race-based AAPs designed to realize this promise, it essentially continues the Court’s movement away from this direction. This fact is made even more problematic when one realizes that the Court continues to allow AAPs designed to benefit women to be subjected to a lower standard of scrutiny than those for race.

Additionally, as *Adarand*’s suggested reference to an undefined expiration

340. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 273 (1995) (Ginsburg, J., dissenting).

341. *Id.* at 273 (citing various studies); *see also* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 318 (1986); *Associated Gen. Contractors of Cal. v. Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991); A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 50 (G. Jaynes & R. Williams eds., 1989); Ayres, *supra* note 60, at 819, 821-22, 828; H. Cross et al., *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers*, 90-4 URB. INST. REP. 42, 42 (1990).

342. *Adarand Constructors, Inc.*, 515 U.S. at 274 (Ginsburg, J. dissenting).

343. *Id.* (Ginsburg, J. dissenting).

date for affirmative action shows, the question of time frames continues to be a major sore point for the Court. Finally, while southern whites were given all the time they needed to desegregate in *Brown II*, the Court is not willing to do the same for university officials and policy makers trying to correct the challenges of contemporary and historic forms of racism. As the discussion of *Grutter* decision below will show, the Court continues to pressure policy makers to quickly solve the effects of racism, even as it refuses to acknowledge that racism is a problem that needs to be solved to begin with.

VI. THE *GRUTTER* DECISION

Law schools, like most other graduate and undergraduate institutions, consider a variety of factors when they assess the qualification of their applicants. Schools look at student scores on standardized tests, undergraduate college grades, extracurricular activities, letters of recommendation, and personal statements from the applicants, among other things.³⁴⁴ In *Grutter v. Bollinger*,³⁴⁵ the University of Michigan Law School relied on a combination of factors in assessing law school applicants in the hopes of finding candidates whose “talents, experiences, and potential” could “contribute to the learning of those around them.”³⁴⁶ In addition to the so-called “hard variables” just described, the Law School also considered “soft variables” like the quality of the student’s undergraduate college and the level of difficulty of the student’s course of study at that college.³⁴⁷ “Soft variables” also included “racial and ethnic diversity . . . [so that the School could enroll] ‘a critical mass of underrepresented minority students.’” [which, in turn, would] ‘ensure their ability to make unique contributions to the character of the Law School.’”³⁴⁸ Hispanics, Native Americans and African-Americans were considered to be members of underrepresented groups.³⁴⁹ The plaintiff in the case, Barbara Grutter, a white woman with a 3.8 undergraduate grade point average and a 161 LSAT score, was initially put on the school’s waiting list, but eventually was rejected.³⁵⁰ Grutter alleged that there was no evidence of past discrimination to justify the AAP she believed caused her rejection, and that there was no compelling reason for the school to use race as a predominant factor in the admissions process.³⁵¹

In response to Grutter’s claims, the law school noted it was not interested in

344. See Georgetown University Law Center Web Site, Juris Doctor Admissions Information, available at http://www.law.georgetown.edu/admissions/jd_general.html (last visited July 23, 2004).

345. 539 U.S. 306 (2003).

346. *Id.* at 315.

347. *Id.*

348. *Id.* at 316-18 (citing App. to Pet. for Cert, at 120-21).

349. *Grutter*, 539 U.S. at 316.

350. *Id.* at 316.

351. *Grutter v. Bollinger*, 539 U.S. 306, 315-18 (2003).

applying hard and rigid criteria to its applicants.³⁵² Thus, just because a person had one of the highest test scores, or for that matter one of the lowest, it did not mean that they were guaranteed or denied a seat, respectively.³⁵³ The law school explained that ““critical mass”” meant “a number that encourages . . . minority students to participate in the classroom and not feel isolated,” rather than a quota.³⁵⁴ By applying an individualized approach to each applicant on a case by case basis, sometimes a candidate’s race might play a role in their acceptance, and sometimes not, asserted the school.³⁵⁵ Ultimately, the school hoped there would be enough underrepresented minority students admitted so that none of them would “feel . . . like spokespersons for their race,”³⁵⁶ and that by their presence in sufficient numbers, the potential tendency for white students to engage in negative racial stereotyping would be challenged, since it would soon become clear that there is no one minority viewpoint or practice.³⁵⁷

Justice O’Connor, in her majority opinion, observed that the law school was simply “seek[ing] to guide admissions officers in ‘producing classes both diverse and academically outstanding, classes made up of students who promise to continue the tradition of outstanding contribution by Michigan Graduates to the legal profession.’”³⁵⁸ With respect to the application of the strict scrutiny standard of review in the case, O’Connor explained “[n]ot every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the government.”³⁵⁹ She therefore concluded that the school’s diversity goals amounted to a compelling state interest and were therefore constitutional.³⁶⁰

Laying out the benefits of race-based AAPs, Justice O’Connor stated that “numerous studies show that student body diversity promotes learning outcomes, and ‘better prepare[s] students for an increasingly diverse workforce and society, and better prepares them as professionals,’ . . . [and that] [e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”³⁶¹ Further, dismissing claims that the school’s AAP amounted to a quota system, Justice O’Connor noted that from 1993 to 2000, the percentage of minority students in each law school class ranged from 13.5% to 20%,

352. *Id.* at 315-16.

353. *Id.* at 315.

354. *Id.* at 318 (citing App. to Pet. for Cert., at 208a-209a).

355. *Grutter*, 539 U.S. at 319.

356. *Id.* at 319.

357. *Grutter v. Bollinger*, 539 U.S. 306, 319-20 (2003) (discussing testimony of Professor Kent Syverud, Dean of Vanderbilt Law School).

358. *Id.* at 316 (citations omitted).

359. *Id.* at 327.

360. *Id.* at 343-44.

361. *Grutter*, 539 U.S. at 330, 332.

enough of a range to show that there were no predetermined numerical goals.³⁶²

Grutter's counsel also challenged the law school's AAP on the grounds that the school had produced no evidence of past discrimination to justify the program, a point raised in response to the case law discussed earlier in this article, which indicates that government-based AAPs can only be used under such circumstances.³⁶³ Justice O'Connor stated, however, that the issue of past discrimination was completely irrelevant to the dispute at hand.³⁶⁴ The need for academic and cultural diversity, she noted, were all that ultimately mattered.³⁶⁵ Heavily influenced by Justice Powell's opinion in *Bakke*, O'Connor explained that the effects of historical discrimination is not a constitutionally justifiable reason for a university AAP.³⁶⁶ She also noted that Powell rejected the idea that AAPs could be used to remedy the effects of current society wide discrimination, because he believed it would be unfair to innocent whites.³⁶⁷ Justice Powell was in favor of the University of California's AAP in *Bakke* because diversity was its chief goal, Justice O'Connor noted.³⁶⁸ Quoting Powell, she said: the "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."³⁶⁹

On the surface, Justice O'Connor's point that there does not have to be evidence of past discrimination to justify a government AAP may seem like a good thing for AAP advocates, since this can often be a daunting, labor intensive and ultimately extremely expensive area of litigation.³⁷⁰ The downside to this view, however, is that it also essentially *disallows the need to remedy* past and present system wide prejudice. In their concurring opinion, Justices Ginsburg and Breyer explained why this view is so troubling: "It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals."³⁷¹ They also pointed out that minority students are often exposed to poorer educational opportunities at the K through 12 level than their white counterparts: "[D]espite these inequalities, some minority students are able to meet the high threshold requirements set for admission As lower school education in minority communities improve, an increase in the number of such students may be anticipated."³⁷²

362. *Id.* at 336.

363. *Grutter v. Bollinger*, 539 U.S. 306, 322-26 (2003).

364. *Id.* at 322-25.

365. *Id.* at 324-25.

366. *Id.* at 323-24.

367. *Grutter*, 539 U.S. at 323.

368. *Id.* at 324.

369. *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003) (citations omitted).

370. *See id.* at 328-30.

371. *Id.* at 345 (Ginsburg, J., concurring).

372. *Grutter*, 539 U.S. at 346 (Ginsburg, J., concurring).

Justice O'Connor also predicted "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."³⁷³ Barely containing their dismay at what they believed to be a dangerously naïve prediction, Justices Ginsburg and Breyer retorted: "From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination . . . will make it safe to sunset affirmative action."³⁷⁴

It is important to note that the law school's policy was in direct contrast to the AAP adopted by its sister college, the University of Michigan College of Literature, Science and the Arts, at the time of the case.³⁷⁵ The college used a point system to determine which applicants would be admitted.³⁷⁶ If a student received at least one hundred points they were usually admitted.³⁷⁷ Points were given for everything from good high school grades, or being an in-state resident, a legacy, from an economically disadvantaged group or from an underrepresented racial or ethnic minority.³⁷⁸ Individuals from an underrepresented racial or ethnic minority automatically received twenty points.³⁷⁹ In *Gratz v. Bollinger*,³⁸⁰ the companion case to *Grutter* decided on the same day, the Supreme Court struck down the college's point system as it applied to racial and ethnicity because the Court concluded that college's means of seeking its diversity goals were not narrowly tailored to accomplish those goals.³⁸¹

In contrast to the college's system, the Court in *Grutter* noted that the law school "award[ed] no mechanical, predetermined diversity 'bonuses' . . . [and that its policy was] 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'"³⁸² Commenting on complaints from the college that use of this kind of individualized evaluative approach would be extremely costly and labor intensive, the Court in *Gratz* stated that "[t]he fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."³⁸³

The dissenting opinions in the *Grutter* case addressed many of the common anti-AAP arguments discussed earlier in this article. First, Chief Justice

373. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

374. *Id.* at 346 (Ginsburg, J., concurring).

375. See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003).

376. *Id.* at 255-57.

377. *Id.* at 255.

378. *Id.*

379. *Gratz*, 539 U.S. at 256.

380. 539 U.S. 244 (2003).

381. *Id.* at 275-76.

382. *Grutter v. Bollinger*, 539 U.S. 306, 337 (2003).

383. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003).

Rehnquist, joined by Justices Scalia, Kennedy and Thomas, asserted that the law school's desire to achieve a critical mass of minority students was the equivalent of a thinly disguised quota system, the kind rejected by the Court in *Bakke*.³⁸⁴ Rehnquist also attacked the ambiguous nature of the AAP's twenty-five year time frame, pointing out that such vagueness violates the constitutional requirement that the means adopted to achieve the state's ends must be narrowly tailored in such instances.³⁸⁵ Justice Kennedy, in a separate dissenting opinion, repeated Justice Scalia's admonitions that the law school's AAP is an illegal quota system.³⁸⁶ And later, Scalia, only joined by Justice Thomas, asserted that the goal of achieving cross racial understanding is neither a compelling government interest nor a teachable subject at the university level.³⁸⁷

Lastly, in what is perhaps the most scathing critique of the majority's decision in *Grutter*, Justice Thomas, now only joined by Scalia, complained: "Every time the government . . . makes race relevant to the provision of burdens or benefits, it demeans us all."³⁸⁸ To bolster this point, Thomas quoted freed slave and abolitionist, Frederick Douglass, who said in an 1865 speech said, "if the negro cannot stand on his own legs, let him fall also Let him alone! . . . Your interference is doing him positive injury."³⁸⁹ It is important to note that Thomas neglects in his dissent to give the complete quote made by Douglass during this same speech. Douglass actually continued: "Let him alone! If you see him on his way to school, let him alone, don't disturb him! If you see him going to the dinner-table at a hotel, let him go! If you see him going to the ballot-box, let him alone, don't disturb him! If you see him going into a work-shop, just let him alone - your interference is doing him a positive injury."³⁹⁰ Douglas was therefore much more critical of white refusal to grant blacks equal rights than the Thomas quote implies, and would probably have been very unhappy with the way Thomas misused his quote.

For Justice Thomas, however, the University of Michigan law school's desire to achieve racial balance was simply an unacceptable "aesthetic" or a desire to "have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them."³⁹¹ "[S]ocial

384. *Id.* at 379 (Rehnquist, C.J., dissenting).

385. *Id.* at 385-87 (Rehnquist, C.J., dissenting).

386. *Id.* at 388-90, 395 (Kennedy, J., dissenting).

387. *Grutter v. Bollinger*, 539 U.S. 306, 347-48 (2003) (Scalia, J., concurring in part and dissenting in part).

388. *Id.* at 253 (Thomas, J., concurring in part and dissenting in part).

389. *Id.* at 350 (Thomas, J., concurring in part and dissenting in part) (quoting 4 THE FREDERICK DOUGLASS PAPERS 59, 68 (J. Blassingame & J. McKivigan eds., 1991)).

390. Derrick Jackson, *Mugging Frederick Douglass*, Boston Globe, July 4, 2003, available at <http://www.commondreams.org/views03/0704-07.htm>.

391. *Grutter*, 539 U.S. at 355 n.3 (Thomas, J., concurring in part and dissenting in part).

experiments on other people's children,"³⁹² were completely unacceptable, in his opinion, especially when schools tempt minority students with the spoils of an elite education, only to leave them "overmatched . . . [in the] cauldron of competition."³⁹³ Finally, relying on the stigma argument, Thomas said that the school's AAP may imbue minorities with a sense of inferiority and make them dependent on special, noncompetitive treatment.³⁹⁴

It is also important to note here that the majority's rationale in *Grutter* probably does not extend to work place issues.³⁹⁵ In contrast to the educational sphere, the Court has never said that it is permissible to use raced-based AAPs to promote racial, cultural or intellectual diversity in the work place.³⁹⁶ In fact, as the earlier discussion about the *Adarand* case shows, government programs that favor one race over another cannot survive strict scrutiny unless those programs are remedial in purpose and designed to "correct specific past wrongs."³⁹⁷ This would be especially true in cases where quotas are used, and most probably true even in cases where the holistic "race plus" analysis used by the University of Michigan Law School were to be used to hire or promote employees.³⁹⁸ Universities are different, the Supreme Court is saying in *Grutter*, because of the unique and important role they play in promoting intellectual exchange and thought vis a vis the First Amendment. In addition, universities seem to serve the dual function of preparing students to work in a diverse work world. But even these well intended objectives, if Justice O'Connor's reference to a twenty-five year deadline is to be taken seriously, are not constitutionally invulnerable.

A. *Post-Grutter: Twenty-Five Years and Counting Down*

America's major universities heaved a combined sigh of relief and unease after the *Grutter* decision was rendered. Relief because the Supreme Court championed the idea that racial and ethnic diversity is good for schools. Unease because it rejected the notion that the government has a constitutionally protected interest in ending society wide discrimination. Unease also because universities now have to spend more time, labor and money to be in compliance with the new legal landscape. For instance, the University of Illinois Medical School now asks applicants to submit three essays in order to assess candidate "motivation and educational goals . . . interpersonal attributes and whether . . .

392. *Id.* (Thomas, J., concurring in part and dissenting in part).

393. *Grutter v. Bollinger*, 539 U.S. 306, 355 n.3 (2003) (Thomas, J., concurring in part and dissenting in part).

394. *Id.* (Thomas, J., concurring in part and dissenting in part).

395. See Dee McAree, *DOJ Pays \$11.5M in Race Bias Case*, NAT'L L.J., Nov. 15, 2004, at 6.

396. See McAree, *supra* note 395, at 6.

397. See McAree, *supra* note 395, at 6.

398. See McAree, *supra* note 395, at 6.

[they] overcame disadvantages.”³⁹⁹ The school originally only required one essay.⁴⁰⁰ With approximately 4500 people applying annually, this will have a dramatic impact on staff and resources.⁴⁰¹

Universities that have redesigned their admissions policies in this manner have done so with mixed results. The University of Michigan undergraduate program, which was struck down in *Gratz*, spent an additional \$1.8 million to evaluate candidates in 2004.⁴⁰² While this represented a 40% budget increase over the previous year, it produced a freshmen class made up of only 9% minority students, 1% less than the previous year.⁴⁰³ Part of this was attributed to the fact that minority applications to the school dropped by 21% in 2004.⁴⁰⁴ This in turn may be because potential applicants did not want to be the focus of undue attention generated by the *Grutter* lawsuit.⁴⁰⁵ Similarly, Ohio State University, which spent an additional \$250,000 to pay for thirty-five additional evaluators in order to achieve its recruitment goals, saw the percentage of minorities in the entering class decrease by 2%.⁴⁰⁶ The percentage of minority students admitted at the University of Massachusetts at Amherst in 2004, however, remained constant at 7%.⁴⁰⁷

In the meantime, fear of anti-affirmative action litigation prompted some public schools to eliminate special summer and financial assistance programs for minorities even before *Grutter* was decided.⁴⁰⁸ Private universities that receive federal funds may also be at risk in this regard.⁴⁰⁹ Even though no post-*Grutter* university AAPs have been successfully challenged in court to date, schools cannot help but think that dropping these plans and replacing them with less controversial alternatives could make their lives less complicated and costly.

In addition, as I discussed earlier in this article, current law allows public agencies and educational institutions to adopt voluntary AAPs, but does not require them to do so. States can therefore pass laws that outlaw affirmative action, as long as those laws do not require states to violate federal legislative

399. Dave Newbart, *UIC Med School Revamps Affirmative Action System*, CHI.-SUN TIMES, Sept. 7, 2004, at 20.

400. *See id.*

401. *See id.*

402. *Applications Down for 2004*, MICH. ALUMNUS, at 14 (Summer 2004).

403. *Id.*

404. *Id.*

405. *See id.*

406. Greg Winter, *After Ruling, 3 Universities Maintain Diversity in Admissions*, N.Y. TIMES, Apr. 13, 2004, at A22.

407. *Id.*

408. Some of this fear is also in response to a 1994 4th Circuit ruling, which struck down a scholarship program for blacks at the University of Maryland. *See Podberesky v. Kirwan*, 38 F.3d 147, 151 (4th Cir. 1994).

409. Jack Greenberg, *Affirmative Action in Higher Education: Confronting Condition and Theory*, 43 B.C. L. REV. 521, 528 n.53, 529 (2002) (citing *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1237 (11th Cir. 2001)).

or regulatory schemes that promote affirmative action in federally funded state programs.⁴¹⁰ Consequently, anti-affirmative action activists have launched several campaigns designed to do just that.⁴¹¹ One of their chief battlegrounds is Michigan.⁴¹² The state university there has stopped using numerical goals to achieve racial diversity, but maintains that it will continue to view race as a qualitative plus factor in admissions.⁴¹³ To counter this, Republicans in the Michigan state legislature introduced Proposition 206 in 2004, a ballot measure that would cut funding for any state program or university that uses racial preferences in hiring and admissions.⁴¹⁴ To date, Proposition 206 has not been put on the ballot for a state-wide vote. Data concerning what occurred after the enactment of California's Proposition 209, however, could give Michigan residents a sense about what might occur there if the ballot initiative were to eventually succeed.

B. California's Proposition 209

Passed in 1996, California's Proposition 209 amended the state constitution by providing that "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."⁴¹⁵ Proposition 209 was extremely divisive. Fifty-four percent of the Californian electorate voted for it, while 46% voted against it.⁴¹⁶ Proponents of the amendment were successful in part because they astutely fanned the flames of voter paranoia by exaggerating claims of unfair reverse discrimination against whites.⁴¹⁷ As they outlined in their campaign literature:

A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. And two wrongs don't make a right! Today, students are being rejected from public universities because of their RACE!⁴¹⁸

410. See generally, Jordan T.L. Halgas, *Navigating the Rough Seas of Affirmative Action in Employment in the Wake of California's "Proposition 209"*, ACAD. L. STUD. BUS. NAT'L CONF. PROC., at 1-12 (2004).

411. Justin Pope, *A Year After Ruling, Colleges Find Affirmative Action Isn't Easy*, ASSOCIATED PRESS STATE AND LOCAL WIRE, June 20, 2004, at http://web.lexis-nexis.com/universe/document?_m=68c4df2d335a38aa232938a1f518042.

412. *Id.*

413. *Id.*

414. *Id.*

415. *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997), *cert. denied*, 1997 U.S. LEXIS 6506 (quoting Proposition language).

416. *Id.* at 697.

417. See Halgas, *supra* note 410, at 2.

418. See Halgas, *supra* note 410, at 2 (citing *Coalition for Econ. Equity v. Wilson*, 122 F.3d 692, 696-97 (9th Cir. 1997), *cert. denied*, 1997 U.S. LEXIS 6506).

The American Civil Rights Coalition, the group that funded the campaign for Proposition 209 in California, is the same group that is providing most of the funding for the Proposition 206 campaign in Michigan.⁴¹⁹ Finally, although Proposition 209 specifically bans all types of AAPs, it still allows state government agencies and colleges to continue to conduct diversity-based recruitment and outreach efforts and to collect statistical data about the participation of minorities and women in their programs.⁴²⁰

The impact of post-Proposition 209 on Californian minority enrollments has been dramatic. At Boalt Hall Law School, minority students accounted for only 2.7% of the total student body from 1997 to 2001.⁴²¹ In contrast, from 1968-1972, the first five years during which affirmative action was put into place at the Law School, minority enrollments constituted 9% of the total student body.⁴²² Similarly, African-Americans made up 7.5% of the student body at UCLA Law School from 1967-1971, but only 2.3% from 1997 to 2001.⁴²³ Data for the more recent 2000-2001 academic year, however, shows that enrollments have improved slightly.⁴²⁴ This most recent data can be explained in part by the fact that many Californian colleges made a concerted effort to more aggressively recruit minority candidates, thus taking Proposition 209's endorsement of these kinds of outreach efforts to heart.⁴²⁵ Nevertheless, the numbers are still drastically less than they were before Proposition 209.⁴²⁶

C. Top 10% and Geographic Diversity Plans

One of the cases that prompted the Supreme Court to revisit the merits of affirmative action in *Grutter* is *Hopwood v. Texas*.⁴²⁷ There, the 5th Circuit Court of Appeals struck down raced-based AAPs that were being used in Mississippi, Louisiana and Texas in 1996.⁴²⁸ As a result, the state of Texas passed a law that required the University of Texas at Austin to replace its race-based AAP with one that admitted the top 10% of all high school graduates in

419. *Anti-Affirmative Petition Drive Has No Michigan Donors*, ASSOCIATED PRESS STATE AND LOCAL WIRE, August 26, 2004, at http://web.lexis-nexis.com/universe/document?_m=410fclabbddea9b5e7c6f91f315851 (last visited Nov. 11, 2004).

420. Halgas, *supra* note 410, at 12 (citing *Coalition for Econ. Equity*, 122 F.3d 692, 696-97).

421. William C. Kidder, *Affirmative Action Under Attack: The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACKLETTER L.J. 1, 31 (2003).

422. *Id.*

423. *Id.*

424. *Id.* at 32-34.

425. See Kidder, *supra* note 421, at 11-12.

426. See Kidder, *supra* note 421, at 32-40.

427. 78 F.3d 932 (5th Cir. 1996).

428. *Id.* at 934.

the state, regardless of race or school district of origin.⁴²⁹ In a similar vein, Florida Governor Jeb Bush signed an executive order that required the state university to end its race-based AAP and replace it with a plan that admitted the top 5% of all high school graduates in the state.⁴³⁰ President George W. Bush, during the debates for his first election campaign, said he was opposed to quotas because they “tend to pit one group of people against another.”⁴³¹ On the other hand, Texas’ top 10% plan, Bush asserted, is a laudable form of “affirmative access.”⁴³²

Top percent plans have produced some interesting results. In Florida, the percentage of black students admitted to public universities in 2004 increased from 14.4 to 14.5% over the previous year, and the percentage of Hispanic students increased from 15 to 15.5%.⁴³³ Happy with these figures, Governor Jeb Bush claimed that the numbers indicate that racial preferences designed to level the playing field for minorities are no longer needed.⁴³⁴ The University of Texas experienced an even more significant change, with 2004 seeing the most racially and ethnically diverse entering class in the school’s history.⁴³⁵ Not too surprisingly, wealthy Texan parents (most of whom are white) are up in arms because they say the new plan unfairly penalizes their children.⁴³⁶ The children are more qualified than their top 10% inner-city or rural counterparts, they argue, because they attend more demanding schools.⁴³⁷ Of course, more demanding schools usually means more resources. Fifty-five percent of the entering freshmen class at 250 of the country’s most selective schools in 2000 came from the highest earning fourth of households.⁴³⁸ And at forty-two of the country’s top public universities in states like New York and California, family income levels for 40% of the 2004 freshmen class were over \$100,000.⁴³⁹ Thus, according to Princeton sociology professor Marta Tienda, the debates governing top percent plans are “a big-time social class story . . . [since] school type is [also] the proxy for social class.”⁴⁴⁰ That is why institutions like the

429. Greenberg, *supra* note 409, at 528.

430. Greenberg, *supra* note 409, at 528.

431. Remi Bello, *Ten Percent Plan Surfaces in Final Debate*, DAILY TEXAN, Oct. 19, 2000, at http://tspweb02.tsp.utexas.edu/webarchive/10-19-00/2000101901_s03_10-percent.html (last visited Dec. 12, 2004).

432. *Id.*

433. *State Touts Minority Enrollment Increase At State Universities*, ASSOCIATED PRESS STATE AND LOCAL WIRE, Sept. 16, 2004, at http://web.lexis-nexis.com/universe/document?_m=b80c72900a72ec51393e132f71987ff8.

434. *Id.*

435. Jonathan D. Glater, *Diversity Plan Shaped in Texas is Under Attack*, N.Y. TIMES, June 13, 2004, at 1.

436. *Id.*

437. *Id.*

438. David Leonhardt, *As Wealthy Fill Top Colleges, Concerns Grow Over Fairness*, N.Y. TIMES, Apr. 22, 2004, at A1.

439. *Id.* at A1.

440. Glater, *supra* note 435, at 1.

University of Michigan have revised their admissions applications so that candidates are now asked about their parent's income and whether their grandparents attended college.⁴⁴¹ "It's . . . an issue of fundamental fairness," says Harvard President Lawrence Summers, since "[a]n important purpose of institutions like Harvard is to give everybody a shot at the American dream."⁴⁴²

A more important problem with top percent plans is that they do little to challenge, and in fact reinforce, the entrenched racial segregation that already exists in the housing market and in K-12 schools across the country. Also, by focusing on high performers at these schools, and not on the fact that the schools themselves are usually overcrowded and under funded – in other words, separate, but still not equal - promoters of the plans seem to be sadly admitting that *Brown I's* promise of a racially integrated society is dead. Given the contentious nature of their own top percent plan, Texas legislators are now considering revising the law so that only a portion of each entering class at the University of Texas would be derived from the top 10% formula.⁴⁴³ They are also thinking about giving admissions officers more discretion to admit students with lower rankings who can add to campus culture, like musicians.⁴⁴⁴ This could lead to the ironic result that a "C" average white violinist from a wealthy school district could be admitted over an "A" average African-American student from a segregated urban school who has experienced a host of social disadvantages and has many extracurricular activities to his or her credit.

D. Geographic Diversity Plans

In addition to top percent plans, other states have replaced race-based AAPs plans with plans that reflect the geographic diversity of a region. For instance, the Tulsa Oklahoma school board enacted a law banning quotas in 2003, and replaced it with a plan in which 60% of the students attending high school would come from one part of the city and the other 40% would come from another part.⁴⁴⁵ The new plan produced an even split among blacks and whites in the 2004 freshman class.⁴⁴⁶ While the plan's effects may be laudable, its purpose is still questionable, since it too runs the risk of reinforcing the separate but not equal problems just discussed.⁴⁴⁷

441. Leonhardt, *supra* note 438, at A1.

442. Leonhardt, *supra* note 438, at A1.

443. Glater, *supra* note 435, at 1.

444. Glater, *supra* note 435, at 1.

445. Andrea Eger, *Quota Ban Doesn't Upset BTW*, TULSA WORLD, Sept. 14, 2004, at A1.

446. *Id.*

447. *Id.*

E. The Complicated Question of Race in the "New" America

Another factor that complicates post-*Grutter* political developments are the demographic changes that have occurred over the past decade with regard to race in the U.S. Since 1990, there are now more black African immigrants in America who arrived here of their own free will than there are those who were forced to come here during the slave trade.⁴⁴⁸ This has produced a "decline in the percentage of African-Americans with ancestors who suffered directly through the middle passage and Jim Crow," and "is also shaping the debate over affirmative action, diversity programs and other initiatives intended to redress the legacy of slavery."⁴⁴⁹ Many of these immigrants come from countries where "blacks constitute a majority at every level of society,"⁴⁵⁰ and therefore may not carry the same level of internalized racism that comes from living in a country where blacks are have been in the minority and denied access to equal rights for generations. Nevertheless, some elite institutions are choosing students from this new generation of immigrants over the descendants of slaves in order to comply with their affirmative action goals.

For example, while 8% of Harvard undergraduates in 2004 were black, approximately two-thirds of those students were the children of Caribbean or African immigrants or biracial parents. Harvard and places like it are therefore losing out on an "'opportunity to correct a past injustice' and depriving their campuses 'of voices that are particular to being African-American, with all the historical disadvantages that that entails.'"⁴⁵¹ My suggestions for how these challenges should be handled will be taken up in my conclusion section below.

VIII. CONCLUSION

Because of its exclusive endorsement of AAPs that promote a diversity of ideas, as opposed to those that function as a remedy for past and present systemic discrimination, the *Grutter* decision is cause for both celebration and concern. On the one hand, the diversity Justice O'Connor applauds could be categorized as a "well-intentioned compromise."⁴⁵² Hers is a middle ground solution that tries to appeal to everyone. Being described as a compromiser is nothing new for O'Connor, who recently announced that she will be retiring from the Court after twenty four years of service. Many law scholars and journalists have already begun to applaud her legacy as a "centrist in an age of ever-edgier extremes"⁴⁵³ or a "deep believer . . . in humane compromise, in

448. Sam Roberts, "More Africans Enter U.S. Than In Days of Slavery," *New York Times*, Feb. 21, 2005, at A1.

449. *Id.*

450. *Id.*

451. *Id.*

452. Keller, *supra* note 73, at A15.

453. Evan Thomas & Stuart Taylor Jr., *Queen of the Center*, *NEWSWEEK*, July 11, 2005, at 24.]

finding ways to defuse quarrels and sand down bitter edges,”⁴⁵⁴ who cast votes in favor of upholding a woman’s right to choose, the decriminalization of sodomy laws targeting gays, and educational affirmative action plans.⁴⁵⁵

But as Justice Ginsberg stated in her dissenting opinion in the *Adarand* case, O’Connor also seems to have decided in *Grutter* “to pretend that history never happened and that the present doesn’t exist.”⁴⁵⁶ She fails to acknowledge that young minority men and women face tremendous challenges as they try to get the best education possible in a country that still often sees them as inferior and undeserving. Surely, the minority community needs to devote its attention to seeking constructive solutions of its own to these problems, but O’Connor’s makes the problem even worse by enabling people in the majority culture to avoid being held even partly accountable for this situation by shifting the emphasis away from its underlying causes and the role that they have and do play in perpetuating it.

The term, centrist, therefore, does not fully capture the damage that *O’Connor’s* can do to the lives of minority youth over the next two decades, as the Court begins to take her suggested twenty-five year timeline to heart, by upholding future challenges to school AAPs on the grounds that the plans have run their course. That this is a real possibility is further evidenced by the fact that John Roberts, President Bush’s proposed replacement for O’Connor, has a record of attacking affirmative action and would possibly support this view.⁴⁵⁷

It is difficult not to imagine what the late Justice Thurgood Marshall would say to Justice O’Connor were he alive today. Marshall was an esteemed member of the Court for twenty-four years (from 1967-1991) and O’Connor’s senior colleague and friend for the last ten of those years. A white woman and self-described “cowgirl from Eastern Arizona,”⁴⁵⁸ O’Connor grew up, as she describes it, “in the Southwest in the 1930s and 1940s, . . . [never having been] personally exposed to racial tensions before *Brown* . . . [or having any] personal sense, as the plaintiff children of Topeka School District did, of being a minority in a society that cared primarily for the majority.”⁴⁵⁹ Coming from such a relatively sheltered upbringing, she credits Marshall with having taught her about the “the darkest recesses of human nature – bigotry, hatred and selfishness” and the separate and unequal worlds that most of America

454. *Id.*

455. *Id.*

456. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 274 n.8 (1995) (Ginsburg, J., dissenting).

457. Elizabeth Bazelon and David Newman, *The Supreme Court Shortlist*, SLATE, July 1, 2005, at <http://slate.msn.com/id/2121270/> (stating Roberts actually submitted friend of the Court brief arguing against government set aside program in *Adarand*).

458. Justice Sandra Day O’Connor, 2004 Stan. Univ. Commencement Address, *Stanford Report*, (June 16, 2004), at <http://news-service.stanford.edu/news/2004/june16/oconnortext-616.html>.

459. Sandra Day O’Connor, *Thurgood Marshall: The Influence of the Raconteur*, 44 STAN. L. REV. 1217, 1217 (1992).

occupies when it comes to race.⁴⁶⁰ Exposed for the first time in any meaningful way to the suffering and wisdom inherent in his stories about life under and after legal segregation, O'Connor wrote that Marshall changed the way she saw the world⁴⁶¹ by "constantly pushing and prodding [the Court] to respond not only to persuasiveness of legal argument, but also to the power of moral truth."⁴⁶²

Justice Marshall obviously had a profound impact on Justice O'Connor's views about racial justice and equality. His presence on the Court obviously exposed her to the kind of intellectual and cultural diversity she ultimately endorsed in *Grutter*. But just as clearly and just as sadly, as her decisions in both *Adarand* and *Grutter* show, Marshall's persistent exhortations about the continued and pernicious presence of racism and the role that the Court should play in combating it, seem to have fallen on deaf ears. O'Connor's lukewarm commitment to race-based university AAPs, the fact that she set an implicit twenty-five year deadline for existing AAPs to achieve their goals, and the attack on affirmative action now playing itself out in state legislatures, would have riled Marshall to the core.

Unlike the reparations given to Japanese Americans for their internment during World War II or the apologies given to Native Hawaiians for conquering their lands, the U.S. has never passed a law that offers an apology or direct compensation to the descendants of slaves for the plight of their ancestors or the challenges those descendants face in contemporary times because of the legacy of slavery.⁴⁶³ Indeed, it was not until 2005 that the Senate apologized for thwarting the attempts of seven presidents to get laws passed outlawing one of the most shameful aspects of American history – the lynching of thousands of African Americans.⁴⁶⁴ Thus, as a form of reparations for slavery and past historical prejudice, and as a remedy for solving the problem of current systemic racism outlined in Part Three, affirmative action is a necessary although imperfect antidote.

Affirmative action is an imperfect antidote because, while it partially compensates victims of prejudice, it does not solve the kind of structural economic and social problems outlined in Parts Three and Four above that minorities face. Affirmative action also does not solve the problem of why people are racist or how to teach people to be more tolerant and accepting of racial, ethnic and cultural differences. The answers to the latter are perhaps best laid at the feet of educators, psychologists, diversity trainers, ethicists and

460. *Id.* at 1217, 1220.

461. *Id.* at 1220.

462. *Id.* at 1218.

463. *Reparations*, The Newsaic, at <http://www.newsaic.com/mwreparations.html> (last viewed on July 17, 2005).

464. Sheryl Gay Stolberg, *Senate Issues Apology Over Failure On Antilynching Law*, N.Y. Times, June 13, 2005, at A15.

spiritual teachers. The University of Michigan Law School implied in the brief to the Court in *Grutter* that diversity in the classroom will contribute to racism's demise because, as white college students learn to be more open to cross racial experiences, they will discard the negative stereotypes they hold about people of color and replace them with more open-minded attitudes.⁴⁶⁵ But surely, young people harmed by racism today should not have to wait for the day to come when the benefits of educational diversity trickle down society wide, assuming that they ever can to any meaningful extent.

Furthermore, schools that admit contemporary immigrants of color from Africa or the Caribbean over blacks who are the descendants of slaves in order to comply with their AAPs should consider more closely the impact that this practice has on the descendants of slaves. As Charles Olgetree says, because of their unique role as objects of oppression and prejudice in this country, African Americans should be "the first among equals."⁴⁶⁶

Because of the *Grutter* decision, however, there is a strong chance that affirmative action will be dismantled altogether over the next twenty-three years, and that equally controversial programs like top percent and geographic diversity plans will replace them, along with a host of yet to be known approaches that seek to ensure that a college education is a vehicle for upward mobility and not just a function of race or class privilege. That shift will be more and more towards remedying the effects of disadvantaged class status, as opposed to racial status. The early numbers indicate that this may still help some of the descendants of slaves, but only at the expense of slowing down the fight to end de facto racial segregation in housing and schools at the pre-college level. Eventually, good intentioned people working for these plans may come to regret this Faustian bargain.

In the meantime, the problem of the Twenty First Century for universities at least, will probably be the problem of the class line, not the color line. And if the resistance and backlash that arose in response to government policies designed to improve the plights of freed slaves after the Civil War is any indication of what we can expect, the battle over who gets to win the debate about whether or not America is a color *and* class blind meritocracy will be just as protracted and divisive as it was during the last two centuries.

465. *Grutter v. Bollinger*, 539 U.S. 306, 324 (2003).

466. Sam Roberts, "More Africans Enter U.S. Than In Days of Slavery," *New York Times*, Feb. 21, 2005, at B4.