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The Hypothetical Opinion in *Grutter v. Bollinger* from the Perspective of the Road Not Taken in *Brown v. Board of Education*.

Kevin Brown*

I. INTRODUCTION

Between 1938 and 1950, the Supreme Court addressed four cases dealing with segregation in graduate and professional schools.¹ But, when the Court addressed these challenges to segregation it was not necessary to overturn the “separate but equal” doctrine announced in

* Charles A. Whistler Professor of Law and the Director of the Hudson & Holland Scholars Programs, Indiana University at Bloomington.. The author would like to acknowledge the contribution of several of his colleagues who have read earlier drafts of this commentary and to thank them for their very helpful comments. These include Jeannie Bell, Hannah Buxbaum, Crieg Bradley, Dan Conkle, Roger Dworkin, Robert Heidt, William Henderson, Ajah Mehorta, Christiana Ochoa, Aviva Orientstein, John Scanlan, Jeffrey Stake, and Susan Williams. In addition, the author would also like to thank Silvia Biers for her excellent research help on the article.

1. *McLaurin v. Okla. State Regents*, 339 U.S. 637, 640–41 (1950) (holding that the Plaintiff, a black graduate student of education, was entitled to the same treatment as students of any other races and finding the State’s assignment of the Plaintiff to a seat in a classroom in a row specified for colored students, and assignment of Plaintiff to one particular table in the library and cafeteria, deprived Plaintiff of his present right to equal protection under the law); *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (holding that the facilities for the study of law furnished by Texas to black students was not equal to that furnished to whites, thus depriving black law students the right to equal protection under the law); *Sipuel v. Bd. of Regents*, 332 U.S. 631, 632–33 (1948) (per curiam) (holding that the State’s refusal to admit the Plaintiff, a black female, to a state law school solely on the basis of race violated the Fourteenth Amendment; no separate facilities for legal studies were offered); *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337, 351–52 (1938) (finding that the Plaintiff, a black law student, was denied his right to equal protection under the law where he was denied admission to a state law school solely on the basis of race even though the State offered to fund his attendance to an out-of-state law school and therefore holding that comparable facilities must be equal and within the state). These four Supreme Court cases addressing segregation in graduate and professional schools were actually preceded by *Pearson v. Murray*, 182 A. 590 (Md. 1936). In *Pearson*, the University of Maryland Law School denied admission to the plaintiff-applicant, an African-American graduate of Amherst College, because of his race. *Pearson*, 182 A. at 590. While Maryland did not provide any legal training for African-Americans, it quickly appropriated \$10,000 to fund an out-of-state scholarship program. *Id.* at 593. The Maryland Court of Appeals ruled that the program was insufficient to provide Murray with equal educational opportunities. *Id.*

*Plessy v. Ferguson*² in order to grant relief to the African-American plaintiffs. When the Court wrote the opinion in *Brown v. Board of Education*,³ however, it was confronted with a need to define the harm derived from segregation per se for the first time. *Brown* presented the Court with a situation where it could be asserted that the physical facilities and other tangible factors were equal. Given the tangible and measurable equality of segregation in this context, the Court was forced to announce the harm resulting from segregation per se. In one of the most quoted phrases from *Brown*, the Court noted, “[t]o separate [African-American youth] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”⁴ The Court went on to quote approvingly from the district court in Kansas:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of law; for the policy of separating the races is usually interpreted as denoting the inferiority of the Negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.⁵

Since the Court indicated that the harms inflicted by segregation were never likely to be undone, presumably blacks who had attended segregated schools prior to 1954 were already damaged beyond repair. As a result, the Court’s opinion in *Brown* proclaimed that the mental development of black adults may already be irretrievably stunted.

Unquestioning admiration of *Brown* blinds us to the underlying acceptance of African-American inferiority embodied in the Court’s opinion striking down segregation and, thereby, justifying remedies for de jure segregation.⁶ Examining the language from emotionless reflection that comes from fifty years of distance, one fact is obvious: The Supreme Court declared from the summit of judicial reasoning as a proven constitutional fact that the educational and mental development

2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

4. *Id.* at 494.

5. *Id.*

6. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205–06 (1973) (defining de jure segregation as a condition of segregation resulting from intentional state action directed specifically to segregate the school system).

of black people had been retarded in ways unlikely to ever be undone. Regardless of whether as an empirical matter this was true in 1954 (a point that has been contested by later psychological research),⁷ it is important to note that the psychological harm inflicted on blacks was the Court's primary articulated justification for striking down segregation in public schools.

A half century has elapsed since the Supreme Court rendered its historic opinion in *Brown*. Therefore, we now know how the Court's school desegregation jurisprudence worked in terms of physically desegregating America's public schools. The Court's jurisprudence progressed from cautiously supporting school desegregation for the first ten years,⁸ to aggressively supporting it until the early 1970s,⁹ to restricting it in the 1970s and 1980s,¹⁰ to finally setting the framework for the termination of school desegregation decrees in the 1990s.¹¹

7. The research by the psychologist purporting to show that African-Americans in public schools had lower self-esteem has been strenuously criticized. See, e.g., WILLIAM E. CROSS JR., *SHADES OF BLACK DIVERSITY IN AFRICAN-AMERICAN IDENTITY* 37, 59–83 (1991) (arguing that the psychologist in *Brown* confused racial group preference with self-esteem, assuming that racial group preference would automatically correspond with self-esteem). Cross notes that direct measures of self-esteem developed in the 1960s led to the conclusion that blacks did not suffer from low self-esteem even in 1954. *Id.*

8. See *Griffin v. County Sch. Bd.*, 377 U.S. 218, 232 (1964) (holding that a school board denied black children equal protection when it closed certain public schools while at the same time contributing to the support of the private segregated schools for white children that took their place); *Cooper v. Aaron*, 358 U.S. 1, 15–16 (1958) (holding that good faith on the part of the school board would not excuse delay in implementing a desegregation plan in light of the State's failures to take action to facilitate desegregation).

9. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25–31 (1971) (upholding the district court's use of zoning, pairing and grouping techniques to meet flexible mathematical ratios between white and black students in schools and finding that this use of mathematical ratios provided a starting point, rather than an inflexible requirement, and additionally provided a feasible remedy, even though it required busing); *Green v. New Kent County Sch. Bd.*, 391 U.S. 430, 439–41 (1968) (holding that the school board's "freedom of choice" plan failed to adequately desegregate the school system and ordering the school board "to come forward with a plan that promises realistically to work, and promises realistically to work now").

10. See, e.g., *Crawford v. Bd. of Educ.*, 458 U.S. 527 (1982) (upholding an amendment to the constitution of the State of California which limited court ordered busing for only desegregation purposes); *Pasadena v. Spangler*, 427 U.S. 424, 440 (1976) (holding that the district court overstepped its authority when it required annual adjustment of attendance zones so that no school would have mostly minority students); *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974) [hereinafter *Milliken I*] (holding that the imposition of a multi-district remedy for a single district's segregation was improper); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (limiting the constitutional violation of segregation to only segregation that results from intentional governmental conduct-de jure segregation-as opposed to the existence of segregation-de facto segregation).

11. See *Missouri v. Jenkins*, 515 U.S. 70, 93 (1995) (reversing an order designed to attract non-minority students from outside the school district to remedy intra-district violations); *Freeman v. Pitts*, 503 U.S. 467, 489 (1992) (holding that the district court could relinquish

Evidence verifying these movements is amply reflected in the statistics regarding school integration. Ten years after the Court's decision in *Brown*, only 2.2% of the black students in the eleven states that constituted the former Confederacy attended desegregated schools.¹² In the 1968–69 school year 23.4% of black students nationwide were attending majority white schools, but by the 1972–73 this percentage had increased to 36.4%.¹³ Also, in the 1968–69 school year 64.3% of black students were in schools that were hyper-segregated, i.e. 90% or more minority students. This percentage decreased to 38.7% four years later.¹⁴

After opinions requiring school districts to make every effort to achieve the greatest possible degree of actual desegregation, the Supreme Court's commitment to desegregation waned in the early 1970s. The percentage of black school children attending majority white schools slowly increased, reaching its zenith of 37.1% in the 1980–81 school year. The percentage of black students attending hyper-segregated schools also slowly decreased through the mid-1980s, reaching its nadir of 32% in 1988.¹⁵ By the 1990s, however, the Court had turned its attention to issues regarding the termination of school desegregation decrees. Over the past seventeen years a number of school districts have terminated their school desegregation decrees.¹⁶ This is one of the significant factors contributing to resegregation in public schools. The percentage of African-American students in the nation attending majority white schools decreased to 31.2% in the

supervision and control over a school district before it achieved full compliance with a desegregation decree); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 248 (1991) (holding that desegregation decrees are not perpetual and should be dissolved when vestiges of prior discriminatory conduct have been eliminated to the extent possible).

12. U.S. COMMISSION ON CIVIL RIGHTS, *TWENTY YEARS AFTER BROWN: EQUALITY OF EDUCATIONAL OPPORTUNITY* 46 (1975).

13. GARY ORFIELD & JOHN T. YUN, *THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY, RESEGREGATION IN AMERICAN SCHOOLS 14* (June 1999), available at http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf.

14. *Id.*

15. ERICA FRANKENBERG ET AL., *THE CIVIL RIGHTS PROJECT HARVARD UNIVERSITY, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 31 (January 2003), available at <http://www.civilrightsproject.harvard.edu/research/reseg03/AreWeLosingtheDream.pdf> (examining trends in racial enrollment and segregation in American public schools).

16. By the beginning of 2000, for example, about forty-five school districts had been released from court supervision. Sue Anne Pressley, *Charlotte Schools Are Scrambling: New Ways to Assign Students Sought After Order to End Busing*, WASH. POST, Nov. 8, 1999, at A3; see Bradley W. Joondeph, *Review Essay: A Second Redemption?*, 56 WASH. & LEE L. REV. 169, 169 (1999) (examining the debate over the propriety of federal decisions which relinquished jurisdiction over formerly segregated school districts).

1996–97 school year and to 28.4% in 2000.¹⁷ Meanwhile, the percentage of African-Americans in schools that are hyper-segregated also increased from 32% in 1988 to 37.2% in 2000.¹⁸ Thus, one of the realities of the Supreme Court’s de jure segregation jurisprudence is that America never successfully integrated its public schools.

Fifty years after the Court’s decision in *Brown*, we also know how the Court has resolved—at least for now—the issue of affirmative action in higher education. In the Summer of 2003 the Court delivered what Justice Scalia called the Supreme Court’s “split double header,”¹⁹ in the University of Michigan affirmative action decisions of *Grutter v. Bollinger*²⁰ and *Gratz v. Bollinger*.²¹ Applying strict scrutiny, Justice O’Connor’s opinion for the five majority members of the Court in *Grutter* upheld the University of Michigan Law School’s admissions policy.²² The policy provided for the use of racial and ethnic classifications as part of a holistic admissions process in order to assure the admission of a critical mass of students from groups which have been historically discriminated against, like African-Americans, Hispanics, and Native Americans.²³ But the Court rejected the affirmative action plan presented in *Gratz*, concluding that this plan lacked the individualized consideration necessary for a race-conscious admissions plan.²⁴

O’Connor’s opinion for the Court in *Grutter* noted that the educational benefits of enrolling a critical mass of minority students with a history of discrimination are substantial.²⁵ Nevertheless, the

17. FRANKENBERG, *supra* note 15, at 37.

18. *Id.* at 31. Hispanics actually experience higher rates of segregation than blacks. For Hispanics, segregation has been increasing since the 1968–69 school year. *Id.* at 33. At that time, 54.8% were in majority-minority schools and only 23.1% were in hyper-segregated schools. *Id.* at 77. The percentage of Hispanics currently in predominately minority schools is 76.3%, and the percent in schools that are in hyper-segregated schools is also 37.4%. *Id.*

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

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

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

22. *Grutter*, 539 U.S. at 343–44.

23. *Id.* at 312–16.

24. *Gratz*, 539 U.S. at 271.

25. *See Grutter*, 539 U.S. at 308. The Court noted that:

[T]he Law School’s admission policy promotes ‘cross-racial understanding,’ helps to break down racial stereotypes, and ‘enables [students] to better understand persons of different races.’ These benefits are ‘important and laudable’ because ‘classroom discussion is livelier, more spirited, and simply more enlightening and interesting’ when the students have ‘the greatest possible variety of backgrounds.’

opinion implicitly accepted the commonly shared belief that in order to admit African-Americans, Hispanics and Native Americans in meaningful numbers into selective colleges, universities, and graduate programs, the high standards of these institutions must be compromised. Regarding the gaps in what he called “academic credentials,” Justice Thomas, in his dissenting opinion in *Grutter*, pointed to the fact that while African-Americans constitute 11.3% of those who take the Law School Admissions Test (“LSAT”) exam, they constitute only one percent of those who score over 165.²⁶ Justice Thomas also noted:

[W]hites scoring between 163 and 167 on the LSAT are routinely rejected by the Law School . . . (in 2000, 209 out of 422 white applicants were rejected in this scoring range). Blacks, on the other hand, are nearly guaranteed admission if they score above 155 (63 out of 77 Black applicants are accepted with LSAT scores above 155).²⁷

Though the *Grutter* opinion was about law school admissions, a quick look at the performance of different racial and ethnic groups on the Scholastic Assessment Test (“SAT”) and the American College Test (“ACT”) exams tell us that this gap in “academic credentials” exists in undergraduate admissions at selective colleges and universities as well. For example, according to the College Board’s 2003 National Report profiling SAT test takers, the gap between the SAT scores of African-Americans and that of non-Hispanic Whites is still 206 points (857 and 1063, respectively).²⁸ The disheartening aspect of such a realization is that this racial gap has actually increased over the past ten years.²⁹ The gaps are also increasing for all Latino groups, with the exception of Puerto Ricans.³⁰ There are also significant racial gaps between the

26. *Id.* at 376 (Thomas J., concurring in part and dissenting in part).

27. *Id.* at 377 (Thomas J., concurring in part and dissenting in part).

28. COLLEGE ENTRANCE EXAMINATION BOARD, 2003 COLLEGE-BOUND SENIORS: A PROFILE OF SAT PROGRAM TEST TAKERS 6 (June 27, 2003), available at http://www.collegeboard.com/prod_downloads/about/news_info/cbsenior/yr2003/pdf/2003_TOTAL_GRP_PRD.pdf.

29. See NATIONAL CENTER FOR EDUCATION STATISTICS, U.S. DEPARTMENT OF EDUCATION, DIGEST OF EDUCATION STATISTICS 2002 154 (June 2003) (reproducing a table entitled *Scholastic Assessment Test (SAT) averages, by race/ethnicity: 1986-87 to 2001-02* as originally published in COLLEGE ENTRANCE EXAMINATION BOARD, NAT’L REPORT ON COLLEGE-BOUND SENIORS, VARIOUS YEARS (Oct. 2002)), available at <http://nces.ed.gov/programs/digest/d02/tables/dt133.asp>. For the 1990–91 assessment year, the gap was only 185 points (with whites and blacks receiving total scores of 1031 and 846, respectively). *Id.* In 1996–97, the gap increased to 195 points, where whites scored a 1052 as compared to the 857 scored by blacks. *Id.* In 1998–99, the gap widened to a difference of 199 (with whites and blacks receiving total scores of 1055 and 856, respectively). *Id.* In 2000–2001 it increased to 201 (where the scores were 1060 and 859, for whites and blacks, respectively) and in 2001–02 the gap reached an all time high of 203 where blacks scored a total average of 857 and whites scored 1060. *Id.*

30. See *id.* at 154 (showing that the gaps in scores with whites have also been increasing for

performance of blacks and non-Hispanic Whites on the ACT. The average composite score of African-Americans on the ACT is 16.9, compared to whites at 21.7.³¹ This gap has held fairly consistent over the past seven years.³²

In this commentary I shall revisit the Supreme Court's opinion in *Brown* with hindsight provided by being fifty years removed from the decision. In revisiting the Court's opinion, my strategy is to return to this historical crossroad with the aim of identifying and marking out a road, open to the Court at that time, but not taken. When the Court delivered its opinion in *Brown*³³ another path was open to justify the striking down of segregation in public schools. The amicus curiae brief submitted to the Court by social scientists not only pointed out the harm segregation inflicted upon the black school children but also noted that segregation caused psychological harm to the majority group. This

both Hispanic or Latino, and Mexican-Americans, but not Puerto Ricans). For Hispanic-Latino, the gap for the 1990–91 assessment year was only 111 points (1031 (white) as opposed to 920 (Hispanic)). *Id.* In the 1996–97 assessment year the gap had increased to 118 points (1052 as opposed to 934); in 1998–99 it was 128 (1055–927); and in 2000–01 it was 135 (1060–925). *Id.* For Mexican Americans, for the 1990–91 assessment year, the gap was only 118 points (1031 as opposed to 913). *Id.* In the 1996–97 assessment year the gap had increased to 143 points (1052 as opposed to 909); in 1998–99 it was 146 (1055–909); and in 2000–01 it was 151 (1060–909). *Id.* However, for Puerto Ricans the 1990–91 assessment year the gap was 156 points (1031 as opposed to 875). *Id.* In the 1996–97 assessment year, the gap had decreased to 151 points (1052 as opposed to 901); in 1998–99 it was 152 (1055 compared to 903); and in 2000–01 it was 152 (1060 compared to 908)). *Id.*

31. Press Release, ACT, Inc., *ACT Scores Steady Despite Record Number of Test Takers* (Aug. 20, 2003), available at <http://www.act.org/news/releases/2003/8-20-03.html>.

32. ACT, THE 1997 ACT HIGH SCHOOL PROFILE REPORT—NATIONAL NORMATIVE DATA: ACADEMIC ABILITIES AND NONACADEMIC CHARACTERISTICS OF ACT TESTED 1997 GRADUATES, at <http://www.act.org/news/data/97/97data.html> (last visited Sept. 15, 2004). For students graduating in 1997, for example, the average ACT score for blacks was 17.1 as compared to 21.7 for whites. *Id.* (Tables 5 & 6). All racial/ethnic minorities, American Indian, Mexican-American, Asian-American and Other Hispanics, scored lower on the ACT exam than non-Hispanic, white test takers (19.0, 18.8, 21.7, and 19.0, respectively). *Id.*

33. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). I am an African-American law professor at Indiana University School of Law in Bloomington and graduate of Yale Law School. Before joining the faculty, I worked as the only African-American for three years at a 120-person corporate law firm in Indianapolis. My personal reality has been shaped by the Court's decision in *Brown* to strike down segregation, and by the commitment to justice from people such as Thurgood Marshall, Robert Carter, Constance Baker Motly, Jack Greenberg, Charles Black and William Coleman who paved the way for the society in which I live. Whenever I discuss the Supreme Court's opinion in *Brown*, I always do it against a personal background of tremendous appreciation and respect for the lawyering done by the attorneys for the black plaintiffs and the decision rendered by the Supreme Court. I stand with those who believe that segregation was a great evil and a blight upon the American soul. I also recognize that the priority in the 1950s was to dismantle that system of oppression at whatever cost was necessary. Thus, I do not so much criticize what was done in the past, as suggest the need to rededicate ourselves to the continuing mission of dismantling structures of racial oppression in the present and the future.

group often develops patterns of guilt-feelings, rationalizations and other mechanisms in an attempt to protect themselves from recognizing the essential injustice inflicted upon blacks.³⁴ Thus, the social scientists' brief noted that segregation produced a dual harm.³⁵ While on one side of the segregation coin was the harm to blacks through the proclamation of a false message of inferiority, on the other side was the harm to whites from the proclamation of the false message of superiority. blacks were harmed by the psychological damage that comes from subjection to a belief in their inferiority. But whites were harmed as well. They were harmed when they were taught the false message of their superiority.

My purpose in returning to this juncture is to suggest that if the Court had based its determination that segregation was unconstitutional on a finding that segregation harmed both blacks and whites, then it would be easy to see how our current reliance on standardized tests, as markers of academic ability, generates the same dual harm that segregation generated: proclaiming the message of the intellectual inferiority of underrepresented groups such as African-Americans, Hispanics and Native Americans, and the intellectual superiority of whites (and now Asians). These tests also provide the continued rationalizations and mechanisms to justify the underrepresentation at selective colleges, universities, and graduate programs of minority groups with a history of discrimination. With the recognition of the dual harm caused by segregation in *Brown* the Court would still have upheld the University of Michigan Law School's affirmative action plan in *Grutter v. Bollinger*, but the rationale for upholding it would have been very different.

My vehicle for this reexamination of *Brown* is a hypothetical opinion that the Supreme Court might have rendered in *Grutter* if the Court had chosen to travel the other path open to it in *Brown*. After reciting the facts, the procedural history, and other necessary introductory comments, the hypothetical *Grutter* opinion should turn to the crux of the challenge presented by Barbara Grutter and state something along the lines of the following:

34. See Brief of Appellant at 6-7, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 1,2,3,5), reprinted in *The Effects of Segregation and the Consequences of Desegregation, a Social Science Statement*, 34 MINN. L. REV. 413, 427 (1953) [hereinafter "Appellants' Brief"] (analyzing segregation from the perspective of the dual harms it inflicts, both upon black and white students).

35. *Id.*

II. THE HYPOTHETICAL OPINION IN *GRUTTER V. BOLLINGER*

A.

We have now arrived at the essence of this challenge to the University of Michigan Law School's affirmative action admissions plan. Barbara Grutter, a white Michigan resident who applied to the Law School in 1996, was eventually denied admission. She had a 3.8 grade point average and a 161 LSAT score. She challenges the Law School's affirmative action program with violating the Equal Protection Clause because it provides for the admission of blacks, Hispanics and Native Americans with lower academic credentials than her own. As noted in the dissenting opinion written by Justice Boggs of the Sixth Circuit, minority applicants with an "A" average and an LSAT score as low as 156 (seventieth percentile nationally) are admitted at roughly the same rate as majority applicants with an "A" average and an LSAT score over 167 (the ninety-sixth percentile nationally).³⁶

We acknowledge, just as Justice Douglas noted almost thirty years ago in his dissenting opinion in *DeFunis v. Odegaard*,³⁷ that the makers of the LSAT exam, the Law School Admissions Council, and law schools that utilize the exam, point to a correlation between the test scores and first-year grades.³⁸ This correlation, however, may be

36. *Grutter v. Bollinger*, 288 F.3d 732, 796 (6th Cir. 2002) (Boggs, J., dissenting). A test taker's percentile score means the percentage of all test-takers that a particular test-taker outscores. Hence, someone scoring in the seventieth percentile outscored seventy percent of all persons taking the particular exam.

37. *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting).

38. There have been numerous correlation studies showing that the LSAT is usually a better predictor of law school performance than undergraduate Grade Point Average ("UGPA"). See, e.g., LISA C. ANTHONY ET AL., LAW SCHOOL ADMISSION COUNCIL, PREDICTIVE VALIDITY OF THE LSAT: NATIONAL SUMMARY OF THE 1995-1996 CORRELATION STUDIES 14 (Technical Rep. No. 97-01, 1999) (reviewing data from 165 law schools and noting that the "LSAT alone continues to be a better predictor of law school performance than UGPA alone"); FRANKLIN R. EVANS, LAW SCHOOL ADMISSION COUNCIL, RECENT TRENDS IN LAW SCHOOL VALIDITY STUDIES, 4 REPORTS OF LSAC SPONSORED RESEARCH, 1978-1983, 347, 359 (1984) (reviewing data from 140 law schools and reporting that the "LSAT is currently a better predictor of performance than are undergraduate grades," and that this trend has been observed for several years); LINDA F. WIGHTMAN, LAW SCHOOL ADMISSION COUNCIL, BEYOND FYA: ANALYSIS OF THE UTILITY OF LSAT SCORES AND UGPA FOR PREDICTING ACADEMIC SUCCESS IN LAW SCHOOL, 15 (Research Rep. No. 99-05, 2000) (collecting data from 142 law schools and finding that the LSAT exam alone tended to be a better predictor than UGPA alone); LINDA F. WIGHTMAN, LAW SCHOOL ADMISSION COUNCIL, PREDICTIVE VALIDITY OF THE LSAT: A NATIONAL SUMMARY OF THE 1990-92 CORRELATION STUDIES 9 (Research Rep. 93-05, 1993) (reviewing data from 167 law schools and reporting that "for each of the study years, the LSAT score is a substantially better predictor of first-year performance in law school than is the undergraduate grade point average").

substantially attenuated for minority students by the third year of law school.³⁹ Nevertheless, if we grant the Petitioner's request, it is clear that if academic qualifications—as currently understood—are to be judged without regard to race or ethnicity there will be a significant reduction in the percentage of blacks, Hispanics, and Native Americans that are admitted to selective colleges, universities, and graduate programs, including most law schools, of this Nation.

Stripped to the bare-bones proposition, the Petitioner's claim is based on the assumption that she is more qualified to attend the University of Michigan Law School than most of those minority group members who were admitted ahead of her. This claim hinges primarily upon her better performance on the LSAT.⁴⁰ Thus, the true focus of the Petitioner's

39. See, e.g., Cecilia V. Estolano, *New Directions in Diversity: Charting Law Schools Admission Policy in a Post-Affirmative Action Era* 32-33 (1997) (unpublished J.D. thesis, Boalt Hall School of Law, U.C. Berkeley) (finding the correlation for minority law students showed a sharp drop from 0.4 correlation in the first year to 0.27 in the second year, to 0.17 in the third year; by year three, the test scores were predicting less than three percent of the variation in performance). See also William C. Kidder, *Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Education Attainment?: A Study of Equally Achieving "Elite" College Students*, 89 CAL. L. REV. 1055 (2001) (citing to a study by Linda Hamilton Krieger & Marjorie Shultz of an analysis done by the LSAC at the request of Boalt Hall showing that the correlation between LSAT-undergraduate GPAs ("UGPA") index scores and first-year grade average dropped from 0.50 to 0.26 to 0.11 during the three years of law school, respectively. Specifically, for black Boalt students, the index scores accounted for one quarter of the variance in first year grades, but less than one percent of the variance in the third year); James C. Hathaway, *The Mythical Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86, 91 tbl. 3 (1984) (showing that while the correlation between cumulative law school grades for whites and minorities was about the same (0.37 and 0.38, respectively), this similarity masked a very real difference: the correlation for whites was 0.35, 0.33 and 0.28 for each of the three years, but for minorities it dropped from 0.51 to 0.27 to 0.17 over the three years); Lani Guinier, *Race Shows the Way*, LEGAL TIMES, SEPT. 16, 2002, 58, 59 (noting that the LSAT exam is only "nine percent better than random in predicting first-year law school grades," and that "excessively weighting the LSAT" is the true crux of the Michigan affirmative action case).

40. I see the primary problem with the affirmative action debate to be connected to different performance on standardized tests. For example, whites with equivalent UGPAs are much more likely to be admitted to at least one law school than any other group: seventy-two percent for white applicants, sixty-nine percent for Asian Americans, sixty percent for Hispanics, sixty-one percent for Chicanos; sixty-two percent for Native Americans, and forty-six percent for African-Americans. William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 14 tbl.4 (2000). In addition, a study done by Kidder of applicants to Boalt Hall revealed some startling results. He matched African-American, Chicano/Latino, Native American and Asian/Pacific-American applicants with Caucasian applicants who possessed equivalent undergraduate grade-point averages from the same colleges during the same time period. What he found was that even when controlling for these factors African-Americans scored an average of 9.2 points lower on the LSAT; Chicanos/Latinos scored 6.8 points lower; Native Americans 4.0 points lower; and Asian Pacifics scored 2.5 points lower. Kidder, *supra* note 39, at 1074. Kidder also found that when he adjusted for undergraduate major there was no significant difference. Thus, all major minority groups scored lower on the LSAT than whites even when holding their date of

claim of merit is that performance on standardized tests, such as the LSAT, carry with it a racially neutral judgment about academic qualifications for the purpose of law school study.

B.

Before turning our attention to the bare-bones proposition which will control the disposition of the case, it is incumbent upon us to briefly review the sad, sordid, and prolonged history of the presumably objective, neutral, and non-biased justifications for racism that have

graduation, college or university attended, UGPA, and major constant. *Id.*

National data also indicates that testing imposes a greater barrier than do other measures of performance. *See, e.g.,* William T. Dickens & Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye*, 38 *INDUS. REL. J. ECON. & SOC'Y* 331, 338, 361-62 (1999) (indicating that data from the High School and Beyond survey, a nationally representative sample of youth, revealed a smaller black-white gap in high school grades than in SAT scores). The percentage plans adopted in California, Florida, and Texas for determining admissions to their selective colleges are also based on this assumption. The plans point to a way to maintain minority admissions in undergraduate education, even if race conscious admissions programs had been struck down, by placing more emphasis on grades. *Id.* *See generally* William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-Taking Speed*, 82 *TEX. L. REV.* 975 (2004) (noting that the LSAT is a univariate test designed to measure reasoning ability). Test-taking speed is assumed to be an ancillary variable with a negligible effect on candidate scores. *Id.* at 991-99. In reporting results from a study he conducted with data obtained from a national and a regional law school, Henderson separated law school grading methods into three distinct categories with varying degrees of time pressure: (1) in-class exams; (2) take-home exams; and (3) papers. *Id.* at 1008. His data showed that the LSAT was a relatively robust predictor of in-class exams and a relatively weak predictor of take-home exams and papers. *Id.* at 1010-16. From this data Henderson argues that a part of the predictive ability of the LSAT for law school GPA is based not on reasoning ability, but on test-taking speed. *Id.* at 1030-39. Henderson also notes that when speed is used as a variable on law school exams, the type of testing method, rather than knowledge and preparation of the student, can change the ordering (i.e., relative grades) of individual test-takers. *Id.* The current emphasis on time-pressured law school exams, therefore, may skew measures of merit in ways that have little theoretical connection to the actual practice of law. *Id.* Finally, this study found some preliminary evidence that the performance gap between white and minority students may be smaller on less time-pressured testing methods, including blind-graded, take-home exams. *Id.*

But see Linda F. Wightman, *Standardized Testing and Equal Access: A Tutorial*, in 4 *COMPELLING INTEREST EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION* 23 (Mitchell Chang et al. eds., 1999), at http://www.stanford.edu/~hakuta/racial_dynamics/Chapter4.pdf (prepublication draft) (last visited Sept. 20, 2004) (claiming that the data shows that regardless of whether the admissions process was modeled by UGPA and LSAT combined or by UGPA only, the consequences would be a substantial reduction in overall number of minority applicants admitted to ABA-approved law schools). *See also* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 402-03 (1997) (arguing that a wealth of evidence demonstrates that the racial gap in other measures of academic achievement is just as large as the SAT gap). While it may also be true that there are racial gaps in GPA, the combined effect of racial gaps in both the GPAs and standardized tests create much higher obstacles for under represented students than one of these obstacles by itself would.

plagued Western societies since the first inadvertent contact of Europeans with Africans 550 years ago. Economic motivations played a significant role in the selection of blacks by the Europeans (and later the forefathers of our nation) as the labor force to develop and cultivate the New World as well as their subsequent subordination under segregation after the Civil War. However, economic motivations alone can never suffice to explain institutions like slavery and segregation. People are motivated by more than material needs and desires. Throughout the centuries, religious, scientific, and cultural justifications have been propounded to justify the confinement of blacks and other minorities to an inferior status. A society that had maintained institutions of slavery and segregation for hundreds of years viewed such oppressive measures as rational responses to cope with reality as they perceived it. As the inheritors of such a society, however, we have come to realize the awful mistake of their perception. This Court authors this opinion today with the primary desire to avoid replicating the logic of the past on which racial oppression has been justified.

1.

At the time of initial contact between Europeans and Africans during the Fifteenth Century, the divine word of the Almighty was held sacrosanct in European societies. Thus, the original justifications for slavery and ontological racial differences were rooted in interpretations of the inviolable will of God. Long before the first African set foot on North American soil, biblical justifications for placing blacks in a condition of servitude abounded.⁴¹ Proponents of slavery found support for the institution in the Old Testament.⁴² As long as the Europeans

41. See Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 634 (1985) (noting that "the religious anti-evolutionists . . . had produced an immense literature on the nature of racial characteristics, the 'mental gap' between blacks and whites, and the dangers of racial mixing"); see also THOMAS F. GOSSETT, *RACE: THE HISTORY OF AN IDEA IN AMERICA* 3-16 (1963) (detailing different religious and cultural theories on segregating the races, from Africa and India to the Middle East and Europe).

42. Abraham, the Father of three faiths, owned slaves. See *Genesis* 20:14 ("Then Abimelech brought sheep and cattle and male and female slaves and gave them to Abraham"); *Exodus* 21:2 ("If thou buy an Hebrew servant, six years he shall serve: and in the seventh he shall go out free for nothing"); *Leviticus* 25: 44-46, which states:

Both thy bondmen, and thy bondmaids, which thou shalt have, shall be of the heathen that are round about you; of them shall ye buy bondmen and bondmaids. Moreover of the children of the strangers that do sojourn among you, of them shall ye buy, and of their families that are with you, which they begat in your land: and they shall be your possession. And ye shall take them as an inheritance for your children after you, to be your bondmen for ever: but over your brethren the children of Israel, ye shall not rule one over another with rigour.

See also DANIEL P. MANNIX & MALCOM COWLEY, *BLACK CARGOES: A HISTORY OF THE*

were enslaving heathens—which they considered the Africans to be—not only did the Almighty not prohibit it, but He positively commanded it. In the New Testament, the Apostle Paul’s epistles took slavery for granted.⁴³ Thus, it was often asserted that slavery could not be a sin against Divine law, because the Bible sanctioned it.⁴⁴

Perhaps the primary religious justification for specifically enslaving blacks is derived from Chapter 9 of Genesis.⁴⁵ This Chapter recounts an encounter that Noah had with his three sons. It ends with Noah cursing the descendants of his son Ham, stating that they will be the servants of his other sons, Shem and Japheth.⁴⁶ Before the Europeans began taking blacks out of Africa, both Christians and Muslims had come to believe that the descendants of Ham had been turned black. By the 1500s, Christian communities drew upon the Ham legend to explain that the enslavement of blacks was part of a divine curse placed upon

ATLANTIC SLAVE TRADE 1518–1865 59 (1962) (quoting *Leviticus* 25:44, which states “[b]oth thy bondmen and thy bondmaids, which thou shalt have, shall be of the heathen that are round about you; of them shall ye buy bondmen and bondmaids”).

43. See, e.g., 1 *Corinthians* 12:13 (“For by one Spirit are we all baptized into one body, whether we be Jews or Gentiles, whether we be bond or free; and have been all made to drink into one spirit”); *Ephesians* 6:5–6 (“Servants, be obedient to them that are your masters according to the flesh, with fear and trembling in singleness of your heart, as unto Christ; Not with eye service, as men pleasers; but as the servants of Christ, doing the will of God from the heart”); *Colossians* 3:22 (“Servants, obey in all things your masters according to the flesh; not with eye service as men pleasers; but in singleness of heart, fearing God”); *Titus* 2:9–10 (“Exhort servants to be obedient unto their own masters, and to please them well in all things . . . not purloining, but shewing all good fidelity; that they may adorn the doctrine of God Our Savior in all things”); *Philemon* 1: 13–16 (Plea for Onesimus), which states:

Whom I would have retained with me, that in thy stead he might have ministered unto me in the bonds of the gospel: But without thy mind would I do nothing; that thy benefit should not be as it were of necessity, but willingly. For perhaps he therefore departed for a season, that now as a servant, but above as a servant, a brother beloved, specially to me but now much more unto thee, both in the flesh, and in the Lord?

44. Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985, 1016 (1990).

45. GOSSETT, *supra* note 41, at 5.

46. See *Genesis* 9: 21–27.

And he [Noah] drank of the wine, and was drunken; and he was uncovered within his tent. And Ham, the Father of Canaan, saw the nakedness of his father, and told his two brethren without. And Shem and Japheth took a garment and laid it upon both their shoulders, and went backward, and covered the nakedness of their father; and their faces were backward, and they saw not their father’s nakedness. And Noah awoke from his Wine, and knew what his younger son had done unto him. And he said, cursed be Canaan; a servant of servants shall he be unto his brethren. And he said, Blessed be the LORD God of Shem; and Canaan shall be his servant. God shall enlarge Japheth, and he shall dwell in the tents of Shem; and Canaan shall be his servant.

Id.

them.⁴⁷ As a result, supporters of black slavery could argue that enslavement of the black race was the will of Heaven, divinely ordained and derived from God's unfolding plan for humanity.

2.

Racial differences have always been a subject of intense academic study, particularly in the United States. J.C. Nott summarized the general academic motivation for studying racial differences.⁴⁸ Shortly before this Court rendered its infamous *Dred Scott*⁴⁹ decision, Nott noted that the study of racial differences in this country is particularly important because it is the home of the three best defined varieties of human species—the white, the Negro, and the Indian—to which the extensive immigration of the Chinese was rapidly adding a fourth.⁵⁰

This Court did not explicitly base its legal decisions upholding slavery in *Dred Scott*⁵¹ or segregation in *Plessy v. Ferguson*⁵² on the scientific rationale that is discussed below. Nevertheless, this Court must accept its share of the responsibility for the long oppression of African-Americans, Native Americans, Hispanics, and other minorities. The scientific evidence discussed below helped to strengthen the perception that this Court's decisions upholding slavery and the "separate but equal" doctrine were reasonable common sense opinions. Conversely, the Court's opinions also added an air of legitimacy to such scientific endeavors.

The first use of the word "race" did not occur until 1606, and there were only five theories relating to the varieties of mankind that gained an appreciable following during the entire seventeenth century.⁵³ The first group of scientists to record racial differences, the natural scientists, blended religion with their scientific explanations of the differences of the races of humankind. These first racial "scientists" were not so much seeking to develop the laws of nature independent of religious grounding, but were instead attempting to describe God's divine plan that could be uncovered by studying nature.⁵⁴ They noted

47. JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 73–74 (2000).

48. J.C. NOTT & G.R. GLIDDON, *TYPES OF MANKIND* (1854).

49. *Dred Scott v. Sandford*, 60 U.S. 393 (1856). The *Dred Scott* decision, as students of history and law alike know, upheld the constitutionality of slavery. *Id.* at 454.

50. NOTT & GLIDDON, *supra* note 48, at 80.

51. *Dred Scott*, 60 U.S. at 393.

52. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

53. Leonard Lieberman et al., *The Debate Over Race: Thirty Years and Two Centuries Later*, in *RACE AND IQ EXPANDED EDITION* 56 (Ashley Montagu ed., 1999).

54. *Id.*

that nature delights in inequality. Carl Linnaeus, often referred to as the father of taxonomy,⁵⁵ was the first to scientifically formalize the racial hierarchy. Linnaeus divided humans into four races, *Homo Europeus*, *Homo Asiaticus*, *Homo Afer*, and *Homo Americanus*. He linked culture and biology together in a way that has survived to this day. The characteristic traits Linnaeus observed in *Homo Europeus* were gentle, acute, inventive, and governed by custom. He noted that the characteristic traits of *Homo Afer* were crafty, indolent, negligent, and governed by caprice.⁵⁶ Later, German anatomist and anthropologist, Johann Blumenbach, also created an influential racial classification. He listed Caucasians at the top of the human ladder with Asians, Africans, Native Americans, and Polynesians on the lower rungs.⁵⁷

By the end of the eighteenth century, the inferiority of blacks, derived from scientific understanding of the differences in nature, was generally accepted. For example, the first edition of the *Encyclopedia Britannica* in 1798 asserted in the “Negroes” entry that they were a people of “idleness, treachery, revenge, cruelty, impudence, stealing, lying, debauchery, nastiness and intemperance.”⁵⁸ They were also said to be “strangers to every sentiment of compassion” and were “an awful example of the corruption of man when left to himself.”⁵⁹

Throughout much of the nineteenth century, scientists espousing the views of black inferiority were embroiled in a theoretical dispute about the cause of such inferiority. Scientific writing before Darwin advanced one of two positions: monogeny and polygeny. The monogenists accepted the validity of the Genesis account of the creation of Adam and Eve and argued that while all humans came from one source, since creation the races had diverged and developed their own capacities. Georges Louis Leclerc de Buffon, in his 1778 book *Natural History of Man*, asserted that white was the real and natural color of man.⁶⁰ Thus,

55. See Carl Linnaeus (1707–1778), available at <http://www.ucmp.berkeley.edu/history/linnaeus.html> (July 7, 2000) (discussing the history of Carl Linnaeus, the father of taxonomy, who created a system of naming, ranking and classifying organisms that is, in large part, still utilized today). Carl Linnaeus is also often called Carl von Linné, or Carolus Linnaeus.

56. WINTHROP D. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550–1812* 221 (1977) (quoting from Linnaeus, translated from Latin and reprinted in Bendyshe, *HISTORY OF ANTHROPOLOGY* 424–26 (1864)).

57. FEAGIN, *supra* note 47, at 81.

58. PAUL GORDON LAUREN, *POWER AND PREJUDICE: THE POLITICS AND DIPLOMACY OF RACIAL DISCRIMINATION* 21 (1988) (quoting the 1789 edition of the *Encyclopedia Britannica*).

59. *Id.* (quoting the definition of “Negro” in the 1789 edition of the *Encyclopedia Britannica*).

60. CORNELL WEST, *PROPHESY DELIVERANCE!: AN AFRO-AMERICAN REVOLUTIONARY CHRISTIANITY* 56 (1982) (citing from GEORGE LOUIS LECLERC DE BUFFON, *NATURAL HISTORY OF MAN* (1778)).

the standard from which to judge the skin color of humans was that of white skin. Given such a neutral and objective standard, there must be an explanation for the aberration of black skin. While physician Benjamin Rush contended that the black hue of the Negro was the result of leprosy,⁶¹ the answer most often accepted by the monogenists was that black skin was an aberrant development caused by extensive exposure to the sun in hot climates.⁶²

Other scientists rejected a literal interpretation of Genesis and adopted the position of polygeny. The polygenic theory had a significant number of followers in the United States even after Darwin.⁶³ The theory asserted that the human races were derived from separate biological species.⁶⁴ Blacks were thus another, and lower, form of life all together different from whites. Louis Agassiz and Samuel Morton were the most prominent proponents of polygeny. Agassiz, a Harvard professor, founded and directed the Museum of Comparative Zoology.⁶⁵ When asked if his theory of polygeny contradicted the account of creation of Adam in Genesis, Agassiz responded that the standard explanation for the creation of humankind rooted in the Genesis account of the Bible only spoke of the creation of

61. See, e.g., Benjamin Rush, *Observations Intended to Favor a Supposition that the Black Color (as it is Called) of the Negroes is Derived from Leprosy*, reprinted in RACIAL THOUGHT IN AMERICA: FROM THE PURITANS TO ABRAHAM LINCOLN A DOCUMENTARY HISTORY, VOL. I 128-225 (Louis Ruchames ed., 1969).

62. WEST, *supra* note 60, at 57.

63. See STEPHEN J. GOULD, *THE MISMEASURE OF MAN* 42 (1981)

The doctrine of polygeny acted as an important agent in this transformation [of American science and intellectual emancipation]; for it was one of the first theories of largely American origin that won the attention and respect of European scientists—so much so that Europeans referred to polygeny as the “American school” of anthropology.

Id. For a detailed history of the American polygeny theory, see generally WILLIAM STANTON, *THE LEOPARD’S SPOTS: SCIENTIFIC ATTITUDES TOWARD RACE IN AMERICA 1815–59* 193–96 (1960) (noting that before the Civil War, science provided a major justification for proslavery thinking).

64. GOULD, *supra* note 63, at 45–46 (“The theory of polygeny does not constitute an attack upon the scriptural doctrine of human unity. Men are bound by a common structure and sympathy, even though races were created as separate species”); STANTON, *supra* note 63, at 193–96.

65. GOULD, *supra* note 63, at 43. Agassiz also noted that sub-Saharan Africa had never produced a regulated society. *Id.* at 46–47. Gould cited Agassiz as writing:

[T]his compact continent of Africa exhibits a population which has been in constant intercourse with the white race, which has enjoyed the benefit of the example of the Egyptian civilization, of the Phoenician civilization, of the Roman civilization, of the Arab civilization . . . and nevertheless there has never been a regulated society of Black men developed on that continent. Does this not indicate in this race a peculiar apathy, a peculiar indifference to the advantages afforded by civilized society?

Id. at 47.

the Caucasian race.⁶⁶

Samuel Morton provided the empirical work that buttressed the polygenic theory.⁶⁷ Morton was a Philadelphia physician who had a reputation as a great data-gatherer, and his work even won him praise from our eminent Brother, Oliver Wendell Holmes.⁶⁸ Morton published three major works on the relative sizes of human skulls between 1839 and 1849.⁶⁹ His work proved that Caucasians had the largest skulls, followed by Mongolians, American Indians, and then Africans. The objective and neutral interpretation derived from this work was that intellectual superiority was tied to cerebral volume. Since Caucasians were believed to have the largest skulls, *a fortiori*, Caucasians were also the most intelligent group.⁷⁰

Following the well-accepted position of the natural sciences regarding the inferiority of blacks was the science of physiognomy—the science of discovering temperament and character from outward physical appearance, especially the face. The Dutch anatomist, Pieter Camper, demonstrated that there exists a connection between facial and cranial measurements and personality traits and character. Camper showed that a beautiful face and a beautiful body were inseparably attached to a beautiful nature, character, and soul. For him the optimal facial angle was one hundred degrees. Since the facial angle of Europeans measured out at ninety-seven degrees, they were closest to the optimal angle. Black people, by contrast, measured between sixty and seventy degrees. This placed them closer to apes and dogs than to (white) human beings.⁷¹

In the mid-nineteenth century, Paul Broca, the founder of the Society of Anthropology of Paris, “broke new ground” in understanding how the human brain functions. He measured the shape of the head and developed a cephalic index. Broca demonstrated that variations in the shape of the human head were linked to significant differences in the

66. *Id.* at 45–46.

67. *See id.* at 50–69 (summarizing Morton’s additions to polygeny as an empiricist and data-analyst of races).

68. *Id.* at 50–51 (referencing Morton’s vast collections of skulls for study and quoting Oliver Wendell Holmes as praising Morton for “the severe and cautious character of his works, which from their very nature are permanent data for all future students of ethnology” (internal quotations omitted)).

69. *Id.* at 53. Morton published the CRANIA AMERICANA in 1839, a volume on American Indians, the CRANIA AEGYPTIACA in 1844, a volume on skulls from Egyptian tombs, and in 1849, a volume summarizing his entire work until that date. *Id.*

70. *Id.* at 54–72 (detailing Morton’s scientific findings and critiquing his analysis of his results).

71. WEST, *supra* note 60, at 57–58.

racess. Black skin and wooly hair were associated with inferior intelligence, while white skin and straight hair were the equipment of the highest group.⁷²

Concurrent with the end of slavery, scientific explanations regarding the differences between the races were forced to adapt to the publication in 1859 of Charles Darwin's book, *Origin of the Species*. Three different evolutionary theories eventually swept away the old monogenist/polygenist discussions about the source of racial differences. One group followed Charles Darwin's statement in his *Descent of Man*, published in 1871, where he wrote, "at some future period, not very distant as measured by centuries, the civilized races of man will almost certainly exterminate and replace the savage races of the world."⁷³ By the 1890s, tough-minded racial Darwinists like Frederick Hoffman,⁷⁴ Lewis Henry Morgan,⁷⁵ and Nathaniel Shaler—a prominent social scientist and Harvard University dean⁷⁶—were asserting that the law of natural selection meant the eventual extinction of the black race. Social Darwinists who were not preaching the eventual extinction of the black race were scarcely more complimentary. These scientists were divided into two groups. Racially optimistic Social Darwinists argued that intelligence evolves slowly over a long period of time and that blacks were destined to evolve to the level of whites, but slowly. As a result, it would take thousands of years for blacks to make up the deficit and achieve intellectual equality with whites. The racially pessimistic Social Darwinists, however, argued that while blacks were evolving, so were whites—and at a faster rate than blacks. Therefore, the gap between the two races was actually growing larger, not smaller.⁷⁷

72. See WILLIAM H. TUCKER, *THE SCIENCE AND POLITICS OF RACIAL RESEARCH* 23 (1994) (investigating the scientific and political vestiges of eugenics in America).

73. CHARLES DARWIN, *DESCENT OF MAN* 201 (1871).

74. Hoffman pointed to census statistics showing higher black mortality and lower black birth rates than those of whites. He went on to argue that emancipation from slavery had been the worst thing that ever happened to blacks, because as enslaved people, at least their needs were met. Hovenkamp, *supra* note 41, at 654. The law of natural selection meant the eventual extinction of blacks. TUCKER, *supra* note 72, at 35.

75. See LEWIS HENRY MORGAN 1818–1881, available at http://www.mnsu.edu/emuseum/information/biography/klmno/morgan_lewis_henry.html (last visited Oct. 17, 2004) (discussing that Morgan's work was the "foundation for the new world view of genetic explanation, cultural evolution or social Darwinism"). Morgan also confirmed this notion by arguing that the black race was in a lower stage of development than whites. Hovenkamp, *supra* note 41, at 653–54.

76. See TUCKER, *supra* note 72, at 35.

77. *But see* Hovenkamp, *supra* note 41, at 634 (citing beliefs of Edward Taylor and Lewis Henry Morgan that intelligence "evolves" and that someday, the Afro-American would develop an intelligence equal to that of Caucasians).

3.

As the twentieth century dawned, scientists provided a new form of evidence for proving the substandard nature of the black race—intelligence testing. In 1904, the French minister of public education commissioned Alfred Binet to develop techniques to identify children whose lack of success in normal classrooms suggested a need for some form of special education. Binet developed a series of short tasks, related to everyday problems that were intended to assess basic reasoning processes such as ordering, comprehension, invention and censure.⁷⁸ Binet, however, did not assert that he was measuring an innate, genetically inherited capacity.

The theory that Intelligence Quotient (“IQ”) is a product of heredity was an American theory.⁷⁹ H.H. Goddard brought Binet’s ranking scale of intelligence to America and refined it into a score about innate intelligence. In 1916, Lewis Terman, a professor at Stanford University, revised Binet’s scale and increased the number of tasks to be performed on the IQ test. He named his revised scale the Stanford-Binet.⁸⁰ Terman relentlessly emphasized that the IQ tests measured the limits of intelligence and the inevitability of such limits.⁸¹ According to Terman, environment is much less important than is the original endowment in determining the nature of the traits in question.⁸²

R.M. Yerkes, a Harvard University professor, convinced the United States Army to allow him to administer intelligence tests to all of its

78. GOULD, *supra* note 63, at 149.

79. *Id.* at 155–57.

80. LEWIS M. TERMAN, *THE MEASUREMENT OF INTELLIGENCE: AN EXPLANATION OF AND A COMPLETE GUIDE FOR THE USE OF THE STANFORD REVISION AND EXTENSION OF THE BINET-SIMON INTELLIGENCE SCALE 40–56* (1916). The Binet-Simon test utilized age standards and mental functions to test general intelligence and to allow categorization of students into age categories. *Id.* at 40–43. This allowed categorization within defined psychological parameters. *Id.* The Stanford-Binet test, after acknowledging limitations of the Binet-Simon test, added thirty-six new tests (or tasks). *Id.* at 48–50, 56. These new tests added more tasks for children to complete and allowed a more thorough test of their intelligence. *See id.* at 56–61 (detailing the Stanford revisions and extensions to the Binet test by years and tasks).

81. *See id.* at 1–21 (providing an overview of categories of children and their resulting behavior, for example, that those who tested as “feeble-minded” inevitably became delinquents). *See also id.* at 65–104 (analyzing many other intelligence quotient tests and the different results per child as they relate to success later in life).

82. *Id.* at 118. Terman asserted that:

[T]he fact that an exceptionally superior endowment is discoverable by the tests, however unfavorable the home from which it comes, and that inferior endowment cannot be normalized by all the advantages of the most cultured home. . . . The tests actually reach and discover the general developmental conditions of intelligence, and not mere fragments of knowledge and attainments acquired by chance.

Id.

World War I recruits. Yerkes argued that he could assist in the war effort by efficiently identifying those people who should be leaders and those who should be commanded. Yerkes, Terman, and Goddard, among other colleagues, developed the Army's mental tests in the summer of 1917. As an Army colonel, Yerkes presided over the administration of these tests to 1.75 million World War I recruits. One of Yerkes's lieutenants, E.G. Boring, selected 160,000 case files and produced results from this sample. His results confirmed that blacks were a mentally deficient race. He found that blacks were at the bottom of the intellectual scale, with a full eighty-nine percent testing at the level of moron or below.⁸³

The source of the differences noted in intelligence testing sparked a scientific debate. While both sides accepted the reality that blacks were intellectually inferior, a disagreement developed about the cause of the differences. Yerkes and Terman, among others, asserted that their measures of intelligence were markers of permanent, inborn limits. Thus, the mental infirmities that these tests revealed were generally not remediable by social intervention. Environmentalists rejected this biological determinism. They harkened back to Alfred Binet's original motivation by emphasizing the power of creative education to increase the achievements of all children, but especially those from deficient social environments. Mental testing, for environmentalists, was a way of enhancing the potential of those who tested poorly through proper education and improving their physical and social environment. While the environmentalist accepted the intellectual inferiority of those who performed poorly on the intelligence tests, the environmentalist believed that social policy could be structured to remedy this deficiency.

C.

It was at the point when the environmentalists and the biological determinists were debating the issue of nature or nurture that this Court stepped into the debate with our opinion in *Brown v. Board of Education*. We delivered an opinion that transcended the debate between the environmentalists and the biological determinists. This Court recognized that both of these groups agreed upon the fundamental—albeit false—premise that there was only something deficient about the black race; they differed, however, as to its cause—biology or socio-cultural environment. In our opinion in *Brown*, this Court recognized that segregation created a dual psychological harm that effected blacks and whites in different ways.

83. GOULD, *supra* note 63, at 197–98.

Segregation affected blacks by disseminating a false message about the inferiority of African-Americans and it affected whites by disseminating a false message about the superiority of Caucasians. As a result, this Court noted the dual nature of the psychological harm caused by segregation. As a result, we viewed remedies for segregation as beneficial to all school children, but in different ways.

In this Court's 1968 decision in *Green v. New Kent County School Board*,⁸⁴ we addressed a "freedom of choice" school assignment plan used to remedy the operation of a dual school system. The plan, however, did not produce a significant amount of racial balancing in the schools. The New Kent County School Board argued that its freedom of choice plan could only be faulted by finding that the Fourteenth Amendment required compulsory integration. We rejected this argument, however, emphasizing that school boards operating state-compelled dual systems were charged with the affirmative duty to take whatever steps might be necessary to eliminate racial discrimination root and branch. We went on to note that:

[S]chools are an important socializing institution, imparting those shared values through which social order and stability are maintained. Schools bear central responsibility for inculcating the fundamental values necessary to the maintenance of a democratic political system. When children attend racially and ethnically isolated schools, these shared values are jeopardized: If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society. The elimination of racial isolation in the schools promotes the attainment of equal educational opportunity and is beneficial to all students both black and white.⁸⁵

One of our brethren noted in a separate concurring opinion that:

[I]f the mission of education is to prepare our children to survive and succeed in today's world, then they must be taught how to live

84. *Green v. New Kent County Sch. Bd.*, 391 U.S. 430 (1968).

85. This statement actually comes from the opinion of the Supreme Court of Connecticut in *Sheff v. O'Neill*, 678 A.2d 1267, 1285 (Conn. 1996) (internal quotation marks and citations omitted). I am using the statements in my hypothetical opinion as what would have been representative of the United States Supreme Court decision in *Green* had *Brown* been decided as I am opining within this comment. In *Sheff*, the Supreme Court of Connecticut addressed a situation where the segregation in Hartford public schools could not be traced to intentional state conduct. The court concluded that under the Constitution of the State of Connecticut there is an "affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto." *Id.* at 1283. Thus, it was the racial and ethnic composition of the public schools that triggered the affirmative obligation to remedy the condition. *Id.* at 1281, 1288.

together as one people. Anything less will surely result in a segregated society with one racial and ethnic community pitted against another. Instead of fostering social division, we must build an integrated society, commencing with educating our children in a non-segregated environment.⁸⁶

Thus, the duty to take account of race for the purposes of producing an integrated school was born. As made clear by our opinions, school desegregation was not a social welfare program for blacks (and later other minorities),⁸⁷ but a benefit for all public school students.

In *Keyes v. School District No. 1*,⁸⁸ this Court first faced a situation where the segregation of public schools was not the result of intentional governmental conduct. We stated that a distinction needed to be drawn between de facto segregation and de jure segregation. De jure segregation was the result of governmental conduct and, thus, violated the equal protection clause. This Court concluded that the existence of de facto segregation provided a strong evidentiary presumption that the segregation in public schools was the result of governmental conduct. It was possible for a given school district to rebut the presumption that segregation was not a function of governmental conduct. But our opinion set a very high evidentiary requirement in order to rebut the presumption that few school districts were able to meet. In explaining why the evidentiary requirement was subsequently set so high, we noted that the ultimate goal of remedies for de jure segregation was to eradicate the vestiges of the dual harm of segregation. As a result, racially and ethnically mixed schools primarily served to benefit all public school students and American society.

In the 1974 *Milliken v. Bradley* opinion, this Court upheld a lower court decision including suburban schools in the desegregation remedy for Detroit public schools.⁸⁹ We noted in that opinion that school districts were creations of the state. Given the fact that the State of Michigan was also found responsible for de jure segregation in Detroit's public schools, the remedy did not have to be confined to the borders of

86. *Sheff*, 678 A.2d at 1294 (Berdon, J., concurring). See *supra* note 85 (indicating that the statement is used for the hypothetical outcome of *Green*, had *Brown* not been decided the way it was in 1954).

87. See *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 197-98 (noting that, in the Southwest, Hispanics and African-Americans have a great many things in common, including "economic and cultural deprivation and discrimination"), *reh'g denied*, 414 U.S. 883 (1973).

88. *Id.*

89. *Milliken v. Bradley*, 418 U.S. 717, 752-53 (1974). I am proposing the outcome of *Milliken* on the basis of a different outcome of *Brown*. In *Milliken*, the Court reversed and remanded, only allowing the desegregation remedy to be applied to Detroit public schools and not across the state of Michigan. *Id.*

the Detroit public school district. While this Court recognized the need to place a limit on the desegregation remedies, we noted that the limit was dictated by practical considerations. In addressing the issue of the transportation of students in pursuit of an inter-district desegregation remedy, this Court stated:

An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process. . . . It hardly needs stating that the limits on time of travel will vary with many factors, but probably with none more than the age of the students.⁹⁰

D.

The Court renders this opinion today against the background of the history of the presumably objective, neutral, and non-biased justifications for supporting the oppression of minorities—particularly African-Americans—and this Court’s history of school desegregation jurisprudence that seeks to combat the dual harm of segregation. The propriety of using the LSAT as the basis of the Petitioner’s racially-neutral assertion that she was more qualified to attend the University of Michigan Law School than certain minority students from racial or ethnic groups whose average group scores are lower than non-Hispanic Whites can now be placed in its proper historical context.

Barbara Grutter attempts to appeal to a sense of “simple justice” in our society. The problem with this claim of simple justice is that it can only logically be based on the assumption that race and ethnicity are irrelevant considerations in determining a person’s life experiences. For Grutter’s race-neutral assumption about merit based on standardized tests to be valid, it would be necessary for race to have no more relevance in our society than eye color would in a society where all had access to colored contact lenses. However, this assumption must be weighed against the reality of every day life in America today. While it is the sincere and deepest desire of every member of this Court to see America as a society where race and ethnicity do not matter, that day has not yet dawned. This Court also recognizes that many African-Americans, Hispanics, and Native Americans have been tremendously successful in American society. However, who can seriously take heed of the continued disparity in group oriented social statistics like per

90. *Swann v. Charlotte-Mecklenburg*, 402 U.S. 1, 30-31 (1971). In this opinion, the Court addressed a number of practical considerations involving intra-district school desegregation remedies. *Id.* I feel that this would be the position adopted by the Court deciding *Milliken* if my hypothetical scenario were true.

capita income,⁹¹ poverty rates,⁹² infant mortality,⁹³ life expectancy,⁹⁴ and college attendance and graduation rates,⁹⁵ and not come to the

91. When adjusted for inflation, the per capita income of African-Americans, for example, increased by 250 percent from 1967 to 2000. Yet, this increase left blacks earning only sixty five percent of that of non-Hispanic White per capita income in 2000. See U.S. BUREAU OF THE CENSUS, HISTORICAL INCOME TABLE P-1B, *available at* <http://www.census.gov/hhes/income/histinc/p01b.html> (last modified Sept. 30, 2002) (charting per capita income for blacks in the U.S. from 1967 through 2001); U.S. CENSUS BUREAU, HISTORICAL INCOMES TABLE P-1A, *available at* <http://www.census.gov/hhes/income/histinc/p01a.html> (last modified Sept. 30, 2002) (charting per capita income for non-Hispanic Whites in the U.S. from 1967 through 2001).

92. According to the U.S. Census Bureau, in 1966, 41.8% of the black population, 50.6% of black children under the age of eighteen, and 55.1% of blacks over the age of sixty five lived below the poverty line. In 2001, these percentages decreased to 22.7%, 30.2% and 21.9%, respectively for African-Americans with corresponding figures for non-Hispanic White Americans of 7.8%, 9.5%, and 8.1%. For general poverty statistics in 1966 and 2001, see U.S. BUREAU OF THE CENSUS, HISTORICAL POVERTY TABLES, TABLE 2: POVERTY STATUS OF PEOPLE BY FAMILY RELATIONSHIP, RACE, AND HISPANIC ORIGIN: 1959 TO 2002, *available at* <http://www.census.gov/hhes/poverty/histpov/hstpov2.html> (last modified Oct. 6, 2003) (charting the numbers of adult U.S. residents, by race, that fell below the poverty level annually). For those under the age of eighteen and over the age of sixty five in both 1966 and 2001 see also U.S. BUREAU OF THE CENSUS, HISTORICAL POVERTY TABLES: 2002, TABLE 3: POVERTY STATUS OF PEOPLE, BY AGE, RACE, AND HISPANIC ORIGIN: 1959 TO 2002, *available at* <http://www.census.gov/hhes/poverty/histpov/hstpov3.html> (last modified Oct. 6, 2003) (charting the numbers of United States children under the age of eighteen, by race, that fell below the poverty level annually).

93. The infant mortality rate for children of black mothers has fallen significantly from 22.2 per 1,000 live births to 14.6 between 1980 and 1999. But this figure is still far higher than the children of non-Hispanic White mothers mortality rate which fell from 10.9 to 5.8 over the same period. See CENTERS FOR DISEASE CONTROL AND PREVENTION, TABLE 23: INFANT MORTALITY RATES, FETAL MORTALITY RATES, AND PERINATAL MORTALITY RATES, ACCORDING TO RACE: UNITED STATES, SELECTED YEARS 1950-1999, *available at* <http://www.cdc.gov/nchs/data/hus/tables/2001/01hus023.pdf> (last visited Oct. 16, 2004) (charting infant, fetal and perinatal mortality rates, by race, in the United States from 1950 through 1999).

94. The life expectancy of black males increased by over eight years from 1970 to 2000 and that of black females by nearly seven years. Yet, the figures from 2000 still have black males living six and one-half years less than non-Hispanic White males (68.3 and 74.8) and black females living five years less than non-Hispanic White females (75.0 and 80.0). See CENTERS FOR DISEASE CONTROL AND PREVENTION, 49 NATIONAL VITAL STATISTICS REPORT 24 (Oct. 9, 2001), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr49/nvsr49_12.pdf (reporting on the life expectancy for United States citizens by age, race and sex for the year 2000).

95. The percentage of blacks ages eighteen to twenty four enrolled in higher education increased from 13% in 1967 to 31.3% in 2001. However, the percentage of non-Hispanic Whites enrolled in college increased over the same period from 26.9% to 39.3%. See NCES DIGEST 2002, *supra* note 29, at tbl. 186 (charting the annual enrollment rates of 18 through 24 year olds in the U.S., by race, from 1967 through 2001). The college completion rate for blacks over the age of twenty five increased from 4.5% in 1970 to 16.5% in 2000. But the non-Hispanic White completion rate increased from 11.6% to 28.1%. For 1970 figures, see BLACK AMERICANS: A STATISTICAL SOURCEBOOK 128 (Louise L. Hornor ed. 2000) (charting the annual college completion rate for persons twenty-five years old and older in the U.S. from 1970 through 1998). For the 2000 figures, see The U.S. BUREAU OF THE CENSUS, CURRENT POPULATION SURVEY tbl. 7 (Feb. 22, 2001), *available at* <http://www.census.gov/population/socdemo/race/Black/ppl-142/tab07.txt> (charting the number and percent of U.S. population aged twenty five and older by

obvious conclusion that race and ethnicity still matter today, and matter in particularly negative ways for disadvantaged minorities in America? The tremendous achievement of successful members of these minority groups should not blind our society to the reality of the continued existence of the effects of discrimination upon these groups. As a consequence, to achieve the same result on standardized tests requires minorities to overcome an additional barrier which people like Barbara Grutter never faced.

It has become common fare for whites denied admission to selective colleges, universities, or graduate programs to assert that if they had been black, their test scores would have been sufficient for admission to the program of their choice. But this fallacious reasoning fails to recognize the undeniable impact of race and racism that is still an aspect of everyday American life. If this white person had been born black, or for that matter Latino or Native American, her entire life would have been different. Part of that difference would no doubt translate into lower scores on standardized tests like the LSAT, the SAT, or the ACT. Simply put, because of the existence of the history of racial and ethnic oppression in our country, right now it may not be possible to develop a culturally-neutral standardized test in which the score of a non-Hispanic White can be equated with that of a black, Latino, or Native American.

This Court does not want to overstate the racial gap between whites and underrepresented minority groups that exists on standardized tests or their perception of reality due to the difference in cultural experience of the two groups. Standardized tests are used to measure the differences between the people who take them. If ninety-nine percent of the knowledge and understanding among people is the same, then this ninety-nine percent would be excluded for purposes of standardized tests because it would tell us nothing about how those who take the test differ from one another. Only the differences among individuals matter for purposes of assessing their abilities through the use of standardized tests. Thus, if the typical African-American experience, as well as that of other minorities in this society, is only slightly dissimilar from that of non-Hispanic Whites, such a slight dissimilarity will translate into huge divergences at the upper end of the test score range of standardized tests, drafted only to measure the differences among people.

Among the primary justifications for the Law School's admission policy are that it promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand

persons of different races.⁹⁶ These benefits are important and laudable because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible range of diverse backgrounds.⁹⁷ This Court believes that these justifications tacitly recognize that being a member of an underrepresented minority group with a history of discrimination may create very different experiences from those of members of majority racial groups. This Court also recognizes the obvious truth of this statement, but we extend it to its logical conclusion with regard to the challenge raised by Grutter. The reason the Law School recognizes that students from underrepresented groups with a history of discrimination are likely to bring a different perspective to the Law School is also the very reason they are likely to not do as well on culturally biased standardized examinations.

Barbara Grutter's claim relies on 500 years of invalid religious, scientific, and cultural evidence that has inexorably led to the dual harm that this Court firmly rejected almost fifty years ago in its opinion in *Brown*. Her claim is the latest manifestation of the presumably objective, neutral, and non-biased justifications for racial differences propounded first by Biblical scholars, then by natural scientists, followed by polygenicists and monogenists, physiognomists, Social Darwinists, proponents of IQ tests, and finally, by those articulating theories of deficit socio-cultural environments of disadvantaged minorities. If this Court were to accept the Petitioner's argument that she is more qualified because she was able to perform better on culturally-biased standardized tests, we would be committing the same sophistry that has plagued our nation since its very beginning. This Court would be replicating the dual harms of segregation recognized in our far-sighted opinion in *Brown* by accepting as valid judgments that lead to the dissemination of the dual messages that blacks and other minorities are intellectually inferior, and non-Hispanic Whites are intellectually superior.

If we are to achieve the true individuality that we seek, the Gordian Knot of justifications for continued racial oppression, forged so long ago, must be severed. Let the next major cut in that knot be declared by this Court here and now. This Court will not allow the myth of intellectual inferiority of blacks and other disadvantaged minorities, and the concomitant myth of intellectual superiority of non-Hispanic

96. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (quoting Appellant's Petition for Certiorari at 244a, 246a.).

97. *Id.*

Whites, to take on a new existence through the application of culturally-biased standardized tests. This Court announces its firm resolve to root these beliefs out of the American culture.

We reject the challenge made by Barbara Grutter to the Law School's affirmative action policy. However, we are still troubled by the implications that are left by the Law School's justification for consideration of race and ethnicity because it fails to remove the implication that these underrepresented minority students are not as qualified to attend the Law School as majority students with higher LSAT scores. Therefore, we remand this case back to the lower court and direct the Law School to develop policies and practices that assure the admittance of a critical mass of underrepresented minorities to its program that are not based upon culturally-biased standards that favor the dominant non-Hispanic White group. In so doing, these new policies and procedures must remove any stain, stigma, notion, or suggestion that the underrepresented minorities admitted are in any way less qualified or less deserving of admittance in a meritocratic procedure than applicants from other racial ethnic groups.

We suggest, but do not require, that one way in which to accomplish this command is to quantify the amount of cultural bias and adjust upwards the test scores of underrepresented groups with a history of discrimination. For example, the Law School could seek to quantify the portion of the gap between the LSAT scores of African-Americans and non-Hispanic Whites that is attributable to race as opposed to other non-racial factors such as socio-economic status, region of the country, or strength of undergraduate admissions program. The portion of the gap between the performance of blacks and whites that cannot be traced to non-racial factors should be presumed to be the result of cultural bias attributable to the LSAT. Once the racial effect is quantified, then the Law School could adjust upwards the LSAT score of all African-Americans, Hispanics, and Native Americans to account for this quantified cultural bias.

We recognize that full implementation of this requirement may require the Law School to develop solutions of varied kinds. Thus, we hereby direct the lower courts to take such proceedings and enter such orders and decrees consistent with this opinion. Such proceedings must be conducted with all deliberate speed as is necessary to assure the admittance of a critical mass of underrepresented minorities in a culturally-neutral admissions process that does not convey the implicit message that underrepresented minorities are not as qualified as their counterparts from other racial and ethnic groups.

IT IS SO ORDERED.