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EMPLOYING RACE-NEUTRAL AFFIRMATIVE ACTION TO CREATE EDUCATIONAL DIVERSITY WHILE ATTACKING SOCIO-ECONOMIC STATUS DISCRIMINATION

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I. INTRODUCTION

Diversity in American education is a positive thing for all students from pre-kindergarten to law school and beyond. Socio-economic status (SES) discrimination is the predominant impediment to achieving meaningful educational diversity. The challenge for proponents of race-neutral diversity in public education policy is to establish effective race-neutral tools to provide all Americans a competitive middle class education. A “competitive middle class education” can be defined as one that adequately equips a student upon completion of his or her secondary education with sufficient academic skills, as reflected in grades and test scores, to enter a respected university or college in the state where he or she graduated from high school without regard to race. Advocates of race-based policies to achieve diversity in education, like advocates of race-based school busing, should expand the debate to consider whether race-neutral socio-economic factors might be a greater impairment to achieving competitive educational equity for students than continuing patterns of racial segregation. Before America completely turns its back on education as a civil rights issue, the

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supporters of educational equity must carefully articulate the race-neutral class-based socio-economic status (SES) issues that prohibit students from receiving a competitive middle class education. This debate should be treated as a race-neutral civil rights issue that impacts all Americans for generations to come.

Gary Orfield of the Civil Rights Project at Harvard University has suggested that the country "has turned its back on civil rights issues, and [hasn't] had a serious debate about the implications of it."¹ Orfield opines that allowing Boston, and other school systems, to return to neighborhood-based frameworks is a "shameful" example of the abandonment of education as a civil rights issue.² On the contrary, properly staffed and funded neighborhood schools that do not practice racial discrimination are not inherently evil, nor do they demonstrate an abandonment of education as a civil right. Instead, a neighborhood school, free of racial discrimination, which provides a student with educational equity, the so-called "competitive middle class education," fulfils the goals of parents who yearn for educational viability in every school.³ It is only when public neighborhood schools are not adequately funded and are staffed with poorly trained teachers on either a race-neutral basis, or for that matter, a racially discriminatory one, has the state abandoned education as a civil rights issue. When it comes to providing educational equity to students on a race-neutral basis, education as a civil rights issue is to be determined by wise public policy rather than the minimal educational requirements of the Constitution.

PART I of this article provides an introduction to the educational equity debate from *Brown v. Board of Education's* goal of integrating public schools to *Grutter v. Bollinger's* objective of creating diversity in law schools. PART II analyzes *Grutter's* intellectual diversity rationale. PART III discusses the implications of race-based affirmative action's devious history.

¹ Greg Toppo, *Busing's Altered Route*, USA TODAY, May 17, 2004, at 4D.

² *Id.* (stating "[L]ike most cities, Boston uses a 'controlled choice' plan for elementary and middle school. It reserves half of a school's space to kids from outside a neighborhood. That has led to complaints from families who say they're locked out of local schools. Such complaints - and tight budgets - are leading critics to say Boston and other cities should return to neighborhood systems.")

³ *Id.* (noting "[M]any cities now let students choose their schools," and quoting Ted Landsmark, chair of a city task force on racial diversity for the Boston School Committee "The first thing that parents want is quality in all schools.")

PART IV addresses whether race-neutral diversity percent plans should be redefined and defended as effective methods of accommodating class-based intellectual diversity.

While acknowledging the first anniversary of *Grutter v. Bollinger*⁴ and celebrating the fiftieth anniversary of *Brown v. Board of Education*,⁵ we must accept the reality that the goal of providing all students with a competitive middle class education remains unfulfilled. Bill Cosby, while making remarks at a May 2004 ceremony that paid tribute to the *Brown v. Board of Education* decision, denounced the poor grammar used by many underprivileged African-Americans.⁶ Cosby's observations correctly suggested that African-Americans, especially those suffering from a pattern of social and economic disadvantage, are not likely to contribute meaningfully to intellectual diversity at the nation's elite universities, or even in the workforce, because they have not learned to speak basic English.⁷ It is reasonable to infer from Cosby's statements that economically disadvantaged African-American "knuckleheads" who cannot speak standard English will not contribute to a diverse workforce because of race-neutral grammar impairments rather than racial discrimination by white employers.⁸ Cosby asserted that the grammar used by blacks is a strong indication that those individuals remain uneducated, in spite of the gains and achievements of the civil rights movement.⁹ Cosby suggested that many poorly educated blacks have squandered the opportunities the civil rights movement provided them.¹⁰

⁴ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (holding that the University of Michigan Law School's narrowly tailored use of race in admissions decisions to further an interest in obtaining the benefits that flow from a diverse student population is not unlawful.)

⁵ *Brown v. Board of Education*, 347 U.S. 483, 495 (1954) (holding that the "separate but equal" doctrine had no place in public education and plaintiffs and others in similar situations had been deprived of the equal protection of the laws guaranteed under the fourteenth amendment).

⁶ David Osborne, *Poor Blacks Betray Rights Pioneers*, Says Cosby, THE INDEPENDENT, June 1, 2004, at 25 (quoting Cosby's statement that poor black people, or some of them, are "knuckleheads" who mangle the English language).

⁷ *Id.*

⁸ *See Id.*

⁹ *Cosby Has More Harsh Words About Black Community*, ORLANDO SENT., July 2, 2004, at A6 (noting Cosby told a room of activists that too many black men are beating their wives while their children run around not knowing how to read or write).

¹⁰ *Id.* (acknowledging Cosby's statement accusing blacks of squandering the opportunities the civil rights movement gave them).

In a subsequent July 2004 speech at the Rainbow/PUSH Coalition & Citizenship Education Fund annual meeting, Cosby reiterated his concern that some in the black community, especially the youth, are not taking advantage of the gains of the civil rights movement; they think they are hip, “but they can’t read; they can’t write. They’re laughing and giggling, and they’re going nowhere.”¹¹ Cosby suggested that inadequately educated black children who use poor grammar were the black community’s “dirty laundry” that many of his detractors would rather not discuss outside the confines of the African-American community.¹² In a larger context, Cosby’s comments highlighted the sensitive reality that all individuals in America who are true victims of economic discrimination are not likely to contribute to meaningful diversity at America’s elite universities without an effective race-neutral SES affirmative action plan.

It is this Author’s contention that the educational achievement gap between a competitive middle class education and the inferior education that others receive is America’s “dirty laundry” of class division. In response to Cosby’s comments, Theodore Shaw, Director-Counsel and President of the NAACP Legal Defense and Educational Fund, wrote about America’s class divide in a recent editorial.¹³ “Unlike much of the world,” he wrote, “we ignore human rights protections against discrimination based on economic status.¹⁴ As a nation, we wage war on poor people in this country and not on poverty.”¹⁵ Shaw argued that the dysfunctional educational experiences in the black community stem from the large concentration of poverty in that community.¹⁶ If the United States Supreme Court was more realistic about the harsh impact that socio-economic status has on a child’s chance to receive an equitable competitive middle

¹¹ Joseph Perkins, *Bill Cosby’s Comments Have U.S. Audience Riveted*, THE OAKLAND TRIB., July 11, 2004.

¹² *Cosby Has More Harsh Words About Black Community*, ORLANDO SENT., July 2, 2004, at A6 (quoting Cosby’s admonishment that others were trying to hide the black community’s “dirty laundry”).

¹³ Theodore Shaw, *Beyond What Cosby Said*, WASH POST, May 27, 2004 at A31.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* (stating violence and dysfunction in poor black communities are under an especially glaring spotlight, but arguing many of the problems Cosby addressed are largely a function of concentrated poverty in black communities - the legacy of centuries of governmental and private neglect and discrimination).

class education, the Court might have come to a different decision in *San Antonio Independent School District v. Rodriguez*.¹⁷ In *Rodriguez*, the Court essentially approved district-by-district wealth discrimination in expenditures for public education by sustaining the constitutionality of a property tax-based system in Texas, allowing school districts to maintain wide gaps in expenditures for the education of Texas children.¹⁸

Shaw correctly suggested that a dysfunctional educational experience for all students is often the result of poorly funded schools.¹⁹ The over-arching message of *Rodriguez's* property tax-based school funding system is that the state may deny poor children and others living in property-poor school districts an equitable chance at a competitive middle class education.²⁰ Poor children and their parents in search of a competitive middle class education should find very little comfort in the Supreme Court's minimalist approach toward a state's constitutional duty to educate its children.²¹ Under this approach, as suggested in *Plyler v. Doe*,²² a state may rationally deny equitable access to education to the poor children as a class.²³ A state is not allowed to totally deny poor children an education, but it is not required to provide them with an equitable one.²⁴

Although *Brown* advanced the American agenda as a multiracial society of equals, the educational achievement gains

¹⁷ 411 U.S. 1 (1973).

¹⁸ *Id.* at 18.

¹⁹ Shaw, *supra* note 13 (arguing "[P]redictably, conservatives are applauding Bill Cosby for saying that the problems of the black community stem primarily from personal failures and moral shortcomings. But just as we in the progressive African-American community cannot countenance the demonization of poor people, we must not cede the issue of personal responsibility to ideological conservatives. Most poor black people struggle admirably to raise their children well. Parents, including single mothers, work for low wages, sometimes in multiple jobs, to support their families. Recently Cosby recognized this in a press statement in which he emphasized that he was not criticizing everyone in the 'black lower economic classes' but intended to issue a 'call to action' and to foster 'a sense of shared responsibility and action.'")

²⁰ *Rodriguez*, 411 U.S. at 18-20 (holding education is not among the rights afforded explicit protection under our federal Constitution).

²¹ *See Id.* (limiting state's constitutional obligation to ensure equality of education to its citizens).

²² 457 U.S. 202 (1982) (holding a Texas law denying education to the children of unlawful foreigners unconstitutional.).

²³ *Id.*

²⁴ *See Id.*

resulting from *Brown* can best be described as very modest.²⁵ The educational achievement gap between blacks and whites remain significant because a disproportionate number of blacks suffer from socio-economic status inferiority. Historically speaking, *Brown* simply failed to reasonably foresee class-based economic inferiority as a barrier to educational achievement on par with racial segregation. When America makes a total commitment to provide all of its children with a comparable middle class education it will need neither race-based nor class-based affirmative action in education. One editorial writer complained, "equal access to public schools has not produced equal education."²⁶ Since society continues to ignore socio-economic factors that prevent the educational achievement gap between advantaged and disadvantaged groups from closing, *Brown's* removal of de jure racial segregation as impairment to a quality education for all students remains an incomplete remedy. *Brown* simply did not address the issue of economic discrimination as an impairment to equal results in educational performance of students. Because "vast gaps still separate the academic achievement of black and white students,"²⁷ it is absolutely necessary and proper to "shift the national conversation away from . . . integration to new education strategies that deliver more equal education results"²⁸ in an environment with zero tolerance for racial discrimination. Black columnist Leonard Pitts Jr. stated that fifty years after the *Brown* decision, "I'm more concerned about the fact that black kids read poorly, are not proficient in math and go to college less often than I'm concerned with the fact that they don't get to sit next to white kids in the process".²⁹ Pitts concedes that the shift of focus from school integration to the quality of public education that African-American children are actually receiving saddens him because integration is an important expression of American equality

²⁵ Patrick Welsh, *Perfect - And Hard to Reach*, WASH POST, May 2, 2004 at B01 (observing that fifty years after the *Brown* decision, we are still worrying about equal access to quality education).

²⁶ *Equal Access to Schools Fails to Equalize Education*, USA TODAY, Apr. 29, 2004, at A11 (stating educational gains from *Brown* decision were smaller than educational gains of subsequent *Brown*-inspired decisions) [hereinafter *Equal Access*].

²⁷ *Id.*

²⁸ *Id.*

²⁹ Leonard Pitts Jr., *50 Years of Black, White and Brown - Are We There Yet?*, HOUS. CHRON., May 17, 2004, at 2.

“where children of all colors, cultures and creeds are taught together.”³⁰ Notably, the *Brown* decision has always been about issues far broader than simply the physical integration of public schools. *Brown* integrated African-Americans into the United States’ Constitution as legal equals before the law without having to continue to wear the constitutional badge of inferiority given to them in *Plessy v. Ferguson*.³¹ It is encouraging that commentators like Pitts are ready to accept that America has a duty to educate all of her children regardless of the racial make-up of the classroom.

African-Americans should properly view *Brown* as an important first step for economic justice through educational equity if only because ending racial segregation in schools gave many African-Americans their first opportunity to acquire the competitive middle class education needed for career advancement. Although school integration (or, perhaps more fittingly, desegregation) remains a desirable goal as a means to close the educational gaps between the economically disadvantaged and economically advantaged, the African-American community has the level of intellectual maturity to realize that race is not the only factor involved in providing a student with a competitive middle class education. The African-American quest for economic justice through the medium of equal educational opportunity has not been realized because “researchers now realize that factors such as birth weight, how much parents read to their children, the amount of TELEVISION kids watch and teacher expectations influence educational achievement more than integrated classrooms.”³²

Those of us who grew up poor know that groups who have suffered from the adverse impact of lack of economic justice are more likely to produce children in the “at-risk” educational achievement group. I know from personal experience of childhood poverty that parents with competent reading skills who are the victims of adverse economic discrimination are so busy trying to “make a living” or survive from “paycheck-to-

³⁰ *Id.*

³¹ See *Plessy v. Ferguson*, 163 U.S. 537, 550-51 (1896) (holding that a law authorizing the separation of the races in public conveyances is not unreasonable or offensive to the Fourteenth Amendment).

³² See *Equal Access*, *supra* note 26, at A11.

paycheck” that they are not likely to have adequate time to read to their children. As a poor child in the Mississippi delta, television provided me with a reliable medium of entertainment and communication, but the messages I received failed to inform me that the excessive watching of television could possibly undermine my opportunity for future educational achievement and professional advancement. My under-funded elementary school was attended by African-Americans only. I clearly understood from the first grade to the fifth grade that my teachers did not expect very much from African-American students whose parents were not schoolteachers. However, I developed a positive attitude towards learning in the sixth grade because I knew my teacher, Mr. Willis, expected me to perform at a very high academic level in spite of the fact that neither of my parents were schoolteachers. My life experiences in the Mississippi delta are consistent with the reality of most low income African-American families that a student’s socio-economic status and the quality of the school a student attends impacts the educational achievement of an individual African-American student more than the racial makeup of his or her classroom.³³

An article by David L. Chappell, appearing in the *New York Times* on May 8, 2004, entitled *If Affirmative Action Fails . . . What Then?*,³⁴ stated that, “many people earnestly believe that aggressive remedies like affirmative action are still necessary to eliminate the inequality at which *Brown* made only a glancing blow.”³⁵ Because America is a nation where symbols are very important, it is unfair to characterize the symbolic value of *Brown* as giving racial inequality a temporary setback.³⁶ It is important not to forget that in 1954, *Brown* rejected state-sponsored racial inequality that was approved fifty-eight years

³³ *Id.* (discussing black high school graduates who, on average, have skills of an eighth grade white student, have higher failure rates on state exams, and take fewer accelerated classes than white students).

³⁴ David L. Chappell, *If Affirmative Action Fails . . . What Then?*, N.Y. TIMES, May 8, 2004, at B7.

³⁵ *Id.*

³⁶ Richard Thompson Ford, *Symposium: Brown at Fifty, Brown's Ghost*, 117 HARV. L. REV. 1305, 1305 (2004) (stating *Brown* made racism and discrimination unacceptable and established different expectations regarding race and integration).

earlier by the Supreme Court in *Plessy v. Ferguson*,³⁷ in effect, changing the inequality playing field.

Brown's holding that state-sponsored "separate but unequal" public education based on intentional racial discrimination was an unconstitutional violation of the Equal Protection Clause gave voice to millions of Americans of color and their supporters.³⁸ *Brown's* attack on racial inequality in education created a new dialogue about developing effective means of protecting the self-respect of all Americans while providing people of color with a new opportunity to achieve economic justice.³⁹

Race-neutral affirmative action is defined as a process by which individuals are presumed to have suffered from discrimination by society because of their SES. Race-neutral affirmative action does not consider race as a factor, and it is not designed to be a substitute for considering race as a factor. Rather, it considers the total SES of an individual when deciding to offer her a race-neutral affirmative action package. Aggressive, race-neutral affirmative action steps should be taken by society to insure that all students, regardless of their socio-economic status, are given a reasonable opportunity to obtain a competitive middle class education. A student with a competitive middle class education is presumed to be qualified to perform college level work at public universities in his or her state. However, the evidence clearly demonstrates that for the average African-American student, such an education has not been

³⁷ 163 U.S. 537 (1896) (accepting the "separate but equal" doctrine as constitutionally sound).

³⁸ [T]he *Brown* decision was the catalytic event which gave impetus to the civil rights movement which followed. In other words, *Brown* had a mushrooming effect or a spillover effect as it opened the floodgates to sit-ins, marches, freedom rides and other forms of protests. *Brown* also started a chain reaction and engendered a proliferation of litigation housing and minority enterprise. *Brown* led to executive orders by presidents and legislative enactments by Congress (e.g. Title VII of the 1964 Civil Rights Act) and other legislative bodies to address discrimination. And *Brown* eventually led to the enlargement of the doors of opportunity for all minorities. Williams: *Brown Paved Way For Me*, WASH POST, May 13, 2004 at T05.

³⁹ [T]hough desegregation and integration has not been as smooth and effective as originally envisioned by the *Brown* court and those supporting the decision and its remedy, *Brown* became the focal point behind the movement for the guarantee that every child be given adequate and equal resources in order for him or her to have an opportunity to reach their full potential.

Id.

attained.⁴⁰ "On average, black students who graduate from high school are equipped with the skills the average white student mastered by the eighth grade, according to federal tests."⁴¹ It is obvious that black students who graduate from high school with eighth grade skills are not prepared to attend any accredited college, elite or not. Black students with eighth grade skills cannot be expected to contribute meaningful academic diversity at any accredited college in a positive manner. A race-neutral affirmative action plan applies to all students qualified to attend a college or professional school. It would only apply to those individuals qualified to meet the academic requirement of the college to which they apply. Qualified college applicants whose applications enter the SES diversity applicant pool may be given a preference over other individuals with higher standardized test scores and higher grade point averages to support a school's interest in promoting socio-economic status diversity. Under the SES race-neutral affirmative action plan, qualified African-Americans, other minorities, whites, and all other qualified individuals will compete with each other for a SES preference slot in the admission process.

Because of America's historic failure to adequately fund and develop the four race-neutral factors of teacher quality, high quality preschool, school accountability, and competition that help "boost classroom learning"⁴² many have erroneously come to believe that race-based affirmative action or integrated classrooms are the only effective means of achieving educational equality for African-Americans. Research suggests the education achievement gap for all students could be significantly improved and eliminated by addressing issues relevant to teacher quality,⁴³ high quality preschools,⁴⁴ school accountability⁴⁵ and

⁴⁰ Stephan Thernstrom, *Another Bend In 'The Shape Of the River'*, WASH POST, Dec. 14, 1998 at A23 (noting the grades of the average black student put him or her at the 23rd percentile of the class).

⁴¹ See *Equal Access*, *supra* note 26, at A11.

⁴² *Id.*

⁴³ Parents in suburban schools accustomed to strong teachers have a hard time imagining the low quality of teaching in poor districts. In schools serving affluent families, 70% of the students have teachers who majored in the subject they instruct and hold a teaching license in the topic. In schools where most kids are poor, that holds true for only half the students. Drawing on multiple studies, the non-profit Education Trust calculates that if students were assigned highly rated teachers for five years, test-score gaps separating poor and middle-class students would disappear.

competition.⁴⁶ A realistic commitment by the American people to excellent teacher quality at all schools, high-quality preschools for all students, regardless of their race or socio-economic status, coupled with holding schools accountable for the academic performance of all students, including minority students, and allowing providers of education to compete for students, will make the need for race-based affirmative action unnecessary.

It seems all too obvious that if students came to college prepared with a competitive middle class education and free of psychological burdens of racial inferiority, schools would not have to base admission on a race-based or race-neutral affirmative action plan.⁴⁷ The quality of primary and secondary education within a state can vary dramatically, according to one commentator.⁴⁸ Those who support diversity in education would be well-served to heed the advice of Constance Hawke, a lawyer from Cleveland, Ohio, to develop affirmative action alternatives that do not include race as a factor, a “suspect” legal factor that produces much of the attack on affirmative action.⁴⁹ Although I

Id.

⁴⁴ High-quality preschools. When black students arrive in kindergarten, only 20% have the skills needed to learn to read, compared with 50% of their classmates, according to the U.S. Education Department. Only high-quality preschools that focus on learning skills have proved capable of closing that gap. Children attending Chicago’s Child-Parent Centers, for example, enjoy lifelong academic and social gains, long-running research shows. The key to their success is college-educated teachers who focus on pre-reading skills.

Id.

⁴⁵ For years, no one asked how minority groups performed, as long as a school’s average test scores were acceptable. All too often, though, they lagged other groups of students. Requiring schools to highlight minority students’ test scores holds them responsible for ensuring that all students learn at higher levels. That’s one goal of the federal accountability law, No Child Left Behind. But a revolt by states risks leading to watered-down reporting requirements that could dampen the effectiveness of performance standards for improving minority achievement.

Id.

⁴⁶ Schools in the experimental Knowledge is Power Program offer better education for 4,000 urban students, and serve as laboratories that more schools could imitate. Other competition options include allowing students in failing schools to transfer to adjoining school districts, and giving students vouchers to attend private schools when public schools are failing.

Id.

⁴⁷ See Constance Hawke, *Reframing The Rationale For Affirmative Action In Higher Education Admissions*, 135 ED. LAW REP. 1, 18 (1999) (discussing the impact K-12 schooling has on student preparedness for higher education).

⁴⁸ See *Id.* at 18 (emphasizing primary and secondary educational standards can vary widely within states).

⁴⁹ [One] alternative would be to maintain affirmative action practices but to change the basis for preferential treatment to categories that are not “suspect” in nature. The reason that the current practice of affirmative action is under legal attack is that it

concede that *Grutter* does not require race-neutral affirmative action plans, I share Hawke's belief that universities can develop effective race-neutral preferences to increase intellectual diversity.⁵⁰ Since primary and secondary education paves the road to college, college and university administrators and faculty must lobby for high quality "and funding for K-12 in order to ensure that higher education standards will not have to be lowered to accommodate under-prepared students or to spend higher education resources, not on new knowledge, but on remedial information and skills that should have been acquired early in the education process."⁵¹ Students "who attend inner city schools that are inadequately funded may not be prepared to enter higher education without extraordinary concessions by the university."⁵² It is asserted that an "individual who is unable to compete in the university environment . . . will drop out [and perpetuate] the downward spiral."⁵³ Inadequately funded schools are not limited to inner cities. Inadequately funded schools exist in rural America and throughout America. It may be argued that any student, regardless of race, who attends an inadequately funded school coupled with a personally inferior SES is at significant risk of not succeeding at the college level.

II. AN ANALYSIS OF *GRUTTER'S* INTELLECTUAL DIVERSITY RATIONALE

David L. Chappell observed that enthusiastic advocates of race-based affirmative action are irritated because race-based affirmative action has had "very limited success in closing the academic and economic gaps between black and white Americans."⁵⁴ The Supreme Court held in *Grutter v. Bollinger* that race could be a factor in making an admission decision to

permits preferences on the basis of race or national origin—and those preferences are prohibited by Title VI, Title IX and the Fourteenth Amendment. Preferential treatment is entirely legal if it is granted for other reasons; in fact, many colleges and universities routinely show preferential treatment in admissions for legacies (when an applicant's family previously attended the institution) and other special skills (such as athletic or musical abilities).

Id.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Chappell, *supra* note 34, at B7 (explaining the discontent among affirmative action supporters regarding the program's effectiveness).

promote intellectual diversity at the University of Michigan Law School.⁵⁵ The Court's intellectual diversity justification in support of the use of race as a factor in a public law school's affirmative action plan, however, is flawed. Using the intellectual diversity rationale is not compelling enough to justify the limited use of race to support the educational interest of elite colleges because there is no plausible rational connection between race and intellectual mixture.⁵⁶ Furthermore, the elite colleges' intellectual diversity justification is not compelling because it is tailored to serve "Michigan's interest in maintaining a 'prestige' law school"⁵⁷ without adequately addressing the issue of "providing access to higher education for large numbers of minorities."⁵⁸ In reality, a very modest number of minorities are impacted by race-based affirmative action at elite colleges.⁵⁹

Unfortunately, the Court allowed the University of Michigan, a flagship public law school, to use race as a compelling factor to justify intellectual diversity without really considering that there may exist race-neutral approaches which would expand

⁵⁵ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) ("[T]he Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.").

⁵⁶ The list of amici curiae urging the Court to uphold racial and ethnic preference policies was extraordinary. I cannot think of a case in which so many leading figures in the worlds of education, business, and even the military have united to protect a policy under constitutional review. The Establishment left the Justices in no doubt as to where the mainstream of elite opinion stood on the matter. Yet neither the amici nor the Justices who accepted the position they urged could manage to identify grounds on which racial and ethnic diversity can plausibly be said to constitute a compelling interest as a matter of constitutional law. Given that Michigan does not have anything that would qualify as a "compelling" state interest in establishing or maintaining an elite law school in the first place, how could it have a "compelling" state interest in racial and ethnic diversity at that law school? Justice Scalia, dissenting in the denial of relief to Barbara Grutter, cut to the heart of the matter: [T]he allegedly "compelling state interest" at issue here is not the incremental "educational benefit" that emanates from the fabled "critical mass" of minority students, but rather Michigan's interest in maintaining a "prestige" law school whose normal admissions standards disproportionately exclude blacks and other minorities. If that is a compelling state interest, everything is.

See Robert P. George, Symposium, *On Grutter and Gratz: Examining "Diversity" in Education*: "Gratz and Grutter: Some Hard Questions", 103 COLUM. L. REV. 1634, 1635-36 (2003).

⁵⁷ *Id.* at 1636.

⁵⁸ Hawke, *supra* note 47, at 16.

⁵⁹ See *Id.* at 16 (noting that only about twenty to thirty percent of four-year colleges and universities are in position to take account of race in admissions decisions; vast majority do not award any special status to applicants on basis of race).

intellectual diversity.⁶⁰ A recent study conducted by Princeton University researchers has concluded that a Texas plan which allows a student in the top ten percent of a high school graduating class to qualify for admission to any public university or college in the state has increased racial and intellectual diversity at the state's elite universities.⁶¹ The race-neutral "Top 10 Percent Plan helps students who might not otherwise have a chance to go to one of the state's prestigious public universities."⁶² Law schools and graduate schools must follow the lead of Texas in creating appropriate and flexible race-neutral plans to increase educational diversity for the SES-disadvantaged student. Race-neutral admissions plans at the graduate or professional school level should go beyond race-neutral percent plans in addressing their respective institutional need to expand academic diversity.

Former college athletes who meet minimum qualifications for admissions to graduate and professional schools are a tremendous source of potential intellectual diversity for both elite graduate schools and elite law schools. College athletes are often from diverse SES backgrounds and must engage in a cross-cultural and multiracial understanding of their sport in order to be a successful and well-respected team player. The *Grutter* intellectual diversity rationale allows an elite university to give preferences to minimally-qualified athletes who decide to attend law school after their collegiate athletic career has ended.⁶³ A law school or graduate school may define what factors constitute multicultural athletic status for purpose of achieving its academic diversity, but under no circumstances should a law school or graduate school consider race as a factor in deciding whether a former athlete deserves to be admitted under its multicultural educational diversity preference plan. The law school or graduate school admissions team should articulate those factors it considers in determining whether a former

⁶⁰ See *Grutter*, 539 U.S. at 339 (finding that law school adequately considered race-neutral alternatives).

⁶¹ Darren Meritz, *Top 10% Plan Has Improved Diversity at Top Texas Colleges*, EL PASO TIMES, Jan. 23, 2004, at A1 (noting that Texas' flagship universities are maintaining enrollment of top students from highly competitive feeder high schools).

⁶² *Id.*

⁶³ See *Grutter*, 539 U.S. at 340 (referring to fact that universities make individualized assessments necessary to assemble student body that is not just racially diverse, but diverse along all qualities valued by university).

athlete qualifies for a multicultural diversity admission. At a minimum, former athletes seeking a multicultural diversity admission preference must demonstrate that are qualified based on grades and test scores and have the potential for expanding the multiracial nature of intellectual dialogue in a classroom setting, or otherwise have a positive potential for bringing intellectual diversity to the learning enterprise.

Former athletes at universities are likely to bring a different set of multicultural views and experiences to either a law school or a graduate school than others. One must remember that America's colleges and universities recruit athletes based on merit rather than race at the undergraduate level. Such a diversity plan is not a pretext for using race as a factor in the admission process at graduate or law school level; it is a pragmatic recognition that successful role model collegiate and professional sports figures must possess both a cross-racial and a cross-cultural understanding of our society. In the *Bakke* opinion, Justice Powell quoted a President of Princeton University for the proposition that informal learning through diversity can come from the presence of basketball players on a college campus.⁶⁴ An elite law school could reserve ten admission slots each year for those elite athletes with a B average in undergraduate studies that demonstrate strong leadership skills and the ability to articulate an intellectual vision for multicultural diversity that will better American society. Under its race-neutral intellectual diversity admission plan for true scholar athletes with an appropriate grade point average, the

⁶⁴ [A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religion, and backgrounds; who come from cities and rural areas, from various states and counties; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.' In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow suffers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be so subtle and yet powerful sources of improved understanding and personal growth.

See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312-13 n. 48 (1978) (Powell, J.) (quoting William G. Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY., Sep. 26, 1977, at 7, 9).

elite law school may give the LSAT a very modest value in weighing the factors for admitting the elite athletes. This "elite athletes at elite colleges intellectual diversity proposal" should be viewed as a helpful race-neutral affirmative action plan to encourage elite athletes that are good students, possessing life experiences that create intellectually diverse classrooms, to attend law school or graduate school. It also serves the same positive public policy goals as the Texas Top Ten Percent Plan, that of encouraging good students to attend college, law school, or graduate school.⁶⁵ While speaking positively about the Texas plan, Maggie Smith, Dean of the University College at the University of Texas at El Paso said, "I think that any program that encourages students to go to college is a good thing."⁶⁶

Under *Grutter's* intellectual diversity rationale,⁶⁷ could the Supreme Court approve a race-based affirmative action plan that purports to use race as one of the many positive factors to be considered in evaluating the application of a poor white candidate because poor whites are likely to bring a unique view to an elite law school? Could a poor white applicant for admission to law school make a compelling equal protection argument that the law school's admission committee should give his socio-economic status the same weight as race for a minority applicant because he spent most of his childhood living in a trailer park in Detroit on Eight Mile Road?⁶⁸ The white applicant

⁶⁵ See Meritz, *supra* note 61, at A1 (suggesting that the Top 10 Percent Plan is positive effort that is encouraging good students to attend college).

⁶⁶ *Id.*

⁶⁷ See *Grutter*, 539 U.S. at 334 (asserting that admissions programs must be flexible enough to consider all pertinent elements of diversity, and place them on same footing for consideration, but not necessarily according them same weight).

⁶⁸ The [current] debate over the merits of affirmative action essentially boils down to questions of fairness for both black and white applicants. Critics say it results in 'reverse discrimination' against white applicants who are passed over in favor of less well-qualified black students, some of whom suffer when they attend schools they're not prepared for. But Gary Orfield, director of Harvard University's Civil Rights Project, argues that emphasizing diversity has not meant admitting unqualified students.

Opponents also say that with the expansion of the black middle class in the past 20 years, these programs should be refocused on kids from low-income homes. 'It just doesn't make sense to give preference to the children of a wealthy black businessman, but not to the child of a Vietnamese boat person or an Arab-American who is suffering discrimination,' says Curt Levey, director of legal affairs at the Center for Individual Rights.

See Barbara Kantrowitz, *What's At Stake; In the Competitive World of College Admissions, 'Fairness' Is Often In The Eye of The Beholder, Here Are The Facts About Affirmative Action*, NEWSWEEK, Jan. 27, 2003, at 30.

could argue that a poor white that grew up in a trailer park, rapping with a group of African-Americans will bring a diverse viewpoint to the issue of social and economic justice. Under *Grutter's* framework, where an African-American and a white student growing up in a trailer park in Eight Mile possess identical credentials, the white candidate may not get the last available seat because he is white so long as the law school is free to use race as a positive plus factor to admit the black student under its mantra of seeking academic diversity. The poor white applicant from Detroit's Eight Mile hypothetical reminds us that whenever government uses race as a basis for granting a benefit or placing a burden on an individual, the government travels down a slippery slope of creating racial division among Americans because of the race-based policy's unintended impact or evil intent.

Further, the *Grutter* race-based intellectual diversity rationale lacks legitimacy because race-neutral diversity plans like the Texas Top Ten Percent plan demonstrate that there is no "pressing public necessity" to discriminate against whites in undergraduate college admissions based on race to achieve diversity.⁶⁹ The intellectual diversity rationale is just a pretext for a soft racial quota.⁷⁰ Professor George correctly asserts that in a university setting, where the exchange of intellectual ideas is placed at a premium, "few people who shape university policy notice, much less care about, the absence of diversity" in intellectual discussions.⁷¹ Because university policymakers prior to *Grutter* did not engage in any serious discussion about the

⁶⁹ A majority of the Court has validated only two circumstances where 'pressing public necessity' or a 'compelling state interest' can possibly justify racial discrimination by state actors. First, the lesson of *Korematsu* is that national security constitutes a 'pressing public necessity,' though the government's use of race to advance that objective must be narrowly tailored. Second, the Court has recognized as a compelling state interest a government's effort to remedy past discrimination for which it is responsible. (see *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 504 (1989)). *Grutter*, 539 U.S. at 349-51 (Thomas, J., concurring in part and dissenting in part) (citing *Bakke*, 438 U.S. at 299 (opinion of Powell, J.)) (explaining "This standard of 'pressing public necessity' has more frequently been termed 'compelling governmental interest.'").

⁷⁰ See George, *supra* note 56, at 1639 (examining one pool of applicants to University of Michigan in 1999, where eighty-one percent of African-American applicants were accepted, compared to three percent of Caucasian applicants, in order to demonstrate existence of soft racial quota).

⁷¹ *Id.* at 1636 (surmising that because majority of university policymakers do not care about absence of faculty diversity in political and religious viewpoints, claimed desire for intellectual benefits does not really motivate defense of existing preference systems).

benefits of intellectual diversity, Professor George appropriately rejects the claim that the intellectual benefits of diversity is the true motive behind race-based admissions programs.⁷² Many individuals would object to a poor white student from Detroit's Eight Mile Road receiving any intellectual diversity preference consideration because of his race, and would agree that the intellectual diversity theory is actually a poorly disguised act of racial discrimination.⁷³ Justice Thomas, dissenting in *Grutter*, accused the Court of engaging in racial balancing to allow the law school to create a "critical mass of underrepresented" minority multicultural diversity students" in its student body.⁷⁴

Professor Flagg's *Diversity Discourses* essay is an earnest but inconsistent effort to justify race-conscious academic diversity as a means of promoting a variety of intellectual viewpoints.⁷⁵ Professor Flagg's essay contends that race should be considered as a positive life experience factor when considering the application of an African-American because his or her race will probably promote an intellectually heterogeneous student body.⁷⁶ In fact, it is intellectual folly to proclaim that race for an African-American is a predominant indicator of the potential for intellectual diversity at a university while asserting at same time that "race-conscious diversity-oriented programs do not

⁷² *Id.* at 1636-37 (suggesting that university's claimed motive is less than compelling when analyzed in comparison to non-diverse faculty, and that real motive behind racially driven admissions program is to maintain law school's reputation as elite institution).

⁷³ *See id.* at 1639 (citing *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 853 (E.D. Mich. 2001) (holding that achieving racial diversity in student body is not compelling state interest), *rev'd in part and vacated in part* by 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003)).

⁷⁴ Undoubtedly there are other ways to "better" the education of law students aside from ensuring that the student body contains a "critical mass" of underrepresented minority students. Attaining "diversity", whatever it means, is the mechanism by which the Law School obtains educational benefits, not an end of itself. The Law School, however, apparently believes that only a racially mixed student body can lead to the educational benefits it seeks. How, then, is the Law School's interest in these allegedly unique educational "benefits" *not* simply the forbidden interest in "racial balancing" that the majority expressly rejects?

See Grutter, 539 U.S. at 354-55 (Thomas, J., concurring in part and dissenting in part) (*citations omitted*).

⁷⁵ *See* Barbara J. Flagg, *Essay Diversity Discourses*, 78 TUL. L. REV. 827, 833-37 (2004) (rationalizing that diversity discourse in admission procedures is beneficial as compared to affirmative action because it both achieves desired heterogeneous student body and is less concerned with racial differences and benefits to particular minority groups).

⁷⁶ *Id.* at 834 (explaining that race adds to intellectual diversity of student body because it is another unique element within mix of different backgrounds and experiences that each student possesses and puts forth in classroom setting).

presuppose a belief that there is any correlation between a given racial identity and a particular perspective.”⁷⁷

Granted, there is no single black experience.⁷⁸ The lack of a single black experience suggests that general stereotypical notions about the “black experience” as a group to support intellectual diversity is not consistent with the Equal Protection Clause’s goal of protecting individuals regardless of their race.⁷⁹ This race-based intellectual diversity argument is simply a form of reverse racial discrimination that is shifting race-based harms from historically-innocent African-Americans to specific currently-innocent white⁸⁰ individuals because of their racial status. While views may differ, one commentator has defined the term ‘innocent whites’ as those individuals who believe in their innocence because they are “not guilty of a racist act that has denied the minority applicant the job or other position she seeks.”⁸¹ It is both appropriate and necessary for advocates of race-based affirmative action policies to at least acknowledge that race-based intellectual diversity programs may be the cause in fact, but not the legal cause, of the harm suffered by innocent whites. Notably, the term ‘innocent whites’ is used in the context of the *Grutter* intellectual diversity debate to refer to those white applicants competing for college slots who are not legally liable for any racial discrimination against any individual receiving a race-based college admission preference.⁸² Even if one concedes that the law school’s selection process in *Grutter* is holistic and individualized, it is still a constitutionally defective process that hurts whites because they (unlike racial minorities) do not

⁷⁷ *Id.* at 834-35 (proposing that race should be considered in same light with other experiences and characteristics that constitute our unique identities).

⁷⁸ *Id.* at 835 (stating that distinct lives and experiences of each African-American leads to different viewpoints and perspectives that would contribute to intellectual diversity of university).

⁷⁹ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that all racial classifications are subject to strict judicial scrutiny and further indicating that Fifth and Fourteenth Amendments protect people rather than groups).

⁸⁰ See Flagg, *supra* note 75, at 829. (“[P]ublic debate about affirmative action is steeped in the rhetoric of innocence; the costs to whites imposed by affirmative action measures are costs borne by ‘innocent white victims.’” (citing Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 300-01 (1990))).

⁷⁸ *Id.*

⁸² *Id.*

individually receive any benefit of race as a positive plus factor at any point in the admission process.⁸³

It is incontrovertible that innocent whites suffer in the battle for admission slots at elite schools because the Supreme Court in *Grutter* revived the intellectual ghost of *Plessy* by holding that a state may treat students unequally under the law because of their group racial status.⁸⁴ *Plessy* and *Grutter* are related in their sanctioning of state discrimination against an individual on the basis of race. Because I would have opposed the Supreme Court's use of race in *Plessy* in 1896,⁸⁵ I must object to the *Grutter* Court's approval of a race-based intellectual diversity rationale in 2004. Unlike some commentators,⁸⁶ my belief is that one who lacks legal blameworthiness for acts of racial discrimination should not be legally required to individually bear the burden of reverse racial discrimination in the name of race-based intellectual diversity.

Grutter's race-based intellectual diversity does not exist without cost.⁸⁷ Professor Flagg asserts, from an institutional perspective, that when race-based intellectual diversity benefits the entire university, there are no innocent white victims.⁸⁸ An institutional perspective should not countenance white discrimination in the name of a suspect race-based intellectual diversity policy. In fact, there is no substantial evidence that racial discrimination in favor of African-Americans will present an intellectual view in the classroom or elite university setting that is different in kind or substance from their white counterparts. "In the context of academic diversity, race is not a proxy for a point of view."⁸⁹

If race is not the predominant marker for life experience, then a white student from Detroit's Eight Mile Road with a life

⁸³ *Contra, Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸⁴ *See Grutter*, 539 U.S. at 343-44 (holding that use of racial preferences is still necessary to further intellectual diversity interests).

⁸⁵ *See Plessy v. Ferguson*, 163 U.S. at 550-51 (holding that law allowing separation of races in public transportation is not unreasonable or offensive to Fourteenth Amendment).

⁸⁶ *See Flagg, supra* note 75, at 829 (discussing that lack of individual blameworthiness is rationale behind finding whites to be "innocent victims").

⁸⁷ *Contra Id.* at 835 (suggesting that benefits of racial diversity are so great that there is no cost to whites in the practice of affirmative action).

⁸⁸ *Id.* (arguing that because affirmative action creates no costs to whites, there are, subsequently, no white victims).

⁸⁹ *Id.* at 846.

experience similar to the experience of his African-American counterpart should be given an intellectual diversity preference similar to the one granted to African-Americans. If intellectual diversity is truly to be determined by the contents of one's viewpoint, and not the color of his skin, then the hypothetical white student from Detroit's Eight Mile Road is just as entitled to an intellectual diversity preference under *Grutter's*⁹⁰ rationale. Professor Flagg has concluded that race-based "affirmative action is seen by whites as problematic just because the 'other' is receiving something 'we' are not."⁹¹

Race-based affirmative action is problematic for many whites because whites are people too and do not wish to see anyone given an academic racial preference admission under an illusory intellectual diversity concept. Clearly, race-based affirmative action, as well as race-based academic diversity, are losing ground in the court of public opinion not simply because of their "costs to whites."⁹² Race-based laws should rightfully lose ground in the court of public opinion because they bankrupt the constitutional principle of equal protection of the laws, while reinvesting in the *Plessy* tradition of allowing the state to treat people differently, and to their disadvantage, because of the racial identity assigned to them by the government. When members of the human race are born in America, the government will typically assign them a racial classification of white, black or place them in another racial category it deems relevant. The only way to truly bury *Plessy* is to adopt the recommendation⁹³ that the government be prohibited from using an explicit race-based factor to advance *Grutter's* race-based intellectual diversity scheme.

Professor Flagg's statement that her discourse on academic diversity is not a discourse on race-based affirmative action is unpersuasive. Race is a significant factor in her discourse on

⁹⁰ See *Grutter v. Bollinger*, 539 U.S. at 328-33 (2003) (discussing substantial benefits to intellectual diversity in educational forums).

⁹¹ Flagg, *supra* note 75, at 830.

⁹² See *Id.* at 831 (commenting that issue of "costs to whites" is partially to blame for decreasing push for affirmative action among whites).

⁹³ See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 354 (1949) (suggesting that race may be one of those traits "which can never be made the basis of a constitutional classification").

both affirmative action and academic diversity.⁹⁴ The argument theorizes that race-conscious academic diversity does not impose cost on innocent whites because the beneficiaries are equally whites and people of color.⁹⁵ The no-cost argument to innocent whites should be rejected because if a race-based intellectual diversity admissions policy rejects a white applicant with identical credentials to an admitted African-American, it is incorrect to say that both applicants with identical credentials benefited equally under the intellectual diversity concept if race was considered as a positive plus factor for the African-American candidate only.

Although Professor Flagg may be correct in contending that intellectual diversity does not characterize people of color as undeserving,⁹⁶ it is very difficult for African-Americans to be received as equals in a diverse intellectual community because they will be presumed to have entered the intellectual community in spite of their presumed less-than-elite academic credentials and standardized test scores. Although academic diversity may value the experiences and values that intellectual diversity bring to the academic community, most professors do not expect intellectual diversity students to perform on the law school final examinations and legal research papers as well as their non-diversity counterparts. While it is true that academic

⁹⁴ Even with that caveat, the discourse of diversity is not a discourse of affirmative action. It does not understand the use of race conscious policies to impose costs on "innocent whites," because its beneficiaries are equally whites and persons of color. It does not characterize people of color as "undeserving," but values the experiences and perspectives they bring to the academic community equally with those of whites. Academic diversity cherishes difference, and so harbors few qualms about taking into account any personal characteristic, including race, that might be salient with respect to intellectual heterogeneity. Unlike constitutional doctrine, which strongly disapproves government's use of race-conscious measures, the quest for academic diversity questions whether it is possible to consider the whole person for admission purposes without considering race. Finally, diversity discourse is not concerned with remedial objectives; diversity is desirable in and of itself, and in the present (citing Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 766 (1997)).

See Flagg, *supra* note 75, at 836.

⁹⁵ See *Id.* at 828-37 (noting that University of Michigan Law School community benefits from unique "perceptions" and "experiences" of historically underrepresented students).

⁹⁶ See *Id.* at 828 (commenting that in admissions diversity discourse, "applicants' backgrounds and experiences" are considered items of merit and students with these attributes are just as deserving of admission as those students with high grades).

institutions respect differences,⁹⁷ intellectual heterogeneity is a distant second or third cousin to outstanding academic performance demonstrated through excellent grades and other demonstration of superior professional skills. The *Grutter* opinion clearly demonstrates that elite law schools are unwilling to significantly modify their requirements for excellent grades and high standardized test scores to more effectively accommodate their alleged compelling state interest in intellectual heterogeneity. It is my hope that elite law schools will consider granting a multicultural race-neutral diversity preference admission to qualified former athletes who have less than excellent grades and lower standardized test scores. In line with the view of Justice Thomas that there are many existing exceptions to the strict consideration of grades and test scores in the college admission process, the proposal to create an exception to the strict academic merit system for qualified former athletes seeking admission to law school is unreasonable.⁹⁸

The answer to Professor Flagg's question of whether "it is possible to consider the whole person for admission purposes without considering race"⁹⁹ is "yes" because race is not relevant to either academic ability or academic performance. In fact, one does not have to evaluate the whole person to decide whether or not he or she is competitive at an elite school. A fair assessment can be made without using race as a factor to determine whether an applicant is likely to be competitive at law school based on their undergraduate grades, standardized test scores, work ethic, and moral character. I believe an intellectual diversity program which considers race as a factor is by definition a de facto remedial policy. It is the history of the racially or socially disadvantaged that gave rise to the permissible inference that those who are racially disadvantaged may bring a different intellectual point of view to a historically homogenous elite white college (HHEWC). One commentator correctly suggested that the *Grutter* Court's diversity rationale "shows how transparently

⁹⁷ See *Id.* at 833-36 (explaining that diversity of student experiences is desirable social goal in academic institutions).

⁹⁸ *Grutter v. Bollinger*, 539 U.S. at 354 (Thomas, J., concurring in part and dissenting in part).

⁹⁹ Flagg, *supra* note 75, at 837.

the diversity interest can substitute for one based on remedying the effects of societal discrimination."¹⁰⁰

Unlike Professor Flagg's contentions to the contrary, intellectual diversity is desirable only when it is race-neutral.¹⁰¹ Professor Flagg states, "[A] policy that purports to take account of individuality without reference to color would be insulting to many persons of color. Thus diversity's interest in and respect for individuals is undercut by the Court's requirement that an institution seek out 'workable race-neutral alternatives.'"¹⁰² However, an intellectual diversity policy that allows group racial status to be considered as a relevant factor for college admissions' race-neutral qualifications that value a person's life experience on the merit invites the Court to misuse its strict scrutiny analysis in race-related cases in a manner not unlike that employed in its holding in *Korematsu v. United States*.¹⁰³

In *Korematsu*, the Court approved the detention and relocation of Japanese-Americans because it believed that Japanese-Americans could not be trusted to be loyal to America in its war with Japan.¹⁰⁴ Recent history has taught that the strict scrutiny analysis did not overcome racial stereotypes about the presumed views that Japanese-Americans held about the war with Japan.¹⁰⁵ I am concerned that in future cases the Court may approve race-based harms against students because of stereotypical perceptions that a racial group's status creates a compelling inference about one's intellectual view regarding

¹⁰⁰ Goowin Liu, *Brown @ Fifty Symposium Brown, Bollinger, And Beyond*, 47 *How. L.J.* 705, 760 (2004). "Although the issue was not presented in *Grutter*, it is notable that the Court opinion in reviewing the state of affirmative action never mentioned *Croson's* holding that racial preferences may not be used to remedy societal discrimination." *Id.*

¹⁰¹ *Contra* Flagg, *supra* note 75 at 846 (noting race-neutral admissions policies will impede schools' abilities to identify students with relevant life experiences that are needed to foster diversity in academic settings).

¹⁰² *Grutter v. Bollinger*, 539 U.S. at 339.

¹⁰³ 323 U.S. 214, 215 (1944) (noting that legal restrictions, imposed on citizens of one race, must be subjected to strictest level of scrutiny but because of public necessity are not always unconstitutional).

¹⁰⁴ *See* *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting) (arguing that in curbing rights of Japanese-Americans, federal government was committing act of rank racism).

¹⁰⁵ *See* *Id.* at 235-36 (1944) (Murphy, J., dissenting) (noting irrationality of and lack of logical connections or factual support for military's beliefs and assumptions about Japanese community).

America's enemies and friends in the international community.¹⁰⁶

After reviewing *Plessy* and *Korematsu*, it is hard to accept that so many are willing to trust an inherently political democratic government with the power to use race as a potential plus factor in deciding the intrinsic value of a single intellectual view in the academic community. Although race matters to some, race should not matter in an elite university searching for intellectual ideas designed to teach others how to use scholarship to serve the human race by making the world a better and safer place to live. A college admission policy that pretends to evaluate the whole person in the admission process but allows race to be a positive plus factor¹⁰⁷ for some but not others in the name of intellectual diversity insults the race-neutral goal of *Brown*¹⁰⁸ and hinders America's goal to be free of its racist past in the field of education at all levels. It is conceded under *Grutter's* diversity rationale a public law school may look at race-neutral SES factors for both African-Americans and whites as a positive plus factor in the admission process. However, when race may be used only as a positive plus factor for selected racial minorities, the *Grutter* principle rejects the race-neutral model of *Brown* in favor of the unacceptable approach taken in *Korematsu* of allowing the intentional use of race against individuals because of their group racial status to survive the strict scrutiny test.¹⁰⁹

III. IMPLICATIONS OF RACE-BASED AFFIRMATIVE ACTION DEVI- HISTORIOUS

The Chappell article states that Terry H. Anderson's book, "*The Pursuit of Fairness: A History of Affirmative Action*," alleges that President Richard M. Nixon breathed life into race-based affirmative action for the expressed evil purpose of dividing

¹⁰⁶ See *Id.* at 237 (Murphy, J., dissenting) (stating reasons federal government used to exclude Japanese Americans during World War II, claiming that "[t]hey are claimed to be given to 'emperor worshipping ceremonies' and to 'dual citizenship'").

¹⁰⁷ See *Grutter v. Bollinger*, 539 U.S. at 333 (acknowledging that, however limited, universities have authority to make racial distinctions).

¹⁰⁸ See *Brown v. Board of Education*, 347 U.S. 483, 493 (1954) (holding that segregating African-American children to facilities that are physically equal still deprives those children of "equal educational opportunities").

¹⁰⁹ See *Korematsu*, 323 U.S. at 214.

blacks and whites along racial and political lines.¹¹⁰ According to Anderson, the federal government made its pledge to support race-based affirmative action during the first term of the Nixon administration for political reasons.¹¹¹ "Racial hiring preferences had been declared illegal after President Lyndon B. Johnson's brief experiment with them."¹¹² After the Johnson experiment, President Nixon reinvigorated race-based affirmative action for his own political advantage.¹¹³ "Democratic liberals would be forced to defend and expand Nixon's affirmative action policy. Black hiring preferences would supersede white workers' hard won seniority rights, thus driving a wedge between union members and black voters."¹¹⁴ Nixon managed to take advantage of this racial division in the last part of his first term by denouncing race-based affirmative action plans and court-ordered busing.¹¹⁵ "As Nixon hoped, white rank-and-filers abandoned the Democrats in droves."¹¹⁶

President Nixon initially used affirmative action to give the superficial appearance that he was accommodating the African-American interest in achieving economic equality in the workplace.¹¹⁷ He manipulated race-based affirmative action for the express purpose of persuading many middle class whites to abandon the Democratic Party. At the time, many whites viewed racial preferences granting economic equality to African-Americans in the workplace as a direct threat to a white worker's interest in job security.¹¹⁸ Whenever scholars of color evaluate race-based affirmative action or race-neutral affirmative action as a method for remedying inequality in our society we must be

¹¹⁰ See Chappell, *supra* note 34 (noting that Nixon's actions were "partly from political calculations").

¹¹¹ See *Id.* (explaining that federal government support of affirmative action did not come until Nixon's presidency and that these actions helped Nixon politically during his first term).

¹¹² *Id.*

¹¹³ See *Id.* (stating that Nixon politically "revived" preferences).

¹¹⁴ *Id.*

¹¹⁵ See *id.* (calling busing a "strong remedy").

¹¹⁶ *Id.*

¹¹⁷ See Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CALIF. L. REV. 1923, 1995 (2000) (noting that affirmative action programs resulted in minorities receiving positions where they would "previously be excluded").

¹¹⁸ See Chappell, *supra* note 34, at B7 (describing how Nixon gained votes from middle-class white Democrats by taking advantage of diverting interests of union members and black voters).

mindful to apply Professor Derrick Bell's interest convergence theory.¹¹⁹ According to this theory, "the interest of Blacks in achieving racial equality will only be accommodated when it converges with the interests of whites."¹²⁰

More than thirty years after President Nixon endorsed race-based affirmative action for political reasons,¹²¹ we come to this critical question: Is the interest of most African-Americans in achieving educational equality and economic justice actually being accommodated under the Supreme Court's *Grutter* holding, allowing the use of race as a factor in deciding law school admissions under a properly structured diversity program?¹²² Critical race scholars of color, and all other scholars, must analyze the issue of whether race-based affirmative action is designed to divide the African-American community between affluent educated blacks eager to attend historically elite white universities and poor uneducated blacks who are often trapped in a vicious cycle of poverty and violence.¹²³ The Chappell article states that an effective race-based affirmative action plan has a propensity to give assistance to well off African-American students with college-educated parents.¹²⁴ Chappell concludes that race-based affirmative action provides only a slight opportunity for poor blacks that are the greatest victims of racism.¹²⁵

Legal scholars of color have a special obligation to determine whether *Grutter's* rationale for diversity leaves behind most

¹¹⁹ See Derrick Bell, *Brown v. Board of Education And The Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1983) (claiming that Supreme Court found a convergence of interests of blacks and whites in *Brown v. Board of Education*, as opposed to selecting rights of one group over other).

¹²⁰ *Id.* at 523.

¹²¹ See Chappell, *supra* note 34, at B7 (pointing out that although racial hiring preferences were illegal under Lyndon B. Johnson's administration, Nixon was in favor of them in order to sway votes of Democratic liberals who would support policy).

¹²² *Grutter v. Bollinger*, 539 U.S. at 331-33 (acknowledging importance of education and propriety of university's interest in diverse student body).

¹²³ See Chappell, *supra* note 34, at B7. Chappell recognized that often affirmative action assists more affluent blacks rather than those suffering from the most poverty and racism. *Id.* A persuasive argument can be made that race-based affirmative action college admission policies actually favors affluent blacks who especially share traditional middle class values about education.

¹²⁴ See Chappell, *supra* note 34, at B7 (stating specifically that those receiving benefits of affirmative action are often children of college-educated parents who have already been accepted to college).

¹²⁵ See *Id.* (concluding that because affluent blacks obtain most help from affirmative action, poorest blacks often miss out as a result).

rank-and-file African-Americans, while creating a small group of African-American intellectuals who accommodate and emulate the superior economic status of the white upper class.¹²⁶ Legal scholars of color must constantly address issues of discrimination and equality from *Brown* to *Grutter* from Professor's Derrick Bell's interest convergence perspective.¹²⁷

Such scholars should also not neglect Professor Bell's thought-provoking warning that "all judicial activity in racial cases before and after *Brown*"¹²⁸ analyzing the Fourteenth Amendment's Equal Protection Clause "will not authorize a judicial remedy providing effective racial equality for Blacks where the remedy sought threatens the superior societal status of middle and upper class whites."¹²⁹ African-Americans must be careful not to allow race-based affirmative action to be used by the judicial review process as a devious interest divergence theory to take away from the battle for true economic justice on race-neutral terms.

IV. RACE-NEUTRAL DIVERSITY PLANS MAY BE REFINED AND DEFENDED AS EFFECTIVE METHODS OF ACCOMMODATING CLASS BASED DIVERSITY

The Texas Legislature, in adopting the Top Ten Percent plan to achieve diversity, may well have concluded that it had established a comprehensive race-neutral diversity plan that is superior to race-based affirmative action in expanding both intellectual diversity, geographical diversity, and socio-economic status diversity.¹³⁰ Sponsors of the Top Ten Percent Plan could have explained the plan as expanding diversity using a cross-section of students based on academic performance in high school without having an adverse impact on racial minorities.¹³¹ In fairness to the Texas Legislature, it did not have the benefit of the expanded interpretation of diversity the Supreme Court

¹²⁶ See *Grutter*, 539 U.S. at 336 (forbidding quotas, but allowing institutions to consider race "plus" in addition to other qualifications).

¹²⁷ See Bell, *supra* note 119, at 518 (suggesting that concentrating on enhancing quality of education overall is more important than focusing on issue of segregation).

¹²⁸ *Id.* at 523.

¹²⁹ *Id.*

¹³⁰ See Jonathan D. Glater, *Diversity Plan Shaped in Texas Is Under Attack*, N.Y. TIMES, June 13, 2004, at 1 (discussing results and controversies of Texas legislature's alternative to race-based affirmative action) [hereinafter *Glater*].

¹³¹ See *Id.* (explaining purpose of Texas legislation as removing race from admissions policies of state universities and substituting it with merit-based system).

approved in *Grutter*.¹³² Following a federal court decision prohibiting the use of race in the admissions process at the public universities and colleges in Texas,¹³³ the Legislature responded by enacting a law assuring entrance to the public college or university of choice to those graduating in the top ten percent of their class from any private or public high school in Texas.¹³⁴

A Texas law designed to satisfy the federal court's race-neutral college admissions requirements had the practical effect of expanding diversity for Texas colleges and universities while restoring racial diversity on a race-neutral basis.¹³⁵ The Texas Top Ten Percent Plan has been a successful approach for achieving race-neutral diversity.¹³⁶ California and Florida have adopted race-neutral diversity plans comparable to the one adopted in Texas with some modifications.¹³⁷ In view of the Court's holding in *Gutter* allowing the express use of race as a factor in the admission process, I do not think a claim that the race-neutral percentage plan is unconstitutional pretext for race discrimination is likely to succeed. The Top Ten Percent law has been particularly successful in avoiding allegations of intentional discrimination based on race in the college admissions process, but has recently been disparaged in Texas because of perceived

¹³² *Grutter v. Bollinger*, 539 U.S. at 342 (stating "Universities in California, Florida, and Washington State, where racial preferences in admissions are prohibited by state law, are currently engaged in experimenting with a wide variety of alternative approaches. Universities in other States can and should draw on the most promising aspects of these race-neutral alternatives as they develop."). Cf. *U.S. v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) ("[T]he States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear.").

¹³³ *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

¹³⁴ See *Glater*, *supra* note 130, at 1 (citing specifics of Texas law).

¹³⁵ In many ways, the 10 percent rule has transformed the student population on the campus here. For one thing, the number of schools that send their graduates to the University of Texas has risen by a third, from just over 600 to more than 800. And, according to the admissions office, the new freshman class will be, for the first time, more diverse than classes were before the United States Court of Appeals for the Fifth Circuit struck down affirmative action in higher education in 1996. Of the 6,341 students who have sent in deposits so far, the university classifies 3,536 as Anglo, 298 as African-American, 1,146 as Hispanic and 1,128 as Asian. (In addition, 23 are classified as Native American and 210 as "other.") [sic].

See *Id.*

¹³⁶ See *Grutter v. Bollinger*, 539 U.S. at 342 (concluding that race-based admissions policies offend equal protection and should be limited in time).

¹³⁷ See *Glater*, *supra* note 130, at 1 (noting other states, such as California and Florida, adopted legislation similar to that of Texas').

reverse class-based discrimination.¹³⁸ Under the reverse class discrimination attack, wealthy parents find the most fault with the plan because they believe their children are not treated fairly under its rules.¹³⁹

The criticism leveled at the Top Ten Percent Plan by wealthy parents is simply invalid. In fact, the Texas law should not be changed to accommodate the allegation of reverse discrimination by affluent parents who are disappointed that their children did not finish in the top ten percent of their class. Parents of children denied a perceived right of entry to the University of Texas at Austin contend that a number of high schools are superior to others, and that staying in the top 25 percent at a superior school should be given greater weight than placing in the top ten percent of an inferior school.¹⁴⁰ The heated discussion surrounding the Texas Top Ten Percent Plan reveals that socio-economic status, rather than race, is the real proxy for doling out precious but scarce spots in elite universities. The Glater article demonstrates that Professor Bell's interest convergence theory¹⁴¹ should be expanded to apply to socio-economic status issues of inequality and class¹⁴² discrimination in the American struggle for diversity at its elite colleges and universities.¹⁴³

¹³⁸ See *Id.* (stating "[a]ny change in the rule raises the touchy subject of class, because those demanding change tend to be concerned about students at the state's elite high schools in wealthy areas, while defenders of the rule say they are worried about students from poorer rural and urban neighborhoods.").

¹³⁹ See *Id.* (describing wealthy parents' problems with Texas law).

¹⁴⁰ Critics of the rule say that students from poor high schools without the resources of wealthier institutions are not ready for the work at an elite public university, and that too many graduates of high-powered high schools are leaving the state for college when they do not get into the University of Texas. "Those kids are not prepared," said Douglas S. Craig, a lawyer in Houston whose son, Charles, was not accepted at the university. Charles Craig went to the University of Colorado at Boulder instead, Mr. Craig said, adding that getting into the top 10 percent at his son's selective private high school was very difficult. "His class was two-thirds National Merit scholars and semifinalists. Their scores are all very, very high." But Bruce Walker, vice provost and director of admissions at the University of Texas, said data collected by the university showed that students admitted under the 10 percent rule consistently get better grades than other students. Critics question that data, however, and argue that SAT scores are a better measure of students' abilities. The SAT scores of students in the top 10 percent there have fallen slightly over the last several years, according to the admissions office.

See Glater, *supra* note 130, at 1.

¹⁴¹ See Bell, *supra* note 119, at 523 (stating that principle of interest convergence provides that interest of blacks in achieving racial equality will be accommodated only when it converges with interests of whites).

¹⁴² "It's a big-time social class story," said Marta Tienda, a Princeton University professor of sociology and public affairs who has studied the effects of the rule. "School type is the proxy for social class." Guidance counselors and administrators at

Support of race-neutral diversity plans for the admissions process results in an overall disagreement with the assertion by Professor Rosen that “selective universities can’t achieve colorblindness, diversity, and high admission standards at the same time.”¹⁴⁴ Professor Rosen and historical opponents of race-based affirmative action endorsed race-based affirmative action as a lesser evil than colorblind admissions at elite universities to limit the number of multicultural and diverse students they admit.¹⁴⁵ It appears that Professor Rosen fears that abandoning racial preferences would force states to expand diversity in college admission with percentage plans like the Top Ten Percent plan in Texas.¹⁴⁶ Professor Rosen suggests that expanding diversity beyond narrow racial preferences “would be the end of America’s great universities.”¹⁴⁷ Professor Rosen equates creating diversity beyond just race in a multicultural society with plans such as the Texas Top Ten Percent plan with lowering the academic standards of an elite college.¹⁴⁸

rural schools question the motives behind changing the rule. “The State of Texas has done a great thing by offering this opportunity to get our most gifted students into a challenging educational setting,” said Cherri S. Franklin, principal of the public junior and senior high school in Marfa. “And the rich people don’t want them there. She emphasized that she was speaking for herself and not the school system.”

See Glater, *supra* note 130, at 1.

¹⁴³ “Opinions about the 10 percent rule do not fall neatly into predictable categories. While affirmative action—historically used only at the state’s two flagship schools, the University of Texas at Austin and Texas A&M University—drew harsh attacks from political conservatives, the 10 percent rule has critics and supporters from different places on the ideological spectrum. Todd Staples, a Texas state senator who has questioned the 10 percent rule, said he was not sure what kind of change would be appropriate. “My senatorial district is sprawling across a part of 16 counties, from rural to suburban fast growth,” Mr. Staples, a Republican, said. “So I have a mixture of high schools that are impacted differently on this issue. My goal is to have a win-win policy.” State Senator Royce West, a Democrat from Dallas, predicted that reaching consensus on changes to the 10 percent rule would be difficult. Senator West, who heads the committee that will hold the hearing on the rule, conducted an end-of-session filibuster to block a cap on it. “I am not going to stand here and let this rule be abolished when it has not served its purpose yet,” he said. He said any changes would have to continue some form of preference for students at schools that have historically been underrepresented.

Id.

¹⁴⁴ See Jeffrey Rosen, *How I Learned to Love Quotas*, N.Y. TIMES, June 1, 2003, at 52 (stating that universities can only achieve two out of three of these goals).

¹⁴⁵ See *Id.* (stating that he converted from an affirmative action skeptic to supporter because its abolishment would result in lowering of rigorous academic standards).

¹⁴⁶ See *Id.* (arguing that ten percent plan was adopted as way to lower academic standards and that it was the direct result of 5th Circuit’s ban on affirmative action).

¹⁴⁷ See *Id.* (quoting 1997 Supreme Court brief filed by three University of Texas law professors).

¹⁴⁸ I wish I could say there were a single, dramatic moment of revelation that turned me from an affirmative action skeptic into a supporter. But the truth is that

It is a fair assessment of the *Grutter* opinion to conclude that the Supreme Court allowed a public university to take advantage of race as a flexible aspect of other factors to be utilized in making an admissions decision at an elite state university law school.¹⁴⁹ The Court's decision in *Grutter* to permit the use of race in the college admission process undermines the important role that race-neutral Texas Top Ten Plan is now playing in promoting socio-economic status diversity.¹⁵⁰ However, the

my conversion took place over several years, in the late 1990's. After the courts and popular initiatives began to ban affirmative action, I noticed that state legislatures and universities rebelled, deciding on their own that racial diversity is more important than meritocracy. In both California and Texas, the political pressures to achieve racial diversity proved so overwhelming that when each state's universities were forbidden to take race into account in the admissions process, they simply refused to accept the decline in black and Hispanic enrollment that inevitably followed. Instead, universities responded to the widespread political demand for diversity by devising plans that, in effect, lowered academic standards across the board. This response has had some success in keeping up minority enrollments, but at the cost of an even more serious compromise of academic standards than the relatively modest concession represented by affirmative action itself. In other words, I became convinced that selective universities can't achieve colorblindness, diversity and high admission standards at the same time. They can achieve only two out of the three goals. For the most part, schools would prefer to choose standards and diversity, using racial preferences to create a diverse class while keeping standards relatively high. But if the courts order colorblindness, America's finest public and private universities won't hesitate for a moment in choosing diversity as the second goal, allowing rigorous admissions standards to go out the window. This is a prospect that both the Bush administration and some of the conservative justices on the Supreme Court seem ready to embrace. "If Michigan really cares enough about that racial imbalance, why doesn't it . . . lower the standards, not have a flagship elite law school?" asked Justice Antonin Scalia at the oral argument. "It solves the problem."

Id.

¹⁴⁹ See Kerstin Forsythe, *Racial Preference and Affirmative Action in Law School Admissions: Reactions from Minnesota Law Schools and Ramifications for Higher Education in the Wake of Grutter v. Bollinger*, 25 HAMLINE J. PUB. L. & POL'Y 155, 165 (2003) (citing James E. Coleman Jr., *An Ode to Justice Lewis F. Powell Jr.: The Supreme Court Approves the Consideration of Race as a Factor in Admissions by Public Institutions of Higher Education*, Duke Law, available at <http://www.law.duke.edu/publiclaw/supremecourtonline/commentary/gravbol.html>) (last visited Oct. 17, 2004).

¹⁵⁰ In Texas, the percentage plan Bush signed into law in 1997 as governor can be summed up in a sentence: The top 10% of graduating seniors from every high school in the state are guaranteed admission to any Texas public university. The California and Florida plans admit the top 4% and 20%, respectively. But unlike Texas, neither guarantees admission to its flagship institutions. Conceived by black and Hispanic state legislators, the Texas law doesn't specifically consider race; rather, it aims to capture the best students in each of the state's high schools, regardless of race or economic standing. The idea is to reward the hardest-working and brightest students statewide, regardless of the quality of education they receive. But in doing so, it takes advantage of the state's racial diversity—and segregation. And, it removes the hurdle of standardized tests, on which Hispanic and black students have historically posted lower scores than average. UT junior Vanessa Medina, for example, got 'A's in high school, was president of the speech and debate team, completed advanced-placement English and other college-prep courses, and ranked sixth out of more than 200 students in her 2000 graduating class at Riverside High School in El Paso. But with "only a handful of kids" aspiring to college, Medina says

cherished principle of equal protection could have been honored, and diversity expanded, if the court had held that diversity is a public necessity in America, and that the Texas Top Ten Percent Plan demonstrates that diversity can be achieved on elite college campuses without race-based affirmative action.¹⁵¹ It remains to be seen whether some version of race-neutral percent plan will work at the law school level. I am discussing the race-neutral percent plans in college admission for the express purpose of generating dialogue about race-neutral alternatives in advancing SES diversity. I believe the Texas percent plans have the incidental effect of benefiting racial minorities and others on equal terms in the college admission process. While I do not suggest that the diversity percent plans are a cure-all and will work with equal success for every situation, it is my belief that race-neutral diversity percentage plans are a lesser public evil in the college admission process than race-based plans.

The Court's race-based rationale in *Grutter* changes the strict scrutiny test from strict in theory and fatal in fact, to strict in theory but flexible in fact.¹⁵² The problem with a flexible in fact test for racial discrimination is that the flexible approach virtually assures that the equal protection of the law prohibiting racial discrimination can easily be adjusted to accommodate a new and unimproved notion of a race-based "connected but

she often wasn't challenged in high school. "A lot of teachers conformed to the students. They didn't expect very much," she says. Now a psychology major, Medina, admitted through the top 10% law, is maintaining a 3.5 grade-point average and has set her sights on graduate school.

See Mary Beth Marklein, *Affirmative Action Faces Another Test*, USA TODAY, Mar. 26, 2003 at 7D (describing the percentage plan as used in Texas public universities).

¹⁵¹ And UT data show that students enrolled under the 10% law, including minorities, have consistently outperformed other students with comparable test scores, though the grade-point averages of black and Hispanic students admitted in the top 10% were lower than those of white and Asian students in that group. Some surprises have emerged, too. For example, more women are enrolling in math and science, fields that have struggled to recruit women and minorities. And "they're kicking men's butts," admissions director Bruce Walker says. But even modest gains didn't come easily. Just after the percentage plans became law, white and Asian-American enrollments rose while the numbers dropped for blacks and Hispanics. That prompted university officials to get aggressive, increasing recruitment and scholarships at high schools where Hispanic and black students were a majority.

Id. (explaining the achievements of the percentage program in Texas public universities, in terms of academic performance and diversity).

¹⁵² See *Grutter v. Bollinger* 539 U.S. at 326-27 (quoting *Adarand Constructors, Inc. v. Pena* 515 U.S. 200, 257 (1995), finding that government use of race-based criteria is not inherently invalid as long as it is narrowly tailored, and that "strict scrutiny is not "strict in theory, but fatal in fact").

unequal" diversity theory in the field of higher education. The Supreme Court used an acknowledged strict in theory, flexible in fact approach in *Korematsu* to visit a racial wrong on Japanese-Americans because of their racial group status. The Top Ten Percent Plan properly advances the state's goal of creating a diverse learning experience on its college campuses without exhibiting race as a factor, and without invoking the strict scrutiny test for race-based classifications. Strong proponents of the percentage plans have at times been found guilty of "overselling it."¹⁵³ I do not intend to sell "percentage plans as any kind of panacea,"¹⁵⁴ but after a careful reading of the *Plessy*, *Korematsu*, and *Grutter* opinions, it is easy to oppose the burdens being inflicted based on racial group when a controversial, but effective, race-neutral percentage plan or other alternative may be available.

The *Grutter* majority's assertion that the University of Michigan implemented workable alternatives before considering race in its admission process is not consistent with the findings of the federal district court.¹⁵⁵ There is virtually nothing in the *Grutter* opinion to suggest that the University of Michigan had actually implemented in good faith a race-neutral plan that failed to generate the desired intellectual diversity. The *Grutter* Court gave the United States' argument suggesting that race-neutral percentage plans were effective methods for expanding intellectual diversity only minor consideration.¹⁵⁶ Under an

¹⁵³ See Marklein, *supra* note 150 (stating "[s]till, like many proponents of the percentage plan, Torres says Bush is overselling it. 'I would be very skeptical of percentage plans as any kind of panacea,'").

¹⁵⁴ *Id.*

¹⁵⁵ See *Grutter v. Bollinger*, 539 U.S. at 340 (holding that "the Law School sufficiently considered workable race-neutral alternatives," and noting the District Court took Law School to task for failing to consider race-neutral alternatives such as "using a lottery system" or "decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores, stating also these alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both.").

¹⁵⁶ The United States advocates "percentage plans," recently adopted by public undergraduate institutions in Texas, Florida, and California to guarantee admission to all students above a certain class-rank threshold in every high school in the State. The United States does not, however, explain how such plans could work for graduate and professional schools. More-over, even assuming such plans are race-neutral, they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university. We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission.

appropriate race-neutral plan, a university or college is not required to conduct an evaluation of the whole person to decide whether she will bring intellectual diversity. Elite public universities recruit student athletes with minimum academic qualifications free of race factors on a routine basis without considering the whole person. It is only when race is to be considered as a factor in the admission process is a law school constitutionally required under *Grutter* to consider enough other factors to establish that race was not the predominant factor.¹⁵⁷ The law school in *Grutter* correctly concluded that all of the student admitted under its race-based diversity program were qualified to study law at Michigan but based on the traditional qualifications of grades and LSAT scores, it created the inference the diversity applicants may not be the best qualified. It is my contention that law schools like those colleges recruiting athletes have the race-neutral ability to admit qualified individuals based on unique talents and experiences free of considering race. In recruit athletes, the predominant factor in recruiting qualified but academically inferior athletes is athletic ability. At the law school level, it may be appropriate to admit qualified individuals with academically inferior credentials by considering the candidate's cross cultural ability to expand a multiracial understanding among people from a variety of SES backgrounds free of racial discrimination. When it comes to creating race-neutral diversity in law school admissions, one must be prepared to think outside of the race card box.

Professor Torres' excellent explanation about the positive ways that the Texas Top Ten Percent plan has expanded the educational opportunities for nontraditional students at the University of Texas was published in the *Columbia Law Review* four months after the *Grutter* decision in June of 2004.¹⁵⁸ I am

Id. (discussing the position of the United States based upon an amicus curiae brief).

¹⁵⁷ *Id.* at 336-37 (requiring admissions programs to remain "flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicants race or ethnicity the defining feature of his or her application," holding "individualized, holistic review" without focus on any particular soft variable was acceptable for race-conscious admissions program).

¹⁵⁸ Gerald Torres, Symposium: *On Grutter and Gratz: Examining "Diversity" in Education: Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Edge*, 103 COLUM. L. REV. 1596, 1602 (2003) (explaining that University of Texas' use of Top Ten Percent plan has resulted in student body with higher numbers of minority students than race-conscious program that was used before it).

now convinced that Professor Torres' analysis of the Texas percent plan make those plans strong candidates for advancing diversity on a race-neutral basis at the undergraduate college level.¹⁵⁹ Regardless of how one feels about race-based affirmative action^o or race-neutral alternatives, my commitment to the concept of economic justice in our society leads me to the conclusion that the Michigan Law School did not make a compelling case that there were no effective race-neutral alternatives to achieve diversity. The insights shared by Professor Torres' evaluation of the real impact that the Texas Top Percent Plan has on the lives of disadvantaged SES students leads me to the conclusion that society must work harder by thinking outside the race box to expand diversity with top graduates with a predominant disadvantaged SES history while deleting race as a factor in its admission criteria.¹⁶⁰

Although the Texas Top Percent Plan has had his greatest impact at the undergraduate level,¹⁶¹ there is no evidence that a

¹⁵⁹ See *Id.* at 1604 (suggesting that percentage plan adopted by university resulted in socio-economic and geographic diversity that was comparable to race-conscious program).

¹⁶⁰ Affirmative action brought us students of color, but we were not expanding our feeder school base or our representation of socioeconomic groups. Moreover, we were missing some of the most qualified, neediest students of color and those who would be most likely to succeed and to return after their freshman year. Therefore, finally, Hopwood forced us to build a student body that was truly more diverse—not just more racially and ethnically representative, but also more geographically and socioeconomically representative of the state. Sadly, I think we would not have rolled up our sleeves and made the effort of doing the math and trudging into the neglected high schools and neglected districts had it not been for Hopwood. The truth is that it is not a criticism of percent plans to say they must be properly and aggressively implemented in order to work. In fact, that is the point. There is no magic bullet for the problems of educational inequality. What affirmative action and percent plans both reveal is that there is a large and unpaid debt owed to the K-12 systems and that there is a need for universities to reexamine their goals and codify them into admission, retention, recruitment, and financial aid policies. The relationship of elite institutions of higher education to K-12 has begun to be transformed by the shock treatment that Hopwood represented.

See *Id.* at 1608.

¹⁶¹ The Fifth Circuit Court of Appeals forced the University to think about how it would assemble a diverse pool of potential students. Critics of the Top 10% Plan often lump it with the California and Florida plans and frequently mischaracterize it as an assault on affirmative action. That may be true in California and Florida, but in Texas the legislation was created by African American and Latino legislators who were historically the principal advocates of racial, ethnic, economic, and geographic diversity. They were joined by farseeing rural white conservatives who saw in the Top 10% Plan a chance to enroll a robustly diverse class at the flagship universities of the University of Texas and Texas A & M. The University of Texas has been aggressive in implementing the plan. The University of Texas has proven that an institution in a state like Texas can, in its undergraduate program, build a diverse class on the basis of the Top 10% Plan. The plan has also forced the admissions administrators to recognize that the University's traditional admission schemes were causing it to miss

modified version of the percent concept will not be effective at the graduate or professional level. The Texas Top Ten Percent Plan is designed to reward the hard work and academic success of students who attended high schools that were not traditional feeder schools for the prestigious University of Texas.¹⁶² For example, the University of Michigan would not be sacrificing its academic quality by guaranteeing admission to the valedictorians of thirty previously identified colleges with a disproportionate number of students from a personal disadvantaged SES background who have a demonstrated potential for increasing intellectual diversity. There is a strong likelihood that the top academic graduate from a college with a disproportionate number of its students from a disadvantaged SES would add both geographical and intellectual diversity to an elite law school. In practice, the Michigan Law School could decide to offer preference diversity admission to individuals for a host of SES reasons that exclude race. I simply refuse to believe that elite law schools cannot maintain academic quality while increasing the intellectual diversity on campus with nontraditional students who are the top academic performers from their respective colleges.¹⁶³ A university or college willing to engage in hard work

students with the academic potential to prosper at the university level. Finally, and perhaps most importantly, the Top 10% Plan has allowed the University to broaden its service to the state of Texas by drawing its freshman class from more high schools and school districts than ever before. As a result, the University is 'doing a better job of what a flagship state university is supposed to do for the communities of the state.'

Id. at 1601-02.

¹⁶² *Id.* at 1603 (noting that "because of the composition of Texas communities, this recruiting and financial aid mechanism reached a significant number of nonwhite students").

¹⁶³ Despite the misgivings about relying on a single factor, admissions officials are convinced that, from the standpoint of admissions as a science, there is a place for automatic admissions policies based on GPAs. Research on the students admitted under HB 588 reveals what many educators already know but what those who are committed to standardized testing are loathe to admit: High school performance is a better indicator of college performance than are standardized test scores. Top-ten percenters make much higher grades in college than non-top-ten percenters; in fact, these students (who in many cases would not have been admitted any other way because of their lower entrance exam scores) are now performing as well in college as their non-top-ten-percent counterparts who scored 200-300 points higher on the SAT. What this has meant for Texas is that, because students of color have historically had lower standardized test scores than whites, these successful minority students would not have made it into the University of Texas without the combination of HB 588 and the efforts of the University to make it work. In addition to evidence of the academic success of the top-ten percenters, since implementing the law the University has seen retention rates improve from 87% to 92%. Based on the two most important indicators of academic success (college grades and return rates), the efforts of the University of Texas to implement HB 588 have yielded a more qualified entering

to increase intellectual diversity at the graduate school or professional level should grant a preference to qualified individuals using SES factors and refuse to give race any consideration in its necessary and proper battle for meaningful diversity.¹⁶⁴ My discussion of using race-neutral SES factors to promote academic diversity at top colleges and law school is different from the Texas Top Ten Percent Plan but my discussion of the race-neutral alternative has been inspired by the success of that plan.¹⁶⁵

V. CONCLUSION

Because the conceptual framework for effective race-neutral educational diversity demonstrated by the success of the Texas Top Ten Percent Plan could be designed to create true educational diversity based on socio-economic status, the Supreme Court should reconsider the race-based diversity scheme presented in *Grutter* as soon as possible. The Texas Ten Percent Plan is in fact and in law a proxy for an America divided by class in education from preschool to professional school. The Texas plan is valid and important because it considers the entirety of the educational experience and its impact on individual students when addressing issues impacting status diversity. Because "Texas looks a lot like the neighborhood the United States is becoming,"¹⁶⁶ I am strongly recommending the Texas Top Ten Percent concept as a model for the expansion of real diversity in this nation. While Professor Torres' conclusion that not all of the lessons of Hopwood and the Texas Top Ten Percent Plan can be generalized to all of America is accurate,¹⁶⁷ it certainly has enough lessons in it for each state, and school, in the nation to develop effective race-neutral plans. Professor

class of students than conventional admissions programs and conventional affirmative action policies.

Id. at 1604.

¹⁶⁴ *Contra Grutter v. Bollinger*, 539 U.S. at 340 (noting that even assuming percentage plans are race-neutral, "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university").

¹⁶⁵ Torres, *supra* note 158, at 1608.

¹⁶⁶ *Id.* at 1609.

¹⁶⁷ *See Id.* (acknowledging that "we know that all of the lessons will not be able to be generalized beyond Texas").

Torres correctly suggests that utilizing versions of the Texas plan to expand educational diversity into other neighborhoods requires a great deal of local knowledge.¹⁶⁸ However, weaving considerations of race into the Texas college admission process, along with the Top Ten Percent Plan, is to do a disservice to the people of Texas. The Top Ten Percent Plan has effectively expanded real diversity without any such consideration.¹⁶⁹

It is my belief that the Texas high performing scholar's concept will expand educational diversity at all levels in most communities across America. I am glad that Professor Torres has provided us with an excellent critique of the Texas Top Ten Percent Plan in his very reflective comments as we continue to confront the implication of status issues for diversity and higher education.¹⁷⁰ These and all reflections on education and diversity should be studied and considered as vital for all serious scholars of a subject the entire nation can no longer afford to ignore.

¹⁶⁸ See *Id.* (admitting that there is "a strong dose of local knowledge contained in the lessons of HB 588 and how it has worked as implemented by the University of Texas").

¹⁶⁹ *Contra Id.* at 1608 (arguing "[b]y weaving considerations of race into our admissions policies without forgetting the lessons we have learned since 1996, we will be better able to serve the entire state as well as the students on campus.")

¹⁷⁰ *Id.* at 1596 (noting that the Texas Top Percent plan "had effectively kept the undergraduate college integrated, but it did not and probably could not be made to apply in any sensible way to the Law School or to any other graduate or professional schools").

