

AFFIRMATIVE ACTION IN HIGHER EDUCATION: CONFRONTING THE CONDITION AND THEORY

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Abstract: The author argues that when the Supreme Court next confronts the issue of affirmative action in higher education, it should examine the policy realistically—in terms of the condition of blacks and the consequences for the country—not abstractly, and uphold its constitutionality. In reaching this conclusion, the author: discusses the status of African-Americans in our society; reviews the legal and theoretical reasons for and against affirmative action in higher education for African-Americans; assesses African-Americans' performance on standardized tests and how those tests impede blacks who apply for admission to selective schools; surveys the states that have prohibited affirmative action; and, evaluates how the elimination or modification of affirmative action plans would effect African-Americans. The author then introduces a new defense of affirmative action, which he calls a "social conditions" or "closing the gap" theory. The social conditions argument, considered in the context of current affirmative action jurisprudence, asks that courts approve affirmative action in higher education as a way of bettering the social conditions in which African-Americans live, because those conditions affect everyone in our society, without regard to their cause.

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INTRODUCTION

"It is a condition which confronts us, not a theory," said President Grover Cleveland, calling for sharp reductions in the tariff, in his third annual message to Congress.¹ The aphorism is remembered more than the tariff, or, for that matter, his presidency. It has become a favored way of expressing the need for action, not words, and is particularly apt for addressing the African-American condition that confronts us today: something must be done; the issue should not be debated endlessly in terms of abstract concepts like levels of scrutiny and quality of tailoring. This Article discusses why, when next the issue of affirmative action in higher education confronts the Supreme Court of the United States, it should examine the policy realistically—in terms of the condition of blacks and the consequences for the country—not abstractly, and uphold its constitutionality.

In these pages I argue that affirmative action is good policy and is constitutional. I examine, among other things, the legal and theoretical reasons for and against affirmative action in higher education for African-Americans.² This includes an assessment of standardized tests;³ why African-Americans perform on them as they do;⁴ how the tests impede blacks who apply for admission to selective colleges and universities;⁵ the experience of states that have prohibited affirmative action;⁶ what would be in store for African-Americans if it were terminated;⁷ and alternative proposals.⁸

This Article describes and assesses the principal traditional arguments in support of affirmative action, described in shorthand as diversity, reparations, and the closely related concept of societal discrimination.⁹ I introduce a new defense of affirmative action, which I call "social conditions" or "closing the gap."¹⁰ This Article also discusses the half dozen main reasons that have been deployed against affirmative action, including, once more in shorthand, principle, stigma and stereotype, and backlash.¹¹

¹ Grover Cleveland, Third Annual Message to Congress (Dec. 6, 1887).

² See *infra* Part II.

³ See *infra* Part I.A.

⁴ See *infra* Part I.B.

⁵ See *infra* Part I.C.

⁶ See *infra* Part I.D.

⁷ See *infra* Part I.D.

⁸ See *infra* Part I.E.

⁹ See *infra* Part II.

¹⁰ See *infra* Part II.A.1.

¹¹ See *infra* Part II.B.

Justice Powell's opinion in *Regents of the University of California v. Bakke* held that affirmative action employed for the purpose of creating diversity in the student body is constitutional in principle, protected by the First Amendment right of academic freedom.¹² In the form it took at the University of California, however, affirmative action was not narrowly tailored because minority students were considered separately for admission and the school was perceived as admitting a fixed number of them.¹³ Therefore, affirmative action in principle was constitutional, but as applied, it was not. In 1996, in *Hopwood v. Texas* (*Hopwood I*), the United States Court of Appeals for the Fifth Circuit held that Justice Powell did not speak for the Court in writing that affirmative action is constitutional in that it provides diversity, that *Bakke* has in effect been overruled by later decisions, and that affirmative action denies equal protection of the laws to non-minority applicants.¹⁴ I disagree with *Hopwood I* and argue that *Bakke* was correctly decided and, in any event, now is a binding precedent.¹⁵

The social conditions argument asks that courts approve affirmative action in higher education as a way of bettering the social conditions in which African-Americans live and because those conditions affect everyone in our society, without regard to their cause.¹⁶ It is not the traditional demand for recompense for discrimination, sometimes referred to as a "societal discrimination" argument or a claim for reparations. It may be analogized to a claim that a state has the right to order that a toxic dump in a residential neighborhood, the origins of which may be unknown, that poisons blacks and whites alike, be cleaned up. Decisions that have denied relief for societal discrimination are inapposite to the toxic damages argument. Toxic damages claims seek compensation or reparations for individuals who have suffered loss and seek to be made whole. Without disparaging those arguments, the social conditions argument argues that the state, faced with a social condition that is extremely harmful, may act against it to create a more livable society. Grover Cleveland's apothegm is pertinent: It is a condition, not a theory, that confronts us. The social conditions argument asserts that admitting black students under affirmative action is in the interest of the society as a whole. It should not be seen, as opponents characterize it, as the unjust rejection of an "inno-

¹² 438 U.S. 265, 312 (1978).

¹³ *Id.* at 319-20.

¹⁴ *Hopwood v. Texas*, 78 F.3d 932, 944 (5th Cir. 1996) [*Hopwood I*].

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part II.A.1.

cent" white applicant in favor of a black applicant whom she never harmed. This argument has, so far as I know, not been presented to or decided by any court, nor discussed in the literature, except to the extent that it incorporates elements of some of the other arguments.

As a factual predicate, I discuss the status of African-Americans in our society.¹⁷ There can be no doubt about the origins of that status, which include slavery, segregation, discrimination, and exclusion from the wealth building programs of the last mid-century. There also can be no doubt about the virulence of socio-economic factors that characterize African-American life, including: isolation in where they live and where they spend their free time; teenage pregnancy; the manner in which many African-Americans speak, that is, "black English"; worldwide color discrimination; whom they marry; income, wealth, and employment; commission of and victimization by crime; and rate of imprisonment. These descriptors have persisted throughout American history. The status of blacks is unlike that of any other group, although some other groups have experienced some of the same dislocations. Affirmative action that takes aim at these social conditions, addressing the real-life situation of the black community, seeks relief for blacks and, in the process, for everyone else.

Finally, I argue the constitutional issues: I take the position that Justice Powell's opinion in *Bakke* expressed the narrowest rationale on which a majority of the Court agreed.¹⁸ It states the holding of the case that the First Amendment right of academic freedom to create an admissions policy that promotes diversity is a compelling governmental interest.¹⁹ That policy, if narrowly tailored, withstands strict scrutiny and is constitutional. *Bakke* has not been overruled and should not be overruled. Indeed, strict scrutiny is a shoe on the other foot, favoring proponents of affirmative action because overruling should occur only to serve a compelling governmental interest.²⁰ I believe that a majority of the Court may well support such a strict scrutiny analysis.

I argue also that affirmative action is constitutional as a proven means of improving African-Americans' social conditions, enabling blacks to continue moving towards parity or near-parity with whites in measurements of social status.²¹ That is in the interest of everyone. It

¹⁷ See *infra* Part II.A.1.

¹⁸ See *infra* Part III.A.

¹⁹ See *infra* Part III.A.

²⁰ See *infra* Part III.A.2.

²¹ See *infra* Part IV.

is possible that a majority of the Court will accept that argument. At a minimum, the Court will have received a broader and deeper understanding of why affirmative action is a useful policy. But, if the Court is reluctant to enter uncharted waters, it may seek a safe harbor by simply reaffirming *Bakke*.

I. TESTS, ADMISSIONS STANDARDS, AND RACE

A. How African-Americans Fare on Standardized Tests

Christopher Jencks and Meredith Phillips, editors of *The Black-White Test Score Gap*, have written that "if racial equality is America's goal, reducing the black-white test score gap would probably do more to promote this goal than any other strategy that commands broad political support."²² The reason is that "African Americans currently score lower than European Americans on vocabulary, reading, and mathematics tests, as well as on tests that claim to measure scholastic aptitude and intelligence."²³ The typical American black student scored lower than 75% of his white counterparts on most standardized tests for admission to college, law school, medical school, and business school. On some tests, blacks scored below 85% of whites.²⁴

Most American universities are hardly selective at all; that is, they admit a very large percentage of applicants.²⁵ Of the remaining

²² Christopher Jencks & Meredith Phillips, *The Black-White Test Score Gap: An Introduction*, in *THE BLACK WHITE TEST SCORE GAP* 1, 3 (Christopher Jencks & Meredith Phillips eds., 1998) [hereinafter *TEST SCORE GAP*].

²³ *Id.* at 1.

²⁴ *Id.* These percentages mean that if the black-white distributions are normal and have the same standard deviation, and if the black-white gap is one (black or white) standard deviation, when the authors compare a randomly selected black to a randomly selected white, the black will score higher than the white 24% of the time. If the black-white gap is 0.75 rather than 1.00 standard deviation, a randomly selected black will score higher than a randomly selected white about 30% of the time. *Id.*

The score gap has narrowed since 1970, but that trend may be reversing. Between 1988 and 1998, blacks' average SAT score rose 1%; during the same period, whites' scores increased more. By 1998, the gap had grown to 194 points. See *Why There Has Been No Progress in Closing the Black-White SAT Gap*, 22 J. BLACKS HIGHER EDUC. 6, 6-7 (Winter 1998/1999) [hereinafter *Why There Has Been No Progress*].

²⁵ Reluctantly, I am using the *U.S. News & World Report* ratings, which often make unwarranted discriminations among schools, incorporating factors that have no necessary relationship to quality of education. The weight *U.S. News* gives to SATs and similar tests discourages schools from engaging in affirmative action, because admitting low scoring blacks reduces test score average, and thereby, a school's position in the ratings hierarchy. But they are the only widely circulated ratings. By encouraging or discouraging applica-

schools, most are only somewhat selective.²⁶ But, fifty undergraduate schools in the United States are highly selective, admitting only a small fraction of applicants, and 150 are very selective, admitting a somewhat higher ratio.²⁷ There are 50,000 places in the first-year undergraduate classes at the nation's twenty-five most highly selective universities, about 3,000 of which, or 6%, are filled by black students.²⁸ The highly selective and very selective schools offer superior faculty, research, laboratory, and library facilities; readier access to highly rated advanced or professional studies; and greater intellectual challenges. Their students also enjoy years of developing relationships with schoolmates, many of whom in later life will hold important positions. They meet visiting recruiters who seek out undergraduates for promising career opportunities. Although success may follow graduation from any school, and has been achieved by many who did not attend college or even graduate from high school, graduating from a selective institution improves life's prospects. Certainly, that is the perception of the many students who apply to selective institutions. They (or their parents) are willing to pay a great deal for the opportunity to attend such schools. These schools easily could fill their classes with white or Asian students who score in the highest percentiles on the Scholastic Aptitude Test (SAT) and American College Test (ACT).²⁹ Blacks comprise less than 1% of this top scoring group.³⁰

At professional schools, the situation is the same. On the Law School Admissions Test (LSAT), which is graded on a scale of 120 to 180, the black median score in 1996 was 142.7; for whites, it was 153.9.³¹ Among those admitted to medical school, black Medical Col-

tions they affect a school's selectivity and have evolved into a self-fulfilling prophecy of how a school will be regarded by the general public.

²⁶ On college selectivity or competitiveness, see BARRON'S PROFILES OF AMERICAN COLLEGES 223-1622 (23d ed. 1999).

²⁷ Barron's designates fifty-four schools as most competitive. *Id.* Admission to one of these schools requires rank in the top 10% to 22% of high school class, a B+ to A average, and a score of 655 to 800 on each of the SATs. *Id.* Barron's labels about 100 schools as highly competitive. *Id.* Admission to one of these highly competitive schools requires placing in the top 20% to 35% of high school class and a score of 620-650 on the SATs. *Id.* The vast majority of other schools are labeled at lesser levels of competitiveness. *Id.*

²⁸ Theodore Cross & Robert Slater, *Special Report: Affirmative Action and Black Access to Higher Education*, 17 J. BLACKS HIGHER EDUC. 8, 10 (Fall 1997).

²⁹ The ACT, a test similar to the SAT, is given mainly in the Midwest and the South. See *id.*

³⁰ *Id.*

³¹ *Id.* at 12. The median score at Yale is 171; at second-tier schools (ranking fifty-first to eighty-ninth in *U.S. News* rankings), it is 153 to 161; at third-tier schools, it ranges from 150 to 157; at fourth-tier schools, it runs from 144 to 154. *Id.* Only 1745 blacks scored at or

lege Admission Test (MCAT) scores averaged 23.5; white scores averaged 30.2, on a scale of zero to forty-five.³² The MCAT scores for rejected whites were significantly higher than those for admitted blacks.³³ One commentator has estimated that if MCAT scores were the determining factor in admissions, probably only seven blacks in the entire United States could be admitted to any of the top ten medical schools.³⁴ And, of course, scoring at this level merely makes admission possible; it does not assure it.

At the fifty highest-ranked business schools, the mean score on the Graduate Management Admission Test (GMAT) of admitted students was nearly 200 points higher than the mean score of black students who took the test.³⁵ Blacks now make up 10% of the student bodies at the top ten business schools.³⁶ In race-blind admissions in which GMAT scores were the determining factor, blacks would be close to 1% of the same population.³⁷

In a study of SAT, ACT, LSAT, and MCAT scores, the *Journal of Blacks in Higher Education* has concluded that if standardized tests become the determining factor for all students in admissions decisions at America's leading universities, black enrollment would drop by at least one-half and at many schools by as much as 80%.³⁸ If selective undergraduate colleges operated on a race-blind policy, black enrollment would fall to 2% or below.³⁹ Many excluded black applicants would not have ready access to second, third, and fourth tier schools that admit on the basis of test scores because typically their grades and

above 150, the median score for students at most of what *U.S. News* calls the third and fourth tier law schools. *Id.* More than 36,000 whites scored above 150. *Id.* at 14.

³² *Id.* at 16.

³³ Cross & Slater, *supra* note 28, at 16. In pre-med science courses, blacks admitted to medical school had a grade point average (GPA) of 3.09, whites, 3.58. The average GPA of whites who were rejected was 3.28, higher than the GPA of admitted blacks. *Id.*

³⁴ *Id.* at 17.

³⁵ *Calculating the Impact of a Rollback of Affirmative Action on the Nation's Major MBA Programs*, 18 J. BLACKS HIGHER EDUC. 6 (Winter 1997/1998) [hereinafter *Calculating the Impact*]. In 1994-95, only 422 black students in the whole country scored over 600, while 22,429 whites did. *Id.* at 6-7. In the same year, only thirty-three blacks scored over 700, while 3238 whites did. *Id.* at 7-8.

In 1960, before affirmative action, blacks were less than 2% of all executives, managers, and administrators; now they comprise 7.2%. *Id.* at 9.

³⁶ *Id.* at 8.

³⁷ *Id.*

³⁸ Cross & Slater, *supra* note 28, at 8.

³⁹ *What if Private Universities Were Forced to Abandon Affirmative Action*, 28 J. BLACKS HIGHER EDUC. 6, 7 (Summer 2000) [hereinafter *What if Private Universities*].

scores are below those of white applicants.⁴⁰ This outcome has been averted, however, because beginning in the mid-1960s and continuing since then, almost every selective American college and professional school has used race as a factor in admissions decisions to make possible the admission of lower-scoring black students.⁴¹

Now, affirmative action is under attack. It has been prohibited in California by referendum⁴² and by the Regents of the University of California.⁴³ A referendum in the State of Washington has had the same effect.⁴⁴ The decision of the United States Court of Appeals for the Fifth Circuit in *Hopwood v. Texas* (*Hopwood I*) has banned affirmative action in Texas, Louisiana, and Mississippi.⁴⁵ In response, Texas has passed a statute that assures the top 10% of high school graduates admission to the flagship University of Texas at Austin.⁴⁶ In Florida, Governor Jeb Bush has signed an executive order entitled "One Florida" that would prohibit all consideration of race in admission to the University of Florida system and, instead, guarantee admission to college to all students who graduate in the top fifth of their high school classes.⁴⁷ The United States Court of Appeals for the Fourth Circuit has struck down a scholarship program for black students at the Uni-

⁴⁰ *A Nationwide Ban on Race-Sensitive Admissions Would Have a More Serious Impact on African-American Higher Education Than Most People Expect*, 31 J. BLACKS HIGHER EDUC. 14, 14-15 (Spring 2001) [hereinafter *A Nationwide Ban*] ("[A]t all colleges and universities surveyed the average combined SAT score of admitted black students was lower than the average combined score of admitted white students . . . not only at flagship state universities but at second—and third—tier institutions.") (citing ROBERT LENNER & ALTHEA K. NAQAI, CENTER FOR EQUAL OPPORTUNITY, PERVERSIVE PREFERENCES: RACIAL AND ETHNIC DIFFERENCES IN UNDERGRADUATE ADMISSIONS ACROSS THE NATION (2001) (report on file with BOSTON COLLEGE LAW REVIEW until May, 2003)).

⁴¹ See WILLIAM J. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER* 7 (1998) ("[T]he percentage of blacks enrolled in Ivy League colleges rose from 2.3 in 1967 to 6.3 in 1976, while the percentages in other 'prestigious' colleges grew from 1.7 to 4.8. Meanwhile, the proportion of black medical students had climbed to 6.3 percent by 1975 and black law students had increased their share to 4.5 percent.").

⁴² See William Claiborne, *Affirmative Action Ban Is Upheld*, WASH. POST, Apr. 9, 1997, at A1.

⁴³ William Booth, *U. of Calif. Ends Racial Preferences*, WASH. POST, July 21, 1995, at A1.

⁴⁴ See Initiative 200, Proposed Washington State Civil Rights Initiative, at <http://www.secstate.wa.gov/units/text/i200.htm> (last visited Feb. 8, 2002).

⁴⁵ 78 F.3d 934 (5th Cir. 1996). A second *Hopwood* decision, *Hopwood v. Texas*, 236 F.3d 256 (5th Cir. 2000) (*Hopwood II*), that moderated the Fifth Circuit's ruling in *Hopwood I*, has had little discernible effect in reviving affirmative action in that Circuit. See *Hopwood II*, 236 F.3d at 267-77 (summarizing the differences between *Hopwood I* and *Hopwood II*).

⁴⁶ See *infra* Part I.D.1.

⁴⁷ See Mark Hollis, *Lawmakers Hope to Revive Rage Against One Florida*, ORLANDO SENTINEL, June 19, 2000, at C3; Clarence Page, *Jeb Bush Plan for Colleges Offers Good Solutions*, ORLANDO SENTINEL, Nov. 30, 1999, at A13.

versity of Maryland.⁴⁸ In the United States Court of Appeals for the Sixth Circuit, two anti-affirmative action suits have been brought against the University of Michigan.⁴⁹ In one, the University's position has been upheld in a trial court;⁵⁰ in the other, against the law school, the University's affirmative action plan has been struck down.⁵¹ The cases were heard before the Sixth Circuit en banc on December 17, 2001. The United States Court of Appeals for the Eleventh Circuit has held the University of Georgia's affirmative action program unconstitutional because it "mechanically awards an arbitrary 'diversity' bonus to each and every non-white applicant . . . and severely limits the range of other factors relevant to diversity. . . ."⁵² Although cases until now have involved only state universities covered by the Fourteenth Amendment prohibition of state action that denies equal protection of the laws, private universities may be similarly affected.⁵³ Title VI of the 1964 Civil Rights Act and other civil rights laws impose the same obligation on all institutions that receive federal funds.⁵⁴ All selective colleges and universities, private and public, receive federal funds, but a recent Supreme Court decision casts doubt on whether an individual would have the right to file a private suit against a school.⁵⁵

⁴⁸ See *Podberesky v. Kirwan*, 38 F.3d 147, 151 (4th Cir. 1994).

⁴⁹ See *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rev'd*, 247 F.3d 631 (6th Cir. 2001); *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *aff'd*, 135 F. Supp. 2d 790 (E.D. Mich. 2001).

⁵⁰ See *Gratz*, 122 F. Supp. 2d at 814 (striking down the University policy from 1995 to 1998, but upholding its 1999-2000 policy as a legitimate means to achieve diversity); *Gratz*, 135 F. Supp. 2d at 802 (rejecting argument that 1995 to 1998 policy remedied past or present discrimination).

⁵¹ See *Grutter*, 137 F. Supp. 2d at 872 (holding that the law school's use of race as a factor violated Title VI of the 1964 Civil Rights Act, that diversity of the student body was not a compelling state interest and not narrowly tailored, and that the law school could not claim that remedying societal discrimination is a compelling state interest); *Grutter*, 247 F.3d at 633 (granting stay of injunction pending expedited appeal because the district court's interpretation of *Bakke* diverged from other courts' interpretations, including the *Gratz* decision).

⁵² *Johnson v. Bd. of Regents*, 263 F.3d 1234, 1237 (11th Cir. 2001).

⁵³ See, e.g., *id.* at 1237 (basing the decision on a violation of Fourteenth Amendment's Equal Protection clause, but noting that the University also violated Title VI); *Grutter*, 137 F. Supp. 2d at 872 (same).

⁵⁴ See Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000(d) (1994) (covering non-state actors who receive federal funds); see also *Id.* § 1981 (granting all persons within the United States the same right to make and enforce contracts as that enjoyed by white citizens; no state action is required). Title VI and the Equal Protection clause are coterminous. See *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 589-90 (1983); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978).

⁵⁵ See *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001) (holding that individuals have no private right of action to enforce regulations that prohibited discriminatory im-

B. *Why the Score Gap?*

If universities knew the cause or causes of the score gap, they, or society, might address those causes instead of instituting affirmative action. Unhappily, although there are many theories, the source of the discrepancy remains a matter of much research and writing, but little certainty. The *Journal of Blacks in Higher Education* explains that "[b]lack students, for a host of reasons, are not as well prepared as white students to take the SAT."⁵⁶ Some have attributed the racial test score gap to environmental causes, primarily poverty, segregation, and unequal funding of black and white schools. These explanations have become less persuasive. As the four decades since *Brown v. Board of Education*⁵⁷ have witnessed a slow but steady rise in black income and net worth, an end to legally required school segregation, and a closing of the gap in funding for black and white students and schools, a score gap between the races has persisted. After some decrease since the 1970s, there has been a modest increase in the size of the gap in recent years.⁵⁸ Other observers rely primarily on "self-generated" factors, but they have been equally unpersuasive. They attribute blacks' low test scores to a "culture of poverty," an overwhelming number of single-parent black households, and innate (read, "genetic") differences between the races.⁵⁹ The first account does little to explain the considerable gap between the lower scores of children of affluent black parents and the higher scores of children of low-income white parents. The second has been weakened significantly by a recent study which, after "control[ling for] a mother's family background, test scores, and years of schooling," demonstrates that "whether she is married has even less effect on her children's test scores than whether she is poor."⁶⁰ A number of other studies also lead to no clear conclusions.⁶¹

Within the last twenty years, the most influential commentary on the subject of the racial test score gap has combined elements of ear-

pact of conduct by federal funding recipients, because implementing statute only prohibited intentional discrimination in federal programs).

⁵⁶ See *Why There Has Been No Progress*, *supra* note 24, at 9.

⁵⁷ 347 U.S. 483 (1954).

⁵⁸ See Jencks & Phillips, *supra* note 22, at 9.

⁵⁹ *Id.* at 10 ("In the 1960s and 1970s, many conservatives blamed blacks' problems on a culture of poverty that rejected school achievement, the work ethic, and the two-parent family in favor of instant gratification and episodic violence.").

⁶⁰ *Id.*

⁶¹ *Id.* Jencks and Phillips summarize related research as well, but those studies yield no definitive conclusions. See *id.* at 16-20.

lier theories, focusing both on environmental factors and on self-generated factors. In 1986, Nigerian anthropologist John Ogbu co-authored a study suggesting that "because blacks had such limited opportunities in America, they developed an 'oppositional' culture that equated academic success with 'acting white.'"⁶² According to Ogbu, black children, and especially teenagers, are encouraged to shun academic pursuits, lest they lose the respect of their peers.⁶³ This theory and others like it, which tie a cultural account to a history of oppression, have found considerable support.⁶⁴ Similarly, the American Psychological Association points out that all over the world "children of caste-like minorities do not have 'effort optimism,' i.e., the conviction that hard work (especially hard schoolwork) and serious commitment on their part will actually be rewarded. As a result, they ignore or reject the forms of learning that are offered in school."⁶⁵

Stanford psychologist Claude Steele has proposed another theory that has been persuasive in many quarters. Steele wrote in 1998, "African-American students know that any faltering could cause them to be seen through the lens of a negative racial stereotype. Those whose self-regard is predicated on high achievement—usually the stronger, more confident students—may feel this pressure so greatly that it disrupts and undermines their test performance."⁶⁶

⁶² *Id.* at 9. Other commentators recognize similar effects. According to Elijah Anderson:

To accept the school would be to give in and act white, to give up the value of the street for some other thing. And the value of that other thing has not been sufficiently explained. . . . In fact, the code of the street, and by extension the oppositional culture, competes very effectively with traditional values. . . . Alienated black students take on the oppositional role so effectively that they often become models for other disaffected students.

ELIJAH ANDERSON, *CODE OF THE STREET* 97 (1999); see also WILLIAM JULIUS WILSON, *WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR* 72 (1996).

⁶³ See BOWEN & BOK, *supra* note 41, at 84.

⁶⁴ See Jencks & Phillips, *supra* note 22, at 11.

⁶⁵ *Explaining the Gap in Black-White Scores on IQ and College Admissions Tests*, 18 J. BLACKS HIGHER EDUC. 94, 96 (Winter 1997/1998) [hereinafter *Explaining the Gap*] (article adapted from AMERICAN PSYCHOLOGICAL ASSOCIATION, TASK FORCE REPORT (1996) (chaired by Ulric Neisser of Emory University)).

⁶⁶ Claude M. Steele & Joshua Aronson, *Stereotype Threat and the Test Performance of Academically Successful African Americans*, in *TEST SCORE GAP*, *supra* note 22, at 402; see also Claude Steele, *A Threat in the Air: How Stereotypes Shape Intellectual Identity and Performance*, 52 AM. PSYCHOLOGIST 613, 614 (1997). But cf. RICHARD HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1995) (exploring ways that low intelligence, independent of social, economic, or ethnic background lies at the root of social problems in the United States).

By far the most contentious debate in contemporary test score-gap discussions concerns heredity: Is there a genetic basis for blacks' comparatively low performance? Some argue that because there is a genetic factor in variations among whites in IQ scores, genetics must play a part in causing black scores to be lower than those of whites.⁶⁷ In *The Bell Curve: Intelligence and Class Structure in American Life*, Richard J. Herrnstein and Charles Murray argue that intelligence is heritable, basing their conclusions principally upon tests of identical twins as well as transracial adoption studies.⁶⁸ *The Bell Curve* has been severely criticized in, among other places, a volume devoted to that purpose, *The Bell Curve Wars*.⁶⁹ One scholar of the subject, Richard E. Nisbett, has concluded that "[d]espite the assertions of some scholars, including Herrnstein and Murray, a review of the evidence . . . provides almost no support for genetic explanations of the IQ difference between blacks and whites."⁷⁰

For me, the most persuasive studies are based on the hypothesis that if race determines IQ, and whites supposedly are innately more intelligent than blacks, then blacks with a greater proportion of European ancestry should have higher test scores. That should be true unless it were asserted that a single drop of black ancestry creates a disposition to be less intelligent than one would be if of completely white heritage. As one study recognized, however, perhaps 30% of the black American gene pool comes from European ancestors.⁷¹ Yet, after determining ancestry by appearance, blood tests, and family history, it was found that African-Americans with a greater degree of European ancestry did not score any higher on IQ tests than those with less.⁷²

Although there is no clear explanation for the test results, they suggest that, in combination, different elements of environment play a large role: quality of schooling, unequal treatment by teachers, weak or complete absence of educational support at home, parents' educa-

⁶⁷ See Richard E. Nisbett, *Race, Genetics, and IQ*, in TEST SCORE GAP, *supra* note 22, at 86-90. There also are studies of German children born to American soldiers in Germany that offer little or no support for the genetic explanation. One such study reports that among several hundred children fathered by American soldiers in Germany, those fathered by black G.I.s had an average IQ of 96.5, whereas those fathered by white G.I.s had an average IQ of 97. See *id.* at 91.

⁶⁸ See HERRNSTEIN & MURRAY, *supra* note 66, at 105-10, 309-11.

⁶⁹ See *generally* THE BELL CURVE WARS (Steven Fraser ed., 1995).

⁷⁰ Nisbett, *supra* note 67, at 89.

⁷¹ See *id.* at 88.

⁷² See *id.* at 89-91.

tional attainment, low household income, peer pressure, "stereotype vulnerability," inadequate preparation for the SAT in the curriculum, segregated living and schooling conditions, and inadequate support from guidance counselors. Together, all or some of these factors may be more virulent than any single one in isolation.

Without knowing the causes, the country nevertheless must confront the questions of justice that would persist if the best schools were to exclude all but a few black applicants and educate nearly all-white classes to live in a society that would remain as racially stratified as it is today. And the country should consider the quality of life that such a condition would promote for blacks as well as whites.

C. *The Disputed Role of Standardized Testing*

Without affirmative action, standardized test scores would be decisive in keeping black admissions at a low level. Test supporters justify them on various grounds. Wide differences in high school and college quality, grade inflation, and applicants' different courses of study make grades alone an unreliable basis for comparing students from different institutions. Test proponents claim the tests factor out such variables and predict academic performance.

But, even supporters of standardized tests do not claim that they predict with pinpoint accuracy. Students whose scores are a modest number of points apart may do just as well in the classroom, or beyond, and the one who scores lowest may, following admission, do better than the highest scorer. Several years ago at Columbia Law School, the top student in the graduating class two years in a row had been admitted from the wait list, as was the editor-in-chief of the *Law Review* in another year. Recently, a student who was admitted from the wait list the day before classes commenced later became a Supreme Court law clerk.⁷³ Students admitted from the wait list often rank higher in their classes than those who had been admitted before them,⁷⁴ which indicates that at least within the range of students whose scores are high enough to be wait-listed, the tests are not very discriminating.

Test opponents point out that the tests do not identify qualities important for the education the test takers seek, or accurately predict

⁷³ Confidential source.

⁷⁴ *Id.*

success after graduation.⁷⁵ Additionally, they contend that tests are biased against poor people and minorities, that black students are so tense in testing situations that they do not display their true abilities, and that test results are manipulable through expensive test preparation courses, which blacks are less likely to attend than whites, giving white students an unfair advantage.⁷⁶ In response, the testing organizations claim that test preparation courses do not affect scores to any material extent, but the tutoring organizations disagree.⁷⁷

Grades and scores together predict performance better than tests alone. Tests predict performance only for the first year of school, when students typically take the same courses, thereby making scores comparable.⁷⁸ At law schools, test scores correlate at the rate of 0.41 or at best 0.50 with first year grades.⁷⁹ But, they do not purport to predict performance for subsequent years, or how competent or successful a student will become after graduation.⁸⁰

⁷⁵ See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 969 (1996).

⁷⁶ See *id.* at 991; Tony Schwartz, *The Test Under Stress*, N.Y. TIMES, Jan. 10, 1999, § 6 (Magazine), at 30. On black students feeling tense during tests, see generally Steele & Aronson, *supra* note 66.

⁷⁷ A study by the Law School Admissions Council reports that for the 1996-97 academic year, 28.03% of black and 31.31% of white test takers took such courses. See ANDREA E. THORNTON ET AL., LAW SCHOOL ADMISSIONS COUNCIL, LSAT TECHNICAL REPORT 97-02: SUMMARY OF SELF REPORTED METHODS OF TEST PREPARATION BY LSAT TAKERS FOR TESTING YEARS 1991-1997, at 11 tbl.13 (1998). Course takers average score was less than a point higher than that of those who did not. See *id.* at 17 tbl.25. Tutoring companies argue that such studies lump together one-day cram courses with much more extensive preparation. See Schwartz, *supra* note 76, § 6, at 30. SAT tutoring companies, meanwhile, claim that some students raise their scores up to 100 points in lengthier courses costing up to \$175 an hour. See *id.* Some tutors charge over \$400 per hour. For some students, tutoring throughout high school has cost \$25,000. See *id.*

⁷⁸ See Edward G. Haggarty, *LSAT: Uses and Misuses*, 70 N.Y. ST. BAR. J. 45, 45 (May/June 1998).

⁷⁹ LAW SCHOOL ADMISSIONS COUNCIL, LSAT & LSDAS REGISTRATION & INFORMATION BOOK 121 (2002) ("Correlation is stated as a coefficient for which 1.00 indicates an exact correspondence between candidates' test scores and subsequent law school performance. . . . The closer to 1.00 the correlation coefficient is, the greater the test's predictive validity. . . . The correlation between LSAT scores and first-year grades varies from one law school to another. . . . During 2000, validity studies were conducted for 183 law schools. Correlations between LSAT scores ranged from .13 to .62 (median is .41). Correlations between LSAT scores combined with undergraduate grade-point averages and first-year law school grades ranged from .26 to .67 (median is .50).").

⁸⁰ Bowen and Bok present a wealth of evidence on the income of former affirmative action students. See BOWEN & BOK, *supra* note 41, at 122-28, 362-74; see also DAVID B. WILKINS & ELIZABETH CHAMBLISS, HARVARD LAW SCHOOL BLACK ALUMNI SURVEY, PRELIMINARY REPORT 1-22 (Sept. 2000). For information on former affirmative action students at Michigan Law School, see David L. Chambers et al., *Doing Well and Doing Good, The Careers*

Some, but not most, students admitted by affirmative action graduate with grades as good as or better than those of whites with higher test scores.⁸¹ It is not clear, however, that failure of tests to predict accurately downgrades the evaluation of black applicants disparately. Opponents of affirmative action cite studies showing that the tests over-predict for blacks, i.e., that they generally do not perform in school as well as their scores forecast.⁸² Moreover, opponents argue, the tests are not economically biased; black students from families with incomes between \$80,000 and \$100,000 have mean SAT scores lower than those of whites from families with incomes under \$10,000.⁸³

Even though the predictive value of the tests is flawed, schools continue to use them.⁸⁴ The tests move the admissions process along quickly. Without them, college admissions officers would have to assess the predictive value of grades by quality of education (which varies by school and courses taken) and by the relative strengths of individual students' high school programs. Such a system would burden a college or professional school with five, ten, or even twenty thousand applicants.

Nevertheless, despite what they like about the standardized tests, most schools ignore or discount them at times. When I sat in on ad-

of Minority and White Graduates of the University of Michigan Law School 1970-1996, 42 L. QUADRANGLE NOTES 61, 62 (1999).

⁸¹ Hugh Price, current president of the National Urban League, former vice-president of the Rockefeller Foundation, and former member of the editorial board of *The New York Times*, was admitted to Yale Law School with LSAT scores about 200 points below those of his average white classmate, and graduated at the lower end of the middle third of his class. There were only seven blacks in his class, which indicates that in law school he performed better than about a third of his white classmates whose scores were far better than his. See Hugh Price, Speech to the Commonwealth Club of California (Feb. 10, 1995), in COMMONWEALTH, Feb. 1995, at 1, 4.

⁸² See Charles L. Finke, *Affirmative Action in Law School Academic Support Programs*, 39 J. LEGAL EDUC. 55, 66 n.22 (1989) (observing that blacks do not perform as predicted and that the tests "over-predict"). A recent study of the predictive capacity of the SAT concludes that "high school class rank and SAT scores were very accurate predictors of which students would graduate with honors at a group of several private liberal arts colleges" and that "using a large sample of institutions and students . . . high school grades and SAT scores are good predictors of both freshman GPA and individual freshman course grades." L. Scott Miller, *Promoting High Academic Achievement Among Non-Asian Minorities*, in PROMISE AND DILEMMA: PERSPECTIVES ON RACIAL DIVERSITY AND HIGHER EDUCATION 47, 54 (Eugene Y. Lowe, Jr. ed., 1999).

⁸³ See *Why Family Income Differences Don't Explain the Racial Gap in SAT Scores*, 20 J. BLACKS HIGHER EDUC. 6 (Summer 1998).

⁸⁴ See Cross & Slater, *supra* note 28, at 12.

missions committee meetings as Dean of Columbia College,⁸⁵ I observed that committee members, not always articulating the reasons, voted mainly on the basis of the official criteria. But, sometimes they departed from numerical standards to favor, for example, an applicant from a poverty-stricken family, a Vietnamese boat person, or someone who had escaped from a war-torn region, by recognizing the importance of having overcome hardship, or by a desire to promote social equality. Geographic diversity also was a factor. A Wyoming resident applying to Columbia or any other East Coast school, in the all-other-things-being-equal situation, would have an advantage over someone from the region in which the school is located.

Many schools admit children of alumni ("legacies") or applicants from rich or famous families over others with better academic credentials.⁸⁶ For an extremely rich and generous donor, a school may even favor the children of his friends.⁸⁷ Ivy League colleges admit legacies at rates higher than the rates at which other applicants are admitted, ranging from more than double (Harvard, Yale, Princeton) to 20% (Cornell).⁸⁸ In recent years, legacy admits at Harvard had average SAT scores thirty-five points below those of non-legacies, lower grade point averages, and fewer extracurricular activities in high school than other admitted students.⁸⁹ George W. Bush's college board scores (leaked by Yale students during the 2000 presidential campaign and reprinted in *The New Yorker*) were 566 verbal and 640 math.⁹⁰ The median scores for students admitted to his class, as published in his Yale class's twenty-fifth reunion book, were 668 verbal and 718 math.⁹¹ His father, the forty-first president of the United States, and grandfa-

⁸⁵ I was dean from 1989 to 1993.

⁸⁶ See *Naked Hypocrisy: The Nationwide System of Affirmative Action for Whites*, 18 J. BLACKS HIGHER EDUC. 40, 40-43 (Winter 1997/1998) [hereinafter *Naked Hypocrisy*].

⁸⁷ See, e.g., Ralph Frammolino et al., *UCLA Eased Entry Rules for the Rich, Well-Connected*, L.A. TIMES, Mar. 21, 1996, at A1 (stating that the UCLA chancellor and others often gave preference to friends and relatives of donors).

⁸⁸ *Naked Hypocrisy*, *supra* note 86, at 40.

⁸⁹ *Id.* at 41-42. At Harvard University, there were 264 legacies in 1997; at Cornell, 1150. *Id.* at 41. Schools usually will not reveal the numbers or names of students admitted because of affluence or celebrity of parents, although occasionally it leaks out. Additionally, to endear themselves to alumni, schools often will make public the number of alumni children whom they admit.

⁹⁰ Jane Mayer & Alexandra Robbins, *Dept. of Aptitude—How George W. Made the Grade*, NEW YORKER, Nov. 8, 1999, at 30.

⁹¹ See Nicholas D. Kristof, *The Campaign 2000: The Cheerleader; Earning A's in People Skills at Andover*, N.Y. TIMES, June 10, 2000, at A1. The article continues: "So if his father and grandfather had not been stars at Yale, and his grandfather had not been a Yale trustee, George almost certainly would have ended up at Texas." *Id.*

ther, a United States senator and Yale trustee, were Yale graduates. The reason legacies are favored, of course, is that schools look to their alumni for financial support. For example, when Columbia, in the 1960s, eliminated preference for legacies, alumni contributions fell drastically. Columbia soon returned to the prior policy.⁹² This tilt in favor of alumni, who attended school when few or no blacks did, is also a tilt towards whiteness, and will continue to be until the children of affirmative action students start applying in substantial numbers.

Preferences based on wealth and influence are covert. A 1996 study in the *Los Angeles Times* revealed preferences in admission to the University of California at Los Angeles (UCLA) accorded to children of politicians, donors, alumni, and celebrities, often processed through the office of the chancellor or the fund-raising department.⁹³ The article stated that the Chancellor admitted the son of an Arab sheik after the admissions office decided he was unqualified and the child of a movie producer after he agreed to give the university \$175,000 over five years.⁹⁴ Some schools also extend preference to children of their faculty and of some scholars as an incentive to join the faculty.

In *Regents of the University of California v. Bakke*,⁹⁵ the Supreme Court had never been informed that U.C. Davis's Dean personally admitted about a half-dozen applicants each year, including children of rich and influential physicians who had been rejected or wait-listed by the office of admissions.⁹⁶ Allan Bakke challenged U.C. Davis's affirmative action program on the ground that it denied him a place in the incoming class; the identical criticism could have been made of the Dean's special admissions program.⁹⁷

⁹² I learned this as Dean of Columbia College.

⁹³ See Frammolino, *supra* note 87, at A1.

⁹⁴ *Id.*

⁹⁵ 438 U.S. 265 (1978).

⁹⁶ JOEL DREYFUS & CHARLES LAWRENCE III, *THE BAKKE CASE: THE POLITICS OF INEQUALITY* 23-24 (1979).

⁹⁷ There is a basis in human rights theory for arguing that discrimination on economic grounds is prohibited. The International Covenant on Civil and Political Rights, which also is a compendium of widely accepted fundamental rights, prohibits discrimination on the basis of wealth. It provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as . . . social origin, property, birth. . . ." International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 26, 999 U.N.T.S. 171 (emphasis supplied). The United States has ratified the Covenant and pursuant to it might prohibit favoritism for legacies and children of wealthy parents. See COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, EXEC. REP. NO. 102-23, at 19 (1992). But the United States has declared that the Covenant is not self-enforcing. See *id.* Moreover, the United States takes the

D. Returns on the Prohibition of Affirmative Action

Nathan Glazer, one of the earliest opponents of affirmative action in higher education, now favors it for black students (although, apparently, not other minorities).⁹⁸ He observes that "[o]ne way or another, the commitment to enrolling more blacks than would qualify based on academic criteria alone will be pursued."⁹⁹ He has so far been right for some of the states where affirmative action has been prohibited. While referenda, court decisions, and executive orders have prohibited affirmative action in Texas, Florida, and California, those states have nevertheless struggled to keep a substantial black and Hispanic presence in their public universities.¹⁰⁰ To that end, Texas and Florida have changed the rules at the undergraduate level to guarantee admission to their university systems to a fixed percentage of the top students in each high school based on rank in class.¹⁰¹ Since these states have many tightly segregated residential areas and schools, this system allows the creation of classes with substantial numbers of black students. In addition, all three states also have incorporated subjective, non-quantified factors into admission standards by statute or by rules adopted by the schools that can ease admission of blacks in several ways.¹⁰² First, blacks may be disproportionately numerous among applicants with the favored characteristics. Second, some of the factors are impressionistic and difficult to challenge in an affirmative action case.

1. Texas

The Texas statute, titled "Automatic Admission: All Institutions," provides that each institution in the higher education system "shall admit an applicant . . . as an undergraduate student if the applicant graduated with a grade point average (GPA) in the top 10% of the student's high school graduating class in one of the two school years" preceding the year for which the applicant is applying for admis-

position that this and other human rights treaties do not bind the states. See *id.* The Supreme Court has held that wealth is not a suspect classification. See *San Antonio v. Rodriguez*, 411 U.S. 1, 20-28 (1973).

⁹⁸ See generally Nathan Glazer, *Should the SAT Account for Race? Yes*, NEW REPUBLIC, Sept. 27, 1999, at 26.

⁹⁹ *Id.*

¹⁰⁰ See *infra* Part I.D.1-3.

¹⁰¹ See *infra* Part I.D.1-3.

¹⁰² See *infra* Part I.D.1-3.

sion.¹⁰³ Because all or mostly black high schools in Texas are widespread, many black high school graduates are eligible for admission to the University of Texas at Austin. Before adoption of the statute, without affirmative action, most black applicants would have been rejected for insufficient test scores. In effect, the Texas law amounts to a redefinition of merit, away from system-wide test scores and towards comparison of students with others who most likely share the same background. The top ten standard amounts to adopting a recommendation of test opponents, that is, to judge by what students have done, not by a test that purports to measure potential.

Texas enacted a second statute to provide for undergraduates not in the top 10%. Titled "Other Admissions," it states that "[b]ecause of changing demographic trends, diversity, and population increases in the state," in addition to academic achievement, schools "shall also consider" any or a combination of "socioeconomic" factors.¹⁰⁴ There follows a list of eighteen factors, including whether the applicant would be in the first generation of his or her family to attend or graduate from an institution of higher education; has "bilingual proficiency;" is from a rural, urban, suburban, or central city area; attended school under a desegregation plan; or is from a family whose income is below poverty level.¹⁰⁵ The law prescribes a personal interview and the evaluation of "other considerations." There is enough elasticity and even suggestiveness in these criteria (the interview, "other considerations," and such words as "bilingual," "central city," "desegregation") to create a student body that could resemble one fashioned by affirmative action.

The new statutes enabled the University of Texas to restore undergraduate black admission numbers to about where they had been before *Hopwood I*.¹⁰⁶ After a sharp decline from 266 in 1996 to 190 in 1997 following *Hopwood I*, black enrollments increased to the pre-

¹⁰³ TEX. EDUC. CODE ANN. § 51.803(a) (Vernon 2002). Of note, Texas A&M University has recently proposed extending the plan to the top 20% of graduates from each of 250 high schools. See Jeffrey Selington, *Critics Blast Plan to Expand Class-Rank Policy in Texas as Affirmative Action Ploy*, CHRON. HIGHER EDUC., Jan. 11, 2002, at 29. Many have criticized the plan, but one of the architects of the 10% plan says he "believes the A&M plan is within the confines of the class-rank law and *Hopwood*." *Id.*

¹⁰⁴ TEX. EDUC. CODE ANN. § 51.805(b) (Vernon 2002).

¹⁰⁵ *Id.*

¹⁰⁶ See *infra* app. A (statistics for 1995-1996).

Hopwood I level of 286 in 1999 and then decreased to 242 in 2001.¹⁰⁷ Following two years of the 10% rule, the University reported that top ten-percenters outperformed their classmates at every SAT level and had a better retention rate.¹⁰⁸ The 10% rule has resulted in admission to the University of Texas at Austin of many students, not merely blacks, from areas where students had not traditionally been admitted. But, some observers in Texas believe that during the first years of the program students from the least effective high schools had not taken advantage of the 10% rule and that in the future the performance level may fall.

The automatic admission standards do not apply to professional schools, which admit students from all over the United States and from abroad. It is difficult to imagine how a 10% rule would work at that level to achieve an integrated student body. The law school bulletin informs applicants that "[n]o decisions will be made on numerical criteria alone."¹⁰⁹ One of the goals of the admissions process is "to identify those students with the greatest probability of success in law school, giving due weight to proven predictors (LSAT, GPA, undergraduate school and major, but also giving appropriate weight to all other factors)."¹¹⁰ The law school seeks to discover students with commitment to public service and leadership, with the background, experience, and other qualities likely to be of value in the classroom, and to provide a service to the state by educating citizens from under-

¹⁰⁷ See *infra* app. A; see also Office of Institutional Studies, Univ. of Tex. at Austin, Fall Enrollment of New Students by Group and Ethnicity, at <http://www.utexas.edu/academic/ois/stathb.00-01/students/s12b/s12b.html> (last visited Mar. 21, 2002).

¹⁰⁸ GARY M. LAVERGNE & DR. BRUCE WALKER, IMPLEMENTATION AND RESULTS OF THE TEXAS AUTOMATIC ADMISSIONS LAW (HB 588) AT THE UNIVERSITY OF TEXAS AT AUSTIN, REPORT NUMBER 4, DEMOGRAPHIC ANALYSIS, FALL 2001, ACADEMIC PERFORMANCE AND PERSISTENCE OF TOP TEN PERCENT STUDENTS, ACADEMIC YEARS 1996-2000, available at <http://www.utexas.edu/student/research/reports/admissions/HB588-report4.htm> (last visited Feb. 19, 2002) ("Top 10% students perform about as well as their non-top 10% classmates with SAT scores about 200-300 points higher. This is true in all colleges and for all racial/ethnic groups."); see also DR. BRUCE WALKER, IMPLEMENTATION AND RESULTS OF HB 588 AT UNIVERSITY OF TEXAS AT AUSTIN, PRELIMINARY REPORT NUMBER 2, ACADEMIC PERFORMANCE AND PERSISTENCE OF TOP 10 PERCENT STUDENTS, ACADEMIC YEAR, 1998-99, UNIVERSITY OF TEXAS AT AUSTIN NEWS, OFFICE OF PUBLIC AFFAIRS, Oct. 19, 2000, available at <http://www.utexas.edu/student/research/reports/admissions/top10.html> (last visited Apr. 17, 2001) ("Top 10 percent students at every level of the SAT earn grade point averages that exceed those of non-top 10 percent students having SAT scores that are 200 to 300 points higher.").

¹⁰⁹ UNIVERSITY OF TEXAS LAW SCHOOL BULLETIN 30 (2002), available at <http://www.utexas.edu/law/depts/admissions/UTLAWbul.pdf> (visited Mar. 1, 2002) [hereinafter TEXAS LAW SCHOOL BULLETIN].

¹¹⁰ See LAVERGNE & WALKER, *supra* note 108.

represented regions of the state and disadvantaged socio-economic backgrounds.¹¹¹ Its new criteria include "history of overcoming economic or other disadvantage," "personal experiences with discrimination," and "diversity of experience and background."¹¹² Black students can do as well as white students with these standards, and with regard to some of them (for example, experiences with discrimination), better.¹¹³

But, black law school enrollment is now well under what it was pre-*Hopwood I*. University of Texas Law School had enrolled twenty to forty African-Americans each year.¹¹⁴ Following *Hopwood I*, for the class entering in 1997, the law school offered admission to eleven black students; four enrolled.¹¹⁵ In 1998, black enrollment rose to nine. By 2000, the number of blacks enrolled for the first year increased to seventeen.¹¹⁶ In the fall of 2001, the number of entering black students dropped to sixteen.¹¹⁷

In 1996, pre-*Hopwood I*, one black medical student entered the University of Texas Health Science Center at San Antonio. In 2000, five enrolled. At the University of Texas Southwestern Medical Center in 1996 there were eight. In 2000, the number had risen to thirteen.¹¹⁸ These are shockingly small numbers.

2. California

At the University of California, the prohibition of affirmative action produced strikingly poor black enrollment at some schools.¹¹⁹ Overall, in 2000 and 2001, the number of black students enrolling for the first time at the university's undergraduate colleges stabilized at about 20% below the level at which it had been under affirmative ac-

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *infra* app. A. In 1996, there were twenty-nine African-Americans at the Center. For a more complete history of enrollment figures at the University of Texas at Austin, see THE UNIVERSITY OF TEXAS AT AUSTIN, OFFICE OF INSTITUTIONAL STUDIES, FALL ENROLLMENT OF NEW STUDENTS BY GROUP AND ETHNICITY, FALL AND SUMMER ENTRANTS COMBINED NUMBER DISTRIBUTION, at <http://www.utexas.edu/academic/ois/stathb.01-02/students/s12a/s12a.html> (last visited Mar. 30, 2002).

¹¹⁵ See *infra* app. A.

¹¹⁶ *Infra* app. A.

¹¹⁷ *Infra* app. A.

¹¹⁸ *Infra* app. A.

¹¹⁹ California has operated under a top 4% plan, but it has not led to an increase in the presence of minorities in California colleges. See *infra* notes 131-141.

tion.¹²⁰ But, that statistic masked the even greater decline of black enrollments at the more prestigious colleges and their rise at the less selective ones. Admissions criteria at University of California campuses are once again undergoing revision. In November 2001, the Regents of the University of California approved a modified selection process for freshmen admissions, known as "comprehensive review."¹²¹ The new system replaces the previous "two-tiered" process, by which the campuses were required to admit 50% to 75% of their freshmen based solely on academic factors.¹²² The full freshman class will now be selected by using fourteen selection criteria—ten academic and four supplemental—that include characteristics such as "special talents, unusual intellectual or leadership skills, and accomplishments in the face of personal challenges."¹²³

Moreover, the Regents have approved a "dual admissions" plan, but it is being held up by budgetary constraints.¹²⁴ Under this system, the University will continue to guarantee admission to the top 4% of each of the state's high school's graduating classes, based on grades alone.¹²⁵ In addition, Californians who graduate with grades that place them in the top 4% to 12.5% of their high school classes will be assured of a place at one of the University's eight campuses, although some will first have to complete their freshman and sophomore years at community college with satisfactory grades.¹²⁶ University spokespersons estimate that the new policy will produce 1000 new community college transfers in its first year, and 3500 per year thereafter.¹²⁷ They believe that 36% of the students admitted under the program will be African-American, Latino, or American Indian, up from the 18.6%

¹²⁰ See app. B, tbl.4. In 1997, 920 black undergraduates enrolled. In 2000, 728—or somewhat over 79%—enrolled. See *id.*

¹²¹ Office of the President News Room, Regents Approve Comprehensive Review in UC Freshman Admissions, at <http://www.ucop.edu/news/archives/2001/nov15art1.htm> (Nov. 15, 2001).

¹²² *Id.*

¹²³ *Id.* For a list of the new criteria, see University of California, Introducing the University, Freshman Selection, at <http://www.ucop.edu/news/archives/2001/nov15art1.htm> (last visited Mar. 20, 2002).

¹²⁴ See generally Office of the President News Room, Regents Approve "Dual Admissions" Plan, at <http://www.ucop.edu/news/archives/2001/july19art2.htm> (dated July 19, 2001, updated Sept. 18, 2001) [hereinafter Office of the President].

¹²⁵ See *id.*; see also Rebecca Trounson, *Regents Consider Plan to Widen Diversity*, L.A. TIMES, July 19, 2001, at 10.

¹²⁶ See generally Office of the President, *supra* note 124; see also Office of Strategic Communications, Facts About the University of California (2001), at <http://www.ucop.edu/news/factsheets/2001/admissionsoverview.pdf> (last visited Mar. 20, 2002).

¹²⁷ Trounson, *supra* note 125, at 10.

admitted system-wide for the freshman class entering in fall 2001.¹²⁸ Low-income and rural students are likely to benefit also.¹²⁹

Finally, University President Richard C. Atkinson has proposed that admission to the California system no longer require students to take the SAT I, but would continue requiring submission of SAT II scores, until new subject area tests could be developed.¹³⁰ The University of California faculty's Board of Admissions and Relations with Schools (BOARS) has released preliminary recommendations that support eliminating the use of the SAT I and call for a new testing array, similar to subject matter achievement tests.¹³¹

University-wide, 920 African-Americans enrolled as college freshmen in 1997.¹³² That number fell to 739 in 1998.¹³³ In 2000, it was 728.¹³⁴ At U.C. Berkeley, the most selective of the colleges, freshman black enrollment went from 252 in 1997 to 122 in 1998.¹³⁵ And from 144 in 2000 to 138 in 2001.¹³⁶ At UCLA, black enrollment fell from 204 in 1997 to 138 in 1998.¹³⁷ In 2000, 146 blacks enrolled but that number fell to 125 in 2001.¹³⁸ But, at less selective U.C. Riverside, the trend was in the other direction: ninety-seven in 1997, 133 in 2000.¹³⁹ U.C. Irvine, which also is not very selective, increased black enrollment over the same three-year period from fifty to seventy-four.¹⁴⁰ U.C. Davis went from ninety-three in 1999 to fifty in 2000.¹⁴¹ At other schools, there were relatively small differences from the previous year.¹⁴²

The top 12.5% plan, although not affirmative action in the sense that term ordinarily is used, will admit some of the best students from ghetto schools without test scores that would have been required un-

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Richard C. Atkinson, *Standardized Tests and Access to American Universities*, at <http://www.ucop.edu/news/sat/speech1.html> (Feb. 18, 2001).

¹³¹ Board of Admissions and Relations with Schools, *The Use of Admissions Tests by the University of California 16-18*, at <http://www.ucop.edu/news/sat/boars.pdf> (last visited Mar. 20, 2002).

¹³² See *infra* app. B, tbl.4.

¹³³ See *infra* app. B, tbl.4.

¹³⁴ See *infra* app. B, tbl.4.

¹³⁵ See *infra* app. B, tbl.4.

¹³⁶ See *infra* app. B, tbl.4.

¹³⁷ See *infra* app. B, tbl.4.

¹³⁸ See *infra* app. B, tbl.4.

¹³⁹ See *infra* app. B, tbl.4.

¹⁴⁰ See *infra* app. B, tbl.4.

¹⁴¹ See *infra* app. B, tbl.4.

¹⁴² See *infra* app. B, tbl.4.

der the old standards. Some whites who would have been admitted under those standards will be rejected unless something is done to protect them, which the plan proposes to do by expanding its total enrollment.¹⁴³ By doing so, the school can continue to offer about as many places to non-minorities as before the top 12.5% plan went into effect.

Trends have been similar in the University of California's professional schools. Boalt Hall, the University of California law school at Berkeley, one of the leading law schools in the country, admitted twenty black students in 1996.¹⁴⁴ In 1997, after affirmative action was prohibited, it enrolled only one, a student admitted a year earlier, who had deferred enrolling. In 2000, it enrolled seven.¹⁴⁵ In 2001, twenty first-year blacks enrolled at University of California medical schools, more than half the pre-abolition total.¹⁴⁶ But, individual schools enrolled blacks in very different proportions of their entering classes. In 1997, U.C. Davis School of Medicine (total annual enrollment ninety-three), enrolled five blacks; in 2000 it enrolled two.¹⁴⁷ At U.C. Irvine, between 1996 and 2000 (total annual enrollment ninety-two), two blacks entered each year, except in 1997, when none entered.¹⁴⁸ U.C. San Francisco (total annual enrollment 141) had eleven black enrollees in 1996 and seven in 2000.¹⁴⁹ At UCLA (total annual enrollment 121), the numbers gradually diminished from ten in 1996 to six in 2000.¹⁵⁰

Affirmative action opponents in California charge that affirmative action is being continued surreptitiously.¹⁵¹

¹⁴³ Karen Arenson, *California Proposal to Improve College Diversity*, N.Y. TIMES, Sept. 22, 2000, at A16.

¹⁴⁴ For statistics on blacks in the University of California Law, Medical, and Business Schools, see app. B.

¹⁴⁵ See *infra* app. B, tbl.1.

¹⁴⁶ University of California, Medical School, at <http://www.ucop.edu/acadadv/damgmt/graddata/mednum2.html> (providing applicants, admits, and first-year class enrollment numbers) (last visited Mar. 21, 2002).

¹⁴⁷ *Infra* app. B, tbl.1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ According to the unsigned website http://www.acusd.edu/~e_cook-vault/medical/sanfrancisco/uscf-med-98.html, while 4% of Asian and white applicants were admitted to U.C.S.F. Medical School in 1998, 10% of black and Hispanic applicants were admitted, and that the probability of that many black and Hispanic acceptances is less than one in four million. The site makes similar claims about U.C. Irvine Medical School for 1999 (1% decrease in black/Hispanic applicants but 250% increase in their acceptances); UCLA Medical School (alleging that even ignoring grades and MCAT scores the probability that

3. Florida

Florida reported that in 2000, under its plan to admit the top 20% of each high school class to college,¹⁵² total black undergraduate enrollment was 6.27%, compared to 5.43% in 1998.¹⁵³ In August 2000, the State University System announced that black enrollment at Florida's "flagships," the University of Florida and Florida State University, had increased 33% and 21% respectively over the previous year.¹⁵⁴ The announcement distinguished Florida from California in that Florida black students did not cascade downwards to the least selective schools.¹⁵⁵ The reason may be that Florida's flagship schools are not nearly as selective as California's.¹⁵⁶

The professional schools do not operate under a top percentage plan. The Florida State University College of Law reported 10.65% black enrollment for 2000.¹⁵⁷ But, to the contrary, black enrollment plunged by about 40% and Hispanic enrollment dipped 7.5% in the first freshman class since the University of Florida discontinued its consideration of race and ethnicity in admissions decisions.¹⁵⁸ Black freshmen went from being 11.8% of the class to 7.2%.¹⁵⁹ The Univer-

42 black/Hispanic applicants could have been admitted among 241 acceptances is .000003); and U.C. Davis Medical School (claiming that black and Hispanic applicants were 12% and received 27% of the acceptances; likelihood of this occurring by chance is less than one in 100 million even if all applicants were equally qualified, but blacks and Hispanics had lower GPAs and MCAT scores). It is not inconceivable that litigation will follow. See U. C. SAN FRANCISCO MEDICAL SCHOOL 1998, ETHNIC PROFILE REPORT, available at http://www.acusd.edu/~e_cook/vault/medical/sanfrancisco/ucsf-med-98.html (last visited Feb. 2, 2002). One article claims that blacks and Hispanics were admitted to California medical schools and the University of Texas Law School in extraordinarily large numbers, given number of applicants and their academic records and test scores. See *The Death of Meritocracy*, LA GRIFFE DU LION, June 2000, available at <http://www.lagriffedulion.f2s.com/prop209.htm>.

¹⁵² See Page, *supra* note 47, at A13.

¹⁵³ Rick Bragg, *Minority Enrollments Up in Florida*, N.Y. TIMES, Aug. 30, 2000, at A18.

¹⁵⁴ *Id.*

¹⁵⁵ One Florida Yields Big Gains in Minority Enrollment, at http://www.myflorida.com/myflorida/government/governo.../one_florida_gains_in_minority.htm (last visited Feb. 4, 2002).

¹⁵⁶ See *Top 50 Public National Universities—Doctoral*, U.S. NEWS & WORLD REP., Sept. 17, 2001, at 107 (ranking U.C. Berkeley at one, UCLA at four; University of Florida at nineteen, and Florida State University at forty-eight); *Best National Universities—Doctoral*, U.S. NEWS & WORLD REP., Sept. 17, 2001, at 106 (ranking U.C. Berkeley at twenty and UCLA at twenty-six; neither Florida university is ranked in the top fifty).

¹⁵⁷ Carrie Miller, *UF's Black Enrollment Plummets*, GAINESVILLE SUN.COM, Sept. 1, 2001, at <http://www.sunone.com/articles/2001-09-01c.shtml>.

¹⁵⁸ See *id.*

¹⁵⁹ See *id.*

sity of Florida Levin College of Law reported that its black enrollment numbers held steady.¹⁶⁰

E. *What Are the Alternatives to Affirmative Action?*

1. Top Percentage Plans

The top percentage plans, in combination with factors like character and experience, have brought diversity to college campuses in Texas and Florida.¹⁶¹ Their ability to facilitate admission of blacks in other states depends on the extent of high school segregation and the educational background of the students. Top percentage plans work for blacks (and Hispanics as well) where there is, ironically, rigid separation in residential areas and schools. Where there are many all or nearly all black high schools, a college that desires diversity but is prohibited from using affirmative action could switch to a system based on class standing, as Texas and Florida have. That would guarantee admission of many black applicants without any mention of race.

But, where high schools are integrated, a top percentage plan would not work. The plan would pass over well-qualified minority students who attend well-funded white or integrated schools. Although some would not be in the top 10% of their own schools, they might be better prepared than someone in the top 10% of an inferior, ghetto school.¹⁶² Under the top 10% plan, top ten-percenters need not constitute the entire entering class. Others can be admitted under standards like the eighteen indicia in the Texas law that include hardship, character, and other personal qualities. The Texas plan has resulted in mean SAT scores declining at the University of Texas at Austin from 1240 in 1996 to below 1220 in 2001.¹⁶³ At the same time, GPAs are up for students at all SAT levels. Fewer whites have been admitted to the Austin campus, stirring resentment. And the number of Asians admitted is up sharply. Furthermore, the plans do not work to integrate graduate and professional schools. The University of California top

¹⁶⁰ See *id.*

¹⁶¹ See *supra* Part I.D.1, 3.

¹⁶² Under a top ten percentage plan, however, minorities from integrated high schools may still be admitted to a flagship college. Top ten percenters need not constitute the entire entering class. Others can be admitted under standards like the eighteen indicia in the Texas law that identify hardship, character, and other qualities. See TEX. EDUC. CODE ANN. § 51.805(b) (Vernon 2002).

¹⁶³ Jim Yardley, *The Ten Percent Solution*, N.Y. TIMES, Apr. 14, 2002, at A1.

percentage plan, coupled with satisfactory performance in junior college, is too new to have elicited much reaction. The University has pledged that students who do well in community college are guaranteed admission to the University system.¹⁶⁴

In addition, the United States Commission on Civil Rights and its chair have criticized the Texas and Florida plans because Florida and Texas have not admitted to college the same proportion of minority students as were admitted under affirmative action.¹⁶⁵ The chair of the Commission has charged that the University of Texas rejects minority students who would have succeeded under affirmative action.¹⁶⁶ In Florida, GPAs of the top 20% of students varied substantially from high school to high school.¹⁶⁷ In some schools, students with a C+ average may be in the top 20%.¹⁶⁸ Elsewhere, someone with a high B would not be in the top 20%.¹⁶⁹ White students are proportionately more numerous in the top fifth and blacks are proportionately under-represented in the top fifth.¹⁷⁰

2. Do Nothing

Opponents of affirmative action say that blacks should, metaphorically, pull up their socks and get about the business of doing as well as whites do on tests. This challenge, they say, will stimulate blacks to score better. If they do not do better, Stephan and Abigail Thernstrom, the leading academic objectors to affirmative action, argue that a student rejected by, say, the University of Texas School of Law,

¹⁶⁴ But students might be wary of how that pledge will be implemented. There may be a stigma attached to being consigned to community college, even as an interim measure, which might discourage students from taking advantage of the opportunity. See *supra* notes 126-127 and accompanying text.

¹⁶⁵ For the full text of the Civil Rights Commission criticism, see UNITED STATES COMMISSION ON CIVIL RIGHTS, TOWARDS AN UNDERSTANDING OF PERCENTAGE PLANS IN HIGHER EDUCATION: ARE THEY EFFECTIVE SUBSTITUTES FOR AFFIRMATIVE ACTION?, available at <http://www.usccr.gov/pubs/percent/stmnt.htm> (last visited April 7, 2002); Mary Francis Berry, *How Percentage Plans Keep Minority Students Out of College*, CHRON. HIGHER EDUC., Aug. 4, 2000, at A8. In 1996 (pre-*Hopwood* II), 65% of Hispanic and 57% of black applicants to the University of Texas were admitted. Berry, *supra*, at A8. In 1999 (under the top percentage plan), the numbers were 56 and 46%, respectively. The admission of white students remained steady at 62%. *Id.*

¹⁶⁶ Berry, *supra* note 165, at A8.

¹⁶⁷ See Jeffrey Selinger, *What States Aren't Saying About the "X-Percent Solution,"* CHRON. HIGHER EDUC., June 2, 2000, at A31.

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ White students are 59% of the high school seniors in Florida, but over 67% of students in the top fifth. Blacks are 23% of high school seniors and 14% of the top fifth. *Id.*

would have "the academic credentials to get into a less competitive institution—fair and square without playing the race card . . . [although] those black students with the weakest grades and scores in the nation would probably be left having to choose another profession."¹⁷¹ They assert that black undergraduates rejected by the University of Michigan could go to Western Michigan University or Wayne State University, which, like most of the three thousand colleges in the country, are not highly selective.¹⁷²

In an admissions regime favored by the Thernstroms, if no provision like a top percentage plan were introduced, black presence at the *U.S. News & World Report* twenty-five highest-ranked colleges, with a combined student body of 50,000 freshman, would fall from 6%, or 3,000 students, to an estimated 2%.¹⁷³ Without affirmative action, in a test score driven regime of admissions, all but a few blacks would attend non-selective colleges and, if they chose to go to professional school, almost all would either be rejected or admitted only to the lowest tier schools.¹⁷⁴ But, it would be almost as difficult for black applicants to enter second and third tier undergraduate schools. At all colleges and universities "the average combined SAT score of admitted black students was lower than the average combined score of ad-

¹⁷¹ STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE* 421 (1997).

¹⁷² *Id.*

¹⁷³ Cross & Slater, *supra* note 28, at 10–11.

¹⁷⁴ *See id.* at 11–12. At highly selective schools a student needs at least 1300 on the SAT (i.e., 650 verbal, 650 mathematics) to be considered for admission. *See id.* at 9. Whites are fourteen times as likely as blacks to attain a score of 650 on the mathematics exam and four times as likely on the verbal part. *Id.* At law schools, in 1995–96, Harvard's and Yale's admits had a median LSAT score of 170. *Id.* at 13. Only seventeen black students in the United States scored 170; 2300 others (whites, Asians; and Hispanics) attained that score. *Id.* A score of 165 was the median at the top fifteen law schools. *Id.* Of white, Asian, and Hispanic test takers 7227 students scored at or above that level; seventy blacks nationwide reached that score. *Id.* At a score of 160 or more, 267 blacks in the country attained the median level of admits to the top thirty-four highest-ranked law schools. *Id.* There were 16,278 students of other groups at 160 or above. *Id.* The third and fourth or lowest tier law schools had a median score of 150. *Id.* at 14. Only 1745 blacks in the entire country scored at that level; more than 36,000 whites did. *Id.* Whites outnumbered blacks twenty to one. *Id.* There is, therefore, no reason to believe that most black applicants, shunned from selective schools, would be admitted readily to even a non-selective law school if affirmative action ended. *See id.* at 11–15. Medical schools confront a similar distribution of black and overall scores. The median combined MCAT score of 25.2 for white students who were rejected for admission to medical schools nationwide was significantly higher than the 23.5 median score of black students who were admitted. *Id.* at 16.

mitted white students. This was true not only at flagship schools but at the less selective institutions."¹⁷⁵

3. Introduce Non-Racial Admissions Criteria by Which Blacks Fare as Well as Whites

There have been other proposals. Susan Sturm and Lani Guinier propose developing ways of assessing a range of abilities wider than SATs purport to measure.¹⁷⁶ They also argue that, because tests do not make fine discriminations, applicants should be scored in broad bands, within which admissions decisions might be made by lottery.¹⁷⁷ But, a lottery, unless it were to include all applicants, needs to identify who goes into the pool from which winners will be selected. That implicates selection standards. If, instead of precise grades and/or

¹⁷⁵ *A Nationwide*, *supra* note 40, at 14.

¹⁷⁶ Sturm & Guinier, *supra* note 75, at 957-78, 1009-22.

¹⁷⁷ While Sturm and Guinier do not discuss it, the Netherlands has extensive experience with lotteries for university admission purposes. By law, for subjects (usually medical education, although sometimes other disciplines) in which there are more applicants than places, students are ranked by grades earned in high school (medical school is an undergraduate program). A weighted lottery is conducted, in which students with higher grades have a better chance of being admitted. The lottery tends towards producing equality of result, in that students with the highest grades may be rejected in favor of others with lower grades. Some highly publicized instances have occurred, giving rise to protests, as a consequence of which the law is likely to be amended. The pending proposal is to admit students with grades above a certain level (now proposed as eight out of a possible ten) and place the remaining applicants in the lottery. The public reaction to the existing system resembles that of opponents of affirmative action in the United States. See NETHERLANDS MINISTRY OF EDUC., CULTURE AND SCIENCE, INFORMATION DEP'T, EDUCATION IN THE NETHERLANDS, available at <http://www.minocw.nl/english/edusyst/edn105.htm> (last visited Feb. 13, 2002); P.J.D. Drenth, *The Selection of Medical Students in the Netherlands*, available at <http://www.gov.ie/educ/commission/Research%20Paper%203.htm> (last visited Feb. 8, 2002).

Germany employs other equalizing devices. Where there are not enough places for all the students who should be admitted "places available for first-year students shall be awarded in accordance with" the following principles. "Up to three tenths of the study places are to be reserved for: 1. applicants for whom refusal of enrollment would constitute unusually great hardship, particularly from a social point of view; 2. applicants who . . . have committed themselves to practicing a profession in sectors of particular public need. . . ." There are other priorities for making admissions decisions. Beyond those priorities, selection shall be determined "according to the period of time which has elapsed since the necessary qualifications . . . were acquired" and how that time was spent (waiting period: *Wartezeit*). The waiting period may not exceed eight years. I have discussed the rationale of *Wartezeit* with German academics who tell me that the rationale is that over time the applicant will have become more mature and has demonstrated commitment. Usually, applicants, if not admitted within a few years, give up and get on with their lives. GERMAN FEDERAL MINISTRY OF EDUCATION AND SCIENCE, FRAMEWORK ACT FOR HIGHER EDUCATION § 32 (2) 1 & (3) 2 (1994).

scores, selection were made within broad bands, there would likely be far more whites than blacks in the higher scoring bands, and that would lead back to where the problem started. Selective schools, at first, would not be likely to find a substantial number of blacks with minimum scores to place in the pool. To get more black applicants in the pool, they would have to lower the minimum score for entering the lottery. But, then the number of white entries would increase as well, and the chances of being selected would not improve. Sturm and Guinier argue also that past performance, rather than test scores, is the best indication of future performance.¹⁷⁸ But, apart from using GPAs, that standard seems to be more workable for employment than admissions decisions. If past performance does mean GPA, it is not certain that black students will fare much better than they do with standardized tests. California's new selection regime may provide a means of demonstrating past performance by admitting some applicants first to community college.¹⁷⁹ If they perform adequately, they will be admitted to a four-year school.

Recently, the Educational Testing Service considered a program that would add points to test scores of students, whom they called "strivers," who have demonstrated outstanding character while growing up in adverse circumstances.¹⁸⁰ Presumably many of them would be black. But, the proposal was controversial and has not been implemented. In any event, formally and informally, many admissions regimes take into account character and life circumstances. How the data are used is not, and is not required to be, quantified or articulated. U.C. Berkeley considers some such factors, as do University of California medical schools.¹⁸¹ Texas requires their use by statute. But, among the disadvantaged, there are more ambitious, hard-working white students than black students, even though blacks may be proportionately more numerous. By the point at which admissions reach a level where blacks are clustered, it may be that enough whites have been admitted to fill the class. Nevertheless, to the extent that non-quantitative criteria are used, the exercise of discretion, consciously or

¹⁷⁸ See Sturm & Guinier, *supra* note 75, at 969–80, 1010, 1019–20.

¹⁷⁹ See *supra* notes 125–128 and accompanying text.

¹⁸⁰ See Amy Dockser Marcus, *Education: New Weights Can Alter SAT Scores: Family is Factor in Determining Who's a 'Striver'*, WALL ST. J., Aug. 31, 1999, at B1.

¹⁸¹ See Boalt Hall School of Law – University of California, Berkeley, Policies & FAQs, at <http://www.law.berkeley.edu/perspectives/admissions/policyfaq.html> (last visited Mar. 22, 2002); U.C. Admissions, UC Admissions Chances, at http://www.acusd.edu/~e_cook/chances/index.html (last visited Mar. 22, 2002).

unconsciously, may take race into account, although no school would admit to violating a prohibition of affirmative action in this manner.

The line may be beginning to crack with the proposal by the President of the University of California that it abandon the SAT.¹⁸² But, almost all schools so far have resisted substituting a more holistic assessment for standardized tests.¹⁸³

Facing the end of affirmative action, UCLA Law School made a large-scale effort to factor socio-economic considerations formally into the admissions process, while eschewing consideration of race. It established a minimum score for admission, calculated from quantifiable academic indicators: LSAT score and GPA, the quality of the school from which the applicant graduated, the applicant's curriculum, grade inflation, and other indicia.¹⁸⁴ The melded number required to be eligible for admission, derived from these criteria, was 625.¹⁸⁵ For applicants with a low academic score who came from a disadvantaged background, the score would be increased according to a formula that incorporates family economic status, parents' education, whether the applicant came from a single-parent household, quality of the neighborhood in which the applicant lived, and so forth.¹⁸⁶

The formula resembles one developed by the Supreme Court of India, although without reference to it, known as the "creamy layer" principle, a reference to the cream that rises to the top of a container of milk.¹⁸⁷ In India, reservations, which means affirmative action, are

¹⁸² See Office of the President News Room, *UC President Richard C. Atkinson Calls for Ending SAT I Test Requirement at UC*, at <http://www.ucop.edu/news/sat/satarticle1.htm> (last visited Mar. 20, 2002).

¹⁸³ See Gaston Aperton, *Why We Need the SAT*, N.Y. TIMES, Sept. 4, 2000, at A16. ("The vast majority of the nation's highly selective institutions, as well as other large public universities, are expected to rely on the tests for the foreseeable future."); see also Jacques Steinberg, *Most Colleges are Expected to Continue to Use the SAT*, N.Y. TIMES, Feb. 24, 2001, at A6 ("It's the only standard factor in every student's application.") (quoting dean of admissions at Stanford). But see Jess Bravin, *Law School Admission Council Aims to Quash Overreliance on LSAT*, WALL ST. J., Mar. 29, 2001, at B14 (noting that the test has become single most important factor in deciding who gets admitted to a law school, but is in danger of becoming casualty of battles over affirmative action; and that a past president of Association of American Law Schools said "we ought to be open to thinking about whether we need the test at all").

¹⁸⁴ See Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 484 (1997). See generally Deborah Malamud, *A Response to Professor Sander*, 47 J. LEGAL EDUC. 504 (1997).

¹⁸⁵ See Sander, *supra* note 184, at 484.

¹⁸⁶ See *id.* at 484-85.

¹⁸⁷ See *Indra Sawhney v. Union of India*, 80 A.I.R. 1993 S.C. 477, 558-60 (formulating the "creamy layer" test).

granted on the basis of caste or membership in certain tribes.¹⁸⁸ That privilege is withheld from members of certain scheduled castes and tribes who come from the creamy layers, which means from prosperous and well-educated families.¹⁸⁹ UCLA's plan differs from India's way of allotting preferences in that UCLA does not consider race.

The first year it was in effect at UCLA, this system produced an extraordinarily diverse class, but black enrollment subsequently dropped by 72%.¹⁹⁰ In 1999, the decrease was even more pronounced. Only three blacks enrolled in the law school.¹⁹¹ In 2000, five enrolled.¹⁹² In 2001, ten enrolled.¹⁹³ In the past, a large proportion of admitted black students had relatively high socio-economic status (SES), which includes parents' income, education, quality of neighborhood, and other factors.¹⁹⁴ Although they had test scores below those of almost all admitted whites, affirmative action made possible their admission.

Deborah Malamud points out that while high-SES blacks had been eligible for affirmative action consideration, they are not eligible under the new program because they do not receive credit for suffering from disadvantage. As a result, a large majority of blacks from families with high SES (superior economic, educational, and other indicia of status) were deemed too well-off to be eligible for affirmative action and not admitted.¹⁹⁵ At the same time, black students from disadvantaged families did not have scores high enough to be admitted and were too low in SES for the socio-economic supplement to put them over the top. The three blacks who enrolled were among

¹⁸⁸ The Constitution of India requires that universities (and other institutions) employ "reservations," or affirmative action, for certain tribes and castes. See INDIA CONST. arts. 15 (4), 16 (4).

¹⁸⁹ The Supreme Court of India has ruled that the constitutional requirement to provide affirmative action excludes applicants whose families were in the "creamy layer" of society. See *Sawhney*, 80 A.I.R. at 560; see also INDIA CONST. arts. 15 (4), 16 (4). The "creamy layer" included families with income, wealth, and education above a certain level. See *Sawhney*, 80 A.I.R. at 558-60. The most comprehensive scholarly treatment of affirmative action in India is MARC GALANTER, *COMPETING INEQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* (1984).

¹⁹⁰ Malamud, *supra* note 184, at 504. The average black enrollment went from 9.7% between 1990 and 1996 to 2.6% in 1997. Sander, *supra* note 184, at 497 tbl.13.

¹⁹¹ *Infra* app. B, tbl.1.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ Malamud, *supra* note 183, at 505.

¹⁹⁵ *Id.*

nineteen who had been offered admission that year.¹⁹⁶ Sixteen declined the offer, suggesting that they did not want to attend school isolated from other black students. The likelihood is that at least some who declined went to another law school. At least on the basis of the UCLA experience, non-racial, poverty-based affirmative action will not result in admission of a substantial number of blacks.

4. Make Test Preparation Courses Available to Black Applicants

A short-range proposal is to encourage and pay for black enrollment in test preparation courses that claim they can raise LSAT scores at least six or seven points on the sixty-point scale ranging from 120 to 180.¹⁹⁷ A Law School Admissions Council (LSAC) study, in contrast, reports gains of less than two points for those who took such courses.¹⁹⁸ But, the LSAC report does not claim that its conclusion holds true for all test tutoring, some of which is extensive, taught in-depth over a period of at least several months, like Kaplan's and Katzman's, and some of which is not.¹⁹⁹ The commercial test tutoring firms (Kaplan and Princeton Review are the biggest), which charge approximately \$800 per course, say that the study does not apply to them.

According to a study of the 1996–1997 academic year made for the LSAC, about 28% of African-American LSAT test takers (median score 141.58) reported having attended a commercial test preparation school, compared to 31% of white test takers (median score 152.11).²⁰⁰ At best, more blacks taking test preparation courses might slightly close the test score gap, but probably not enough to make a major difference.

¹⁹⁶ UNIVERSITY OF CALIFORNIA, OFFICE OF THE PRESIDENT, UNIVERSITY OF CALIFORNIA'S LAW SCHOOLS, at <http://www.ucop.edu/acadv/datamgmt/graddata/lawnos.html> (last visited Mar. 26, 2002).

¹⁹⁷ For example, see The Princeton Review, Guaranteed Satisfaction, at <http://www.review.com/integrated/templates/defaultrh/testprep.cfm?TPRPAGE=65&TYPE=LSAT> (last visited Mar. 26, 2002).

¹⁹⁸ See Thornton, *supra* note 77, at 16–17 tbls.20–25.

¹⁹⁹ See Schwartz, *supra* note 76, § 6, at 16. Schwartz asks why, if the LSAC believes that test preparation is ineffective, it supplies test preparation materials itself. See Schwartz, *supra* note 76, § 6 at 16.

²⁰⁰ See Thornton, *supra* note 77, at 11 tbl.13.

5. Improve Education of Black Students: Change Society

Finally, there is the long-range approach. No matter what happens with testing, elementary, high school, and college education for blacks should be improved. Is improvement likely? Can there be enough to make a difference in test outcomes or other quantitative standards? A change as great as is needed to secure admission of a substantial number of black students without affirmative action is most likely to be achieved if efforts begin when children are young. This is a time of much political talk and experimentation in teaching techniques, school administration, class size, and other factors, aimed at improving the education of the most disadvantaged children. Some experiments have been successful,²⁰¹ leaving open the question of whether they can be replicated on a large scale.

Although schools can do a great deal, to achieve maximum change it is likely the students' home and neighborhood environment must also improve, a goal that would require major social policy innovations and substantial redistributive measures. Such programs raise political issues. Some would oppose innovation, saying it is no job for government, but for individuals or non-governmental groups; others would urge participation by the state. In any event, the answer involves at least some reformation of society. The political debates would range from how to organize schools to what the interest rate should be in order to control inflation, to which international trading policies will best provide for the economic stability, physical, and emotional well-being of minority children and, of necessity, their parents. Innovation would involve encouraging school systems to promote minority high achievement and possibly enrolling minority primary grade children in after-school, weekend, and summer programs. There would be opposition from opponents of increased taxes or governmental social programs of any sort, from those opposed to government programs designed to assist any single group, particularly blacks, and from those who believe that such programs do not work. It remains to be seen whether such a campaign could succeed in today's political climate.

Charles R. Lawrence III goes beyond the testing and affirmative action issues that he believes are insufficient to address the need for

²⁰¹ See Jodi Wilgoren, *Seeking to Clone Success for the Poor*, N.Y. TIMES, Aug. 16, 2000, at A1 (describing the success of KIPP Academy, a pair of public middle schools in poor areas of Houston and the Bronx, that have instituted various experimental tactics to improve student performance).

improvements. He argues for "[t]ransformative politics [that] seek to change the political consciousness of those privileged by systems of subordination," and asserts that true equality will not be achieved without thoroughgoing reform of society.²⁰² Like the Sturm and Guinier formula, his ideal is not likely to be realized immediately. The possible future implementation of the Sturm-Guinier and Lawrence proposals will not close the black-white gap in society now. To wait for their arrival, should it come, would consign many African-Americans to continued subordinate status for many years. In the meantime, affirmative action in some form will have to continue. Were it abolished, for at least a generation fewer blacks would graduate from top colleges and professional schools, diminishing their prospects and those of their families, friends, and neighbors.

II. PRINCIPAL THEORIES AND EVIDENCE FOR AND AGAINST AFFIRMATIVE ACTION

The theory under which affirmative action is justified is often not articulated.²⁰³ Indeed, advocates often do not define any supporting theory at all or sometimes conflate several together. Of course, there is no reason why affirmative action cannot be justified by more than one theory at the same time. But, the theory matters, because if, as we shall see below, affirmative action is constitutional only if it serves a compelling governmental interest, that interest needs to be articulated. Moreover, to be constitutional a program must be narrowly tailored, that is, no more extensive than necessary. Therefore, in order to know its proper extent, there must be some understanding of what an affirmative action program has been designed to accomplish, and how.

Briefly, the principal theories that support affirmative action are: (1) it contributes to closing the gap in social conditions between blacks and whites; (2) it provides diversity, an important element of learning; and (3) it serves as reparations for the damage inflicted by slavery, segregation, societal and official discrimination, and other policies that have brought African-Americans to their current status.²⁰⁴ The courts have not discussed the first of these, social condi-

²⁰² Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 965 (2001).

²⁰³ For a thorough canvas of legal-ethical issues involving affirmative action, see KENT GREENAWALT, *DISCRIMINATION AND REVERSE DISCRIMINATION* (1983).

²⁰⁴ See *infra* Part I.A.

tions (closing the gap), but I think it is the most important justification.

The opposition makes six major arguments: (1) affirmative action undermines the fundamental human right of equality; sometimes stated in terms of constitutional interpretation, i.e., "the Constitution is color-blind;" (2) it fails to reward merit; (3) it stigmatizes and stereotypes its beneficiaries in their own eyes as well as those of others; (4) it creates a racially polarizing backlash; (5) its recipients are more likely to drop out of school; and (6) other groups have succeeded without affirmative action.²⁰⁵

These are not the only arguments pro and con. For example, I do not discuss the role model justification. Although more role models might well stimulate more applications by black students, they would still need adequate test scores or affirmative action for admission, and we would return to the first three justifications. I do not address proponents' argument from principle, because it seems to be subsumed in their reparations case. Nor do I discuss to any great extent opponents' position based on principle. It is one of those arguments based on deep feeling that is impervious to argument.

A. Arguments for Affirmative Action

1. The Gap in Social Conditions Between Blacks and Whites

I begin with the social conditions argument because it is new and more comprehensive than those theories based on diversity, societal discrimination, or reparations. Social scientist Elijah Anderson, in *Code of the Street*, has described the cumulative effect of the disabilities the inner-city heaps upon its black residents:

[N]one [of the problems] is more pressing than that of interpersonal violence and aggression. This phenomenon wreaks havoc daily on the lives of community residents and increasingly spills over into downtown and residential middle-class areas. Muggings, burglaries, carjackings, and drug-related shootings, all of which may leave their victims or innocent bystanders dead, are now common enough. . . .²⁰⁶

He describes some of the origins of the inclination to violence, including "lack of jobs that pay a living wage, limited public services . . .

²⁰⁵ See *infra* Part I.B.

²⁰⁶ See ANDERSON, *supra* note 62, at 32-33.

the stigma of race, the fallout from rampant drug use and drug trafficking, and the resulting alienation and absence of hope."²⁰⁷ These and other burdens work their effects cumulatively, spawning an "oppositional culture."²⁰⁸ While all blacks do not live in inner cities, those who live outside, nevertheless, feel the pressure of those handicaps. "[F]amilies with a decency orientation," he writes, "oppose the code of the streets, but often reluctantly encourage their children's familiarity with it in order to enable them to negotiate the inner-city environment."²⁰⁹

Of course, many African-Americans bear no resemblance to those in the society Anderson describes. They are on the same level of income and status as whites with comparable college or professional school education. As Chief Justice Earl Warren wrote in 1954 in *Brown v. Board of Education*, "Today . . . many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world."²¹⁰ Nevertheless, in no other group characterized by race or ethnicity, gender, religion, sexual preference, physical handicap, or age, except perhaps Native Americans or Hispanics, is there so high a proportion of individuals ill-equipped to contribute to society or harmful to the group and the rest of the country. Following are only some of the disabilities that African-Americans face; their most destructive characteristic is that they work in concert.

a. *Isolation*

Blacks are isolated like no other group in society. Notwithstanding a few regions where blacks and whites live alongside each other, the general pattern is one of separate black (sometimes combined with other minorities) and white areas.²¹¹ One scholar of the subject has observed:

No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities for the past fifty years. . . . Not only is the depth of black segregation unprecedented and utterly unique compared with that of

²⁰⁷ *Id.* at 32.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 33.

²¹⁰ 347 U.S. 483, 490 (1954).

²¹¹ DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 60-82 (1993).

other groups, but it shows little sign of change with the passage of time or improvements in socioeconomic status.²¹²

While much residential segregation is directly tied to high rates of poverty within the black community, "segregation cannot be attributed to income differences, because blacks are just as segregated at all levels of income."²¹³ Even when blacks move to the suburbs, as the black middle class grows, they tend to live in black areas: "Whereas segregation declines steadily for most minority groups as socioeconomic status rises, the levels of black-white segregation do not vary significantly by social class. . . . [B]lacks are segregated no matter how much money they earn."²¹⁴

Indeed, some activities are becoming more segregated. School desegregation once lessened strict racial separation for many black children (and lifted black children's test scores).²¹⁵ But, it was never pervasive, and is now diminishing. Courts are deciding that desegregated districts are "unitary," providing grounds for terminating court-ordered desegregation plans.²¹⁶ If, following termination of court-enforced desegregation, a school reverts to a single race, the school district argues it may not be subjected to a new desegregation order because the racial composition would not have resulted from state action.²¹⁷

The separation is apparent in everyday life. One newspaper article, describing 11 a.m. on Sunday as the most segregated hour of the week, when blacks and whites go to their separate churches to pray, observes that:

[R]eligion is only part of the story. Go to a New York restaurant of any note, or visit a Broadway theater, or attend a concert at Lincoln Center or a movie at the Lincoln Square emporium a few blocks away. You might as well have Jim Crow laws for all the integration that is taking place. The reality is, with some exceptions, blacks and whites don't do many things together except maybe ride the bus and the subways.

²¹² *Id.* at 2.

²¹³ *Id.* at 10-11.

²¹⁴ *Id.* at 11.

²¹⁵ David Grissmer et al., *Why Did the Black-White Score Gap Narrow in the 1970s and 1980s?*, in *TEST SCORE GAP*, *supra* note 22, at 206-11.

²¹⁶ See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237, 245-46 (1991).

²¹⁷ See, e.g., *id.*

Money alone—who has it and who doesn't—cannot explain this stark separation.²¹⁸

There is a barrier even in language. In 1996, the Oakland, California Board of Education undertook to introduce into the curriculum a subject it called "Ebonics," a term for "black English," spoken not only in Oakland, but by many African-Americans across the country.²¹⁹ I have not seen statistics on how many speak "black English," but common observation suggests that it is used widely. The Board of Directors of Teachers of English to Speakers of Other Languages (TESOL) has described Ebonics as "African-American Vernacular English" or "black English," and said that it is a "rule-governed, linguistic system, with its own lexical, phonological, syntactic and discourse patterns."²²⁰ The Oakland Board of Education had concluded that to teach black children how to speak standard American English, the best foundation would be to build upon the manner in which they already were speaking.²²¹ But, criticized by conservative educators and civil rights advocates, it dropped the program.²²² We need only observe that blacks and whites are so isolated from one another that a way of speaking called "black English" exists.²²³

The black experience in America is not unique. Throughout time and across continents, darker-skinned minorities living within or

²¹⁸ Clyde Haberman, *Integration, One Sunday at a Time*, N. Y. TIMES, Jan. 13, 2001, at B1. James M. Nabrit III, an African-American lawyer in the District of Columbia, born in the District in 1932, reports a similar experience. He attended segregated schools in Washington but his parents, who wanted him to have an excellent, integrated education, sent him to Mount Hermon School for Boys in Massachusetts for high school. In *Legends in the Law*, an interview published in the Washington Lawyer, he said, "Before I went to school in Massachusetts, I knew only one white person, a man who had a store on Georgia Avenue." *Legends in the Law*, WASHINGTON LAW., July/Aug. 2001, available at http://www.dcbbar.org/washLaw/08_01/legends.html (last visited Apr. 16, 2002).

²¹⁹ See Richard Lee Colvin, *Oakland District Says Policy on Ebonics Misunderstood*, L.A. TIMES, Dec. 31, 1996, at A1.

²²⁰ See Teachers of English to Speakers of Other Languages, Policy Statement of the TESOL Board on African American Vernacular English (Mar. 10, 1997), at <http://www.cal.org/ebonics/tesolebo.html> (last visited Feb. 4, 2002).

²²¹ See Colvin, *supra* note 219, at A1.

²²² See CNN Interactive, *Oakland School Board Amends Ebonics Policy*, Jan. 16, 1997, at <http://www.cnn.com/US/9701/16/black.english/index.html> (last visited March 23, 2002).

²²³ The language-race difference is not exclusively a United States phenomenon. Frantz Fanon has described a similar barrier between blacks in the French colonies and whites in Metropolitan France: "I ascribe a basic importance to the phenomenon of language. . . . The black man has two dimensions. One with his fellows, the other with the white man." FRANTZ FANON, *BLACK SKIN WHITE MASKS* 17 (1970).

under domination of European populations have experienced color prejudice. Some psychologists have suggested that a sort of primal bias in favor of lighter-colored skin exists in human cultures vastly separated by geography and time. This color bias has been explained by a number of theories, including innate biochemical or psychological factors, experiences in early childhood, and inundation with universal cultural symbols.²²⁴ Cultures are full of white/black symbolism from early childhood. Children learn to associate "white" with "good" and "black" with "bad." These symbols appear in idiomatic speech, in religious imagery, and in literature (e.g., "black mark," "blackball," "black heart," "white hope," "white knight," "fair haired"). In Mozart's *Magic Flute*, an opera that virtually every opera-goer has seen, Monostatos, a villainous Moor, is often played in blackface. In societies across the world, such as India,²²⁵ Japan,²²⁶ Britain,²²⁷ and else-

²²⁴ See JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 9 (1984) ("[T]he power of which I write stems from a view of the universe that takes the symbols of *whiteness* and *blackness* with a deadly seriousness, spreads them out to the whole of human activity, and, from that point, onto the many-hued skins of men, thereby reducing them to the categories of race."); see also JOHN E. WILLIAMS & J. KENNETH MORLAND, *RACE, COLOR, AND THE YOUNG CHILD* 262 (1976) ("We propose that virtually every child has experiences early in life which lead to the development of a preference for light over darkness."); Kenneth Gergen, *The Significance of Skin Color in Human Relations*, 96 *DAEDALUS* 390, 398 (1967) ("More compelling is the possibility that the emotional response to at least the experience of black and white is established at a very early age, and as a result of almost universal experiences. Two such experiences seem especially germane: the meaning of night versus day for the child and the training he receives in cleanliness.").

²²⁵ See Andre Beteille, *Race and Descent as Social Categories in India*, in *COLOR AND RACE*, *supra* note 224, at 172-74. According to Beteille:

The inhabitants of the Northern states—particularly Punjab, Jammu and Kashmir, Rajasthan, and parts of Uttar Pradesh—are on the whole fairer than those of the Southern states. Indeed, many North Indians have a vague prejudice against South Indians because of their dark skin color. . . . Within the subcaste, a certain amount of selective breeding has no doubt taken place for centuries. . . . The ideal bride, whose beauty and virtue are praised in the songs sung at marriages, almost always has a light complexion. . . . Even a casual examination of the matrimonial columns of such popular dailies as *The Hindu*, *The Hindustan Times*, or *The Hindustan Standard* shows that virginity and a light skin color are among the most desirable qualities in a bride.

Id.

²²⁶ See Hiroshi Wagatsuma, *The Social Perception of Skin Color in Japan*, in *COLOR AND RACE*, *supra* note 224, at 129 ("Long before any sustained contact with either Caucasoid Europeans or dark-skinned Africans or Indians, the Japanese valued 'white' skin as beautiful and deprecated 'black' skin as ugly.").

²²⁷ See E. R. Braithwaite, *The "Colored Immigrant" in Britain*, in *COLOR AND RACE*, *supra* note 224, at 218. Braithwaite wrote:

where, anthropologists have noted that white skin is often valued as beautiful and black skin deprecated. Cortez encountered it when the Aztecs capitulated to him as a white god, as did Captain Cook as he sailed the South Sea islands.²²⁸

Malcolm X recognized black/white symbolism as he contemplated his early attempts to "whiten" his appearance by straightening and coloring his hair. "This was my first really big step toward self-degradation," he wrote in his autobiography,

when I endured all of that pain, literally burning my flesh to have it look like a white man's hair. I had joined that multitude of negro men and women in America who are brain-washed into believing that the black people are "inferior"—and white people "superior"—that they will even violate and mutilate their God-created bodies to try to look "pretty" by white standards.²²⁹

The cry that "black is beautiful" that arose among students during the civil rights movement of the 1960s was an attempt to counter this image.

This assessment of skin color is not anachronistic. Last year, a study of the significance of skin color among African-Americans and Mexican-Americans concluded:

Consistently, across—and within—race and gender groups, dark skin incurs a learning and earnings penalty. Although the magnitude of its negative impact may vary, darker skin is associated in each instance with lower socioeconomic status. Our findings show skin color to be a more significant deter-

Immigrant groups have for many centuries been a familiar and important part of the British community. Mostly refugees from persecution in other European countries . . . all these groups were white-skinned. They could, if they chose, fade without difficulty into the 'white' background. The colored immigrant is and seems likely to remain the exception. His high visibility is a constant reminder to Britons of his earliest relationship with them—slave to owner, subject to sovereign, conquered to conqueror, and man to master.

Id.

²²⁸ Gergen, *supra* note 224, at 122.

²²⁹ MALCOLM X & ALEX HALEY, *THE AUTOBIOGRAPHY OF MALCOLM X* 61–62 (1965).

minant of education and income among Blacks than among Chicano/as.²³⁰

This pan-cultural color bias makes reconciliation between the races more difficult to achieve.

Sociologists look at intermarriage rates to gauge the extent to which a group is integrated into society. Among third-generation Hispanics and Asians, the intermarriage rate outside their own group is at least 50%.²³¹ Among blacks, it is 8% to 10%.²³² As evidence of the influence of black isolation, one might compare these ratios with those of members of the armed forces, the most thoroughly integrated institution in the United States. A study by Reynolds Farley found that white men who have served in the military were three times more likely to marry black women as white men who never served.²³³ White women who served in the military were seven times as likely to marry black men as white women who were lifelong civilians.²³⁴

Setting aside ideological disagreements over intermarriage, a recent explanation of the 50% rate of intermarriage among Jews suggests why there is a low intermarriage rate among blacks: Transformations in American life that have brought about the high rate among Jews include "removal of virtually all social barriers between Jews and non-Jews in work, education and leisure" and a "geographic shift away from older areas of dense Jewish concentration."²³⁵ But, there has been no such transformation for African-Americans; blacks and whites live, work, study, and play together far less than members of other groups.²³⁶

²³⁰ Margaret Hunter et. al., *The Significance of Skin Color Among African Americans and Mexican Americans*, in AFR. AM. RES. PERSP., Winter 2001, at 180, available at <http://www.regd.isr.umich.edu/prba/persp/winter2001/mhunter.pdf> (last visited Apr. 7, 2002).

²³¹ See Rochelle L. Stanfield, *The Blending of the United States*, available at <http://us-info.state.gov/journals/iisv/0699/ijse/stanfld.htm> (last visited Feb. 4, 2002).

²³² *Id.*

²³³ Reynolds Farley, University of Michigan, *Rates of Mixed-Race Marriages Increasing, Study Finds* (1997), at <http://www.sistahspace.com/nommo/ir6.html> (last visited Feb. 4, 2002) (delivered to the annual meeting of the Population Association of America, March 27, 1997).

²³⁴ *Id.*

²³⁵ *The Factors Behind the 52 % Intermarriage Rate*, available at <http://www.joi.org/library/research/rate.shtml> (last visited Feb. 4, 2002).

²³⁶ See *supra* notes 211-212 and accompanying text.

b. *Economic Status*

In 1998, only 68% of black men were likely to be working, a proportion lower than that of any other racial group.²³⁷ African-American, Native American, and Hispanic men were twice as likely to be unemployed as whites in 1998.²³⁸ Those who work were more likely to be in lower-paying, semi-skilled jobs.²³⁹ Of the various racial or ethnic groups in America, annual median household income for blacks was the lowest (about \$25,100) compared to Asians' income (\$45,400) and whites' (\$40,600).²⁴⁰ Although the United States economy went through a protracted period of growth during the 1990s, the gaps between whites and Asians, on the one hand, and different minorities, on the other, changed little.²⁴¹ Between 1990 and 1997, African-American, Hispanic, and American Indian incomes grew so that 21% to 25% of this group earned \$50,000 or more.²⁴² At the same time, about 40% of whites and 46% of Asians earned annual income at that level.²⁴³ A recent government report found that "[t]he income of non-Hispanic white and Asian families is nearly twice that of black and Hispanic families. Since the early 1990s black family income has risen, but . . . the ratio of black to non-Hispanic white median family income is about the same today as it was 30 years ago."²⁴⁴ This discrepancy translates into a loss not only to blacks, but also to the national economy. If blacks earned as much as whites, the country as a whole would be richer and better off in all of life's activities that are related to fiscal resources.

Not surprisingly, the median net worth of whites is more than ten times that of blacks: for whites it is \$45,700; for blacks, \$4,400.²⁴⁵ In 1998, 72% of white households owned homes, compared to approxi-

²³⁷ See generally Kelvin M. Pollard & William P. O'Hare, *America's Racial and Ethnic Minorities*, in POPULATION BULLETIN, Sept. 1999, available at http://www.prb.org/Content/NavigationMenu/PRB/AboutPRB/Population_Bulletin2/Americas_Racial_and_Ethnic_Minorities.htm (last visited Apr. 17, 2002). But black women had the highest female labor force participation, 64% of all racial and ethnic groups. *Id.*

²³⁸ *Id.*

²³⁹ *Id.* tbl.5.

²⁴⁰ See *id.*

²⁴¹ *Id.*

²⁴² Pollard & O'Hare, *supra* note 237.

²⁴³ *Id.*

²⁴⁴ Changing America: Indicators of Social and Economic Well-Being, at <http://search.access.gpo.gov/GPO/SearchRight.asp?ct=GPO&q1=income&cx=33&cy=26> (last visited Apr. 17, 2002).

²⁴⁵ Pollard & O'Hare, *supra* note 237, tbl.6.

mately 40% of blacks and Hispanics.²⁴⁶ One-half of white households in 1999 owned a computer or used the Internet, compared to one-quarter of black households.²⁴⁷ Business ownership among blacks increased from fifteen per thousand population in 1987 to twenty per thousand in 1992.²⁴⁸ Over the same time it increased from sixty-seven per thousand to eighty per thousand for whites.²⁴⁹ According to a recent report, only 2.3% of blacks own businesses. In comparison, 3.4% of Latinos, 8% of Native Americans, and 8.9% of Asians are business owners. Although blacks make up 12.3% of the nation's population, they own 4% of America's businesses, employing 0.7% of their workers, and generating just 0.9% of receipts. Latinos are 12.5% of the population and own 5.9% of the nation's businesses, while Native Americans and Asians own a higher percentage of the nation's businesses than their representation in the population. Native Americans make up 0.9% of the population and 1% of the businesses. Asians are 3.6% of the country's inhabitants but represent 4.5% of its businesses.²⁵⁰

c. *Reactions of the Black Community*

The combination of residential segregation and high rates of urban black poverty has been devastating to isolated black communities. According to one commentator:

In concentrating poverty, segregation acts simultaneously to concentrate anything that is correlated with poverty: crime, drug abuse, welfare dependency, single parenthood, and educational difficulties. To the extent that individual socioeconomic failings follow from prolonged exposure to concentrated poverty and its correlates, therefore, these disadvantages are ultimately produced by the structural organization of U.S. metropolitan areas. The mere fact that blacks are highly segregated as well as poor means that individual African Americans are more likely to suffer joblessness and to experience single parenthood than either Hispanics

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* tbl.7.

²⁴⁹ *Id.* tbl.7.

²⁵⁰ *The State of Black Entrepreneurship: Are We Making the Right Moves for True Economic Empowerment?*, KIP. BUS. REP., at http://www.kipbusinessreport.com/Cover_Story_06-01.htm (last visited Apr. 17, 2002).

or whites, quite apart from any disadvantages they may suffer with respect to personal or family characteristics.²⁵¹

Poverty-stricken blacks tend to live together in poverty-stricken neighborhoods.²⁵² High concentrations of urban poverty are inextricably linked with a host of social problems, which have come to characterize urban black America. The odds of dropping out of high school and the odds of teenage birth rise in lock step with the age of low status workers in a neighborhood.²⁵³ Douglas S. Massey has written that poverty and racial concentration are "mutually reinforcing and cumulative, leading directly to the creation of underclass communities typified by high rates of family disruption, welfare dependence, crime, mortality and educational failure."²⁵⁴ Living in a poor neighborhood increases the likelihood of pregnancy among black adolescent girls and lowers the age of first sexual intercourse.²⁵⁵ A 1993 study detected "reasonably powerful neighborhood effects . . . on childhood IQ, teenage births, and school-leaving, even after the differences in the socioeconomic characteristics of families are adjusted for."²⁵⁶ A study by Linda Datcher has concluded that "community quality is an important factor generating differences in education and earnings of young men both within and between racial groups. . . . [O]ver 40% of the racial differences in education and earnings that

²⁵¹ DOUGLAS S. MASSEY, POPULATION RESEARCH CTR., UNIV. OF CHICAGO, *AMERICAN APARTHEID: HOUSING SEGREGATION AND PERSISTENT URBAN POVERTY* (Mar. 1994), available at <http://www.ssri.niu.edu/dl/massey.html> (last visited Apr. 17, 2002).

²⁵² Paul A. Jargowski, Tabulations from 1990 Census Summary Tape File 3A, CD-ROM, at 31 (tbl. PF 3.2 (1990)), available at <http://aspe.hhs.gov/hsp/97/trends/Pf3-2.htm> (last visited Apr. 17, 2002) (documenting percentage of children who live in poor neighborhoods).

²⁵³ Douglas S. Massey et al., *Migration, Segregation, and the Geographic Concentration of Poverty*, 59 AM. SOC. REV. 425, 426 (1994) (citing Jonathan Crane, *The Epidemic Effect of Ghettos and Neighborhood Effects on Dropping Out and Teenage Childbearing*, 96 AM. J. SOC. 1226 (1991)).

²⁵⁴ Douglas S. Massey, *American Apartheid; Segregation and the Making of the Underclass*, 96 AM. J. SOC., 329, 350 (1990). Massey has written "the probability of a teenage birth increases dramatically as the percentage of low-status workers in the child's neighborhood increases from 70% to 95%, ultimately reaching a likelihood of about 20%." DOUGLAS S. MASSEY, *AMERICAN APARTHEID* 178 (1994). Moreover, school performance drops as segregation increases. "Given complete segregation between blacks and whites and a 20% rate of black poverty, our simulation predicts that children will attend high schools where 47% of the students score below the 15th percentile on the CAT [California achievement test]. *Id.* at 141.

²⁵⁵ See Dennis P. Hogan & Evelyn M. Kitagawa, *The Impact of Social Status, Family Structure, and Neighborhood on the Fertility of Black Adolescents*, 90 AM. J. SOC. 825, 825 (1985).

²⁵⁶ Jeanne Brooks-Gunn et al., *Do Neighborhoods Influence Child and Adolescent Development?*, 99 AM. J. SOC. 353, 353 (1993).

result from background arise from poorer neighborhood of origin of blacks."²⁵⁷

Many blacks have reacted in a socially disruptive manner, including by committing crimes. The statistics are astonishing, even taking into account that they include arrests and convictions tainted by racial discrimination. According to the U.S. Department of Justice Bureau of Justice Statistics, in 1998, 221.6 of 100,000 young black males ages eighteen to twenty-four had committed a homicide.²⁵⁸ The comparable number for white males is 28.7.²⁵⁹ There is a similar disproportion among homicide victims: 117.1 of 100,000 eighteen to twenty-four year-old black males died in this manner; among whites, 14.5 did.²⁶⁰ In 1999, the numbers dropped to 102.8 blacks and 12.6 whites.²⁶¹

In 2000, blacks, constituting about 12% of the population, were 48.8% of those arrested for murder and non-negligent manslaughter, 53.9% of those arrested for robbery, 34% of those arrested for aggravated assault, and 28.4% of those arrested for burglary.²⁶² In 2000, among the two million incarcerated offenders, blacks constituted 50% of state and federal prisoners.²⁶³ Overall, black men and women were nearly seven times more likely than whites and two times more likely than Hispanics to have been in prison or jail.²⁶⁴ Based on current rates of first incarceration, an estimated 28% of black males will enter state or federal prison during their lifetime, compared to 4.4% of white males.²⁶⁵ Thirteen percent of the black adult male population, or 1.4 million African-American males, have lost the right to vote be-

²⁵⁷ Linda Datcher, *Effects of Community and Family Background on Achievement*, 64 REV. OF ECON. AND STAT. 41 (1982). See generally Mary Corcoran et al., *Effects of Family and Community Background on Economic Status*, 80 AM. ECON. REV. 362-66 (1990).

²⁵⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES (1998), available at <http://www.ojp.usdoj.gov/bjs/homicide/oars.txt> (last visited Mar. 14, 2002).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ JAMES ALAN FOX & MARIANNE W. ZAWITZ, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES 59-60, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf> (last visited Mar. 26, 2002).

²⁶² BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, available at http://www.fbi.gov/ucr/cius/_00/00crime4.pdf. (last visited Apr. 7, 2002).

²⁶³ Drug Policy Alliance, U.S. Prison Population Passes Two Million Mark, Feb. 15, 2000, at http://www.lindesmith.org/news/DailyNews/2million_inmates2.html (last visited Apr. 7, 2002).

²⁶⁴ *Id.*

²⁶⁵ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL OFFENDER STATISTICS, LIFETIME LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON, available at <http://www.ojp.usdoj.gov/bjs/crimoff.htm> (last visited Feb. 4, 2002).

cause of their involvement in the criminal justice system.²⁶⁶ In states with the most restrictive voting laws, 40% of African-American men may be disenfranchised.²⁶⁷ Incarceration makes impossible normal family life. It makes higher education practically impossible, leading to another generation of undereducated parents.

To a considerable extent, the prosecution of black men is a function of the war on drugs and the disproportionately high number and length of prison sentences imposed for use or sale of crack cocaine, which is cheaper than powder cocaine and more popular with black drug users than with whites.²⁶⁸ Between 1986 and 1991, the number of white state prisoners who had been convicted of drug offenses grew to 30,950, an increase of 110%, while the number of black prisoners grew to 82,730, an increase of 420%.²⁶⁹

A widespread distrust of the justice system among blacks accompanies this situation. During the voir dire in the civil suit against O.J. Simpson by the families of those he had been acquitted of killing, white prospective jurors almost all believed that Simpson was guilty of murder, while African-Americans said that he was probably innocent.²⁷⁰ When the white Los Angeles Police officers accused of beating Rodney King were acquitted in 1992, blacks in Los Angeles rioted in one of the most destructive uprisings the country has known.²⁷¹ In New York City, in 1999, after police officers shot and killed Amadou Diallo, an African immigrant, thousands of people protested on a daily basis and many were arrested. New York City radio stations

²⁶⁶ Sentencing Project, *Losing the Vote: The Impact of Felony Disenfranchisement Laws in the United States*, at <http://www.sentencingproject.org/policy/9080.htm> (last visited Feb. 4, 2002).

²⁶⁷ See *id.*

²⁶⁸ See Drug Policy Alliance, *Drug Prohibition and the U.S. Prison Population*, at http://www.soros.org/lindesmith/cites_sources/brief13.html (last visited Feb. 4, 2002).

²⁶⁹ *Id.*

²⁷⁰ See *Simpson Judge OKs Jury Prospects Who Admit Bias*, Sept. 25, 1996, available at <http://www.cnn.com/US/9609/25/simpson> (last visited Apr. 17, 2002). Similarly, as jurors deliberated at the New York trial of Sean Combs, a hip-hop impresario, in connection with a shooting that wounded three people in a Manhattan night club, black and white jurors were on both sides of the question of whether to convict. But race-tinged tensions characterized the deliberations: a black juror accusing a white of wanting to convict because the defendant was black; a white juror cried because he believed he was being called a racist; a black juror confronted a white juror who was adamant about a co-defendant's guilt by saying "[d]on't forget Amadou Diallo. He was shot 41 times." Katherine E. Finkelstein & Dan Barry, *Jurors in Rapper's Trial Recall 3 Days of Heated Exchanges*, N.Y. TIMES, Apr. 12, 2001, at A1, B6.

²⁷¹ See Melissa Roth, *Understanding the Riots Part 1, The Path to Fury: How Los Angeles Reached the Crisis Point Again*, L.A. TIMES, May 11, 1992, at T1.

broadcast a call to arms for protesters by Reverend Al Sharpton. The New York City court, at which the four officers were on trial, moved the trial to the state's upstate capital, Albany, causing anxiety that hundreds, if not thousands of protesters could stream into the Capital Region.²⁷² The 1968 *Kerner Commission Report* presents a lengthy catalogue of race riots that have erupted over the years and left a legacy of abraded race relations in their wake.²⁷³

William Julius Wilson and Loic J.D. Wacquant summed up the cumulative results of this congeries of disadvantages:

Among the resources that individuals can draw upon to implement strategies of social mobility are those potentially provided by . . . the resources they have access to by virtue of being socially integrated into solidary groups, networks or organizations. . . . Our data indicate that not only do residents of extreme-poverty areas have fewer social ties but also that they tend to have ties of lesser social worth, as measured by the social position of their partners, parents, siblings, and best friends, for instance. In short, they possess lower volumes of social capital.²⁷⁴

Furthermore, one commentator has noted that "[y]oungsters vary in the extent to which they feel a stake in American society."²⁷⁵ Ambition to strive higher would be dampened down if standardized tests were to remain a barrier to gateways of higher education through which blacks must pass to achieve parity with successful whites. If there is no way to be admitted to the schools that prepare one for success, why try? Affirmative action offers a way. Elijah Anderson writes of the oppositional culture that underlies much of the alienation that gives rise to dysfunctional conduct: "Young people must also be encouraged to adopt an outlook that allows them to invest their considerable personal resources in available opportunities. In such more positive circumstances, they can be expected to leave behind the attitudes, val-

²⁷² Melissa Grace, *Diallo Trial Albany-bound*, TIMES UNION (Albany), Dec. 17, 1999 at A8.

²⁷³ See generally REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) ("Kerner Commission Report"). As I edit these pages, Cincinnati has just emerged from a race riot set off by the police killing of a young black man. See Francis X. Clines, *Appeals for Peace in Ohio After Two Days of Protests*, N.Y. TIMES, Apr. 12, 2001, at A18.

²⁷⁴ Loic J.D. Wacquant & William Julius Wilson, *The Ghetto Underclass: Social Science Perspectives*, in 501 ANNALS AM. ACAD. POL. & SOCIAL SCI. 22-23 (1989).

²⁷⁵ Jackson Toby, *Social Disorganization and Stake in Conformity*, 48 J. CRIM. LAW, CRIMINOLOGY & POL. SCI. 12, 16 (May/June 1957).

ues, and behavior that work to block their advancement into the mainstream."²⁷⁶

The social conditions outlined in this section have a momentum that, without intervention, passes them from one generation to the next.²⁷⁷

d. *Closing the Gap by Affirmative Action*

Affirmative action in higher education is an effective means of closing the gap between blacks and whites. The *Journal of Blacks in Higher Education* reports:

[O]ver the past 30 years at least 15,000 black students admitted under affirmative action guidelines have graduated from America's 25 highest-ranked universities. Another 15,000 African Americans, also admitted under preferential admissions policies, have graduated from the nation's highest-ranked law schools. Some 10,000 more blacks have successfully entered the business world after admissions under affirmative action policies that were established at our leading business schools. Another 3,500 young blacks have graduated from our most distinguished medical schools.²⁷⁸

Forty-three thousand, five hundred graduations over thirty years may not seem to be a large number. But, this includes only the highest-ranked schools. Very selective and selective schools employ affirmative action, too. Moreover, the increase is probably proportionately higher in recent years in that fewer blacks were admitted in the early days of the programs.²⁷⁹

Bowen and Bok report:

By 1996, blacks made up 8.6 percent of all male professionals and 13.1 percent of all female professionals. . . . They also accounted for 8.3 percent of all male executives, managers and administrators and 9.6 percent of all females in such po-

²⁷⁶ ELIJAH ANDERSON, *CODE OF THE STREET* 289 (1999).

²⁷⁷ See generally Mary Corcoran & Terry Adams, *Race, Sex, and the Intergenerational Transmission of Poverty*, in *CONSEQUENCES OF GROWING UP POOR* 461-517 (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997).

²⁷⁸ T.L.C., *Thomas Carlyle and Affirmative Action*, 24 J. BLACKS HIGHER EDUC. 7, 7 (Summer 1999). These statistics may include some double counting in that at least some of the professional school graduates were also among the college graduates. The number is impressive, nonetheless.

²⁷⁹ See *supra* note 174 and accompanying text.

sitions (up from 3 percent and 1.8 percent). From 1960 to 1990, blacks almost doubled their share of the nation's physicians and almost tripled their share of attorneys and engineers.²⁸⁰

They observe that among the affirmative action cohort admitted to college in 1976, black women who graduated from selective schools on the average earned \$64,700 per year, compared to \$66,000 for their white women classmates; black males earned \$85,000, compared to \$101,900 for their white male classmates.²⁸¹ But, "black women from the [selective] schools earned 73% more (\$27,200 more) than did all black women with BAs. The [selective school] earnings advantage was even greater for black men, whose average earnings were 82% greater (\$38,200 more) than the average earnings of all blacks who hold B.A. degrees."²⁸²

According to Bowen and Bok, "There is, indeed, a real wage premium associated with enrollment at an academically selective institution; [t]his premium is substantial (even at a fairly early stage in one's career); and [t]he premium is at least as high, and probably higher, for black students than for white students."²⁸³ A survey by the Mellon Foundation indicates that "the average student who entered a highly selective college like Yale, Swarthmore or the University of Pennsylvania in 1976 earned \$92,000 in 1995, [while an] average student from a moderately selective college, like Penn State, Denison or Tulane, earned \$22,000 less."²⁸⁴ While attending an elite school has little financial advantage for a student from an affluent family, "the payoff . . . appears to be greater for students from more disadvantaged family backgrounds."²⁸⁵ Students from advantaged families can readily connect with opportunities not available to others. Those who

²⁸⁰ BOWEN & BOK, *supra* note 41, at 10 (citing U.S. Bureau of the Census statistics from 1960 & 1990).

²⁸¹ *Id.* at 123.

²⁸² *Id.*

²⁸³ *Id.* at 128.

²⁸⁴ Alan B. Krueger, *Economic Scene: Children Smart Enough to Get into Elite Schools May Not Need to Bother*, N.Y. TIMES, Apr. 27, 2000, at C2 (citing *College and Beyond* survey data collected by the Mellon Foundation).

²⁸⁵ ALAN KRUEGER & STACY DALE, ESTIMATING THE PAYOFF TO ATTENDING A MORE SELECTIVE COLLEGE: AN APPLICATION OF SELECTION ON OBSERVABLES AND UNOBSERVABLES, (Nat'l Bureau of Econ. Research, Working Paper No. w7322, 1999), available at <http://papers.nber.org/papers/W7322> (last visited Mar. 29, 2002); see also Krueger, *supra* note 284, at C2.

are isolated or not so well-off profit more from connections that they can make only while attending highly selective institutions.

In September 2000, Harvard Law School published a preliminary report of a survey of its black alumni.²⁸⁶ There have been 1700 black graduates, almost all of whom graduated since 1970.²⁸⁷ Among the 495 alumni who responded, average salaries were \$243,655 for 1970s graduates, \$194,468 for 1980s graduates, and \$113,283 for 1990s graduates.²⁸⁸ While Harvard black graduates' income was considerably higher than that of minority graduates of the University of Michigan Law School, Michigan graduates' incomes were quite substantial as well. A 1996 survey of University of Michigan's minority graduates indicated that, for the same three decades Michigan incomes were \$141,419, \$104,513, and \$67,865, respectively.²⁸⁹

Furthermore, there are nine blacks among the general counsel of Fortune 500 corporations. All of them graduated from selective law schools.²⁹⁰ Among the fifty most influential African-American executives in corporate America, twenty-six received at least one degree from a selective university.²⁹¹ Based on an informal survey, the upper ranks of the foreign service are becoming increasingly filled by black officers who hold degrees from selective schools.²⁹² Nine blacks as of the time of the survey were ambassadors. They hold degrees from Yale, U.S.C., DePauw, Syracuse, Brown, Tufts, and UCLA, as well as from two schools that are not as selective, Virginia State and Western College for Women in Ohio. The latter two may not have had much choice when entering college in 1964. Additionally, five blacks are ambassador-designates. They have degrees from Penn, Harvard, UCLA, Michigan, and University of Ohio. Two blacks, graduates of UCLA and U.S.C., are in the Senior Seminar, an elite training program for higher office.

I have inquired of deans, admission officers, and faculty members at a few highly selective law schools what proportion of their black

²⁸⁶ See WILKINS & CHAMBLISS, *supra* note 80.

²⁸⁷ See *id.* at 1.

²⁸⁸ *Id.* at 1, 3. This may well not be a representative sample of all black graduates. It is possible that higher earners replied earlier and more readily than those who earned less.

²⁸⁹ *Id.* at 3.

²⁹⁰ *The Importance of Preserving a Core of African Americans at the Most Prestigious Law Schools*, 26 J. BLACKS HIGHER EDUC. 22, 23 (Winter 1999/2000).

²⁹¹ See *The Higher Education of the Nation's Leading Black Corporate Executives*, 27 J. BLACKS HIGHER EDUC. 78, 78 (Spring 2000).

²⁹² My information comes from a State Department official who requested anonymity.

students and alumni had been admitted by affirmative action.²⁹³ Responses, made on condition that their schools not be named, were, for two schools, "enormous;" for one, about "70%;" for another, "virtually all." One admissions officer scoffed at the 70% estimate by another, remarking that the truth would be closer to 85% or more.

In sum, the social conditions in which African-Americans live are unlike those any other group in American society has experienced over time and across the land. While slavery and segregation were their genesis, they have metamorphosed into symptoms without immediate connection to the past. Many of these pathologies have taken on lives of their own, replicating themselves over generations. There is compelling national interest in changing these social conditions for the better, in the interest of national productivity, relationships within and between racial groups, justice in distributing the goods of society, status within it, and quality of life for all of us.

2. Diversity

Diversity improves education. The study of history, art, literature, sociology, psychology, politics, philosophy, law, medicine, and many other subjects thrives on discussion, in and out of class. Without schoolmates of diverse experience and viewpoints, including African-Americans, students would miss an essential part of their education. For that reason, "[v]irtually all selective colleges and professional schools have continued to consider race in admitting students."²⁹⁴ Justice Powell's opinion in *Regents of the University of California v. Bakke* quotes the President of Princeton University: "[A] great deal of learning occurs informally. It occurs through interactions among students

²⁹³ I received e-mail on January 25 and 26, 2002. The following is an edited extract from one of those confidential e-mails:

A "Career Ambassador" is the highest rank in the Foreign Service and equates to a four star general. There are nine blacks serving as ambassadors, only one is a political appointee, who is serving in Trinidad and is a Yale grad. Of the eight career Foreign Service Officers, six attended selective schools; (U.S.C., DePauw, Syracuse, Brown, Tufts and UCLA). The other two attended Virginia State 1968 and Western College for Women in Ohio that same year. They may or may not have had much choice when entering college in 1964. There are five blacks who are Ambassador-designates and must be confirmed by the Senate. All are career officers. Four went to Penn, Harvard, UCLA and Hampton (then Ohio U. for grad school). The fifth attended Emory University in Atlanta and graduated second in his class.

²⁹⁴ BOWEN & BOX, *supra* note 41, at 8.

of both sexes; of different race, religions, and backgrounds. . . ."²⁹⁵ Justice Powell cited Harvard's admissions criteria, which includes admitting students from diverse backgrounds, including minorities.²⁹⁶

The law has long recognized that students learn from their classmates as well as from faculty, and that relationships developed in school provide opportunities after graduation. Over fifty years ago, in *Sweatt v. Painter*, which held unconstitutional the exclusion of the black petitioner from the then all-white University of Texas, the Supreme Court recognized the value of diversity for education and beyond graduation.²⁹⁷ According to the Court:

Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85 percent of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas law school.²⁹⁸

Recently, in the context of prohibiting the exclusion of women from the Virginia Military Institute, the Court returned to the insights of *Sweatt*, adverting to the "faculty stature, funding, prestige, alumni support and influence" at VMI, from which women had been excluded.²⁹⁹

The Association of American Universities has issued a unanimous statement asserting that "our students benefit significantly from education that takes place within a diverse setting. . . . [They] learn from others who have backgrounds and characteristics very different from their own. . . . [T]he value of such encounters will become more im-

²⁹⁵ 438 U.S. 265, 312 (1978).

²⁹⁶ See *id.* at 316-17.

²⁹⁷ See 399 U.S. 629, 635-36 (1950); see also *McLaurin v. Oklahoma St. Regents for Higher Educ.*, 339 U.S. 637 (1950).

²⁹⁸ *Sweatt*, 399 U.S. at 634.

²⁹⁹ See *United States v. Virginia*, 518 U.S. 515, 553 (1996).

portant, not less, than in the past."³⁰⁰ Bowen and Bok have written, "[T]here is no mistaking the predominantly favorable impression that students of all races share about the value of diversity in contributing to their education."³⁰¹

Diversity obviously is important in law school, sociology, and other humanities and social sciences. Is it useful for those who study mathematics, physics, and hard sciences? Students of those subjects do not confine their academic programs to so narrow a curriculum. Most colleges have distribution requirements designed to provide a broad liberal education to all students. Students in these classes include science majors. Students typically do not declare a major until halfway through college and commonly change interests and enroll in new subjects. Whatever their specialty or major, they do not live in separate compartments. They interact across a campus and its institutions.

Stephan and Abigail Thernstrom attack the diversity argument by charging that the relationship between black affirmative action students and white students is charged with animosity.³⁰² But, they also form interracial friendships and interact with other students, certainly more than if they were not at the same school. Opponents of affirmative action might argue that the small number of blacks admitted without affirmative action can provide enough diversity. As in California, however, following the prohibition of affirmative action, schools without a critical mass of black enrollments will have a hard time getting black applicants.³⁰³ Absent racial preferences in admissions, thousands of African-Americans at the nation's highest-ranked graduate schools would be forced to matriculate at second or third tier schools.³⁰⁴

How much diversity is necessary for effective higher education? Experienced faculty and deans must make that decision for their own schools. Their consensus has been that 2% is not enough. Black representation in the freshman classes at most selective universities ranges from approximately 4% (e.g., Cornell) to about 10% (e.g.,

³⁰⁰ Association of American Universities, Diversity Statement: On the Importance of Diversity in University Admissions, Sept. 14, 1997, at <http://www.aau.edu/issues/Diversity4.14.97.html> (last visited Apr. 17, 2002).

³⁰¹ BOWEN & BOK, *supra* note 41, at 254.

³⁰² THERNSTROM & THERNSTROM, *supra* note 171, at 386-88.

³⁰³ See *infra* app. B, tbls.1-4.

³⁰⁴ What Would Happen If the Nation's Most Selective Private Universities Were Required to Abandon Affirmative Action Admissions?, 28 J. BLACKS HIGHER EDUC. 6, 6 (Summer 2000).

Duke and Columbia).³⁰⁵ Most such schools range between 6% and 9%.³⁰⁶

Stephan and Abigail Thernstrom reject the diversity justification.³⁰⁷ They argue that diversity, as understood before *Bakke*, referred to individual characteristics, like being a musician, football player, or physicist.³⁰⁸ But, Justice Powell referred to geographical origin as an example of diversity, as the Thernstroms acknowledge.³⁰⁹ It is difficult to think of why one kind of diversity should be treated differently from another.

Diversity for some is an emotionally unsatisfying justification. It meets needs of academe, but says little about the broader needs of blacks and whites and society as a whole.³¹⁰ It could be characterized, or perhaps caricatured, as recognizing the right of a school to admit blacks in order to benefit whites. Perhaps that should not matter, but the condition that confronts us goes beyond the need for diverse classes in selective schools. This is why some critics have recoiled from the "elitist" nature of diversity justification.³¹¹ The social conditions or closing the gap approach should appeal to everyone, including the white majority, to support affirmative action in their own interest and in the interest of justice for blacks. It posits that neither blacks nor whites can live safe, comfortable lives unless the social conditions surrounding blacks are greatly improved. Those who sit in judgment, as judges or onlookers, have to balance compassion for the small number of rejected whites not merely against the claim of a black student for reparations, but against the common weal.

3. Reparations and Societal Discrimination

There has been much discussion and controversy about reparations in recent years. Some supporters of reparations have proposed that they take the form of affirmative action, and some affirmative action proponents have justified it as a form of reparations. In sup-

³⁰⁵ See *The Progress of Black Student Matriculations at the Nation's Highest-Ranked Colleges and Universities*, 21 J. BLACKS HIGHER EDUC. 9, 10 (Autumn 1998).

³⁰⁶ See *id.*

³⁰⁷ See THERNSTROM & THERNSTROM, *supra* note 171, at 415-16.

³⁰⁸ See *id.* at 415.

³⁰⁹ See *id.*

³¹⁰ See Lawrence, *supra* note 202, at 940-41.

³¹¹ See *id.* at 941.

port of this view, affirmative action advocates have written books,³¹² introduced legislation in Congress annually,³¹³ filed suit,³¹⁴ and planned further litigation.³¹⁵

Today's campaign for reparations may be traced at least as far back as 1969, when James Forman, a leader of the Student Non-Violent Coordinating Committee (SNCC), arose during Sunday morning service at Riverside Church in New York City to read a manifesto demanding that America's churches and synagogues pay \$500 million as reparations to black people for "exploit[ation]," "brutali[ty]," "kill[ings]," and "persecut[ion]."³¹⁶ The demand for cash reparations was consistent with the ordinary meaning ascribed to the term.³¹⁷ The dictionary defines reparations as, among other things, "[c]ompensation for war damage owed by the aggressor."³¹⁸ In this sense, the claim for reparations resembles claims based on societal discrimination and whatever may be said for or against the societal discrimination justification of affirmative action in higher education may be said about reparations (although this congruence is not necessarily true for affirmative action of different kinds).

The best known contemporary reparations are those that Germany paid Holocaust survivors.³¹⁹ The United States has paid repara-

³¹² See, e.g., ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000); RANDALL N. ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000).

³¹³ See, e.g., H.R. 40, 106th Cong. (1999) (Commission to Study Reparation Proposals for African-Americans Act); see also Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677 (1999).

³¹⁴ See, e.g., *Cato v. United States*, 70 F.3d 1103, 1109–11 (9th Cir. 1995). In March, 2002, a suit seeking compensation from United States companies for allegedly profiting from the slave trade was filed in a New York federal court. Robert F. Worth, *Companies Are Sued for Slave Reparations*, N.Y. TIMES, Mar. 27, 2002, at B2.

³¹⁵ See Charles J. Ogletree, Jr., *Litigating the Legacy of Slavery*, N.Y. TIMES, Mar. 31, 2002, at wk 9. See generally Jeffrey Ghannam, *Repairing the Past*, 86 A.B.A. J., Nov. 2000, at 38.

³¹⁶ BORIS BITTKER, *CASE FOR BLACK REPARATIONS* 4 (1973).

³¹⁷ *Id.* at 17.

³¹⁸ OXFORD ENGLISH DICTIONARY (2nd ed. 1989).

³¹⁹ Germany, following World War I, paid reparations to the Allies; during recent years, it has paid reparations to individual victims of the holocaust and to Israel. See, e.g., Michael J. Kelly, *U.N. Security Council Permanent Membership: A New Proposal for a Twenty-First Century Council*, 31 SETON HALL L. REV. 319, 372 (2000) (describing staggering post-war reparations); Jennifer Peter, *Germany Pays Nazis' Wartime Slave \$4,454 in Reparations*, WICHITA EAGLE, Feb. 24, 2002, at 6A (noting the German reparations program ultimately will distribute \$5 billion to holocaust survivors). Similarly, Norway has decided to pay \$60 million in compensation to individual Jews and to Jewish organizations for property seized during World War II. *Norway Plans to Pay Jews \$60 Million Compensation*, N.Y. TIMES, June 27, 1995, at A4. A Japanese fund compensates Korean "comfort women" whom Japanese troops

tions to Japanese-Americans, who were interned during World War II.³²⁰ These and other reparations payments typify what the word has come to mean. Neither paid reparations to remote descendants of victims.³²¹ If the question of reparations had arisen not long after the Civil War, there would not have been much of a moral question about whether the former slaves themselves deserved "back pay." Indeed, immediately following the War, Congress enacted legislation that did give the former slaves some economic support that in a sense constituted reparations.³²² But, the term has come to be used expansively, to include the demand for compensation to African-Americans for slavery and its sequelae. For generations, African-Americans worked for slave owners without pay. This was not merely free labor for the owners. The arrangement was mandated by the law of slavery. Today, everyday moral standards dictate that upon the end of slavery recompense was due. If former slaves had demanded what today would be called "back pay" from the slaveholders, they would have objected on the ground that slavery was legal. It does not take a fine moral sensibility to reject that objection, although courts of that time might have taken more of a positivist view.

Boris Bittker rejected the argument that blacks were not entitled to reparations because innumerable groups throughout history also have been enslaved. He wrote that while there is "merit in the argument that the Americans of today, who would have to pay the bill, are no more responsible for ante-bellum slavery in the South than for serfdom in pre-1861 Czarist Russia," emancipation was not followed by a century of equality.³²³ Instead, there was "a mere decade of falter-

impressed into prostitution during the Second World War. Margaret Stetz, *Comfort Women's Due*, N.Y. TIMES, June 2, 1998, at A22.

³²⁰ The United States has made reparations payments of \$20,000 to Japanese-Americans and \$5000 to Latin-Americans of Japanese descent who were interned in relocation centers during the Second World War. *U.S. Will Pay Reparations to Former Latin American Internees*, N.Y. TIMES, June 15, 1998, at A19; see also Civil Liberties Act of 1988, 102 Stat. 103 (1988) (codified as 50 U.S.C. app. 1989b).

³²¹ Under German law, for example, compensation for slave labor will be paid to heirs of persecutees who died after February 16, 1999 only if they are the spouse, child, grandchild, sibling or testamentary heir of the persecutee. See Claims Conference on Jewish Material Claims Against Germany, *Slave and Forced Labor Compensation, Am I Eligible?* available at <http://www.claimscon.org/compensation/eligibility.asp> (last visited May 3, 2002).

³²² Justice Marshall summarized some of this legislation in his opinion in *Bakke*. See 438 U.S. at 390-91 (Marshall, J., concurring) (noting that Congress passed the Reconstruction Acts and the Civil Rights Act, and established the Freedman's Bureau in response to southern states' attempt to re-enslave blacks).

³²³ BITTKER, *supra* note 316, at 12.

ing progress, repeatedly checked by violence."³²⁴ Reconstruction and the segregation, inequality, and violence that followed were "succeeded by a caste system embodying white supremacy."³²⁵

Conventional reparations usually have taken the form of money. But, almost a century-and-a-half has passed since abolition. There are obstacles to identifying who should pay the reparations and who should receive them. The former slaves married and had children. It will not be simple to identify the ancestors of today's claimants. Former slaves and their descendants moved about the country, making them difficult to identify retrospectively. Some children had a parent who was not black, some had a parent who had not been a slave. Some families or individuals may have passed for white for generations. Immigrants from the Caribbean and Africa, whose ancestors were never slaves, or were not slaves under United States law, and their descendants, are numerous and indistinguishable from American-born blacks. Some, like Secretary of State Colin Powell, have achieved success and it might be argued that the society has rewarded them adequately.

It is not likely that records will give information about relationships adequate for making a judgment about inheritance. Entitlement might have to be traced back through perhaps five generations. A few of the former slaves and their descendants may have had wills. Most of the ancestors of today's claimants, however, probably died without wills and estates would have been passed down, generation to generation, under state laws that differ from state to state. In these circumstances, a large number of slave descendants would not be able to establish their claims. Nevertheless, it should be possible to identify at least some descendants of slaves who were owed compensation for labor and mistreatment and who can be traced from that time to the present.

Cash payments to descendants of slaves as reparations, however, would not be a practical way to proceed without difficulty, unfairness, and resentment. Most blacks and most descendants would not be able to establish entitlement. But, social policies designed to help African-Americans overcome the legacy of slavery could be an appropriate way of making compensation. One such social policy might be affirmative action. A recent book reports that "[o]pinion polls show

³²⁴ *Id.*

³²⁵ *See id.*

that the public perceives affirmative action as reparation."³²⁶ That would not be too great a leap. Although today's campaign for reparations began with James Forman's demand for money,³²⁷ programs and institutions could be employed as substitutes. Affirmative action is one of those programs and institutions.

The problem is that affirmative action in higher education is unlike other programs that pay money or invest in the community. Ordinarily, money reparations are paid by a state or city or country. The government obtains the funds for paying reparations by taxing everyone a relatively small amount. The cost of affirmative action, in contrast, is paid by white or Asian students, sometimes referred to as "innocents," whose applications are rejected to make places available for minority applicants.

The objection to innocents being required to pay reparations, particularly to minorities who suffered no harm, has become central to the affirmative action opposition.³²⁸ It is prominent in all anti-affirmative action writing. Although proportionately their numbers are small, the plight of innocents appears in one judicial opinion after another.³²⁹

In view of the impediments to identifying who is entitled to them, and potential conflict arising from the effort, it is unlikely that there will be money reparations. The recent reparations suit filed against businesses said to have profited from slavery and the wide ranging reparations suits that are being planned implicitly confirm this assessment. The plaintiffs are not seeking damages for individuals. Rather, as Charles Ogletree, a lawyer for reparations claimants put it, "[T]he reparations movement must . . . focus on the poorest of the poor—it must finance social recovery for the bottom-stuck, providing an opportunity to address comprehensively the problems of those who have not substantially benefited from integration or affirmative action."³³⁰ But, affirmative action in higher education probably will

³²⁶ BARKAN, *supra* note 312, at 294.

³²⁷ See Adolph L. Reed, Jr., *The Case Against Reparations*, PROGRESSIVE, Dec. 2000, available at <http://www.progressive.org/reed/200.htm> (last visited Mar. 16, 2002).

³²⁸ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 270 (1995) (Souter, Breyer, Ginsburg, JJ., dissenting); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276, 281, 282 (1986) (Powell, J., plurality); *id.* at 288 (O'Connor, J., concurring); *id.* at 311 (Marshall, J., dissenting); *Bakke*, 438 U.S. at 397 (Powell, J.).

³²⁹ See *Adarand*, 515 U.S. at 270 (Souter, Breyer, Ginsburg, JJ., dissenting); *Wygant*, 476 U.S. at 276, 281, 282 (Powell, J., plurality); *id.* at 288 (O'Connor, J., concurring); *id.* at 311 (Marshall, J., dissenting); *Bakke*, 438 U.S. at 397 (Powell, J.).

³³⁰ Ogletree, *supra* note 315, at wk.9; Worth, *supra* note 314, at B2.

continue, although unlikely to be called "reparations." Notwithstanding the problems it presents, the reparations argument has had an effect. It has focused attention on the condition of African-Americans today and the origins of those conditions. It has alerted society that something must be done to respond. The reparations argument fuels other arguments, even when there may be no straightforward logical connection.

B. Arguments Against Affirmative Action

1. Principle

The first argument in opposition to affirmative action is based on a priori moral considerations. Justice Clarence Thomas, for example, has written: "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."³³¹ This sometimes is expressed as a constitutional prohibition: "equal protection" forbids taking race into account for any purpose, or quoting Justice Harlan in *Plessy v. Ferguson*, "[O]ur Constitution is color blind."³³² Originating in natural law or morality, the belief is deeply felt and cannot be proved or disproved, like the opinion some have about the death penalty or abortion. Those who hold it feel passionately. There is no point in trying to persuade them otherwise. Justices Thomas and Scalia, for example, believe that affirmative action is harmful, and neither would find it acceptable even if they thought the results were good.³³³

A variant of principled opposition is the argument that affirmative action is erroneously based upon a theory of "group rights," whereas the constitutional right of equal protection is individual and affords no relief to anyone who has not suffered personal injury.

³³¹ *Adarand*, 515 U.S. at 240.

³³² 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). There is a question about how far this commitment to color-blindness goes. Some affirmative action opponents advocate recruiting the most academically accomplished black students. THOMAS SOWELL, *BLACK EDUCATION: MYTHS AND TRAGEDIES* 133-34 (1972). But why encourage blacks to go to college and not whites? Absolutists would outlaw scholarships limited to blacks and, indeed, in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), the United States Court of Appeals for the Fourth Circuit court so held. Despite *Podberesky*, race-targeted scholarship programs are commonplace; to abolish them would further deplete black presence at some schools.

³³³ See, e.g., *Adarand*, 515 U.S. at 239 (Scalia, J., concurring); *id.* at 240 (Thomas, J., concurring).

Whatever the group right-individual right dichotomy may mean in other contexts, the labels decide nothing because individual rights often are recast as group rights and vice versa. Much civil rights law readily may be characterized as involving group rights because it deals with treatment based on group membership. For example, Justice O'Connor, in *City of Richmond v. J.A. Croson Co.*, wrote of discrimination against groups and indicated that the government is not disabled from acting against it.³³⁴ Similarly, in an employment discrimination case, the plaintiff complained of discrimination because of membership in a group.³³⁵ When there has been a finding of discrimination against an individual because of membership in a group, relief sometimes has been awarded not merely to the adjudicated victim but to members of the victim's group, some of whom may not have demonstrated that they personally suffered any discrimination.³³⁶

The Supreme Court explicitly has recognized "group rights." *Wisconsin v. Yoder* allowed Amish families to keep their children out of school once they had attained a certain age.³³⁷ *Santa Clara Pueblo v. Martinez* upheld Native American tribal law against a woman who protested that her group, an Indian tribe, imposed patrilineal kinship rules that limited marital choice and her relationship with her children.³³⁸ Although Supreme Court free speech jurisprudence is now to the contrary,³³⁹ *Beauharnais v. Illinois*, which upheld the state's group libel law,³⁴⁰ has not been overruled.³⁴¹ There may be enhanced punishment for hate crimes to furnish enhanced protection for those who have been victimized because they belong to a group.³⁴² The "group rights" objection, if accepted, appears to mean only that affirmative action must be justified in the face of an equal protection claim under the bright light of strict scrutiny.³⁴³ That burden is on proponents of affirmative action anyway, no matter whether the right is called "group" or "individual."

³³⁴ See 488 U.S. 469, 509 (1989).

³³⁵ See generally *United States v. Paradise*, 480 U.S. 149 (1987).

³³⁶ See *id.* at 167.

³³⁷ 406 U.S. 205, 234 (1994).

³³⁸ 436 U.S. 49, 55 (1978).

³³⁹ See *Smith v. Collin*, 436 U.S. 953, 953 (1978) (Blackmun & Rehnquist, JJ., dissenting from denial of stay) (Court effectively upholding lower court's determination that Skokie, Illinois ordinances would unconstitutionally bar a Nazi march).

³⁴⁰ See *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952).

³⁴¹ *Smith*, 436 U.S. at 953 (Blackmun & Rehnquist, JJ., dissenting).

³⁴² See *Wisconsin v. Mitchell*, 508 U.S. 476, 490 (1993).

³⁴³ See *Adarand*, 515 U.S. at 227.

2. Merit

Opponents often say that affirmative action devalues "merit," which they believe is manifested by standardized test scores.³⁴⁴ This is just another way of saying that a student with high scores deserves admission. The tests, however, have limitations, and other considerations often influence deciding who deserves admission, including the applicant's potential for fundraising, found among legacies and children of the rich and famous; the university's sense of social justice; and the university's goal of adding diversity to the classroom for educational purposes.³⁴⁵ All the selective institutions under attack for affirmative action choose students by taking into account such factors, but reject others who are just as qualified, admitting some white students with scores on the SAT and similar tests lower than those of many other white admits.³⁴⁶

Everyone who has been admitted merited admission by some standard. Merit has many meanings; it may identify someone who is not an excellent student, but needs the education and can make good use of it.³⁴⁷ Proponents of affirmative action argue that minority applicants are meritorious as well. They say that a black student merits reparations, or a better chance, or that all students merit diversity in their classrooms, or that the black student who has surmounted the obstacles of the ghetto merits admission over the higher scoring non-black who is privileged and attended superior elementary and high schools. To argue merit merely returns us to the fundamental issues in the debate.

3. Stereotypes and Stigma

Critics claim that affirmative action stigmatizes minorities and stereotypes them by creating the general opinion that affirmative action admits will not be as good students as whites.³⁴⁸ They argue that it

³⁴⁴ See BOWEN & BOK, *supra* note 41, at 276-78.

³⁴⁵ See *supra* Part I.C.

³⁴⁶ See *supra* Part I.C.

³⁴⁷ See CHARLES L. LAWRENCE III & MARI MATSUDA, *WE WON'T GO BACK* 101 (1997) ("[P]rivilege should not trump merit, and merit should include the talents of those without privilege. . . . A good affirmative action plan broadens the definition of qualification, expanding the pool of talent available for any given opportunity.").

³⁴⁸ See *Strauder v. West Virginia*, 100 U.S. 303 (1879). *Strauder* may be the first case in which stigma and stereotype were a basis for decision. The Court wrote:

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, be-

encourages the public to have a low opinion even about blacks who were admitted on the basis of grades and scores alone and causes black students to hold the same stereotyped view of themselves.³⁴⁹

How do the critics know this? Supreme Court Justices and laymen alike, without evidence, have not hesitated to talk about stereotyping and stigma, although some hedge their claims, possibly because they are not so sure. For example, Justice Stevens has written that affirmative action "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect, that is, identified purely by their race."³⁵⁰ Justice Powell wrote in *Bakke* that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."³⁵¹ Justice Thomas has written that "[t]hese programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."³⁵² Note the qualifying words: "perceived by many" (Stevens), "may only reinforce" (Powell), "may cause them to develop" (Thomas). None of those who focus on stigma discuss the stigma that would attach to blacks if none, or very few, were accepted.

Looking at the stereotype/stigma concept from the perspective of the beneficiaries of affirmative action, as well as those who observe them, there is little or no empirical support for any conclusion. More important, the stereotype/stigma argument assumes that the perception or the stigmata do their harm in a time frame that is unrealistic.

cause of their color, . . . [is] practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race . . . [equal justice].

Id. at 308. The concept of stigma in the affirmative action context uses the term to refer to blacks who are benefiting from the programs, unlike *Strauder* where blacks were excluded from juries.

³⁴⁹ See *Tracy v. Bd. of Regents*, 59 F. Supp. 2d 1314, 1323 (1999) (concerning the University of Georgia affirmative action program). The court wrote: "AUGA [University of Georgia] is willing to stigmatize its non-white students for the sake of a largely symbolic racial preference." *Id.* Sometimes the term "stigma" is used to suggest that rejected whites have been stigmatized. But while excluded whites may feel indignant and that rejection was unfair, they are not likely to feel or be perceived as unworthy.

³⁵⁰ *Fullilove v. Klutznick*, 488 U.S. 448, 545 (1980) (Stevens, J., dissenting).

³⁵¹ *Bakke*, 438 U.S. at 298; see also Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1175-76 (1996) (presenting a number of arguments against affirmative action).

³⁵² *Adarand*, 515 U.S. at 241 (Thomas, J., concurring).

cally short. Affirmative action students usually graduate and become successful doctors, lawyers, business managers, or other professionals.³⁵³ Even if they felt stigmatized or stereotyped (and there has been no evidence as to whether many or few feel that way), the prospect of entering into satisfying careers would seem to more than compensate for feelings of unworthiness, if any.³⁵⁴ If that were not so, the stigmatized/stereotyped students would decline admission. They know, however, that following graduation, with higher status and income to match, they are likely to feel good. That many black students continue to apply to selective schools demonstrates either that they do not believe they will be stigmatized if admitted or that they merit admission no matter what the test score says, or that it is worth the obloquy, if any, because life will be much better later. Furthermore, once the affirmative action graduates are in school or on their jobs, they cannot avoid being evaluated by their performance, no matter how they are assessed by others while they are in school.

Anecdotal evidence supports the conclusion that stigma and stereotype do not deter blacks from achievement. In his book, *Reflections of an Affirmative Action Baby*, Stephen Carter, a law professor at Yale, writes that "the chances are good that I was admitted at Yale for essentially the same reason I was admitted at Harvard—the color of my skin made up for what were evidently considered other deficiencies in my academic record."³⁵⁵ He also attributes his appointment to the Yale faculty to his being black.³⁵⁶ Yet he disapproves of affirmative action and its potential for stereotyping and stigmatizing.³⁵⁷ At the same time, he has earned distinction and had a successful career as a law teacher and scholar. Whatever discomfort he may have suffered probably is far outweighed by the satisfaction he, his students, and others have obtained because he was educated at Harvard and Yale.

Moreover, one study has demonstrated that black medical school graduates admitted by affirmative action, despite relatively low scores, have developed careers remarkably similar to those of whites who had

³⁵³ See BOWEN & BOK, *supra* note 41, at 118–55.

³⁵⁴ See *What about the Charge that Affirmative Action Reinforces a Sense of Group Inferiority?*, 18 J. BLACKS HIGHER EDUC. 20, 20 (Winter 1997/1998) ("Ask a Harvard Law School graduate who was admitted under affirmative action if, as a result of this advantage, he or she was psychologically damaged or hurt or handicapped in his or her later practice of law.").

³⁵⁵ STEPHEN CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 16–17 (1991).

³⁵⁶ *Id.* at 62–64.

³⁵⁷ *Id.* at 62, 69.

higher scores.³⁵⁸ It is hard to imagine that any of them regret the help they obtained from the preferential treatment they received.

In any event, there are no studies linking the effects of affirmative action in university admissions to stigma and stereotype.³⁵⁹ In 1997, the Society for Industrial and Organizational Psychology published a review of all of the scientific literature on psychological implications of affirmative action, covering stigma, stereotyping, and backlash.³⁶⁰ The report concluded that "help is likely to have detrimental

³⁵⁸ In October 1997, the *Journal of the American Medical Association* published a study of twenty years of affirmative action at the University of California at Davis Medical School. See Robert L. Davidson & Ernst L. Lewis, *Affirmative Action and Other Special Consideration Admissions at the University of California, Davis, School of Medicine*, 278 JAMA 1153, 1153 (1997). In summary, regular admission students had higher grades; there was no difference in failure rates of core courses. *Id.* at 1153. Regular admission students had higher scores on the National Board of Medical Examiners examination, and were less likely to repeat the examination to receive a passing grade. *Id.* Following graduation, the experience of both groups was similar, including completion and evaluation of residency training. *Id.* Both populations selected primary care disciplines at the same rate and had remarkably similar practice characteristics. *Id.*

³⁵⁹ There are studies of affirmative action in employment of women and in contexts other than admissions. An example is George Lowenstein & Samuel Issacharoff, *Source Dependence in the Valuation of Objects*, 7 J. BEHAV. DECISION MAKING 157 (1994). The article reports on a study conducted in a typical manner: experimenters distributed mugs to students who had received top grades in a class exercise. Half the students were told they received a mug due to their performance, half were told mugs were distributed randomly. The first group valued the mugs more highly. The implication is that those who were admitted on the same basis as whites would value their admission more highly. See *id.* at 157-61, 165-67.

³⁶⁰ See DAVID A. KRAVITZ ET AL., THE SOCIETY FOR INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, *AFFIRMATIVE ACTION: A REVIEW OF PSYCHOLOGICAL AND BEHAVIORAL RESEARCH* (1997), available at <http://www.siop.org/AffirmAct/siopsaartoc.html> (last visited Mar. 19, 2002). Kravitz determined that confident assertions about stereotype and stigma that favor or oppose affirmative action have little scientific support: "[O]pinion polls results revealed that White Americans strongly support equality and the elimination of discrimination, but oppose preferential treatment. Reactions to compensatory actions are less clear. Polls of Black Americans revealed somewhat higher support for preferential treatment, but a clear preference for equal opportunity." *Id.* at 12. Experimental data, using undergraduates as respondents, led to a conclusion that "[t]here is greater support for the principle of equal opportunity than for the principle of affirmative action. Evaluations . . . of affirmative action are strongly influenced by actual or presumed AAP [affirmative action program] structure; they are inversely related to the weighting of demographic status in decision making." *Id.* at 16. "[I]ndividuals do think about affirmative action in terms of fairness." *Id.* at 17. "Programs directed at Blacks or minorities are viewed less positively by Whites than programs directed at women or the handicapped. Reasons for this difference are unclear." *Id.* at 25. "Blacks clearly feel more positively about AAPs in general than do Whites, though the size of this difference depends on details of the AAP." *Id.* at 32. "[W]omen generally have more positive attitudes than men." *Id.* "[S]elf report measures of racism are positively associated with opposition to affirmative action targeted at racial minorities." *Id.* "[B]acklash exists when the individual resents the fact that others have re-

effects on a recipient's self-esteem or perceptions of competence only to the extent that the recipient harbors doubts or uncertainties about his or her relative competence in the domain in which the help occurs."³⁶¹

This survey of what purports to be all the relevant literature concludes with an unifying observation:

[A]ffirmative action programs may have positive, negative, or both positive and negative consequences for recipients. . . . However, few studies have been conducted on this topic. . . . Finally, virtually none of this research has dealt with reactions of racial minorities to race-based selection procedures, and there is a clear need for such research.³⁶²

A section of the survey dealing with "effects on non-target groups" (i.e., persons not the beneficiaries of affirmative action) is equally inconclusive: "This stigmatization may be eliminated by providing clear and compelling evidence of the woman or minority member's competence."³⁶³ In another section, the author reports: "[A]s with any other organizational change effort, the consequences of the intervention

ceived positive outcomes. With few exceptions . . . , backlash has been ignored in the affirmative action literature." *Id.* at 37. "[A]ttitudes toward affirmative action seem to be positively associated with having experienced discrimination and having worked at an organization with an AAP, at least if the AAP resulted in positive experiences." *Id.* at 40-41.

There is one doctoral dissertation, published subsequent to the survey, that addresses how beneficiaries of affirmative action in higher education view themselves. See Maudette M. Jackson, *Reactions to Race-Based Preferential Selection* (Apr. 1997) (unpublished Ph.D. dissertation submitted to the Faculty of the Graduate School of the State University of New York at Buffalo) (on file with author). "[T]he results showed no significant negative effects of selection based on solely race or a combination of both merit and race on the psychological well-being of Blacks selected for a leadership position. . . . Overall these results suggest that the negative effects of gender-based selection procedures found for women do not apply to Blacks." *Id.* at 26-28. The author acknowledges that the study was conducted in laboratory settings with college students as subjects, limiting its "generalizability." *Id.* She writes that "given that this is the first race-based preferential selection experimental study, additional research is essential." *Id.* at 29.

³⁶¹ Monica E. Schneider et al., *Social Stigma and the Potential Costs of Assumptive Help*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 201, 208 (1996). Another study concludes that "[a]lthough several psychological theories predict that members of stigmatized groups should have low global self-esteem, empirical research typically does not support this prediction." Jennifer Crocker & Brenda Major, *Social Stigma and Self Esteem: The Self-Protective Properties of Stigma*, 96 PSYCHOL. REV. 608, 608 (1989).

³⁶² KRAVITZ, *supra* note 360, at 53.

³⁶³ *Id.* at 44. A Gallup poll asked employed blacks and employed white women whether they had ever felt that others questioned their abilities because of affirmative action. Paula R. Skedsvold & Tammy L. Mann, *The Affirmative Action Debate: What's Fair in Policy and Programs?*, 52 J. Soc. Issues 25, 25-31 (1996).

depend heavily on the specific characteristics of its implementation."³⁶⁴

In an article that is much more comprehensive than I have been here, Linda Hamilton Krieger finds the evidence to be inconclusive.³⁶⁵ She observes, as did the Society for Industrial and Organizational Psychology, that virtually no studies deal with affirmative action for African-Americans in higher education.³⁶⁶ Assessing whatever material exists, she concludes that generalizations about stigma and stereotype are not very useful.³⁶⁷

To extrapolate from the foregoing studies of affirmative action for women in employment and the slight research into racial factors, we could conclude that affirmative action leads some people, without knowing how many or their personal characteristics, to hold stereotyped views of beneficiaries of affirmative action that stigmatize them. Some beneficiaries share the same feelings. But, among both groups, such views often yield to evidence of competence, allowing the affirmative action beneficiaries to be judged, or to evaluate themselves, on their individual qualities. In other words, the research provides no basis for taking a position for or against affirmative action.

4. Backlash

"Backlash" is defined as "a strong adverse reaction."³⁶⁸ In *Reaching Beyond Race*, Paul M. Sniderman and Edward G. Carmines discuss polls and experiments that test attitudes towards affirmative action.³⁶⁹ They report overwhelming opposition when it is defined as preferential treatment in college admissions, but support for "making an extra

³⁶⁴ KRAVITZ, *supra* note 360, at 53.

³⁶⁵ See generally Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251 (1998).

³⁶⁶ "[M]ost research on the self-derogating effects of affirmative action has focused on gender preference. Little empirical evidence has been done on the effects of preferential selection on minority self evaluation." *Id.* at 1259.

³⁶⁷ "Studies have demonstrated that the self-denigrating effects of affirmative action are highly sensitive to contextual variables and, under certain conditions, disappear entirely." Jackson, *supra* note 360, at 1261. Jackson continues: "Taken as a whole, social cognition, procedural justice, and social identity theory can be used either to oppose or support preferential forms of affirmative action. But even if it were possible to determine whether the cost of preferences outweighed their benefits, such an exercise would hardly be worthwhile if it could be shown that, absent affirmative action, remaining policy tools were inadequate." *Id.* at 1276.

³⁶⁸ WEBSTER'S NEW COLLEGIATE DICTIONARY (1977).

³⁶⁹ See PAUL M. SNIDERMAN & EDWARD G. CARMINES, *REACHING BEYOND RACE* (1997).

effort to ensure fair consideration of blacks."³⁷⁰ They write that the opposition has not waned over the years,³⁷¹ that it exists also in Great Britain,³⁷² and that affirmative action stimulates race prejudice.³⁷³

We need go no further than referenda that show a large proportion of whites, probably always a majority, opposing affirmative action, with the degree of opposition depending on how the questions are phrased. According to one study:

It is clear that white adults do not favor preferences, quotas, or economic aid for blacks when these questions are generally phrased. . . . When survey questions have described programs specifically so that respondents understand clearly what is being asked and they have provided sufficient justification for the policy, opinion has proved to be more moderate.³⁷⁴

In November 1996, 63% of Californian whites, 26% of blacks, 24% of Latinos, and 39% of Asians voted in favor of Proposition 209, which would prohibit a wide range of affirmative action programs, including those in state universities.³⁷⁵ Voters in Houston, on the other hand, rejected a proposition that would have prohibited affirmative action.³⁷⁶ Nevertheless, the opposition was considerable, and the results of the Houston election were litigated over the language of the referendum.³⁷⁷ Finally, the Texas Court of Appeals held that the city's wording of the proposed amendment—the subject of the referendum—was adequate and not misleading.³⁷⁸

Rickshaw Adkins writes that "[c]urrently, polls ostensibly conducted in order to gauge public opinion on affirmative action do not ask the specific kinds of questions that would allow a complete picture of support and opposition to various policies to emerge." The causes

³⁷⁰ *Id.* at 25.

³⁷¹ *Id.* at 28, 30.

³⁷² *Id.* at 32.

³⁷³ *Id.* at 39.

³⁷⁴ Charlotte Steeh & Mariah Krysan, *Polls Trends, Affirmative Action and the Public, 1970-1975*, 60 PUB. OPINION 128, 140 (Spring 1996).

³⁷⁵ See *Elections '96 State Propositions: A Snapshot of Voters*, L.A. TIMES, Nov. 7, 1996, at A29.

³⁷⁶ See Julie Mason, *City's Affirmative Action Plan Gains Support, Polls Says*, HOUSTON CHRON., Oct. 5, 1999, at A17.

³⁷⁷ See Mason, *supra* note 376, at A17 (public opinion poll shows 54% in favor, 46% opposed); Ron Nissimov, *Affirmative Action Case Will Be Heard*, HOUSTON CHRON., Feb. 5, 1999, at A29.

³⁷⁸ *Brown v. Blum*, 9 S.W.3d 840, 842 (Tex. 1999).

of confusion "include definitional and contextual ambiguities and issue-framing and questionable wording concerns."³⁷⁹

Some formulations (e.g. "affirmative action," "racial job preference," "racial quotas," "preference to make up for past discrimination") evoke higher levels of support for affirmative action than others. Nevertheless, in all polls opponents of the programs either outnumber supporters substantially or register a high level of opposition.³⁸⁰ The white reaction exists, notwithstanding that only a very small fraction of white applicants are rejected by selective colleges because of affirmative action. After examining admissions at five highly selective schools, Bowen and Bok concluded that "even if white students filled all the places created by reducing black enrollment, the overall white probability of admission would rise by only one and one-half percentage points; from 25% to roughly 26.5%."³⁸¹ They compare resentment against affirmative action programs to that against parking spaces reserved for handicapped drivers:

Eliminating the reserved space would have only a minuscule effect on parking options for non-disabled drivers. But the sight of the open space will frustrate many passing motorists who are looking for a space. Many are likely to believe that they would now be parked if the space were not reserved.³⁸²

If this were widely understood, would it persuade the opposition? I doubt it. Possibly, opposition would be diminished if it were more widely understood that whites rejected at their first-choice schools went on to attend different schools of the same quality. Affirmative action also might be more acceptable if schools were to increase class size by a number equal to the number of affirmative action admits, as California will be doing in 2002 or 2003.³⁸³ This would make it possible to admit students who would have been admitted had there been no affirmative action.

³⁷⁹ Ricshaw Adkins, *Affirmative Action and Public Opinion Polls*, in RACE VERSUS CLASS, THE NEW AFFIRMATIVE ACTION DEBATE 102-03 (1996).

³⁸⁰ M.A. Aubin, *Race Issues in the United States Based on National Public Opinion Polls*, in BLACK AMERICANS: ISSUES AND CONCERNS (N. N. Rachveli ed., 1994).

³⁸¹ BOWEN & BOK, *supra* note 41, at 36.

³⁸² *Id.* at 36-37 (quoting Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, in TEST SCORE GAP, *supra* note 22, at 453).

³⁸³ *Id.* at 66.

5. Dropout Rate

Because the black dropout rate at selective institutions exceeds the white rate,³⁸⁴ some opponents argue that black students would be better off at less selective schools.³⁸⁵ But, Bowen and Bok report that in a study of twenty-eight selective schools, "none had a dropout rate for minority students anywhere near as high as the average attrition of 60% for black students at all NCAA Division I colleges, many of which are not selective."³⁸⁶ They report that "the more selective the college attended, the lower the black dropout rate."³⁸⁷

Students drop out for reasons like financial or family problems, academic difficulties, lack of interest, or changing interests. Dropping out is not always undesirable. Although not typical of the reasons affirmative action students drop out, Bill Gates dropped out of Harvard, one of my classmates dropped out of law school to get a graduate degree in political science, and one of my students dropped out to study wine making in Bordeaux. Some students drop out of one school and go to another or return some years later. There are usually no records of the extent to which this occurs. The more selective institutions have greater capacity to address academic, family, and financial difficulties to prevent dropping out due to those kinds of pressures.

6. African-Americans Do Not Need Affirmative Action More Than Anyone Else

Oppressive social conditions, objectors argue, are just a rite of passage through which other minorities have passed. Justice Powell, in *Bakke*, wrote that "the United States ha[s] become a Nation of minorities."³⁸⁸ Powell's decision noted the struggles of other ethnic groups to move up to parity with the successful majority.³⁸⁹ Blacks can too, he implied, without affirmative action.³⁹⁰

³⁸⁴ THERNSTROM & THERNSTROM, *supra* note 171, at 408 tbl.9.

³⁸⁵ *Id.* at 391-93. This is one of the Thernstroms' principal arguments against affirmative action in higher education.

³⁸⁶ BOWEN & BOK, *supra* note 41, at 258-59. The National Collegiate Athletic Association (NCAA) monitors student athletes' academic performance to make sure that their participation in sports is not at the expense of their schoolwork. As a consequence, although the NCAA is not concerned about questions of race or affirmative action, it is the keeper of dropout statistics.

³⁸⁷ *Id.*; see *Racial Conservatives Are Still Replaying the Myth that Racial Preferences Cause High Black Student College Dropout Rates*, 32 J. BLACKS HIGHER EDUC. 12, 12-13 (Summer 2001).

³⁸⁸ *Bakke*, 438 U.S. at 292.

³⁸⁹ See *id.*

³⁹⁰ See *id.*

Actually comparing blacks to other groups, however, easily shows that Justice Powell was wide of the mark. No other group in the United States has labored under the weight of the disabilities that African-Americans suffer. A few words of historical perspective will aid understanding.

Even today, after decades of black northward migration, most African-Americans live in the South.³⁹¹ The badges of slavery persisted in the law of every southern state, as well as in a few border and northern ones (Kansas and Delaware were defendants in two of the cases that constituted *Brown v. Board of Education*) for decades after abolition.³⁹² Change came only in 1954 when the Supreme Court rejected segregation decisively,³⁹³ and in the 1960s when Congress enacted the Civil Rights Acts.³⁹⁴ Until then, black children in the South attended separate and inferior elementary and high schools. State law prohibited them from attending white undergraduate, graduate, and professional schools until 1938, when the Supreme Court declared the exclusion unconstitutional if the state was not providing blacks with equal schools.³⁹⁵ This decision was uniformly disobeyed until 1950 when the Supreme Court made the measure of equality so stringent that it amounted to holding segregation in graduate and professional education unconstitutional.³⁹⁶ Not until the late 1960s and 1970s did more than a few, but not many, southern blacks begin to attend a few historically white professional schools and colleges, often under affirmative action policies.

The economic opportunity that other groups enjoyed was also denied blacks. In the Roosevelt years, the government initiated New Deal social welfare programs, including social security, welfare, unemployment insurance, labor, minimum wage, education, home ownership, and other programs that generated the prosperity America

³⁹¹ As of August 30, 2000, 18,683,698 blacks lived in the South out of a total national black population of 34,862,169. At the end of the twentieth century, blacks were returning to the South, producing a surge in that region's non-Hispanic black population. See generally WILLIAM H. FREY, POPULATION REFERENCE BUREAU, MIGRATION TO THE SOUTH BRINGS U.S. BLACKS FULL CIRCLE, POPULATION REFERENCE BUREAU, available at http://www.prb.org/Content/NavigationMenu/PT_articles/April-June_2001/Migration_to_the_South_Brings_U_S_Blacks_Full_Circle.htm (last visited Mar. 26, 2002).

³⁹² 347 U.S. 483 (1954).

³⁹³ See generally *Brown*, 347 U.S. at 483.

³⁹⁴ See Civil Rights Acts of 1964, 42 U.S.C. §§ 1971-2000h-6 (1964).

³⁹⁵ See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 344 (1938).

³⁹⁶ See *McLaurin*, 339 U.S. at 641-42; *Sweatt*, 339 U.S. at 629.

enjoys today.³⁹⁷ The proposals were framed in race neutral fashion, but southern congressmen threatened to withhold support unless the president excluded from coverage agricultural workers and domestic servants, who were almost all black.³⁹⁸ Moreover, southern legislators insisted on local, not national, control over the laws' administration, which discouraged black participation.³⁹⁹ Where blacks were not excluded, unsympathetic and hostile administration of the laws discouraged them.

In the South, blacks were excluded from vocational training, colleges, and professional schools during the period that the G.I. Bill began paying for the education of World War II veterans.⁴⁰⁰ Some vocational training was conducted by private employers, who hired and trained only whites.⁴⁰¹ Vocational education prepared many southern white veterans for well-paying industrial jobs. Most southern black veterans had no more than a fifth grade education;⁴⁰² vocational training would have been the best they could do. The utility of vocational training that blacks could obtain, however, was minimal because almost all employers discriminated.⁴⁰³ For whites, college and professional school education was one of the foundation stones upon which the prosperity of succeeding generations rested.⁴⁰⁴ Excluded from white schools, blacks might have applied to black schools, but black schools did not have enough room to admit all the veterans who ap-

³⁹⁷ See, e.g., Nat'l Labor Relations Act of 1935, 29 U.S.C. §§ 151-169 (1994); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994) (examples of New Deal programs); see also Federal Home Loan Bank Act of 1933, 12 U.S.C. §§ 1421-1449 (1994); Nat'l Housing Act of 1934, 12 U.S.C. §§ 1701-1750g (1994) (creating FSLIC, FDIC, and the FHA).

³⁹⁸ A thoroughgoing discussion of the racial impact of the original Social Security, Unemployment Insurance, and Aid to Dependent Children Acts is in ROBERT LIEBERMAN, *SHIFTING THE COLOR LINE* (1998), and William Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1 (1999) (describing "social citizenship tradition," a majoritarian egalitarian constitutional tradition). For discussion of unemployment insurance and loans, see generally David H. Onkst, *First A Negro . . . Incidentally a Veteran*, 31 J. Soc. HIST. 517, 519 (1998).

³⁹⁹ Ira Katznelson et al, *Limiting Liberalism: The Southern Veto in Congress, 1933-1950*, 108 POL. SCI. Q. 283 (1993).

⁴⁰⁰ See Onkst, *supra* note 398, at 527, 529.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ Cf. *id.* at 534 (noting that while blacks could not fully participate in the G.I. bill program, "others received significant benefits").

plied.⁴⁰⁵ By 1947, black colleges had turned away between 15,000 and 20,000 veterans because of limited resources and facilities.⁴⁰⁶

The "greatest mass-based opportunity for wealth accumulation in American history," investing in a home during the 1950s and later, was also off limits to blacks.⁴⁰⁷ The Federal Housing Administration (FHA) and the Veteran's Administration (VA), which administered the mortgage insurance programs that made possible buying a home at reasonable mortgage rates, explicitly refused to insure mortgages for blacks in white neighborhoods.⁴⁰⁸ Huge housing developments, like Levittown, would not sell to blacks.⁴⁰⁹ Nothing comparable was built by or for blacks.⁴¹⁰ They were tightly concentrated in the ghetto where property values not only did not soar, but suffered in value because of the ambient social pathology.⁴¹¹ In contrast, the value of homes purchased under FHA-insured and VA-insured mortgage arrangements has increased spectacularly and constitutes many families' largest asset.⁴¹²

The rare black fortunate enough to enter a white college in 1970 at age eighteen graduated in 1974 or 1975. If she went on to graduate school, she would have finished (to set an arbitrary, yet plausible date) in 1980. Assuming she had a child in 1983, that child would be of college age now. In other words, the children of the first, small cohort of blacks who had some access to the higher education available to whites would just now be enrolling in college. These black applicants are not far removed from the legally enforced segregation that commenced in reaction to Reconstruction and ended, as a matter of law, in 1950. Moreover, in practice, exclusion from white higher education endured well into the 1960s. No other group has been afflicted in this manner.

Another objection to affirmative action is that there is no way to know when racial preferences, once introduced, should end. No affirmative action supporter argues, or should argue, for it to continue indefinitely. International human rights treaties, which embody widely accepted human rights standards, refer to affirmative action as

⁴⁰⁵ Onkst, *supra* note 398, at 529.

⁴⁰⁶ *Id.* at 530.

⁴⁰⁷ MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH, WHITE WEALTH* 18 (1995).

⁴⁰⁸ *Id.* at 18, 39.

⁴⁰⁹ *Id.* at 18.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² OLIVER & SHAPIRO, *supra* note 407, at 51-52.

"[s]pecial measures aimed at accelerating de facto equality"⁴¹³ that "shall not be continued after the objectives for which [they were] taken have been achieved."⁴¹⁴ The United States is a party to these treaties, although it has hedged its adherence to human rights treaties with so many reservations, declarations, and understandings that they are virtually unenforceable.⁴¹⁵ The time limitation in these agreements nevertheless strongly suggests that affirmative action plans should have sunset provisions. When the vestiges of the past are gone, or no longer are a substantial barrier, affirmative action should no longer be permitted.

To identify vestiges of discrimination is not a forbidding task. In school segregation cases, courts now regularly decide whether vestiges of segregation persist in order to decide whether a school system has become unitary and should be relieved of a desegregation decree.⁴¹⁶ Similarly, courts can decide when affirmative action is no longer needed: "Judges need not blind themselves to what they know as men."⁴¹⁷

III. *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE* IS A CONTROLLING PRECEDENT

A. *Justice Powell's Opinion in Bakke Is the Holding*

A chance to pass judgment on affirmative action in higher education once more is on its way to the Supreme Court,⁴¹⁸ although the Court may avoid reconsidering the constitutional question and decide that the issue is controlled by stare decisis. The rule would then remain, as Justice Powell wrote in *Regents of the University of California v. Bakke*, that a university in using affirmative action to admit minorities is "seeking to achieve a goal that is of paramount importance in the

⁴¹³ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 17.

⁴¹⁴ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

⁴¹⁵ See *id.* (United States' ratification of the race convention). The United States is not a party to the Discrimination Against Women Convention.

⁴¹⁶ See, e.g., *United States v. Fordice*, 505 U.S. 717 (1992).

⁴¹⁷ *Dillard v. Indus. Comm.*, 416 U.S. 783, 800 (1974) (Douglas, J., dissenting).

⁴¹⁸ *Gratz v. Bollinger*, 122 F. Supp. 2d 811 (E.D. Mich. 2000), regarding affirmative action policies at the University of Michigan, is widely expected to reach the Supreme Court. See Barbara Kantrovitz, *Head of the Class, Columbia's Incoming Chief is Part of a New Aristocracy Breed of College Presidents*, NEWSWEEK, Mar. 1, 2002, at 51.

fulfillment of its mission,"⁴¹⁹ and that the "interest of diversity is compelling in the context of a university's admissions program."⁴²⁰ This, he determined, is an exercise of a university's First Amendment right of academic freedom.⁴²¹ At the same time, he wrote that the particular program at the University of California at Davis was not constitutional: It was not narrowly tailored because it used a quota (as he saw it, although that has been disputed) and minority students were evaluated in a discrete minority pool, not in comparison to whites.⁴²²

Four other Justices joined him in upholding affirmative action in principle, while disagreeing with his rejection of how it was used in the *Bakke* case.⁴²³ That they did not discuss diversity is the basis of the argument that they did not support his views about it. Another four Justices dissented, but only dealt with the meaning of Title VI of the Civil Rights Act.⁴²⁴ Some believe that Justice Powell's opinion did not state the holding of the case.⁴²⁵ But, as I shall explain below, I believe it did.

Until recently, the most prominent challenge to *Bakke* had been the United States Court of Appeals for the Fifth Circuit's 1996 decision in *Hopwood v. Texas* (*Hopwood I*).⁴²⁶ It may now be that the United States Court of Appeals for the Sixth Circuit's forthcoming decision in the University of Michigan cases, if the Court reaches the merits, will be the vehicle that brings the issue back to the Supreme Court. But, until the Sixth Circuit decides those cases, the issues will remain defined by the University of Texas *Hopwood* case. There is no reason to believe that the Sixth Circuit will introduce anything new into the debate. *Hopwood I* states the case against *Bakke* as a precedent that upholds affirmative action. *Hopwood I* disapproved a University of Texas School of Law affirmative action plan (no longer in effect at the time of the decision) that closely resembled the plan the Supreme Court had struck down in *Bakke*.⁴²⁷ While *Bakke* disapproved of affirmative

⁴¹⁹ 438 U.S. 265, 313 (1978).

⁴²⁰ *Id.*

⁴²¹ *Id.* at 316.

⁴²² *Id.* at 319-20.

⁴²³ See *id.* at 324-408 (Blackmun, Brennan, Marshall, & White, JJ., concurring).

⁴²⁴ See *Bakke*, 438 U.S. at 412-21 (Stevens, Rehnquist, Stewart, JJ. & Burger, C.J., concurring in part and dissenting in part).

⁴²⁵ See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 944 (1996) [*Hopwood I*].

⁴²⁶ *Id.*

⁴²⁷ See *id.* at 936. The affirmative action plan at issue in *Hopwood I* had been suspended in 1992 and replaced with a different plan by the time the Court of Appeals decided the case in 1996. See *Hopwood v. Texas*, 518 U.S. 1033, 1033 (1996) (internal citation omitted).

action as used in the case then before it, not as a general proposition, the *Hopwood I* court decided that cases following *Bakke* have held that affirmative action is only justified when the state is remedying present effects of past discrimination.⁴²⁸ Last December, however, a different panel of the Fifth Circuit decided in *Hopwood v. Texas* (*Hopwood II*) that *Hopwood I* was wrong: Cases following *Bakke* did not ban all affirmative action.⁴²⁹ Nonetheless, the *Hopwood II* court did agree with *Hopwood I* that the plan under review was unconstitutional.⁴³⁰

A recent United States Court of Appeals for the Eleventh Circuit decision disapproved of an affirmative action plan at the University of Georgia because in making admissions decisions, the school awarded a fixed number of points to black students' scores, instead of considering the students individually against all other applicants. Like the *Hopwood I* court, the Eleventh Circuit held that Justice Powell's opinion was not the holding of the case.⁴³¹

Hopwood I claimed that "Justice Powell's opinion garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."⁴³² Therefore, it was not entitled to respect as *stare decisis*.⁴³³ The opinion observed that more recent affirmative action decisions had doomed affirmative action in educa-

Justices Ginsburg and Souter, concurring in the denial of certiorari, gave this as a reason for declining to review. *Id.*

⁴²⁸ *Hopwood I*, 78 F.3d at 948-49.

⁴²⁹ *Hopwood v. Texas*, 236 F.3d 256, 275 (5th Cir. 2000) (*Hopwood II*) ("Although *Bakke* clearly stands for the proposition that the government can use racial preferences under some circumstances, no controlling rationale emerged from that opinion to delineate precisely what those justifying circumstances are. Thus, in deciding whether the system of racial preferences emphasized by the Law Schools was constitutional, the [*Hopwood I*] panel was free to determine which among the competing rationales offered by the justices in *Bakke* is constitutionally valid.").

⁴³⁰ *Id.* ("Although Justice Powell would surely have disagreed with [the *Hopwood I*] holding, we cannot say that [*Hopwood I*] conflicts with any portion of *Bakke* that is binding on this court.").

⁴³¹ *Johnson v. Bd. of Regents*, 263 F.3d 1234 (11th Cir. 2001). *Johnson* discusses diversity extensively and concludes that Justices Powell and Brennan agreed only that diversity is important but did not agree that it is compelling. *See id.* at 1245-47. However, the opinion does not "decide whether or when student body diversity may be a compelling interest . . ." *Id.* "It disapproves the plan because it was not narrowly tailored." *Id.* at 1237. Because a fixed number of points were added to the Total Student Index (a measure used in making admissions decisions) of minority students, the court held that the plan was not narrowly tailored. *See id.* The university "must be prepared to shoulder the burden of fully and fairly analyzing applicants as individuals and not merely as members of groups when deciding their likely contribution to student body diversity." *Id.* at 1256.

⁴³² *Hopwood I*, 78 F.3d at 944.

⁴³³ *Id.*

tion and elsewhere.⁴³⁴ Finally, the *Hopwood I* court argued that non-remedial state interests could never justify racial classifications.⁴³⁵

In asserting that Justice Powell's was a lone voice not deserving respect as *stare decisis*, the Fifth Circuit panel made no reference to *Marks v. United States*, which provided explicit guidelines for distilling a rule from the opinions of a fragmented court.⁴³⁶ "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of five justices," wrote the majority in *Marks*, "the holding may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds."⁴³⁷ Over the last twenty-five years, the Supreme Court and lower courts many times have accepted as binding a single Justice's opinion deemed "narrower" than multi-author opinions.⁴³⁸ Thus, it is not sufficient for the Fifth Circuit merely to point out that no other Justices joined Justice Powell's opinion. Rather, the relevant inquiry concerns the narrowest ground on which five Justices concurred.

Two views of *Bakke* are possible. On the one hand, as Justice Brennan wrote, "We also agree with Mr. Justice Powell that a plan like the 'Harvard' plan . . . is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."⁴³⁹ The *Hopwood I* court cited this sentence as evidence that a majority of the Court rejected diversity as a basis for affirmative action. This "Harvard footnote," however, is not the whole of Justice Brennan's opinion. Another reading demonstrates that the "Brennan Four" approved diversity as one of a number of grounds upon which affirmative action could be justified. This approval appears several times in Justice Brennan's opinion and is consistent with his views expressed else-

⁴³⁴ See *id.* at 944-45.

⁴³⁵ *Id.* at 944.

⁴³⁶ See *Marks v. United States*, 430 U.S. 188, 193 (1976).

⁴³⁷ *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

⁴³⁸ For examples of cases in which the Supreme Court has accepted as binding a single-justice opinion deemed narrower than multiple-justice opinions, see *O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) ("Justice White concurred in the judgment, providing the narrowest grounds of decision among the Justices whose votes were necessary to the judgment."); *Schlup v. Delo*, 513 U.S. 298, 344 (1995) ("[T]he concurrence's merely making the claim causes it to be an accurate description of what the Court today holds since the narrower ground taken by one of the Justices comprising a five-Justice majority becomes the law."); *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) ("As Justice O'Connor supplied the fifth vote in *Caldwell* and concurred on grounds narrower than those put forth by the plurality, her position is controlling.").

⁴³⁹ *Bakke*, 438 U.S. at 326 n.1 (Brennan, J., concurring).

where. He wrote that "any state"—which includes states that had not discriminated and where, consequently, affirmative action would not be a remedy for adjudicated discrimination—could properly use a diversity-based program of affirmative action: "[A]ny State, including California, is free to adopt [the Harvard plan] in preference to a less acceptable alternative"⁴⁴⁰ The opinion also described the University's program as one that "does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together."⁴⁴¹ That is neither a remedial consideration nor one that rests on societal discrimination. Furthermore, the "Brennan Four" rejected strict scrutiny for affirmative action cases, instead urging application of a more relaxed level of scrutiny that would justify non-remedial selection procedures.⁴⁴² These factors, combined with "at least" in the language of the Harvard footnote,⁴⁴³ strongly suggest that Justice Brennan's opinion accepted the diversity justification.

Justice Brennan also endorsed diversity in *Metro Broadcasting, Inc. v. FCC*,⁴⁴⁴ decided after *Bakke*. He wrote approvingly of the *Bakke* diversity rationale in upholding affirmative action in the allocation of broadcast licenses: "Just as a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which a race conscious university admissions program may be predicated, the diversity of views and information on the airwaves serves important First Amendment values."⁴⁴⁵

In sum, none of the Justices in *Bakke* rejected race as a constitutionally valid factor to take into account in making admissions decisions. Justice Powell accepted only diversity as a justification for affirmative action,⁴⁴⁶ while Brennan and three others would have approved a more expansive consideration of race in admissions, but a fortiori accepted Justice Powell's diversity justification.⁴⁴⁷ The four dissenters did not address the constitutional question at all, relying solely upon their interpretation of Title VI, although their statutory

⁴⁴⁰ *Id.* at 379 (Brennan, J., concurring).

⁴⁴¹ *Id.* at 374 (Brennan, J., concurring).

⁴⁴² *Id.* at 324-25.

⁴⁴³ *Id.* at 326 n.1.

⁴⁴⁴ 497 U.S. 547 (1990).

⁴⁴⁵ *Id.* at 568.

⁴⁴⁶ *See id.* at 311-15.

⁴⁴⁷ *See supra* note 423 and accompanying text.

interpretation sounded a disapproval of race as an admissions standard.⁴⁴⁸ Justice Powell's opinion thus represents the narrowest ground on which the majority agreed.

1. *Bakke* Has Not Been Overruled

Has *Bakke*, as it appears in Justice Powell's opinion, been overruled *sub silentio* or otherwise? The *Hopwood I* court wrote that the Supreme Court had held that non-remedial state interests will never validate racial classifications in education,⁴⁴⁹ but that is not correct. No Supreme Court case sustains this conclusion.⁴⁵⁰ The *Hopwood I* court is, of course, right in pointing out that since *Bakke* the Supreme Court has severely limited the grounds upon which affirmative action may be justified. At least three cases—*Wygant v. Jackson Board of Education*,⁴⁵¹ *City of Richmond v. J. A. Croson Co.*⁴⁵² and *Adarand Constructors, Inc. v. Peña*⁴⁵³—make that clear. In all three, the majority held that the only constitutional justification for affirmative action is as a remedy for past discrimination.⁴⁵⁴ But, they did not refer to higher education at all and they said nothing about *Bakke*.

Only two Justices who were in the majority in the three cases have made clear that they believe affirmative action is precluded in all cases. In *Adarand*, Justices Scalia and Thomas took that position.⁴⁵⁵ On the other hand, Justice O'Connor's majority opinion asserted, "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."⁴⁵⁶ *Adarand* finished with an inconclusive remand to decide unresolved questions about "whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny."⁴⁵⁷ The remand was consistent with Justice O'Connor's

⁴⁴⁸ See *supra* note 426 and accompanying text.

⁴⁴⁹ *Hopwood I*, 78 F.3d at 942.

⁴⁵⁰ The only case involving education is *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), a layoff situation in which racial balance for high school teachers had been agreed to in a union contract. *Id.* at 270. The role model argument was rejected. See *id.* at 275-76. None of the opinions discuss higher education.

⁴⁵¹ 476 U.S. at 267.

⁴⁵² 488 U.S. 469 (1989).

⁴⁵³ 515 U.S. 200 (1995).

⁴⁵⁴ See *Adarand*, 515 U.S. at 218-21; *Croson*, 488 U.S. at 493-94; *Wygant*, 476 U.S. at 274.

⁴⁵⁵ *Adarand*, 515 U.S. at 239, 240.

⁴⁵⁶ *Id.* at 237.

⁴⁵⁷ *Id.* at 238.

belief expressed in *Croson*, in which Justice Kennedy joined, that some kinds of affirmative action might be constitutional.⁴⁵⁸ Following the remand in *Adarand*, the United States Court of Appeals for the Tenth Circuit upheld an amended affirmative action plan.⁴⁵⁹ Six members of the Court, therefore, have been at least open to argument that affirmative action is valid on grounds other than the narrowly remedial.⁴⁶⁰

Moreover, none of the foregoing takes into account the message of the recent voting rights case, *Hunt v. Cromartie*, that race may be considered in a districting case, if it is not dominant in a classification scheme.⁴⁶¹ Even though race coincided to a considerable extent with party affiliation in *Cromartie*,⁴⁶² and those who drew district lines were aware of the race of the populations they were allocating among districts,⁴⁶³ the districting was held to have been based on politics, not race.⁴⁶⁴ While voting rights doctrine is not fully transferable to the context of education, those who formulate the admissions policy of a university, like those who drew the electoral districts in *Cromartie*, do not take race into account for its own sake, but for the educational purpose of assembling a diverse class. At the least, *Cromartie* suggests a more supple view of the use of racial factors than has appeared in affirmative action cases in recent years.

⁴⁵⁸ See *Croson*, 488 U.S. at 486-92.

⁴⁵⁹ See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1181 (10th Cir. 2000), cert. granted *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001), cert. dismissed as improvidently granted, 534 U.S. 103 (2001). During the certiorari stage, the petitioner challenged the statutes and regulations. *Adarand*, 534 U.S. at 513. However, the petitioner later "challeng[ed] only the statutes and regulations that pertain[ed] to direct procurement of DOT funds for highway construction on federal lands." *Id.* The Supreme Court found that the petitioner's shift in its posture necessitated a dismissal of the writ. See *id.*

⁴⁶⁰ The six justices are Kennedy and Stevens, in addition to O'Connor, Souter, Ginsburg, and Breyer. See *Croson*, 488 U.S. at 486-92 (O'Connor, J.); *id.* at 519 (Kennedy, J., concurring) ("I accept the less absolute rule contained in Justice O'Connor's opinion."); *id.* at 517 (Stevens, J., concurring) ("[O]nly two conceivable bases for differentiating the preferred classes from society as a whole have occurred to me: (1) that they were the victims of unfair treatment in the past and (2) that they are less able to compete in the future."); see also *Adarand*, 532 U.S. at 269 (Souter, J., dissenting) (Ginsburg, & Breyer, JJ., joining in dissent) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist . . .").

⁴⁶¹ See 532 U.S. 234, 251-58 (2001).

⁴⁶² *Id.* at 258.

⁴⁶³ *Id.* at 251.

⁴⁶⁴ *Id.* at 257.

2. The Strict Scrutiny Shoe Is on the Other Foot: *Bakke* Should Not Be Overruled

The Supreme Court will strictly scrutinize affirmative action, but how strictly is not clear. At the same time, any plea to overrule a constitutional precedent must withstand scrutiny that is also strict. A majority of the Rehnquist Court has repeatedly displayed firm unwillingness to overrule a controversial precedent-setting decision that has nonetheless found "wide acceptance in the legal culture,"⁴⁶⁵ merely because of a belief that the original case was wrongly decided. In each instance, the Court has required that there be a "special justification"⁴⁶⁶ or "compelling reason"⁴⁶⁷—the literal equivalent of the strict scrutiny rule. To overrule without compelling reason, the Court has said, would have the terrible consequence of undermining confidence in the judicial system.⁴⁶⁸

Two relevant decisions are *Dickerson v. United States*⁴⁶⁹ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴⁷⁰ In *Dickerson*, decided in 2000, the Court, in an opinion by the Chief Justice, declined to overrule *Miranda v. Arizona*,⁴⁷¹ a hallmark of the Warren Court's protection of individual rights.⁴⁷² Chief Justice Rehnquist wrote for a seven-to-two majority that stare decisis prevented the Justices from approaching the question as if it were one of first impression:

Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now. . . . While stare decisis is not an inexorable command, particularly when we are interpreting the Constitution, even in constitutional cases, the doctrine carries such persuasive force that we have always required a

⁴⁶⁵ *Mitchell v. United States*, 526 U.S. 314, 331–32 (1999) (Scalia, J., dissenting).

⁴⁶⁶ See, e.g., *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (internal citation omitted).

⁴⁶⁷ See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 867 (1992).

⁴⁶⁸ See, e.g., *Planned Parenthood*, 505 U.S. at 865–69 (to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question).

⁴⁶⁹ *Dickerson*, 530 U.S. at 428.

⁴⁷⁰ *Planned Parenthood*, 505 U.S. at 833.

⁴⁷¹ 384 U.S. 436 (1966).

⁴⁷² See *Dickerson*, 530 U.S. at 443.

departure from precedent to be supported by some special justification.⁴⁷³

Holding that no "special justification" existed for overruling *Miranda*, the Chief Justice referred to its cultural and legal centrality.⁴⁷⁴ *Miranda*, he wrote, "has become embedded in routine police practice to the point where the warnings have become part of our national culture."⁴⁷⁵ Quoting *Mitchell v. United States*, Chief Justice Rehnquist noted, "[T]he fact that a rule has found 'wide acceptance in the legal culture' is 'adequate reason not to overrule' it."⁴⁷⁶

Affirmative action also has certainly gained cultural centrality in the years since *Bakke* was decided. Just as the *Miranda* warnings have become ensconced in popular culture and police procedure, so too has affirmative action become virtually standard for university admissions policies throughout the country.

The reason for the highly cautious approach to overruling had been explicated in the joint opinion of Justices O'Connor, Kennedy, and Souter in *Casey*.⁴⁷⁷ The Court was asked to overrule *Roe v. Wade*⁴⁷⁸ and a number of decisions that upheld limitations (twenty-four hour waiting period, parental notification, parental or judicial consent, spousal consent) on the right of a woman to obtain an abortion.⁴⁷⁹ The decision upheld *Roe*, although it overruled several earlier decisions that had refused to invalidate some of the limitations.⁴⁸⁰ There was a difference between the big principle asserted by *Roe*, the national controversy it initiated, and the limitations on that principle that, while controversial, were not disputed nationally to the same extent.

The joint opinion stated: "[T]he need for principled action to be perceived as such is implicated whenever [any appellate court] overrules a prior case."⁴⁸¹ As a consequence, overruling is rare.⁴⁸² The opinion referred to "the terrible price [that] would be paid for overruling."⁴⁸³ To pay that price "would seriously weaken the Court's ca-

⁴⁷³ *Id.*

⁴⁷⁴ *Id.* at 443.

⁴⁷⁵ *Id.*

⁴⁷⁶ *Id.* (quoting *Mitchell*, 526 U.S. at 331-32 (Scalia, J., dissenting)).

⁴⁷⁷ See *Casey*, 505 U.S. at 833.

⁴⁷⁸ 400 U.S. 113 (1973).

⁴⁷⁹ *Casey*, 505 U.S. at 833-34.

⁴⁸⁰ See *id.* at 834-35.

⁴⁸¹ *Id.* at 866.

⁴⁸² *Id.*

⁴⁸³ *Id.* at 864.

capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law."⁴⁸⁴ It added: "[T]o overrule under fire in the absence of the most 'compelling reason' to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question."⁴⁸⁵

The *Casey* opinion cited *Lochner v. New York*⁴⁸⁶ and *Plessy v. Ferguson*⁴⁸⁷ as rare examples of justifiable overruling, writing that "examination of the conditions justifying [their] . . . repudiation . . . is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did."⁴⁸⁸ Judicial legitimacy, the opinion pointed out, is at stake in such a situation.⁴⁸⁹ *Lochner* had hobbled the power of the states to regulate business activities; *Plessy* had embedded the separate-but-equal doctrine in American law for over half a century. A terrible price, indeed, would have been paid if those decisions had stood.

The *Bakke* decision, too, involved that rare category of highly important doctrines,⁴⁹⁰ though, unlike *Lochner* and *Plessy*, it should be affirmed, not overruled. Those who would overrule *Bakke* have not met the requisite high standard of "special justification." Indeed, the contrary is the case. Justice Powell was right about diversity.⁴⁹¹ Students—even those with interests remote from the humanities and social sciences—do learn from diverse views, values, and attitudes of classmates who come from various backgrounds.⁴⁹² This is the nearly unanimous conclusion of educators. They should have the academic freedom to act on their knowledge of education. As Justice Powell wrote, that is their First Amendment right.⁴⁹³

Moreover, the potential reaction to *Bakke's* overruling would not be mere dismay at the overruling of any judgment that is a generation old. Overruling would, for the foreseeable future, cripple one of the principal means of advancement that blacks have. A credible estimate is that black presence in highly selective colleges and universities

⁴⁸⁴ *Casey*, 505 U.S. at 865.

⁴⁸⁵ *Id.* at 867.

⁴⁸⁶ 198 U.S. 45 (1905).

⁴⁸⁷ 163 U.S. 537 (1896).

⁴⁸⁸ *Casey*, 505 U.S. at 864.

⁴⁸⁹ *Id.* at 865.

⁴⁹⁰ That *Bakke* is the center of great controversy in the public arena is obvious. Seventy-nine amicus curiae briefs were filed, some for a number of amici.

⁴⁹¹ See *Bakke*, 438 U.S. at 311–12.

⁴⁹² See *supra* Part II.A.2.

⁴⁹³ See *Bakke*, 438 U.S. 265, 311–12.

would drop to about 2%.⁴⁹⁴ Such a decision would contribute to isolating African-Americans further and increasing the frustration that often is expressed in a socially harmful manner.

IV. SOCIAL CONDITIONS AS COMPELLING STATE INTEREST

A. *Affirmative Action is Constitutional as a Means of Correcting Social Conditions*

There is another and, I think, better reason why affirmative action in higher education is constitutional. It is a proven method of successfully addressing the social conditions in which African-Americans live that have an impact on the lives of all other Americans. It has not and cannot do everything needed to correct the conditions, but it has done, and can do, a great deal. The courts have not passed upon this justification. But, can this argument survive constitutional challenge? To succeed it must run the gauntlet of (1) scrutiny at some level of strictness that a majority of the Court can agree upon (but not so strict that the plan is doomed); (2) the search for a compelling governmental interest; and (3) the requirement of narrow tailoring, or that the use of race-based criteria is no broader than necessary.⁴⁹⁵

1. Strict Scrutiny

Five Justices would now require that affirmative action survive strict scrutiny.⁴⁹⁶ Four Justices continue to advocate some lesser level of scrutiny.⁴⁹⁷ The level of scrutiny, however, does not seem to be the main obstacle to approval of affirmative action as constitutional. Justices O'Connor and Kennedy (among the five who require strict scrutiny) are somewhat flexible about the meaning of "strict." Justices Ginsburg and Breyer, among the group advocating a lesser level of scrutiny, have characterized the O'Connor position as lenient enough that they would not reject affirmative action per se: "[T]he lead opinion has dispelled the notion that 'strict scrutiny' is 'fatal in fact.' . . .

⁴⁹⁴ See *Look What Happens When Affirmative Action is Banned: Black Students are Pushed Down Into Second- and Third-Tier Institutions of Higher Education*, 34 J. BLACKS HIGHER EDUC. 82, 82 (Winter 2001-02).

⁴⁹⁵ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 219 (1995).

⁴⁹⁶ Today those five are Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Scalia, and Thomas. See generally *Adarand*, 515 U.S. 200 (1995).

⁴⁹⁷ The four are Justices Stevens, Souter, Ginsburg, and Breyer. Justices Stevens and Ginsburg, dissenting in *Adarand*, noted: "I think it is unfortunate that the majority insists on applying the label 'strict scrutiny' to benign race-based programs." *Id.* at 243.

Today's decision thus usefully reiterates that the purpose of strict scrutiny 'is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making.'⁴⁹⁸ This is, of course, the writing of dissenters characterizing the opinion of members of the majority as embracing a somewhat accommodating level of scrutiny. Although Justice O'Connor should speak for herself, she has not challenged the characterization. It is consistent with her other views about affirmative action, which are more tolerant of it than those of Chief Justice Rehnquist and Justices Scalia and Thomas. But, the question is not so much about level of scrutiny; rather, it is about compelling governmental interest and narrow tailoring.

2. Compelling Governmental Interest

In *Adarand Constructors, Inc. v. Peña*,⁴⁹⁹ the most recent Supreme Court decision on the issue, and in earlier cases,⁵⁰⁰ the Court rejected the argument that affirmative action to compensate for societal discrimination serves a compelling governmental interest.⁵⁰¹ These cases struck down affirmative action programs relating to a school district considering race in selecting teachers to be laid off when it had to reduce personnel,⁵⁰² and to the allocation of contracts to minority business enterprises.⁵⁰³ These decisions did not involve or discuss higher education.

In the recent cases, four Justices (Stevens, Souter, Ginsburg, and Breyer) have, in dissent, voted to uphold affirmative action as compensation for societal discrimination, concluding that this is a compelling governmental interest.⁵⁰⁴ They have dissented from opinions that employ rigid standards in applying strict scrutiny.⁵⁰⁵ In those

⁴⁹⁸ *Id.* at 275-76 (Ginsburg, J., dissenting) (quoting *Adarand*, 515 U.S. at 237-38 (O'Connor, J., majority) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980)).

⁴⁹⁹ 515 U.S. at 200.

⁵⁰⁰ See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Jackson Bd. of Ed.* 476 U.S. 267 (1986).

⁵⁰¹ *Adarand*, 515 U.S. at 220.

⁵⁰² See *Wygant*, 476 U.S. at 270 ("Societal discrimination without more, is too amorphous a basis for finding a racially classified remedy.").

⁵⁰³ See *Adarand*, 515 U.S. at 205-06; *Croson*, 488 U.S. at 477-83.

⁵⁰⁴ See, e.g., *Adarand*, 515 U.S. at 269 (Souter, J., dissenting) (Ginsburg & Breyer, JJ., joining) ("The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination."); see also *Adarand*, 515 U.S. at 242 (Stevens, J., dissenting).

⁵⁰⁵ See, e.g., *id.* at 200.

cases, they used terms like "caste" and "subordination," which could be part of a social conditions argument.⁵⁰⁶

They were dissenters. The five Justices who would require strict scrutiny in passing on the constitutionality of affirmative action have rejected compensation for societal discrimination as a compelling governmental interest.⁵⁰⁷ The five votes, however, are not very solid. Justice O'Connor has been the least doctrinaire among the five. She has been cautious about rejecting blacks' claims for redress. In writing for the majority in *Adarand*, she was careful not to prescribe rigid standards in remanding to the Court of Appeals to decide whether the affirmative action served a compelling governmental interest and was narrowly tailored.⁵⁰⁸ She gave no instructions. Consequently, the United States Court of Appeals for the Tenth Circuit upheld the program.⁵⁰⁹ The Supreme Court recently dismissed its writ of certiorari, however, because of a shift in the petitioner's position.⁵¹⁰

Justice O'Connor has gone to some lengths to make clear that she is not adamantly opposed to affirmative action in all situations. She wrote in *Adarand*:

We wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." The unhappy persistence of both the practice and the effects of racial discrimination against minority groups in this country is an unfortunate reality, and

⁵⁰⁶ Justices Stevens and Ginsburg (two of the four dissenters) wrote in *Adarand*:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," . . . should ignore this distinction.

Id. at 243. Although social conditions were not under consideration, "caste system" and "racial subordination" are parts of social conditions theory. See *supra* Part II.A.1.

⁵⁰⁷ See, e.g., *Wygant*, 476 U.S. at 276. In *Croson*, Justice O'Connor, referring to *Wygant*, wrote: "This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in *Bakke* that '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.'" *Croson*, 488 U.S. at 497 (internal citation omitted).

⁵⁰⁸ See *Adarand*, 515 U.S. at 237.

⁵⁰⁹ See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), cert. granted *Adarand v. Mineta*, 532 U.S. 967 (2001), cert. dismissed as improvidently granted, 534 U.S. 103 (2001).

⁵¹⁰ *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001). For discussion of this case, see *supra* note 459.

government is not disqualified from acting in response to it.⁵¹¹

She has written that "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."⁵¹² Although Justice Powell would have found a compelling interest only where there has been "judicial, legislative, or administrative findings of constitutional or statutory violations,"⁵¹³ Justice O'Connor has required less: "[T]his remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required."⁵¹⁴ Justice O'Connor was also in the majority in *Hunt v. Cromartie*, holding that race could be a factor in drawing electoral districts.⁵¹⁵ She is the least likely of the five-Justice majority to close gateways that affirmative action has opened.

Perhaps, if she were presented with a broader perspective on the conditions that make affirmative action necessary, she would vote to uphold it. The social conditions (or the "closing the gap") thesis offers a more comprehensive picture of the status of blacks, affirmative action, and consequences for the entire nation than any other argument.⁵¹⁶ It depicts blacks who, in extraordinary proportions, live isolated lives, are victims and perpetrators of crime, inhabitants of prisons and jails, disaffected from the justice system, sporadically rioting against real or perceived injustice, and are disproportionately unemployed, with much less income, exceedingly less wealth, and more than their share of teenage pregnancy and single parent households,

⁵¹¹ *Adarand*, 515 U.S. at 237.

⁵¹² *Croson*, 488 U.S. at 509.

⁵¹³ *Bakke*, 438 U.S. at 307; see also *United States v. Paradise*, 480 U.S. 149, 167 (1987) ("[E]very Justice . . . agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy.").

⁵¹⁴ *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). In *Croson*, Justice O'Connor applied similar reasoning: "[A]ppellee argues that the city must limit any race-based remedial efforts to eradicating the effects of its own prior discrimination. . . . Appellant argues . . . the city of Richmond enjoys sweeping legislative power to define and attack the effects of prior discrimination in its local construction industry. We find that neither of these two rather stark alternatives can withstand analysis." 488 U.S. at 486.

⁵¹⁵ *Hunt v. Cromartie*, 532 U.S. 234, 236 (2001); see *supra* notes 461-464 and accompanying text. On the other hand, Justice Kennedy, who has agreed with Justice O'Connor about some aspects of affirmative action, was opposed to the use of race in *Cromartie*. See *id.* at 259-67.

⁵¹⁶ See *supra* Part II.A.1.

often speaking English that outsiders cannot understand.⁵¹⁷ These and other symptoms compound in the confines of the ghetto, pass on to the next generation, and metastasize among whites.⁵¹⁸ Some of these and other symptoms of pathology have their origins in slavery and discrimination.⁵¹⁹ Others have remote connection to discrimination, or, if it has played a role, it is too difficult to trace.⁵²⁰ There is no other group, defined by race or anything else, that is so large a part of the American population but is subjugated to such a great degree. The conditions that oppress them affect everyone. Affirmative action in higher education has been a means of helping African-Americans emerge from this environment and diminish the environment's effect on everybody.⁵²¹

That something must be done about the condition that afflicts so large a percentage of African-Americans should be beyond dispute. That the need is compelling and that government properly may be concerned about it is equally without doubt. That affirmative action in higher education is an effective way of addressing the problem has been established.

3. Narrow Tailoring

"Narrow tailoring" is where many an affirmative action plan has run afoul of the Constitution. Narrow tailoring requires that an affirmative action program be no more extensive than necessary and protect non-minority students where possible. Otherwise, the program will not survive strict scrutiny.

One protection against overbreadth in affirmative action plans would be to increase class size by the number of minorities admitted under affirmative action, thereby diminishing the exclusionary effect

⁵¹⁷ See *supra* Part II.A.1.

⁵¹⁸ See *supra* Part II.A.1.c.

⁵¹⁹ See *supra* Part II.A.3.

⁵²⁰ Justice Powell suggested another compelling interest when he "assumed" in *Bakke* that a state has a compelling interest in facilitating the health care of its citizens. Because there had been no evidence that affirmative action would facilitate health care, he did not base his opinion on the claim. See *Bakke*, 438 U.S. at 310-11. But extrapolating from his assumption, other social conditions that deserve remedy, if supported by the evidence, should warrant affirmative action as well. This assumption recognizes that a university program may encompass more than instruction and scholarship. It may embrace a concern for health care in society. If health care, why not other interests?

⁵²¹ See *supra* Part II.A.1.

on whites (and Asians).⁵²² Anyone who would have been admitted before the increase would be admitted afterwards. Still, there would be a slight exclusionary effect because affirmative action students will occupy places that would have been filled by non-affirmative action "innocent" applicants.⁵²³ The social conditions argument diminishes any force the innocence argument might have in these limited circumstances. If the justification were not that the state is making an effort to overcome social conditions, the white student most likely will reply that she never discriminated, and ask why the cost should fall on her. Judges, and members of the public, have sympathized with this position. Although some Justices have said that to yield her place may be a price she should pay along with other innocent whites for the greater good,⁵²⁴ that is not the majority view.⁵²⁵ The social conditions argument, however, drains the innocents argument of some of its force. It considers the consequences for all of society, not merely the compet-

⁵²² If, for example, under affirmative action a class consisted of 100 students, ninety of whom were white and ten of whom were minorities, an affirmative action opponent might charge that ten whites had been rejected to allow room for the ten minorities. If the size of the class were increased to 110, then it might be assumed that all of the 100 whites who would have been admitted originally, if there had been no affirmative action, would then be admitted.

⁵²³ See *supra* text accompanying notes 327-329.

⁵²⁴ Chief Justice Burger in *Fullilove v. Klutznick* expressed this view:

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. . . . Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

448 U.S. 448, 484-85 (1978). *Adarand* has since overruled *Fullilove*. See *Adarand*, 515 U.S. at 202.

Still, Justices Ginsburg and Breyer continue to take the position Chief Justice Burger took in *Fullilove*.

When this price is considered reasonable, it is in part because it is a price to be paid only temporarily: if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing.

Id. at 270. Justice Powell has written: "As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, 476 U.S. at 280-81.

⁵²⁵ See *supra* Part IV.A.2.

ing black and white students.⁵²⁶ The perception then changes from that of an innocent, weighed in one pan of the scales of justice against a minority student in the other, to the innocent weighed in one pan of the scales of justice against the interests of all of society. Sympathy for the innocent, with this perspective, is less likely to outweigh concern for the public at large.

In *Croson*, although many barriers to minority participation in the construction industry appeared to be race-neutral, the Court was critical of the plan because there was no evidence that the city had considered race-neutral means to increase the proportion of business allocated to minorities.⁵²⁷ In other words, the plan was not narrowly tailored. In contrast, race-neutral means in the university setting have been tried and are still being tried, with limited success.⁵²⁸ One remedy might be to increase the number of African-Americans in highly selective and selective schools by improving their credentials. This would include raising their test scores. But, efforts to discover why blacks' test scores are low have not produced satisfactory answers.⁵²⁹ There are theories, but no one knows for sure. Not knowing why the condition exists is a fatal barrier to changing it.

Maybe test preparation courses could raise the scores, but they have not and do not appear to have the capacity to do so.⁵³⁰ Maybe using socio-economic criteria would allow scrapping racial standards. UCLA weighs socio-economic, but not racial, factors in admissions decisions.⁵³¹ The result has been to reduce severely the number of its black students.⁵³² Uplifting the educational attainment of black children is, of course, desirable, but there is little agreement about how that can be accomplished. In any event, there would be no results for perhaps a generation.

The Supreme Court derided the *Croson* plan because it entitled black, Spanish-speaking, Eskimo, Aleutian, or Oriental entrepreneurs from anywhere in the country to an absolute preference based on their race over citizens of Richmond, even though no need had been demonstrated to prefer them.⁵³³ Schools with affirmative action do

⁵²⁶ See *supra* Part II.A.1.

⁵²⁷ See *Croson*, 488 U.S. at 471.

⁵²⁸ See *supra* Part I.D.

⁵²⁹ See *supra* Part I.B.

⁵³⁰ See *supra* Part I.E.4.

⁵³¹ See *supra* text accompanying notes 184-189.

⁵³² See *supra* text accompanying notes 190-194, app. A.

⁵³³ 488 U.S. at 506.

not face this shortcoming because they readily can show that blacks need it more than members of any other group. Schools can narrowly tailor programs to assist blacks alone, or blacks and others for whom they can make a similar case. Accommodating the needs of blacks alone may not be easy because other groups will apply political pressure for their constituents, which explains why so many groups were included in the litany of beneficiaries in plans like the one in *Croson*. But, of course, a few other groups could qualify.

Narrow tailoring requires that a program be limited in time so that it "will not last longer than the discriminatory effects it is designed to eliminate."⁵³⁴ I am not aware that college or university plans include time limits, but they should, either by imposing a termination date or requiring periodic reviews of the need for affirmative action.

Affirmative action for black applicants also is narrowly tailored in that not much needs to be done to implement it. Colleges could simply cease treating standardized tests as decisive. Schools have shown that they can run admissions programs without relying on tests, as demonstrated by the ease with which schools ignore or marginalize test results when it suits them.⁵³⁵

Depending on the percentage of black high school students and their distribution within the school system, a top percentage plan could be a neutral technique for achieving diversity at the college level, although there appears to be no way it would work for graduate and professional school.⁵³⁶ Using such plans, Florida and Texas have created diverse college classes by admitting black students whom conventional criteria would exclude.⁵³⁷ California has promised to introduce its own top percentage plan.⁵³⁸ The downside of the top percentage plans is that they encourage school segregation and do not necessarily select the minority students with the best potential. The plans may not include high-achieving students in the more demanding high schools who are not in the top 10% or 20%. But, those students still could be admitted if colleges take into account personal and societal factors, as required by a Texas statute and the admissions rules of a number of schools.⁵³⁹

⁵³⁴ *Adarand*, 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)).

⁵³⁵ See *supra* notes 85-97 and accompanying text.

⁵³⁶ See *supra* Part I.E.1.

⁵³⁷ See *supra* Part I.D.1, 3.

⁵³⁸ See *supra* Part I.D.2.

⁵³⁹ See *supra* text accompanying notes 109-112.

A state might not be required to use a top percentage plan in place of affirmative action as a narrowly tailored way of achieving the same objective if it could demonstrate that the top percentage plan encourages segregation in high schools. It might decline a top percentage plan because the characteristics of top percentage students were different from and less desirable than those admitted under a combination of conventional standards and affirmative action. Narrowly tailoring, therefore, if a state decided to use affirmative action, would require the state first to find out whether a top percentage plan would produce a diverse student body. The state might ascertain that a top percentage plan would not have that result, that it is undesirable because it would embed segregation in its high schools more firmly, that it would exclude some of the best students from demanding schools, or some other reason. If the state then decides not to use a top percentage plan, affirmative action would be the most narrowly tailored action it could take towards closing the black-white gap or towards achieving diversity on campus.

B. *The Confluence of Bakke and Social Conditions Theory*

The five-to-four divisions in a string of Supreme Court decisions dealing with affirmative action mirror a similar split in the country. What will the Court do when the issue returns to it? *Hopwood I* says that Justice Powell's opinion does not state the holding in *Bakke*. I have argued that Justice Powell's opinion is the holding of the case and should be controlling. But, if it is the holding, should it be overruled? To hold that affirmative action in higher education is unconstitutional, relying on either reasoning, after a generation in which perhaps every selective and most non-selective schools based their admissions on it, would administer a shock to higher education. It would exacerbate the resentment that too many African-Americans feel about their place in society. It would increase the isolation in which they live. It is impossible to overlook the fact that terminating affirmative action in higher education would severely reduce black presence in highly selective colleges, graduate, and professional schools.

For some Justices, this outcome would be profoundly contrary to the national interest. They very well might factor that result into their decisions. To give weight to practical consequences may seem to some to subordinate the role of law. But, it is commonplace, and often is articulated.

It is not difficult to find judicial conclusions that have been influenced by the likely effect of a decision. In *Plessy v. Ferguson*, Justice Harlan's historic dissent argued, presciently, the consequences that would follow a decision holding racial segregation constitutional:

The judgment this day rendered will, in time, prove to be as pernicious as the decision made by this tribunal in the *Dred Scott* case. . . . [It] will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution. . . . What can more certainly arouse race hate, what more certainly create and perpetuate feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?⁵⁴⁰

Justices O'Connor, Kennedy, and Souter's opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* rejected a plea to overrule *Roe v. Wade*, in part because of "the consequences of overruling."⁵⁴¹ Justice Scalia, dissenting in *Morrison v. Olsen*,⁵⁴² correctly predicted and deplored the conduct of the independent counsel in the Clinton impeachment imbroglio. He envisioned selecting:

a prosecutor antagonistic to the administration . . . and . . . should the independent counsel or his or her staff come up with something beyond [the investigation's original] scope, nothing prevents him or her from asking the judges to expand his or her authority or, if that does not work, referring it to the Attorney General, whereupon the whole process would recommence ⁵⁴³

In *Bush v. Gore*, Justice Scalia, concurring in the grant of a stay of the decision of the Florida Supreme Court and an order expediting the

⁵⁴⁰ *Plessy v. Ferguson*, 163 U.S. 537, 559-60 (1896).

⁵⁴¹ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992) (explaining decision not to overrule *Roe*, 410 U.S. 113 (1973)). The Justices also wrote of "the certain cost of overruling . . .," *id.* at 856, and "prescience," *id.* at 862.

⁵⁴² 487 U.S. 654 (1988).

⁵⁴³ *Id.* at 730.

case to be heard in the Supreme Court, wrote an opinion that adverted to the lack of legitimacy with which a Bush victory would be perceived if the motion had been denied.⁵⁴⁴ In *Brown v. Board of Education*,⁵⁴⁵ the Justices, in conference, spoke of the possibility of public school closings and violence should they rule to outlaw segregation.⁵⁴⁶ The government, as amicus curiae, argued that a decision upholding segregation would have adverse foreign policy consequences.⁵⁴⁷ The examples could be multiplied.

Justice Powell's opinion in *Bakke* is a sound justification of affirmative action in higher education. At the same time, later cases that deal with affirmative action in other activities (small business, employment, etc.) point in the other direction.⁵⁴⁸ Some Justices for whom the contending decisions are in equipoise might consider the ramifications of a decision holding that Justice Powell's opinion did not state the holding or that later cases overruled *Bakke*. The steady rise of blacks in society, through the gateways of leading universities, would slow. The improvements in their status and related benefits for all of society would diminish.

Given the division on the Court it may be that the way out would be to decide nothing of substance and let sleeping dogs lie. There is a wide array of doctrines that the Court deploys when it deems it wise not to make a substantive decision: among them is stare decisis. Stare decisis is an instance of what Alexander Bickel called the "passive virtues."⁵⁴⁹ By basing its decision entirely upon precedent, the Court may prudently avoid affirming a constitutional norm with which a number of Justices, perhaps a majority, may disagree, while avoiding a decision unacceptable to a strident sector of the population. The doctrine of stare decisis, if applicable, emerges as a prudent way of dealing with the next higher education affirmative action case that will reach the Court.

⁵⁴⁴ *Bush v. Gore*, 531 U.S. 1046 (2000). Justice Scalia wrote: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election." *Id.* at 1046.

⁵⁴⁵ 349 U.S. 294 (1955).

⁵⁴⁶ See MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW* 199 (possible abolition of public education), 192 (violence), 229 (resistance; end of southern liberalism) (1994).

⁵⁴⁷ See Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 65 (1988).

⁵⁴⁸ See *supra* notes 502-503 and accompanying text.

⁵⁴⁹ See Alexander Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). See generally Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344 (1990).

The Court could avert the problems that would result from overruling *Bakke* and avoid deciding the difficult constitutional questions about diversity, societal discrimination, reparations, and social conditions, as well as related issues of levels of scrutiny, compelling governmental interest, and narrow tailoring. It could simply address the condition that confronts us by upholding *Bakke* as a binding precedent. Such a decision would also avert the likelihood of widespread dissents, because if *Bakke* were overturned, the chant from the ghetto, "No justice, no peace," would be heard again.

Allowing *Bakke* to stand would be a conventional outcome, in line with the Court's policy of avoiding the decision of constitutional questions when possible. The doctrine often finds expression when the Court construes a statute to save its constitutionality. For example, in 2000, the Court decided two immigration cases by construing statutes to avoid confronting constitutional questions.⁵⁵⁰ The Court employs other aversive devices as well, declining to make constitutional decisions in non-adversary proceedings and in other circumstances. Justice Rutledge explained the policy in *Rescue Army v. Municipal Court* as "basic to the federal system and the Court's appropriate place within that structure."⁵⁵¹ He observed:

[A] . . . policy of accelerated decision might do equal or greater harm for the security of private rights. [For] premature and relatively abstract decisions, which such a policy would be most likely to promote, have their part too in rendering rights uncertain and insecure. [Time] and experience [have] verified [that] the choice of the strict necessity policy was wisely made.⁵⁵²

⁵⁵⁰ See *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289 (2001).

⁵⁵¹ 331 U.S. 549, 570 (1947).

⁵⁵² *Id.* at 572. The opinion explained:

the Court will not render advisory opinions; constitutional issues affecting legislation will not be determined in friendly, non adversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; [at] the instance of one who fails to show that he is injured by the statute's operation; [or] if a construction of the statute is fairly possible by which the question may be avoided.

Id.; see also *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

Upholding affirmative action on the basis of stare decisis would not exactly avoid the constitutional question. *Bakke* was a constitutional decision itself, as would be a decision to leave it undisturbed. But, in these circumstances, holding that the Powell opinion was stare decisis would implement the avoidance policy. Reopening *Bakke* might lead to unforeseen destinations. Cass Sunstein, in arguing that the Court was correct in denying certiorari in *Hopwood v. Texas*, counseled that the Court

should economize on moral disagreement, refusing to resolve large-scale moral issues unless it is necessary to do so. This proposition does not suggest any particular outcome in any particular case. What it does suggest is that it would be a democratic disaster if the Court were to issue a broad ruling that foreclosed democratic debate.⁵⁵³

This view is equally applicable to letting sleeping dogs lie by observing the doctrine of stare decisis in *Bakke*.

Justice O'Connor and, to a lesser extent, Justice Kennedy, one of whose votes would be needed for a denouement upholding affirmative action, are not rigidly opposed to it.⁵⁵⁴ They have joined in toning down the severity of strict scrutiny. They have voted against overruling precedents in cases involving national controversy that could impair public confidence in the judiciary.⁵⁵⁵ The vote of one of them would create a majority of five or more justices who would not want to repudiate precedent where to do so would impede black movement towards parity with whites.

Would Justice O'Connor and possibly Justice Kennedy vote to uphold affirmative action in higher education on the basis of the social conditions argument? They have not closed their minds to the possibility of finding that there is a compelling interest in ridding the country of the conditions I have described in these pages. They agree that scrutiny must be strict, but not so strict that it guarantees disapproval of every affirmative action plan. Of course, doting on Justices O'Connor and Kennedy may very well turn out to be badly misplaced. A Justice, and perhaps more than one, may leave the Court at any time. There is no way of knowing whom that may be. There is also no way of knowing who will replace them.

⁵⁵³ Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 93 (1995).

⁵⁵⁴ See *supra* Part III.A.1-2.

⁵⁵⁵ See, e.g., *Casey*, 505 U.S. at 867.

Assumptions about the politics of judicial selection and confirmation can easily be mistaken. The United States has argued in the latest *Adarand* episode in the Supreme Court in support of the validity of "[r]ace-conscious measures, such as DBE [disadvantaged business enterprises] goals for individual contracts, [that] may be used only if race-neutral means prove insufficient."⁵⁵⁶ And the Court has upheld the *Adarand* affirmative action plan, albeit by dismissing the writ of certiorari as improvidently granted⁵⁵⁷—not a ringing endorsement of affirmative action, but far from a repudiation where there was adequate reason to decide on the merits.

That is not what one would have expected from the rhetoric of the last political campaign, or the Court's latest decisions on affirmative action. If *Bakke* were overruled, the disabling environment that has replicated itself in the black community over generations would continue without the moderating influence of affirmative action. Affirmative action in higher education has been no panacea—no one program could be—but for many African-Americans and their families, it has broken the cycle of repetition of social conditions and helped tens of thousands of African-Americans rise towards parity with whites. If it were prohibited, that progress would falter. The social conditions argument should place before the Court some of the best reasons why *Bakke* deserves to survive, which surprisingly have played little or no part in the public debates in the Court or beyond.

But, for the Justices who are reluctant to venture into new territory, avoiding the constitutional question would spare that need. *Stare decisis* is a well-settled, neutral doctrine that is exquisitely applicable to *Bakke*. It is reason enough to avoid confronting new constitutional arguments and has the added virtue of being good for the country.

POSTSCRIPT

As this Article is going to press, the United States Court of Appeals for the Sixth Circuit reversed by a vote of 5 to 4 the District Court judgment in *Grutter v. Bollinger*, the University of Michigan law school affirmative action case.⁵⁵⁸ The court's opinion set forth views much like those of this Article with regard to diversity as a constitu-

⁵⁵⁶ Brief for the Respondents at 6, *Adarand Constructors v. Mineta*, 532 U.S. 967 (2001) (No. 00-730). In support of the program, the brief said that "[i]t is designed to ensure that aid recipients employ race-conscious remedies only as a last resort." *Id.* at 19.

⁵⁵⁷ See *supra* text accompanying note 459.

⁵⁵⁸ See *supra* notes 49-51 and accompanying text.

tional justification of affirmative action and of what constitutes the holding of a fragmented court, relying on *Marks v. United States*.⁵⁵⁹ There now is clearly a conflict of circuits, which increases the likelihood of Supreme Court review.

⁵⁵⁹ 430 U.S. 188 (1977).

APPENDIX

Appendix A: African-American First Year Entering Students at University of Texas Schools

University of Texas

	2001	2000	1999	1998	1997	1996
U.T. Austin ^a	242	296	286	199	190	266
U.T. Law School ^b	16	17	9	9	4	29
U.T. Southwestern Med. Ctr. at Dallas ^c		13	11	7	1	8
U.T. Health Sci. Ctr. at San Antonio ^d		5	3	4	3	1

^a OFFICE OF INSTITUTIONAL STUDIES, UNIV. OF TEXAS AT AUSTIN, FALL ENROLLMENT OF NEW STUDENTS BY GROUP AND ETHNICITY, *available at* <http://www.utexas.edu/academic/ois/stathb.01-02/students/sl2a/main.html>. (last visited Apr. 14, 2002).

^b *Id.*

^c TEXAS HIGHER EDUC. COORDINATING BD., REPORT ON THE EFFECTS OF THE HOPWOOD DECISION ON MINORITY APPLICATIONS, OFFERS, AND ENROLLMENTS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS; App. E: Texas Medical School, *available at* <http://www.thecb.state.tx.us/reports/html/0016/e.htm>, (last visited Apr. 14, 2002). Data for 2000 obtained by: E-Mail from Charles Busbey, Data Analyst, Educational Data Center, Texas Higher Educ. Coordinating Bd (Sent Jun. 20, 2001 to Jun. 25, 2001) (on file with author).

^d TEXAS HIGHER EDUC. COORDINATING BD., REPORT ON THE EFFECTS OF THE HOPWOOD DECISION ON MINORITY APPLICATIONS, OFFERS, AND ENROLLMENTS AT PUBLIC INSTITUTIONS OF HIGHER EDUCATION IN TEXAS; App. E: Texas Medical School, *available at* <http://www.thecb.state.tx.us/cfbins/ArchFetch.cfm?DocID=0376&Format=HTML>, (last visited Apr. 14, 2002); Busbey, *supra* note c. The numbers for 2000 are for M.D. students only and do not include dental students.

Appendix B: African-American First Year Entering Students at University of California Schools

Table 1

University of California Law Schools^a

	2001	2000	1999	1998	1997	1996	1995	1994
Boalt Hall	14	7	7	8	1	20	21	31
U.C.L.A.	10	5	3	8	10	19	20	46
U.C. Davis	4	2	6	3	5	4	3	10

^a OFFICE OF THE PRESIDENT, UNIV. OF CALIFORNIA, UNIV. OF CALIFORNIA'S LAW SCHOOLS, available at <http://www.ucop.edu/acadadv/datamgmt/graddata/lawnos.html>. (last visited Apr. 14, 2002).

Table 2

University of California Medical School^a

	2001	2000	1999	1998	1997	1996	1995
U.C. Davis	1	2	1	2	5	0	3
U.C. Irvine	2	2	2	2	0	2	2
U.C.L.A.	6	6	8	8	10	10	11
U.C. San Diego	4	3	3	3	0	3	5
U.C. San Francisco	7	11	9	9	12	11	15

^a ASSOCIATE OF AMERICAN MEDICAL COLLEGES (AAMC) AND CAMPUS SUBMISSIONS, UNIVERSITY OF CALIFORNIA MEDICAL SCHOOL APPLICANTS, ADMITS, AND FIRST-YEAR CLASS EN-ROLLMENTS NUMBERS, available at <http://ucop.edu/acadadv/datamgmt/meddata/med-num1.html>. (last visited Apr. 14, 2002)

Table 3

University of California Business Schools^a

	1999	1998	1997	1996	1995
U.C. Berkeley	4	9	4	11	9
U.C. Davis	2	1	0	1	2
U.C. Irvine	1	0	1	2	3
U.C.L.A.	10	5	13	13	12
U.C. Riverside	0	2	1	0	1

^a UNIVERSITY OF CALIFORNIA MASTER'S OF BUSINESS ADMINISTRATION FALL 1995 - FALL 1999, available at <http://www.ucop.edu/acadadv/datamgmt/graddata/busnos.html>. (last visited Apr. 14, 2002).

Table 4

University of California Undergraduate Program, California Resident Freshmen^a

	2001 ^b	2000	1999	1998	1997
U.C. Berkeley	138	144	122	122	252
U.C.L.A.	125	146	147	138	204
U.C. Davis	46	50	93	93	94
U.C. Irvine	115	72	74	73	50
U.C. Riverside	131	133	153	113	97
U.C. San Diego	27	23	33	52	61
U.C. Santa Barbara	88	92	82	97	121
U.C. Santa Cruz	78	68	52	51	41

^a <http://www.ucop.edu/news/fctsheets/Flowfrc-9500only1.pdf>

^b University of California Office of the President, Information Resources & Communications, University of California Corporate Student Systems (2002).