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THE USE OF ECONOMIC-BASED AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS

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INTRODUCTION

Preferential treatment based on race is currently on life support and will soon die as a part of the college admissions process.[1] The Supreme Court will likely determine that giving preferential treatment to racial minorities is not the most "narrowly tailored"[2] means of achiev-

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1. *See generally* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

2. *See* Tuttle v. Arlington Cnty. Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999) ("When reviewing whether a state racial classification is narrowly tailored, we consider factors such

ing diversity. Thus, the Supreme Court will soon rule that racial preference in college admissions is unconstitutional because it violates the Fourteenth Amendment.[3]

However, banning racial preference in college admissions does not mean the end of minorities receiving preferential treatment in college admissions.[4] Recently, federal courts have begun to hold that colleges may give preferential treatment and use various criteria in compiling its student body; however, these criteria must be race neutral.[5] Race neutral preferential treatment admissions policies can be equally, if not more, beneficial to minority students than the current race conscious system.

The Supreme Court first dealt with affirmative action in higher education in 1978 in *Regents of University of California v. Bakke*.[6] In that opinion, Justice Powell declared that the goal of achieving the educational benefits of a diverse student body is sufficiently "compelling" to justify the use of race as a factor in university admissions.[7] Since that time, the Supreme Court has only dealt with affirmative action in local, state, and federal government contracts and not in higher education.[8] Thus far, the Supreme Court has refused to grant certiorari for cases involving affirmative action in higher education admissions policies.[9] However, this may soon change based upon the most recent case,

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as: '(1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met, and (5) the burden of the policy on innocent third parties.'").

3. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

4. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); J.A. Croson Co. v. City of Richmond, 488 U.S. 469 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); *Tuttle*, 195 F.3d at 698; *Hopwood*, 78 F.3d at 932; *Grutter*, 137 F. Supp. 2d at 821.

5. *See Hopwood*, 78 F.3d at 932; *Grutter*, 137 F. Supp. 2d at 821. *But see* Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000).

6. 438 U.S. 265 (1978).

7. *Id.* at 314-15 ("As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest.").

8. *See generally Adarand Constructors, Inc.*, 515 U.S. at 200; *J.A. Croson Co.*, 488 U.S. at 469.

9. *See Hopwood*, 78 F.3d at 932.

Grutter v. Bollinger,[10] in which a federal district court ruled that race conscious admissions policies are unfair and unconstitutional.[11]

Part I of this note discusses *Grutter v. Bollinger*. Part II argues that admissions committees will still be able to give deserving minorities special consideration under a race neutral system. Part III suggests that race neutral preferential treatment policies will remove the stereotypical stigmas placed on racial minorities. Part IV of this note describes how race neutral policies will help colleges and government entities focus on the social, economic, and political problems that create disparity in the first place, rather than on the race of the victims, and thus begin a process of remedying the true problems that cause the disparity. Part V delineates how race neutral policies will garner broader support across racial lines because the emphasis will be on the problems that foster disparity in society irrespective of race. Further, this note describes the benefits of abandoning race conscious policies in favor of race neutral policies. Additionally, this note explains how race neutral policies will be more beneficial to minority students than the present race conscious system. Finally, this note concludes by stating that, although race conscious preferential treatment policies will soon be outlawed in this country, it may later be proven to have been the best thing that the Supreme Court has done for racial minorities since *Brown*.[12]

I. *GRUTTER V. BOLLINGER*

In December 1997, the plaintiff, Barbara Grutter, commenced an action alleging that she was rejected from the University of Michigan Law School in 1996 because of her race.[13] Grutter, who is a Caucasian female, believes that she was rejected because the law school uses race as a "predominant" factor, giving racial minority applicants a significantly higher chance of admission than non-racial minority students with similar credentials.[14]

10. Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

11. *Id.* at 871 ("Whatever solution the law school elects to pursue, it must be race neutral. The focus must be upon the merit of *individual applicants*, not upon assumed characteristics of racial groups. An admissions policy that treats any applicants differently from others on account of their race is unfair and unconstitutional.").

12. Brown v. Bd. of Educ., 349 U.S. 294 (1955).

13. *Grutter*, 137 F. Supp. 2d at 823-24.

14. *Id.* at 824.

The law school uses several factors in evaluating an applicant's credentials.[15] The law school pays close attention to Law School Admission Test ("LSAT") scores and undergraduate grade point average ("UGPA"), which create an index score.[16] The higher an applicant's index score, the more likely that the student will be admitted.[17] However, admissions decisions are not based strictly on the index scores, as a high index score may not necessarily identify an applicant who will succeed in law school.[18] Likewise, a low index score may not necessarily identify an applicant who is likely to do poorly in law school.[19]

Although most applicants with high index numbers are offered admission, the admissions committee exercises discretion in the admissions process.[20] Thus, in addition to the applicants LSAT and UGPA, the admissions committee also looks at applicants' transcripts, essays, and letters of recommendation.[21] Second, and most controversial, the law school uses discretion in order to admit applicants with comparatively lower index scores and gain a "critical mass" of diverse students.[22] In addition to employment experience, travel experiences,

15. *Id.* at 829 ("All admissions are made with goal of forming a class with an exciting and productive mix of students who will enhance the educational experience for each other and for the School. Law School Admission Test (LSAT) scores and undergraduate course work and performance are relied on heavily, as are comparative studies of the past performance of similar students at the Law School. Serious regard is also given to an applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic – e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background. The guiding purpose for selection among applicants is to make the School a better and [sic] livelier place in which to learn and to improve its service to the profession and the public.").

16. Grutter v. Bollinger, 137 F. Supp. 2d 821, 829 (E.D. Mich. 2001).

17. *Id.* at 826 ("In short, the numbers reflect the law school's stated policy: 'Bluntly, the higher one's index score, the greater should be one's chance of being admitted. The lower the score, the greater the risk the candidate poses . . . . So we expect the vast majority of those students we admit to have high index scores.'").

18. "The policy also notes, however, that admissions decisions should not be made strictly based on the index score. A high index score may not necessarily identify an applicant who is likely to succeed in law school, and a low index score may not necessarily identify one who is likely to fail." *Id.* at 826.

19. *Id.*

20. *Id.* at 827.

21. *Id.* at 828.

22. "Dean Lehman agreed with the testimony offered by other witnesses to the effect that the law school seeks to admit a critical mass of underrepresented minority students, particularly those from groups which have been discriminated against historically. He was unable to quantify "critical mass" in terms of numbers or percentages, or ranges of numbers or percentages, but indicated that critical mass means "meaningful numbers," that is numbers such that the minority student do not feel isolated or like spokespersons for their race, and feel comfortable discussing issues freely based on their personal experiences. He

volunteer work, extracurricular activities, athletic accomplishments, foreign language fluency, and residency, the admissions committee uses race in order to create a diverse class.[23] Racial preferences are given only to African Americans, Latino Americans, and American Indians.[24] The admissions committee reasoned that, without such preferences given, these racial groups would be under-represented in the student body,[25] and the classroom would be deprived of their experiences and perspectives on the issues.[26] With such racial preferences given, most black applicants that have a mid-range index score are accepted, while most white applicants that have a mid-range index score are rejected, thus giving the court reason to believe that race is more than a mere "plus" factor, but an extremely strong and heavily emphasized factor in the decision process.[27] Hence, Barbara Grutter believes that her race played a detrimental factor in determining that she would not be admitted to the University of Michigan School of Law.

A. The Issues and Holdings in Grutter

In reaching its decision, the court focused on four issues. First, the court evaluated the extent to which race is a factor in the law school's admissions process.[28] Both sides produced witnesses evaluating the extent to which race is used in the admissions process.[29] However, in spite of the law school's attempts to downplay the use of race in the admissions process, the court held that the law school explicitly considers the race of applicants in order to enroll a critical mass of underrepresented minority students.[30]

Second, the court considered whether diversity was a compelling state interest such that race could be used as a factor in admissions decisions.[31] The crux of the argument centered around

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doubted whether critical mass would be present if only five percent of a class consisted of minority students, and he acknowledged that minority students have constituted at least 11% of every entering class since 1992." Grutter v. Bollinger, 137 F. Supp. 2d 821, 834 (E.D. Mich. 2001).

23. "When asked about the extent to which race is considered in admissions, Dean Lehman testified that this varies from one applicant file to another. In some files the applicant's race may play no role, while in others it may be a 'determinative' factor." *Id.*

24. *Id.* at 829.

25. *Id.*

26. *Id.*

27. *Id.* at 832.

28. Grutter v. Bollinger, 137 F. Supp. 2d 821, 825-47 (E.D. Mich. 2001).

29. *Id.* at 829-30.

30. *Id.* at 843.

31. *Id.* at 843-50.

whether Justice Powell's opinion in *Bakke*, stating that achieving racial diversity is a compelling state interest, is legally binding.[32] After discussing various case precedents and using its own reasoning, the court held that Justice Powell's opinion discussing the achievement of racial diversity as a compelling state interest was not legally binding on the court.[33] Thus, because achieving racial diversity is not a compelling state interest, the court concluded that it was unconstitutional to use race as a factor in the law school's admissions decisions.[34]

Third, the court discussed whether the use of race as a factor in admissions decisions is the most "narrowly tailored" means of achieving that goal, if it assumed, *arguendo*, that achieving racial diversity is a compelling state interest.[35] Despite the law school's various testimonies that race was only used to the extent necessary to achieve a critical mass of underrepresented students, the court held that the use of race was not narrowly tailored to achieve racial diversity for the five following reasons: (1) achieving diversity by creating a critical mass is difficult because the concept of critical mass is an amorphous concept and ill-defined;[36] (2) there is no limit on the law school's use of race in its admissions decisions;[37] (3) by ensuring the enrollment of a certain minimum percentage of underrepresented minority students, the law school had created an illegal quota system;[38] (4) there was no logical basis or clearly expressed reason for the admissions committee to single out and give preferential treatment to certain racial minorities and not others;[39] and, (5) the law school failed to investigate alternative, race-neutral means for increasing minority enrollment.[40]

Fourth, the court considered arguments from intervenors as to whether the history and current status of racial discrimination in this country, the so called "achievement gap" between underrepresented minority and non-minority students, the alleged cultural bias in standardized testing, and recent experiences of minority students in secondary and undergraduate schools provided ample justification for the use of race as a factor in the admissions decision.[41] Despite the intervenors' use of over thirty hours of testimony from students, uni-

32. *Id.*
33. *Id.* at 847-48.
34. Grutter v. Bollinger, 137 F. Supp. 2d 821, 872 (E.D. Mich. 2001).
35. *Id.* at 850.
36. *Id.* at 850-51.
37. *Id.* at 851.
38. *Id.*
39. *Id.* at 851-52.
40. Grutter v. Bollinger, 137 F. Supp. 2d 821, 852-53 (E.D. Mich. 2001).
41. *Id.* at 855-63.

versity professors, standardized testing experts, and affirmative action advocates, who stated the potential negative political, social, and economic ramifications of ending race as a factor in college admissions decisions, the court held that "the answer is not to retain the unconstitutional racial classifications but to search for lawful solutions, ones that treat all people equally and do not use race as a factor."[42]

B. Discussion

This note is not designed to criticize or argue against preferences given to racial minorities in admissions policies in order to achieve diversity or to remedy racism in our society.[43] However, it is overwhelmingly clear that legislatures, courts, and the public are becoming less supportive of race conscious affirmative action programs.[44] Racial minorities can continue to fight the losing battle of trying to preserve race conscious programs, or they can begin to adjust, embrace, and develop race neutral programs. If racial minorities fail to abandon race conscious programs in time, the likely result will be that new race neutral policies will be developed without the cooperation and input of racial minorities. Rather than fighting these new policies, racial minorities must control their development.

In addition, this note assumes that the Supreme Court will deem achieving diversity as a compelling state interest. Although there is a dispute as to whether Justice Powell's opinion in *Bakke* is binding, it is likely that the Supreme Court will not get entangled in the debate as the *Grutter* and *Hopwood* courts have previously done.[45] The Supreme Court will likely deem achieving diversity as a compelling state interest according to Justice Powell's opinion in *Bakke*, or according to the notion of academic freedom derived from the First Amendment.[46]

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42. *See id.* at 871.

43. This note posits that racial minorities who have suffered and still suffer from the effects of institutional systematic racism, discrimination, and oppression should be given special consideration and preferential treatment in the admissions process. However, the court has not (and will likely never) fully embrace using race conscious policies in order to remedy the past and present effects of racism on our society. Therefore, racial minorities must advocate for and support a different approach in order to achieve the same objective.

44. *See generally* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); J.A. Croson Co. v. City of Richmond, 488 U.S. 469 (1989); Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Tuttle v. Arlington Cnty. Sch. Bd., 195 F.3d 698, 706 (4th Cir. 1999); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996); Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001).

45. *See Hopwood*, 78 F.3d at 941-48; *Grutter*, 137 F. Supp. 2d at 842-47.

46. "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body . . . . 'It

From there, the Supreme Court will likely focus its attention on whether the use of race conscious policies are the most narrowly tailored means of achieving diversity.

II. Admissions Committees Will Still Be Able to Give Deserving Racial Minorities Special Consideration in a Race Neutral System

In *Bakke*, the court stated, "[N]o one denies the regrettable fact that there has been societal discrimination in this country against various racial and ethnic groups."[47] However, in *Croson* the court states, "[A] state can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classifications by race . . . such programs may well have racially disproportionate impact, but they are not based on race."[48] Although racial discrimination still exists in society and most whites benefit from having white privilege, it is unfair to assume that all whites are socially and economically privileged and all minorities are socially and economically disadvantaged. Society must strive to avoid absolute generalizations about any group of people.

Hypothetically, let's compare two students. Student A is from economically affluent Alexandria, Virginia. Student A grew up in an upper middle class suburb with both parents, who are college-educated, in the home. Student A attended private schools and had access to tutors, enrichment programs, and college prep courses. Student A did not have to work while in high school. Thus, Student A was able to participate in a number of extracurricular activities and community service projects. Student A graduated top of his class with an extremely high GPA and had stellar test scores. Comparatively, Student B is from economically disadvantaged Martinsville, Virginia. Student B grew up in a single-parent home. Student B's parent only obtained a high school diploma. Student B attended an underfunded public school and did not have access to tutors, enrichment programs, or college-prep courses. Student B also had to work part-time throughout high school in order to support his family, thus limiting his time to engage in extracurricular activities and community service projects. Student B

is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the "the four essential freedoms" of a university — to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'" *Bakke*, 438 U.S. at 312.

47. *Id.* at 296 n.36.

48. *J.A. Croson Co.*, 488 U.S. at 526.

graduated with a good GPA and average test scores. The question under this scenario becomes: Who should get preferential treatment in the college admissions process? Most would agree that Student B was more disadvantaged and deserving of additional consideration. What if Student A was black and Student B was white? Should Student A still get preferential treatment over Student B just because of race?

Although some may argue that the previous scenario presents an extreme example, the facts remain that, numerically, there are more whites families who live in poverty than blacks,[49] and today, there exists an increasing number of black families who are moving out of poverty into the middle class.[50] In *Grutter*, Judge Friedman states, "There is no basis in logic or in the evidence for assuming that all members of some racial groups are victims of adverse circumstances or, conversely, that all members of other racial groups are beneficiaries of privilege."[51] Thus, the focus should not be on the race of the applicant, but on his/her individual circumstances, regardless of race.

Instead of automatically assuming that all blacks are socially and economically underprivileged and all whites are socially and economically privileged, college admissions committees should develop and implement race neutral social and economic indicators that will allow the committee to properly evaluate the privileged or underprivileged status of the individual. Such indicators should consider family income, home ownership by parents, hours worked by the applicant during school, educational level of parents (i.e. is the applicant a first-generation college student), parents' occupations, and whether the student lives in a single-family household.[52] Although some racial minorities will be excluded and some whites will be included, that fact remains that deserving racial minorities will continue to receive special consideration under a race neutral system.

In addition, admissions committees can look to other race neutral factors such as the secondary school attended, zip code, school district, extra-curricular activities, leadership potential, maturity, demonstrated compassion, history of overcoming disadvantages,

49. *Poverty by the Numbers*, NAT'L CTR. FOR CHILDREN IN POVERTY (Nov. 20, 2007), http://www.nccp.org/media/releases/release_34.html.

50. This was the trend prior to the Great Recession. Many black families did fall back during this period; however, the numbers are better than previous generations. Rich Morin & Seth Motel, *A Third of Americans Now Say They Are in the Lower Classes*, PEW RES. CTR. (Sept. 10, 2012), http://www.pewsocialtrends.org/2012/09/10/a-third-of-americans-now-say-they-are-in-the-lower-classes/.

51. Grutter v. Bollinger, 137 F. Supp. 2d 821, 868 (E.D. Mich. 2001).

52. *See generally* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

ability to communicate with the poor, travel experience, athletic accomplishments, volunteer work, first language, language most spoken at home, foreign language fluency, legacy, and residency in order to give minorities a plus factor in the admissions decision and create a diverse student body.[53] Such an admissions policy is flexible enough to consider all pertinent elements of diversity without using race as a factor. Thus, admissions committees will still be able to give deserving racial minorities' special consideration under a race neutral system.

III. RACE NEUTRAL POLICIES WILL REMOVE THE STEREOTYPICAL STIGMAS PLACED ON RACIAL MINORITIES

Federal courts have consistently warned about the adverse effects of race conscious policies.[54] In *Bakke*, Justice Powell stated that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection."[55] In *Croson*, Justice O'Conner states, "Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole."[56] In *Adarand*, Justice Thomas stated, "These [race conscious] programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences."[57] In *Hopwood*, Judge Smith, quoting Richard Posner, stated, "The use of a racial characteristic to establish a presumption that the individual also possess . . . characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America."[58]

Just as it is dangerous to allow society to view minorities as lazy, stupid, and morally deprived, it is equally dangerous to assume that all minorities are disadvantaged and deserve special consideration in the admissions process. When college admissions committees are allowed to assume that all racial minorities are disadvantaged, it allows the majority to view all minorities, regardless of GPA and test score, as inferior and in need of special consideration. Further, not all

53. *See Bakke*, 438 U.S. at 265; *Hopwood*, 78 F.3d at 932.

54. *Bakke*, 438 U.S. at 265.

55. *Id.* at 298.

56. J.A. Croson Co. v. City of Richmond, 488 U.S. 469, 517 (1989).

57. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995).

58. Hopwood v. Texas, 78 F.3d 932, 946 (5th Cir. 1996) (quoting Richard Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 12 (1974)).

racial minorities need special consideration and preferential treatment. Many racial minorities, regardless of their background, manage to achieve high GPA's and test scores. However, with race conscious policies in place, many minorities, as well as non-minorities, feel that such applicants could not have been admitted without preferential treatment. With race neutral policies, the focus will turn from the race of the disadvantaged to the disadvantaged individual's circumstances irrespective of race.

IV. RACE NEUTRAL POLICIES WILL HELP COLLEGES AND GOVERNMENT ENTITIES FOCUS ON THE SOCIAL, ECONOMIC, AND POLITICAL PROBLEMS THAT CREATE DISPARITY IN THE FIRST PLACE, RATHER THAN ON THE RACE OF THE VICTIM AND THUS BEGIN A PROCESS OF REMEDYING THE TRUE PROBLEMS THAT CAUSE DISPARITY

The court in *Croson* stated that "it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment."[59] Rather than continue to focus on the race of the underprivileged, it is time for society to focus on the causes of social and economic disparity in this country. There is no reason that, in the most prosperous country in the world, an underprivileged class even continues to exist. Racial minorities are equally as intelligent as whites; however, substantial numbers of racial minorities tend to have lower GPA's and test scores.[60] Studies show that standardized test scores are often impacted by race and class. If underfunded secondary schools, impoverished neighborhoods, biased testing, and limited access to resources are the causes of disparity,[61] then racial minorities must begin to focus on closing the social and economic gap, rather than on preserving a system that merely gives preferential treatment to the disadvantaged—such as a race conscious system that merely accepts disparity as a way of life for racial minorities, rather than trying to remedy it. Thus, instead of fighting to preserve race conscious policies that divert attention away from the actual causes of disparity, minorities must embrace race neutral polices so that the focus shifts away from "battle of the races" to the

59. *J.A. Croson Co.*, 488 U.S. at 474.

60. *See* Maria Veronica Santelices & Mark Wilson, *Unfair Treatment? The Case of Freedle, the SAT, and the Standardization Approach to Differential Item Functioning*, 80 HARV. EDUC. REV. 106 (2010).

61. Grutter v. Bollinger, 137 F. Supp. 2d 821, 855-71 (E.D. Mich. 2001).

actual problems that create and foster social and economic disparity in our society across racial lines.

V. Race Neutral Policies Will Garner Broader Support Across Racial Lines Because the Emphasis Will Be on the Problems that Foster Disparity in Society Irrespective of Race

The issue should not be which groups should or should not receive special consideration, but rather whether an individual, irrespective of race, has suffered social and economic disadvantage to the extent that they deserve special consideration in the admissions decision. Once the focus is diverted from which race should receive special consideration, the focus can center on the causes of disparity in society. Only then can a coalition across racial lines be formed to remedy the social and economic problems that face so many in our society.

Conclusion

Although race conscious preferential treatment policies will soon be outlawed in this country, it may later be proven to have been the best thing that the Supreme Court has done for racial minorities since *Brown*.[62] *Brown* could only outlaw racial segregation in this country's public schools, but it could never foster integration in our society. As long as race can be used to benefit a group in society, it will also inevitability be used to harm those same groups. However, with the end of race conscious policies, society will become more focused on the individual, rather than on the race of the individual, and thus begin the process of fostering a truly integrated society.

62. Brown v. Bd. of Educ., 349 U.S. 294 (1955).