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From Brown to Bakke to Grutter: Constitutionalizing and Defining Racial
Equality

***251** **SECURITY AND DISHONESTY: THE SUPREME COURT, RACIAL
PREFERENCES, AND
HIGHER EDUCATION**

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One should never count on the U.S. Supreme Court to think and write clearly-- or even to tell the whole truth and nothing but. Its most famous decisions involving racial equality in the last half century, starting with *Brown v. Board of Education*, [\[FN1\]](#) are, to put it delicately, a mess. *Brown* barely qualified as **constitutional** reasoning, although the bottom line was certainly right. In *The University of California v. Bakke* [\[FN2\]](#) the Court turned what should have been an easy question into an agonizing one, the result being a dizzying six different opinions. And the majority opinions in *Gratz v. Bollinger* [\[FN3\]](#) and *Grutter v. Bollinger* [\[FN4\]](#) managed to wade deeper into the **constitutional** muck, although that hardly seemed possible beforehand.

Maybe the Court in *Brown* could not have done better than it did--given the need for unanimity--but Chief Justice Earl Warren's opinion is certainly thin, flimsy, and frustrating. The Fourteenth Amendment is almost missing in action. The Court relied instead on "psychological knowledge"--mainly the flawed self-esteem research of Dr. Kenneth Clark. And the decision reaffirmed the central holding in *Plessy v. Ferguson* [\[FN5\]](#)--namely, that it was up to judges to weigh (by often unclear standards) the costs and benefits of policies that engage in the racial sorting of American citizens. Racial classifications were not prohibited. ***252** Every **constitutional** law textbook contains some reference to the soaring rhetoric of Justice John Marshall Harlan's dissent in *Plessy*, but that dissent was the radical moral vision of a man who has remained a voice in the **constitutional** wilderness. [\[FN6\]](#)

Justice Lewis Powell's decisive opinion in *Bakke*--an opinion in which four other Justices joined only in part--depicted the Court's role as discerning principles, noted that racial classifications must be "precisely tailored to serve a compelling governmental interest," [\[FN7\]](#) and then labeled a "diverse student body" [\[FN8\]](#) as an aim that met the

"compelling" interest standard. Racial quotas, however, were unacceptable. In its quest for "diversity," a school could use racial identity only as a "plus" factor, [\[FN9\]](#) one consideration among many. And while Justice Brennan (joined by Justices White, Marshall, and Blackmun) argued that "race-conscious action" [\[FN10\]](#) was required to remedy "the lingering effects of past societal discrimination," [\[FN11\]](#) Powell rejected that "amorphous concept of injury," which, he said, "may be ageless in its reach into the past." [\[FN12\]](#)

"Diversity" was evidently more precise or more principled, in Powell's view. But no other Justice signed on to his reasoning. Five Justices (Powell plus the Brennan four) did agree, however, that both the Constitution and Title VI of the 1964 Civil Rights Act permitted race-conscious policies--benefits and burdens attached to individuals on the basis of the color of their skin.

Allan Bakke won, the University of California lost, and yet the decision gave **constitutional** legitimacy to preferential admissions policies. The Court had drawn an allegedly principled line between the permissible (race as a "plus" factor) and impermissible (race as decisive) that was meaningless in practice. If race was in the mix, then race was inevitably decisive. Michael Kinsley has put the point well. "Admission to a prestige institution . . .," he has written, "is what computer types call a "binary" decision. It's yes or no. You're in or you're out. . . . The effect of any factor in that decision is also binary. It either changes the result *253 or it doesn't. It makes all the difference or it makes none at all. Those are the only possibilities." [\[FN13\]](#)

Powell's diversity rationale allowed race to make "all the difference." And thus, twenty-five years later in *Gratz v. Bollinger*, the Court was once again confronted with the problem of race-driven admissions--precisely the admissions process that Powell had found unacceptable. For all the trouble to which the Bakke Court went, with Justices crafting intricate opinions that amounted to a riot of **constitutional** confusion, those off the bench, sifting through applications at the University of Michigan and elsewhere, read between the lines and understood that five Justices had signed on to racial double-standards in the admissions process. Race could be a factor--and thus could change the result. Otherwise inadmissible students would become admissible when racial identity was thrown in the mix.

I

The use of race as a decisive factor in admissions at selective colleges and universities, however, was kept under wraps. Imitating Powell's fancy footwork, university administrators, spinning the press and inquisitive preference opponents, insisted that race--like musical talent and leadership skill--was just one consideration in the search for students who would contribute to a rich educational environment. Bits and pieces of evidence suggested otherwise, but facts were hard to come by.

In 1991, however, Timothy Maguire, working part time in the Georgetown registrar's office, discovered that the college grades and LSAT scores of blacks admitted to the Georgetown Law Center were dramatically lower than those of their white peers. [\[FN14\]](#)

Race was not just one of many possible "plus" factors being considered by the admissions committee; it was the only consideration that could have explained the acceptance of most black students. His findings became national news--testimony to how successful schools had been in keeping their racially preferential policies secret.

Georgetown defenders declared Maguire's findings distorted, and he had no way of further verifying them. [\[FN15\]](#) But the *254 proverbial cat was out of the bag, and the reality of race-driven admissions became indisputable with the Hopwood litigation that resulted in the 1996 finding by the Fifth Circuit Court of Appeals that the University of Texas School of Law had engaged in racial discrimination against whites; [\[FN16\]](#) with the fight in California that ended in the passage of Proposition 209, forbidding racial preferences in the public sector, including higher education; [\[FN17\]](#) with a similar initiative in the state of Washington; [\[FN18\]](#) and with a number of freedom of information lawsuits. Other tantalizing fragments of evidence trickled out, all suggesting that the weight given to racial and ethnic considerations was in fact very substantial, amounting in most cases to a flagrant double standard. [\[FN19\]](#)

And then William G. Bowen and Derek Bok's widely read and much celebrated book, *The Shape of the River*, [\[FN20\]](#) came along. It was a defense of what the authors called "racially sensitive admissions," but their own numbers undermined their argument that schools were engaged in nothing more than morally appealing "sensitivity." Bowen and Bok studied five private schools intensively. Among applicants for admission in 1989 with SAT scores from 1200 to 1249, 19% of whites and 60% of blacks were admitted; in the next bracket up (1250-1299), 24% of whites and 75% of blacks were accepted. [\[FN21\]](#) Among applicants with near-perfect scores (1500 or better), over a third of whites were turned down, but every single black got in. Indeed, black students with scores of 1200-1249 were nearly as likely to be accepted *255 at Bowen and Bok's five institutions as whites with scores of 1500 or better. Here was a clear picture of race-driven admissions.

The Shape of the River performed an invaluable service in providing hard evidence that the schools themselves had never voluntarily made public. The authors were trusted advocates; others (outside a tight circle) who tried to explore the issue further had no access either to Bowen and Bok's own data or to that which admissions offices continued to keep in tightly locked files. [\[FN22\]](#) But the secrecy and deceit surrounding preferences at both public and private institutions of higher education was far from unique.

Preferential policies in employment, contracting, and voting rights all involved racial double-standards, crafted without public knowledge or consent and sold as providing nothing more than equal opportunity, blacks and whites on a level playing field. Dishonesty has always been the American coin of the realm when it comes to race--from the Declaration of Independence to "separate but equal" and beyond. For a brief moment in the mid-1960s, when the 1964 Civil Rights Act and the 1965 Voting Rights Act were passed, the country seemed to be embarked on a different course. But policies corrupted by a revised form of dishonesty were built upon the foundation of these two great legislative triumphs. At the center of that dishonesty lay the notion that, with ongoing

racial sorting, the nation would move beyond race--that old habits would bring new benefits.

II

Racial preferences were the form that racial sorting took starting in the late 1960s, although they were certainly not what the framers of the great legislative triumphs of the civil rights *256 movement had in mind. The two statutes were pure anti-discrimination laws: open the restaurants on a color- neutral basis, enforce the Fifteenth Amendment. But both were quickly and radically rewritten behind closed doors to embrace race-driven strategies, benefits attached to membership in certain officially-designated "disadvantaged "groups as defined by race, ethnicity, gender, or disability. This larger shift in sensibilities with respect to the meaning of nondiscrimination, and the means by which it was implemented, is the context in which preferences in higher education must be seen.

The least known of these re-writing stories is that involving the Voting Rights Act. [FN23] In 1965 the Voting Rights Act had one purpose: black enfranchisement in the Jim Crow South. Its only point was equal access to the polls, the opportunity to vote, a guarantee of basic Fifteenth Amendment rights. By 1975, however, the legislation had been amended by a process of administrative and judicial interpretation, the result of which was federal authority to redistribute political power among racial and ethnic groups, giving blacks and Hispanics their "fair share" of legislative seats. The act had become a measure to protect minority candidates from white competition, which is precisely the point of all preferences in higher education, employment, and contracting.

And yet the principles that governed that redistribution had never been debated in the public arena. Minority voters were never in on the process of radically rewriting the law. Government attorneys in the U.S. Department of Justice were the main levers of change, and the standards they used in deciding the level of protection to which minority candidates were entitled in particular jurisdictions never saw the light of day. In voting, as in other areas, equal opportunity became equal outcomes-- proportionate racial and ethnic representation, or as close to that ideal as the available means made possible.

The history of Title VII of the 1964 Civil Rights Act is much the same. Once again, the initial statutory aim was straightforward: to ensure fair employment by outlawing intentional discrimination in a variety of settings. On the question of race-based preferences, the intent of Congress was very clear. No color-conscious preferences with the aim of ensuring a racially-balanced workforce. But that was not how the first compliance chief of the Equal Employment Opportunity Commission *257 (EEOC) read the act, and he was in a position to fashion policy almost single-handedly--a process that he called "creative administration." [FN24] A statute designed to prevent acts of discrimination was soon transformed into an instrument to maximize the hiring of members of minority groups. This was not a development to which the public was privy, however. Nor was the shift from access to outcomes acknowledged in the public arena. "Winks, nods, and disguises" [FN25] substituted for honesty in every sphere in which racial preferences were instituted.

Preferences in higher education, then, are but one aspect of a larger story. They are variations on a common theme. In every sphere, "anti-discrimination" policies came to involve racial sorting, although that rapid transformation in the meaning of equality was neither demanded nor supported by the public. No grass roots organizations were responsible for the initial development of these race-conscious strategies. Moreover, those who designed and implemented them shrouded the process in as much secrecy as possible and described the policies in the misleading language of access and opportunity. Presumably university administrators believed in their own programs, and yet they were not willing to defend them openly and honestly. Until white plaintiffs sued the University of Michigan, almost no one outside of the admissions office knew the college had a point system that gave black and Hispanic applicants extraordinary protection from their white and Asian peers in the competition for admission. [\[FN26\]](#)

The consequence has been a history of deception that continues to this day and, most remarkably, has now been sanctioned by the Supreme Court in *Grutter v. Bollinger*, the University of Michigan Law School case, decided in June 2003. The university deceived the Court in describing its admissions practices; the Court deceived the American people; and we're stuck, indefinitely, with racial preferences in higher education (and arguably in other spheres as well) that depend on dishonesty to survive. Such ongoing dishonesty about racial equality perpetuates the corruption surrounding issues of race that has been deeply and perniciously embedded in the history of the nation.

***258 III**

The University of Michigan was actually a defendant in two cases involving racial preferences, both decided by the High Court on June 23, 2003. In *Grutter*, the issue was law school admissions; in *Gratz v. Bollinger*, plaintiffs challenged the process of admitting undergraduates. The college automatically awarded 20 points--one-fifth of the number needed to guarantee admission--to every applicant who was a member of an "underrepresented" racial group. In contrast, Michigan residents got a boost of only 10 points, and children of alumni received 4. Counselors could assign an outstanding essay up to 3 points and an applicant's personal achievement, leadership, or public service was worth up to 5 points, while a perfect 1,600 SAT score merited 12 points.

This was not the constitutionally legitimate process that Justice Powell had described in *Bakke*, Chief Justice William Rehnquist wrote for the Court. "The critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it," Powell had said. [\[FN27\]](#) At the University of Michigan's undergraduate college, however, even if a student's "osq;extraordinary artistic talent' rivaled that of Monet or Picasso, the applicant would receive, at most, five points. . . ." [\[FN28\]](#) But an automatic 20 points would be given to the child of a successful black physician. The result: race was the "decisive factor for virtually every minimally qualified underrepresented minority applicant." [\[FN29\]](#) The system failed the narrow tailoring test. The means chosen "to achieve respondents' asserted compelling interest in diversity" were mechanistic and crude, Rehnquist concluded.

In a concurring opinion, Justice O'Connor referred to the "sharp contrast to the law school's admissions plan, which enables admissions officers to make nuanced judgments with respect to the contributions each applicant is likely to make to the diversity of the incoming class." [FN30] Writing for the majority in Grutter, it is the central point she makes. The law school "engages in a highly individualized, holistic review of each applicant's file . . .," she claimed. [FN31] "Unlike the program at issue in Gratz v. Bollinger . . . the Law School awards no mechanical, *259 predetermined diversity osq;bonuses' based on race or ethnicity." [FN32] Race was considered as simply one factor among many. The admissions office engaged in a "flexible assessment of applicants' talents, experiences, and potential." [FN33]

Did she actually believe her own argument? The law school clearly trafficked in racial double standards. A white or Asian applicant with, say, an LSAT score of 164-165 and a grade-point average of 3.25 to 3.49 had only about a 22 percent chance of getting in. But precisely the same academic profile guaranteed admission for "under-represented" minority students. [FN34] The law school's expert, himself, testified that in 2000, 35 percent of black and Latino applicants were admitted, but if race were left out of the equation, the figure would drop down to 10 percent of the underrepresented minority applicants. [FN35]

Moreover, in the later stages of the admissions process, the "individual" assessment was reduced to a daily racial head count, as Justice Kennedy, writing in dissent, noted. The director of admissions from 1991 to 1996 monitored reports that tracked exactly where the law school stood in assembling a "critical mass" of black and Hispanic students. He generated those daily reports because he knew, he said, that the racial make-up of the entering class was "something [he] need[ed] to be concerned about" Those reports, Kennedy observed, were used "to recalibrate the plus factor given to race depending on how close they were to achieving the Law School's goal of critical mass." [FN36] Individual review had been reduced to racial identity.

Writing in dissent in Gratz, Justice Souter dismissed O'Connor's feeble-- almost laughable--attempt to distinguish between the law school and undergraduate admissions processes. If one considers racial diversity a value, then racial identity increases some applicants' chances for admission, Souter pointed out. "Justice Powell's plus factors necessarily are assigned some values. The college simply does by a numbered scale what the law school accomplishes in its osq;holistic review'" [FN37] He might have made an additional point: The law school simply concealed *260 a race-driven admissions process that involved preferences actually greater than those given to undergraduate applicants. [FN38]

As Souter recognized, it's now clear that the Constitution only demands dishonesty. Arguably taunting his colleagues in the Gratz majority, he confessed to being "tempted to give Michigan an extra point of its own for its frankness"--for its explicit undergraduate point system. "Equal protection," he said, "cannot become an exercise in which the winners are the ones who hide the ball." [FN39] But Souter's playful jab at the majority gave the undergraduate admissions program too much credit. As the legal analyst Stuart

Taylor has pointed out, Michigan's explicit point system was not frankly acknowledged; it was exposed through a freedom-of-information request by a member of the faculty, Carl Cohen, and by subsequent litigation. [FN40] The undergraduate college was "frank" only behind closed doors, which left the public no more informed than it was with respect to Michigan's law school admissions.

Nevertheless, Justice Ginsberg did see a difference between the "candor" of Gratz and the "camouflage" of Grutter, and declared the latter a futile exercise. [FN41] Bowen and Bok had made the same point: "[I]t is very difficult to stop people from finding a path toward a goal in which they firmly believe," [FN42] they wrote, and the goal they really believe in is diversity. One way or another, schools would get the racial mix they wanted. [FN43] Of course, the Court could bar institutions from "considering race directly and forthrightly . . .," they went on to say, but that would likely "bring forth ingenious efforts to minimize the consequent loss of *261 diversity by adopting seemingly race-neutral policies that [could] have a wide variety of other consequences, not all of them benign." [FN44]

If barred from using racial double-standards, Bowen and Bok feared, schools might lower admission standards across the board. Constrained only by Bakke-- and not by any flat prohibition--the University of Michigan law school simply said one thing and did another, which was evidently constitutionally acceptable. As Justice Kennedy noted, the Court pretended that racial classifications still demanded strict scrutiny and then averted its gaze in the face of blatant racial sorting, justified by the flimsiest of rationales-- namely, the need for a "critical mass" of black and Hispanic students. [FN45] That need was premised on the assumption that such a critical mass brings educational benefits: the weakening of racial stereotypes, better preparation for an increasingly diverse workplace and society, the development of skills needed in the global marketplace, and the nurturing of the nation's future leaders.

What, however, was a critical mass? The director of admissions gave a helpful definition: "meaningful numbers" or "meaningful representation." [FN46] Other administrators came up with slightly more illuminating answers. The law school dean was concerned that "underrepresented" minority students not feel "isolated." [FN47] In other words, schools need to make sure the number of black students is sufficient to allow black student organizations, black study groups and so forth. And in many colleges, that critical mass also allows separate dorms, freshman orientations and graduation celebrations. A school's commitment to "diversity" is essential to the self-segregation so prevalent in institutions of higher education.

The Court not only ignored the self-segregation apparent on almost every campus, but also substantial social science evidence that racial double-standards actually hurt race relations on campuses, heightening stereotypes, increasing racial isolation and tension. [FN48] The Court referred to enhanced classroom discussion *262 as a consequence of diversity, and the actual weakening of racial stereotypes when "nonminority students learn there is no "minority viewpoint,"" although O'Connor presented no survey data suggesting such a benefit.

But as Peter Kirsanow, commissioner on the U.S. Commission for Civil Rights, says, the point makes perfect sense. What minority student would want to sit in a class as spokesperson for his or her race. "[W]ho would want the burden of presenting the Hispanic stance on the Heisenberg uncertainty principle? Or the Native-American perspective on gradient derivatives? Or even the black position on Gilgamesh? And imagine the clash of culture regarding the value of pi." [\[FN49\]](#) Kirsanow admits the argument has a bit more weight in a course on criminal justice, but either there is a "black" point of view on Fourth Amendment rights or there isn't; the Court can't have it both ways. And if "diversity" is really what's wanted, then why not just pick one black Democrat and one black Republican, or one pro- and one anti-death penalty Hispanic? In any case, the whole argument over what whites will learn from the presence of a critical mass suggests that "diversity" is for the educational benefit of whites, as a recent graduate of the University of Michigan (and advocate of preferences) complained to a Wall Street Journal reporter. "[I]t's offensive to students of color," she said. "It sounds as if we're just in college to enrich the education of white students." [\[FN50\]](#)

Diversity was a policy driven by the desire to look good--to have the "aesthetic" facade of virtue, Justice Thomas pointed ***263** out (dissenting in Grutter). The school wanted "to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them." [\[FN51\]](#) The reason was clear. When "our institutions engineer the visibility of black and brown faces," Shelby Steele has written, they erect a "firewall that protects them from stigmatization as racist." [\[FN52\]](#)

The alternative to racial double standards is not all-white schools, it's important to remember. Asians (counted as a racial group by the US Census) are a powerful presence at all highly selective institutions of higher education. Moreover, Bowen and Bok calculated that approximately half the black students did not need racial preferences to gain admission to the selective schools they studied. [\[FN53\]](#)

In any case, the definition of diversity used in all racial preference programs is remarkably narrow. Samuel Issacharoff, the Columbia University law professor who represented the University of Texas in the 1966 Hopwood case, is certainly a proponent of race-conscious admissions programs, but he won't buy the diversity argument. It's "not real," he has said, noting that "[n]one of these universities has an affirmative-action program for Christian Fundamentalists, Muslims, orthodox Jews, or any other group that has a distinct viewpoint." [\[FN54\]](#) Distinct viewpoints have never been part of the "diversity" mix. As Justice Kennedy, dissenting in Grutter, reported, University of Michigan law school faculty members were described by an admissions director as "osq;breathtakingly cynical" in deciding who would qualify as a member of underrepresented minorities." There was a debate on whether Cubans should count as Hispanics; one professor objected on the ground that they tended to be Republicans. [\[FN55\]](#)

As Roger Clegg, general counsel for the Center for Equal Opportunity, has noted, "[t]he scary thing about the diversity rationale is that it will always be available." [FN56] But O'Connor's argument that a "critical mass" of "underrepresented" minorities *264 was educationally essential in fact stopped short of preferences today, preferences tomorrow, preferences forever. In fact, the point that racial double-standards were not acceptable indefinitely had been made twenty-five years earlier by Justice Blackmun, dissenting in Bakke, who expressed the "earnest hope" that "within a decade at most" affirmative action policies would be "a relic of the past." [FN57] He was dreaming away, but the discomfort with permanent preferences remained on the Court. As Justice Kennedy pointed out in Grutter, if racial classifications were truly subject to strict scrutiny--if the **constitutional** standard had not been radically altered--then it was hard to see how the Court could defer to the judgment of the universities and suspend that scrutiny until another, and presumably better, day. [FN58]

O'Connor did not really answer Kennedy's unanswerable point. "We are mindful," she says (quoting a 1984 decision), that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." [FN59] It's an interesting acknowledgment that racial preferences are indeed discriminatory. "Accordingly," she goes on, "race-conscious admissions policies must be limited in time." [FN60] They are "potentially . . . dangerous . . .," and, as the law school admits, "must have reasonable durational limits." [FN61] Preferences, in other words, must be "temporary"; they must have a "termination point." [FN62] In Bakke, it may be remembered, Justice Blackmun had famously said that "in order to treat some persons equally, we must treat them differently." [FN63] O'Connor, in effect, reiterated the Blackmun principle. The "acid test" of the efficacy of preferences, she declared, was their ability to eliminate any further need for them. [FN64] Equal protection demands unequal protection--although only for a while. With Grutter, however, Blackmun's ten years turned into fifty. It had been a quarter of a century since Bakke had been decided; the Court "expect [s]," O'Connor wrote, "that 25 years from now, the use of racial preferences will no longer be necessary. . . ." [FN65] Discrimination was an *265 anti-discrimination strategy that would last no longer than half a century, the Court predicted.

V

O'Connor's expectation of just twenty-five years more was one more example of the careless, disingenuous pronouncements that litter the history of racial preferences in higher education and other spheres. In the last quarter century, she said, "the number of minority applicants with high grades and test scores has indeed increased." [FN66] There was every reason to "expect" that in another quarter of a century the pool of academically high-performing black and Hispanic applicants would have so grown as to make race-conscious admissions the strategy of a bygone era. [FN67] The credulous reader might believe this confident optimism--this picture of preferences as nothing more than temporary medicine for a problem already fixing itself. The knowledgeable reader will know that she was either scandalously ignorant of the real record, or deliberately and irresponsibly deceptive.

In fact, there was no empirical basis for O'Connor's faith that the problem of disproportionately few non-Asian minority students with strong academic records will have disappeared by 2028--in any case, a depressing number of years. In the following pages, we focus on the continuing and tragic racial gap in academic achievement between whites and blacks--leaving the story of high-performing Asians and low-performing Hispanics and Native Americans for another day. Preferential policies are primarily driven by concern over the status of blacks in American society, and as long as the admissions process at elite institutions of higher education fails to create a "critical mass" of African American students, schools will not abandon racial preferences unless compelled to do so.

We do not mean to suggest, for a moment, that the racial gap cannot be closed, but only that complacent optimism is deeply misleading. As we argue elsewhere, closing the gap will take change in American public education much more radical than that which mainstream reformers now contemplate. [\[FN68\]](#)

***266 VI**

The best data on what American youngsters know at the end of high school-- when they're ready to apply to Michigan and other selective colleges--come from the tests administered to random samples of students by the congressionally-mandated and federally-administered National Assessment of Educational Progress (NAEP). [\[FN69\]](#) Table 1 sets forth the NAEP evidence on the racial gap in reading, math, and science skills among 17-year-olds from the late 1970s (when Bakke was decided) to 1999. The simplest way of summarizing the complex results is by calculating the size of the racial gap in standard deviation units. If the difference in the mean test scores of two groups is a full standard deviation, the gap is huge. A full standard deviation means that the average student in the lower-scoring group ranks in the bottom sixth of the distribution of the higher-scoring group; only one in six would do better than the average for the higher-scoring group.

Table 1
The Black-White Gap in the NAEP Reading, Math, and Science Scores of
17-year-olds in Standard Deviation Units, 1977-1999.

	Reading		Mathematics		Science
1980	1.19	1978	1.07	1977	1.28
1984	0.79	1982	0.98	1982	1.25
1988	0.55	1986	0.93	1986	1.07
1990	0.71	1990	0.68	1990	1.04
1992	0.86	1992	0.87	1992	1.07
1994	0.66	1994	0.89	1994	1.08
1996	0.69	1996	0.89	1996	1.03
1999	0.73	1999	1.02	1999	1.18

[Source: Calculated from the National Assessment for Education-al Progress Data Tool, at <http://nces.ed.gov/nationsreporcard/nepdata/>]

At the end of the 1970s, black students were woefully behind whites in all three of the basic subjects tested by NAEP, with gaps exceeding a full standard deviation. The average black student had a reading score that put him or her in 10th percentile *267 of the white distribution. Only one in ten African American 17-year-olds could read as well as the average white nearing the end of high school. The gap was only slightly smaller in mathematics, with just 13 percent of black students performing as well as the average white. The situation was even worse in science, with a mere 8 percent of African Americans scoring at or above the white average.

The trend over the next decade, though, was heartening. The racial gap in reading narrowed especially dramatically, falling by more than half between 1980 and 1988. Progress in math was only a little less impressive, with the racial gap narrowing by more than a third. The pace of progress was slower in science, but the huge gap in that subject did decline by almost 20 percent between 1977 and 1990.

Had these trends continued, Justice O'Connor's optimism might have had some foundation in fact. But they did not. Black students made no further progress towards parity with whites, and indeed fell further behind between 1988 and 1999. The mean reading score of African Americans had risen to the 28th percentile in the white distribution by 1988, but it then fell to the 23rd percentile by 1999. The reversal was even sharper in math skills, so that black students in 1999 were doing just a shade better than they had 21 years earlier. African Americans made less progress in science than in the other two subjects, with the gap never falling below a full standard deviation. But the same regression took place, with the racial gap widening by 13 percent over the 1990s. If the unfavorable trends of recent years continue, the University of Michigan and other elite schools will need to give even greater preferences to black applicants in 2028 than they currently do.

Perhaps, though, it is misleading to concentrate on group averages. High school seniors with merely average academic skills rarely end up in elite law schools, or indeed in any law school. Suppose we look only at students at the upper end of the distribution, at the performance of what W.E.B. DuBois called "the talented tenth." An examination of the scores of the top tenth of black students, however, yields the same conclusions. On the 1980 reading assessment, blacks at the 90th percentile of the black distribution scored one point lower than the average white student in reading. By 1988, when overall black achievement hit its high point, blacks at the 90th percentile scored at the same level as whites at the 75th percentile. That was impressive progress, but the pattern reversed thereafter. By 1999, the top *268 tenth of blacks scored midway between the white 50th and 75th percentiles. Over a third of whites outperformed black students at the 90th percentile of the black distribution.

In math, the 90th percentile of the black distribution was barely above the white average in 1978. By 1990 it was just a few points below the white 75th percentile, strong progress similar to that made in reading. But in 1999 the scores of blacks at 90th percentile had plunged, and were a mere 3 points above the white 50th percentile. The same pattern

holds in science. In 1999, as in 1977, black students at the 90th percentile scored a few points below whites at the 50th percentile.

In sum, except in reading skills, the black talented tenth in 1999 did not stack up any better against their white competitors for places at selective colleges than they had more than two decades earlier. And even in reading the racial gap remained alarmingly large. The depressing news conveyed by the NAEP results is further confirmed by the pattern of scores on the College Board SATs (Table 2). Since the SATs are taken by students who aspire to attend selective colleges, they provide a good sense of the skills of the better students coming out of high school. From the mid-1970s to the end of the 1980s, the racial gap in SAT scores followed the trend indicated in the NAEP assessments: black students were moving ahead more rapidly than whites and catching up. The gap in both verbal and math scores dropped by about a quarter.

Table 2
Black-White Gaps in Mean SAT Scores, 1975-2000

	Verbal	Math
1976	119	139
1981	110	121
1987	104	112
1991	90	104
1996	92	101
2000	92	104
2003	98	108

[Source: National Center for Education Statistics, Digest of Education Statistics: 1996, NCES-96-133 (Washington, D. C.: U.S. Department of Education, 1996,) 127; 2000 and 2003 from www.collegeboard.com/research/home. The recentering of the scores in 1995, somewhat surprisingly, seems to have had zero effect on the racial gap.]

***269** Around 1990, however, that progress came to an end. The dramatic regression--the marked slide downhill--that shows up in the NAEP data for the 1990s did not occur with SAT scores. Over the past few years, however, the gap has widened on the combined SAT scores by a modest 13 points. In the years between 1996 and 2003, the SAT verbal gap increased from .84 to .88 of a standard deviation, and the math gap from .90 to .94. While this is not an enormous change, it is significant movement in the wrong direction. In 2003, both gaps were a mere 6 percent smaller than they were back in 1981.

The picture looks no brighter at the very top of the distribution. The combined median SAT score of students at our most selective colleges today is around 1400. In 1999, the top 5.5 percent of whites taking the verbal SATs scored in the 700s, and on math the top 5.8 percent did 700 or better. But fewer than 1,000 (a mere 0.76 percent) of the 119,000 black students in the nation who took the exams did that well on the verbal test. And only a little over 700 African Americans reached 700 in math, just 0.6 percent. White students were 9.8 times as likely as their black peers to score 750 or better on the verbals, and 13.1

times as likely to do that well in math. The ratios for those scoring 700-749 were also huge--6.2 and 8.7.

VII

Black students applying to college thus typically have much weaker academic skills than whites. And most depressingly, the racial gap has narrowed little over the past quarter century. Moreover, those who have been admitted by racial double standards do not catch up with their white and Asian classmates over the course of four years at a highly competitive college. Elite institutions do not provide an environment in which non-Asian minority students with comparatively weak test scores and high school grades blossom. To the contrary, they tend to perform worse than objective indicators predict. On the basis of studies conducted in the 1970s and early 1980s, Robert Klitgard's classic *Choosing Elites* estimated that the GPAs of black students at the ***270** top colleges were about the same as those of whites with combined SAT scores 240 points lower. [\[FN70\]](#)

Later evidence suggests that this is still the case. In their 1998 brief in support of preferential admissions, *The Shape of the River*, Bowen and Bok noted the same phenomenon. The average college GPA of black students in the 28 selective schools in their study put them at the 23rd percentile of their classes, significantly worse than could be predicted from their qualifications upon entry to the school. "The average rank in class for black students is appreciably lower than the average rank in class of white students within each SAT interval," they report. [\[FN71\]](#) Although they devoted several pages to an attempt to explain this troubling pattern, they failed to consider one possibility: the relative poor performance of African American students may be an unanticipated cost of preferential policies. Perhaps the very presence of a "critical mass" of black students at these institutions, most of them with academic skills well below the school's average, creates a self-segregated black subculture that discourages academic achievement.

A more recent study by Stephen Cole and Elinor Barber, which examined samples of students from Ivy League schools, other leading liberal arts colleges, some large state universities, and a few historically black colleges, also found sharp racial differences in academic performance even when SAT scores were held constant. Interestingly, the differences were not uniform across institutions. They were sharpest at the most selective schools, a fact that they attribute in part to preferential admissions that undermined the beneficiaries' academic self-confidence. [\[FN72\]](#)

We cannot be sure whether the overall racial gap narrows at all over four years of college because nothing like a NAEP assessment exists for a representative sample of college seniors. But there are good grounds for doubt. Reliable information about the academic skills of a large subset of college seniors is contained in the various tests used in admissions to graduate schools in the arts and sciences, law, medicine, and business. ***271** Several hundred thousand of the best and most ambitious college students each year take the Law School Admissions Test, the Graduate Management Admissions Test (used by business schools), the Graduate Records Examination, or the Medical College Admissions Test.

For more than three decades, strong racial preferences in admissions have been in place at selective colleges large and small--at Dartmouth as well as Duke. These elite schools have made determined efforts to give "underrepresented" minority students the greatest possible opportunity to develop their intellectual potential. If the policies had been effective, the results should be apparent in the size of the pool of top applicants to graduate school. Indeed, by now, race-conscious admissions should be unnecessary. And yet Table 3 shows that the racial gaps on all of the standard tests employed by graduate schools were still enormous in 1998, the most recent year for which we were able to obtain the data. Indeed, the gaps were a bit larger than those among students at the end of high school. The picture revealed in each of the eight tests reported here is almost identical: the average black student applying to graduate school scores in the bottom sixth of all test-takers. The racial gap was never less than .96 of a standard deviation on any of the eight tests of cognitive skills, and it exceeded a full standard deviation in three of the eight. The most selective graduate schools simply cannot admit substantial numbers of black applicants if they apply the same standards of academic achievement to members of all racial and ethnic groups.

The almost complete absence of black students with credentials qualifying for the most competitive law schools is illustrated by the data on LSAT scores and college grades that were presented by the Law School Admissions Council in its brief in Grutter. [\[FN73\]](#) (The Law School Admissions Council has not been eager to release information about this sensitive subject, but its brief in Grutter, while written in support of preferences, contained devastating information, underscoring the magnitude of the racial gap and the racial double-standards used in sifting through applicants as a result.) In 2002, a total of 4,461 applicants to American law schools had LSAT scores of 165 or better and college GPAs of at least 3.5. Only 29 of the 4,461 were *272 black, 0.65 percent of the total. The 14 highest-ranked law schools (ranging from Yale to Georgetown) all have median LSAT scores above 165 and median GPAs above 3.5. If the 29 black students with academic credentials comparable to those of their average student were apportioned among them, that would work out to be just two in the first-year class at each school. Finding that unacceptable, our law schools have chosen to lower the bar in evaluating black applicants.

Table 3
The Black-White Gap on Various Achievement Tests at Two Key Transitional
Points, in Standard Deviation Units

End of high school	
NAAP reading, 1999	0.73
SAT verbal, 2003	0.88
NAEP math, 1999	1.02
SAT math, 2003	1.0.
NAEP science, 1999	1.18
End of college	
LSAT, 1998	1.08
GMAT, 1998	1.03

GRE verbal, 1998	0.96
GRE quantitative, 1998	0.98
GRE analytical, 1998	1.11
MCAT verbal, 1998	0.96
MCAT physical science, 1998	0.96
MCAT biological science, 1998	0.96

[Source: NAEP figures from Table 1 above. SAT gap calculated from College Entrance Examination Board, 2003 College-Bound Seniors: A Profile of SAT Program Test Takers (New York: College Board, 2003), Tables 4.1 and 6. All others as given in Wayne J. Camara and Amy Elizabeth Schmidt, Group Differences in Standardized Testing and Social Stratification, College Board Report No. 99-5, New York: College Entrance Examination Board, 1999), Table 1.]

For comparative purposes, in order to gauge the trends, the only data we have are for the years 1997-2002--from the same Grutter brief. For that five year period, the figures fluctuate only *273 slightly, and there is no consistent upward trend. In fact, the 2002 figure was below that for both 1998 and 2000-- the percentage of black high scorers being 0.69 and 0.73, respectively. O'Connor described a closing racial gap; she was ignoring the Law School Admissions Council's own numbers.

How well do relatively poorly prepared, preferentially-admitted students do in law school and beyond? Writing in this journal in 1998, one of us presented an intensive analysis of the available data on students beginning their professional education in the Fall of 1991. [\[FN74\]](#) The results were not encouraging. Of the black students admitted as a consequence of the weight given to their racial identity, 22 percent dropped out before graduation. [\[FN75\]](#)

The bar exam was of course another hurdle, and here again, the news was not good: 27 percent of those who did graduate were unable to pass within three years of leaving law school. [\[FN76\]](#) Many of these students had not only devoted three years to preparing themselves for a profession, but were deeply in debt as a consequence. Of all the beneficiaries of law school admissions preferences in 1991, 43 percent failed to clear both hurdles-- obviously a dismayingly large number. These are figures for only one group of students; we do not have trend data to draw a fuller picture. It's unlikely, however, that 1991 was an anomalous year. If it is at all representative, with no or little positive change over time--in keeping with LSAT and other scores-- there is no reason to believe preferences will have melted away by 2028. Indeed, there may be grounds to worry that, under political pressure, the grading of bar exams will also become race-conscious. One standard for whites and Asians, another for "underrepresented" minorities. [\[FN77\]](#) And then, with the compelling need for "diversity" as a justification, would O'Connor find different *274 passing scores for different races a violation of the equal protection clause?

In the history of judicial decisions involving racial preferences in education and other spheres, O'Connor's attempt at reassurance--just twenty-five years more, folks--is arguably the low point in a shocking history of transparently absurd arguments. Ignoring widely available facts, she painted a rosy landscape when the truth is close to catastrophic. It is criminal to offer complacent optimism about the racial gap in academic achievement. Her majority opinion is a cover-up. The racial gap in academic achievement is the most important source of ongoing racial inequality. Those who care about the persistence of that inequality will not engage in such duplicity. Instead, they will say loud and clear, America must get its educational act together. A racially-identifiable group of educational have-nots is morally unacceptable. This is a problem that can be fixed.

[\[FN78\]](#)

Race has been called the "American dilemma." It is, in fact, the American undoing--the ground on which we lose our footing, the problem that plays havoc with bedrock American values. Racial classifications in the United States have a long and ugly history; racial subordination was all about double standards, with different entitlements depending on your racial identity. Nevertheless, the highest court in the land has now embraced them with slipshod, slapdash, reckless, and obfuscating arguments. It is a bleak day in American **constitutional** law.

"Because I wish to see all students succeed whatever their color, I share, in some respect, the sympathies of those who sponsor the type of discrimination advanced by the University of Michigan Law School," Justice Thomas wrote, dissenting in *Grutter*.

[\[FN79\]](#) Who would disagree? The numbers are painful; the desire for a quick fix understandable. But, as Thomas went on to say, "[t]he Constitution abhors classifications based on race. . . ." [\[FN80\]](#) They demean us all--especially, he could have added, when built on foundation of appalling indifference to facts, logic, and principle.

[\[FNaa1\]](#). Senior Fellow, The Manhattan Institute, New York; Commissioner, U.S. Commission on Civil Rights.

[\[FNaa1\]](#). Winthrop Professor of History, Harvard University.

[\[FN1\]](#). [347 U.S. 483 \(1954\)](#).

[\[FN2\]](#). [438 U.S. 265 \(1978\)](#).

[\[FN3\]](#). [539 U.S. 244 \(2003\)](#).

[\[FN4\]](#). [539 U.S. 306 \(2003\)](#).

[\[FN5\]](#). [163 U.S. 537 \(1896\)](#).

[FN6]. This is the central argument in Andrew Kull, *The Color-Blind Constitution* (1992).

[FN7]. [438 U.S. at 299.](#)

[FN8]. [Id. at 306.](#)

[FN9]. [Id. at 317.](#)

[FN10]. [Id. at 336.](#)

[FN11]. [Id. at 352.](#) That phrase, or slight variations on it, is used repeatedly in the Brennan opinion.

[FN12]. [Id. at 307.](#)

[FN13]. Michael Kinsley, *Want Diversity? Think Fuzzy*, *Wash. Post*, June 25, 2003, at A23.

[FN14]. See Timothy Maguire, *My Bout with Affirmative Action*, 93 *Commentary* 50 (Apr. 1992).

[FN15]. See Anthony T. Pierce et al., *Degrees of Success: With Law School, Graduating Is the Test*, *Wash. Post*, May 8, 1991, at A31.

[FN16]. [Hopwood v. Texas, 78 F.3d 932 \(5th Cir. 1996\).](#)

[FN17]. [Cal. Const. art. I, § 31.](#)

[FN18]. Washington State Civil Rights Act, [Wash. Rev. Code Ann. § 49.60.400 \(West Supp. 1999\).](#)

[FN19]. The relevant evidence available through the end of 1996 is summarized and evaluated in Stephan **Thernstrom & Abigail Thernstrom**, *America in Black and White: One Nation, Indivisible* 386-422 (1997). The best source of more recent evidence on the powerful influence of race in admission is a series of studies that Robert Lerner & Althea K. Nagai have conducted for the Center for Equal Opportunity. See Robert Lerner and Althea Nagai, *Pervasive Preferences: Racial and Ethnic Discrimination in Undergraduate Admissions Across the Nation*, available at <http://www.ceousa.org/multi.html> (this study assess the role of race in admissions at 47 public colleges and universities); Robert Lerner & Althea Nagai, *Preferences in Medical Education: Racial and Ethnic Preferences at Five Public Medical Schools*, available at <http://www.ceousa.org/pdfs/multimed.pdf> (this study assesses the role of race in 5 medical schools).

[FN20]. William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998).

Stephan **Thernstrom** & Abigail **Thernstrom**, [Reflections on The Shape of the River](#), 46 *UCLA L. Rev.* 1583 (1999).

[FN21]. Bowen & Bok, *supra* note 20, at 27, fig.2.5.

[FN22]. Although the Mellon Foundation claimed that it would make the data analyzed by Bowen and Bok available to other qualified researchers, the remarkable guidelines that set forth its policies governing access to this material strongly suggested that no scholar with any reservations about racially preferential policies need apply; Andrew W. Mellon Foundation, *Policies Concerning the College and Beyond Database* (Aug. 27, 1988) (on file with authors). This interpretation was confirmed when the sociologist Robert Lerner, a critic of *The Shape of the River*, presented a well-crafted proposal for further analysis of the data Bowen and Bok used to the Mellon Foundation. His request was denied. It is clear that the Mellon Foundation is hostile to research that does not yield answers the foundation likes. For further details, see Stephan **Thernstrom** & Abigail **Thernstrom**, *Racial Preferences in Higher Education: A Review of the Evidence, in One America? Political Leadership, National Identity, the Dilemmas of Diversity* 169 (Stanley A. Renshon ed., 2001).

[FN23]. For a history of the Voting Rights Act, see Abigail **Thernstrom**, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987).

[FN24]. Alfred W. Blumrosen, *Black Employment and the Law* 53 (1971).

[FN25]. [Gratz v. Bollinger](#), 539 U.S. 244, 305 (2003) (Ginsberg, J., concurring).

[FN26]. The tireless and courageous efforts of one Michigan faculty member, philosopher Carl Cohen, were crucial in finally exposing to the light of day what university admissions officers had been doing. See Carl Cohen, *Naked Racial Preferences: The Case Against Affirmative Action* (1995).

[FN27]. 438 U.S. 265, 324 (1978).

[FN28]. [Gratz v. Bollinger](#), 539 U.S. 244, 273 (2003).

[FN29]. *Id.* at 247.

[FN30]. *Id.* at 279.

[FN31]. 539 U.S. 306 at 309 (2003).

[FN32]. *Id.* at 337

[FN33]. *Id.* at 315.

[FN34]. [Grutter v. Bollinger](#), 288 F.3d 732, 797 (2002) (Boggs, J., dissenting).

[FN35]. [Grutter v. Bollinger, 539 U.S. 306, 320 \(2003\)](#) (citing App. To Pet. For Cert. 223a).

[FN36]. [Id. at 392.](#)

[FN37]. [Gratz v. Bollinger, 539 U.S. 244, 295 \(2003\).](#)

[FN38]. In his dissenting opinion for the Sixth Circuit, Judge Boggs offered the assessment that, for students with the same LSAT scores, minority applicants with high C to low B undergraduate averages were admitted at the same rate as majority applicants with A averages in college. And among applicants with college GPAs in the A range, minorities with LSAT scores in the 70th percentile were admitted at the same rate as majority applicants with LSATs in the 96th percentile or higher. That, he concluded, was an even bigger boost than the 20 points the college automatically awarded applicants on the basis of skin color. [Grutter, 288 F.3d at 796](#) (Boggs, J., dissenting).

[FN39]. [539 U.S. 244, 298 \(2003\).](#)

[FN40]. Stuart Taylor, Jr., Ted Kennedy's Excellent Idea: Disclosing Admissions Preferences, Nat'l J., at 292 (2004).

[FN41]. [539 U.S. 244 at 304 \(2003\).](#)

[FN42]. Bowen & Bok, *supra* note 20, at 288.

[FN43]. Bowen and Bok are simply reporting the frequently expressed views of administrators. See, e.g., Roger Clegg, Debater's Notes, Nat'l. Rev. Online, (Apr. 1, 2003), at <http://www.nationalreview.com/clegg/clegg040103.asp> (Roger Clegg, general counsel for the Center for Equal Opportunity, tells the story of how while debating racial preferences at Georgetown University, he was introduced by a university official who casually announced that the school "will proceed with its affirmative action policies no matter what the Supreme Court does" in the Michigan cases).

[FN44]. Bowen & Bok, *supra* note 20, at 289.

[FN45]. [Grutter v. Bollinger, 539 U.S. 306, 392 \(2003\).](#)

[FN46]. [Id. at 318.](#)

[FN47]. [Id. at 319.](#)

[FN48]. See Robert Lerner & Althea K. Nagai, Diversity Distorted: How the University of Michigan Withheld Data to Hide Evidence of Racial Conflict and Polarization (May 27, 2003), available at <http://www.ceousa.org/pdfs/hiddendata.pdf> (in this paper the authors offer a probing analysis of data gathered by the University of Michigan itself but

ignored in the testimony proffered by its chief social science witness, Dr. Patricia Gurin). For evidence from a national survey of campus opinion on preference- related issues, see Stanley Rothman, S.M. Lipset, & Neil Nevitte, Diversity of Affirmative Action: The State of Campus Opinion, 15 Acad. Questions 52 (Fall 2002). On the question of how diversity relates to educational quality, see Rothman et. al., Does Enrollment Diversity Improve University Educational Quality?, 15 Int'l J. of Pub. Opinion Res. 8 (Spring 2003) and Thomas E. Wood & Malcom J. Sherman, Is Campus Racial Diversity Correlated with Educational Benefits? (Apr. 4, 2001), available at http://www.nas.org/reports/umich_diversity/umich_uncorrelate.pdf.

[FN49]. Peter Kirasanow, Still Unconstitutional,, Nat'l. Rev. Online, (Sept. 30, 2003), at <http://www.nationalreview.com/comment/kirasanow200309300914.asp>.

[FN50]. Daniel Golden, Some Backers of Racial preference Take Legal Stand Beyond Diversity: Society Wins with Integrated Elite, Wall St. J., June 13, 2003, at B1. The diversity argument has had numerous critics on the political left, on and off the bench, who view preferences as justified primarily by ongoing societal discrimination. See, e.g., Randall Kennedy, Affirmative Reaction: The Courts, the Right, and the Race Question, 14 Am. Prospect 49 (March 2003). See also supra notes 10- 11 and accompanying text (the opinions of Justices Brennan, Marshall, Blackmun, and White in Bakke) and supra notes 37, 39 & 41 and accompanying text (the opinions of Justices Ginsberg and Souter in Gratz and in Grutter).

[FN51]. [Grutter v. Bollinger, 539 U.S. 306, 355 \(2003\).](#)

[FN52]. Shelby Steele, A Victory for White Guilt, Wall St. J., June 26, 2003, at A16.

[FN53]. Daniel Golden, Some Backers of Racial preference Take Diversity Rationale Further, Wall St. J., June 13, 2003, at B1.

[FN54]. Bowen & Bok, supra note 20, at 42.

[FN55]. [539 U.S. at 393.](#)

[FN56]. Roger Clegg, The Vision Thing, Nat'l. Rev. Online, (Mar. 25, 2003), at <http://www.nationalreview.com/clegg/clegg032503.asp>

[FN57]. [Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 403 \(1978\).](#)

[FN58]. [539 U.S. at 393.](#)

[FN59]. [Id. at 341.](#)

[FN60]. [Id. at 342.](#)

[FN61]. [Id.](#)

[\[FN62\]](#). [Id.](#)

[\[FN63\]](#). [Bakke, 438 U.S. at 407.](#)

[\[FN64\]](#). [Grutter, 539 U.S. at 342.](#) The "acid test" notion is actually taken from Nathanson & Bartnik, *The Constitutionality of Preferential Treatment for Minority Applicants to Professional Schools*, 58 Chi. Bar Rec. 282, 293 (May-June 1977).

[\[FN65\]](#). [Grutter, 539 U.S. at 343.](#)

[\[FN66\]](#). [Id. at 343.](#)

[\[FN67\]](#). [Id. at 344.](#)

[\[FN68\]](#). See Abigail **Thernstrom** & Stephan **Thernstrom**, *No Excuses: Closing the Racial Gap in Learning* (2003).

[\[FN69\]](#). Further evidence on the magnitude of racial gap in NAEP scores is supplied in **Thernstrom & Thernstrom**, *supra* note 68, at chs. 1,7, and 12.

[\[FN70\]](#). Robert Klitgard, *Choosing Elites: Selecting "the Best and the Brightest" at Top Universities and Elsewhere* 164 (1985).

[\[FN71\]](#). Bowen & Bok, *supra* note 20, at 77. For a thorough critical assessment of this work. see **Thernstrom & Thernstrom**, *supra* note 20 (a somewhat shorter version that includes new material).

[\[FN72\]](#). Stephen Cole & Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* 121-27 (2003).

[\[FN73\]](#). Brief of Amicus Curiae Law School Admissions Council in Support of Respondents at 8-9, [Grutter v. Bollinger, 539 U.S. 306 \(2003\)](#) (No. 02-241).

[\[FN74\]](#). Stephan **Thernstrom**, [Diversity and Meritocracy in Legal Education: A Critical Evaluation of Linda F. Wightman's "The Threat to Diversity in Legal Education," 15 Const. Comment. 11 \(1998\).](#)

[\[FN75\]](#). [Id. at 29.](#)

[\[FN76\]](#). [Id. at 36.](#)

[\[FN77\]](#). It is revealing that recent proposals to raise the passing score on both the Florida and New York bar exams have been strenuously resisted on the grounds that tightening standards would have a disparate impact on blacks; Laurie Cunningham, *Raising the Bar*, *Broward Daily Business Rev.*, March 26, 2003, at 1; Committee on Legal Education and

Admission to the Bar, In Opposition to the Board of Law Examiners' Proposal to Increase the Passing Score on the New York Bar Examination, 58 The Rec. of the Ass'n of the Bar of the City of New York 97-120 (2003) (if preferential policies make law school a "level playing field," why should tightening the standards on the bar exams have a disparate impact upon black candidates for the bar?).

[FN78]. See **Thernstrom & Thernstrom**, supra note 68 passim.

[FN79]. [Grutter v. Bollinger](#), 539 U.S. 306, 350 (2003).

[FN80]. [Id.](#) at 353.

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