

February 2012

## Retargeting Affirmative Action: A Program to Serve Those Most Harmed by Past Racism and Avoid Intractable Problems Triggered by Per Se Racial Preferences

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### Recommended Citation

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## ARTICLES

# RETARGETING AFFIRMATIVE ACTION: A PROGRAM TO SERVE THOSE MOST HARMED BY PAST RACISM AND AVOID INTRACTABLE PROBLEMS TRIGGERED BY PER SE RACIAL PREFERENCES

MARK NADEL<sup>†</sup>

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<sup>†</sup> The author is an attorney/advisor at the Federal Communications Commission, although this Article solely represents his personal views. The author would like to thank Richard Banks, Peter Bingham, Robert Cipes, Carl Cohen, Andre Deckrow, William Goggin, Richard Kahlenberg, Kenneth Karst, Anne Lombard, Carolina Nadel, Eugene Nadel, Barmak Nassirian, Vickie Robinson, Michael Rosman, Joy St. John, and Peter Schuck for their comments on earlier drafts.

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## INTRODUCTION

The Supreme Court's 5-4 decision in *Grutter v. Bollinger*<sup>1</sup> explicitly upheld the constitutionality of the University of Michigan Law School's affirmative action program. This Article, however, joins other steadfast advocates of a different variation of "affirmative action"<sup>2</sup> in its concern over serious drawbacks to treating that program as a national model.

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<sup>1</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003). Still, that was conditioned on the use of a holistic evaluation of all students. See *id.* at 333-43. The less individualized review of undergraduates was found unconstitutional. See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>2</sup> One of the key obstacles to constructive debate about affirmative action is that many use the terms "affirmative action" and "racial preferences" synonymously. For a sampling of definitions used for affirmative action, see William W. Van Alstyne, *Affirmative Actions*, 46 WAYNE L. REV. 1517, 1526-45 (2000); see also Carol M. Swain et al., *Understanding Racial Polarization on Affirmative Action: The View from Focus Groups*, in COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 214, 218-23 (John David Skrentny ed., 2001) [hereinafter COLOR LINES]; Deborah C. Malamud, *Values, Symbols, and Facts in the Affirmative Action Debate*, 95 MICH. L. REV. 1668, 1691-94 (1997). See generally John Valery White, *What is Affirmative Action?*, 78 TUL. L. REV. 2117 (2004) (addressing the definitions of affirmative action used by the Court and academics).

UCLA Professor Richard Sander has already observed that the use of large racial preferences to admit less-qualified black students to top law schools has many unfortunate consequences to those minority students.<sup>3</sup> After observing that the grades of about half of black law students fall in the bottom tenth of the class,<sup>4</sup> Sander suggested that minority students and society would both benefit from reducing racial preferences in law school admissions because the former would then attend schools where they were more likely to thrive.<sup>5</sup>

Although Sander's article has triggered a furious response,<sup>6</sup> this Article continues down the same path, identifying two other major shortcomings in current affirmative action programs. To remedy these and Sander's complaints, it offers a three-part proposal.

First, and of most importance, it observes that affirmative action programs have long neglected the students suffering most from the effects of past and present racism: those attending the worst minority schools. Elite colleges and universities concluded decades ago that the inferior K-12 educations that these students generally receive leave them too far behind to handle the schools' rigorous academic programs. Thus, the affirmative action programs at top tier schools focus, instead, on admitting the most qualified of the best prepared minority students: those generally from middle- and upper-class communities.<sup>7</sup> Such programs

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<sup>3</sup> See Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004) (contending that by admitting black applicants with lower academic qualifications to achieve desired diversity, the very top law schools virtually force subsequent tiers of law schools to do the same, and the net result of this cascading effect is unnecessarily harmful).

<sup>4</sup> See *id.* at 425-42. Sander also found that blacks failed the bar exam at significantly higher rates than similar white classmates, and much higher than would have been predicted if they had attended schools where they fell in the middle of the class and had probably learned more. See *id.* at 442-54.

<sup>5</sup> See *id.* at 482-83.

<sup>6</sup> See responses to Sander's article in Stanford Law Review. Ian Ayres & Richard Brooks, Response, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 STAN. L. REV. 1807 (2005); David L. Chambers et al., Response, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 STAN. L. REV. 1855 (2005); Michele Landis Dauber, Response, *The Big Muddy*, 57 STAN. L. REV. 1899 (2005); David B. Wilkins, Response, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 STAN. L. REV. 1915 (2005).

<sup>7</sup> See Deborah C. Malamud, *Class-Based Affirmative Action: Lessons and Caveats*, 74 TEX. L. REV. 1847, 1861-63 (1996); see also Glenn C. Loury, *Performing Without a Net*, in THE AFFIRMATIVE ACTION DEBATE 49, 53 (George E. Curry ed.,

provide racial diversity, benefiting many of the enrolled minority and white students,<sup>8</sup> but they fail to directly benefit those who need help most. Selective colleges and universities have generally viewed those most harmed by racism as beyond the scope of their affirmative action programs.

Many commentators sympathetic to the plight of the most disadvantaged favor class-based, instead of race-based, affirmative action.<sup>9</sup> Supporters of racial preferences, however, observe that this would eviscerate most of the benefit to racial minorities since most of the nation's poor are white.<sup>10</sup>

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1996); Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, at A1. Still, when wealthier minority members gain positions of power, they are likely to be sympathetic to the interests of others who had suffered discrimination. See Dinesh D'Souza & Christopher Edley, Jr., *Affirmative Action Debate: Should Race-Based Affirmative Action Be Abandoned as a National Policy?*, 60 ALB. L. REV. 425, 436-37 (1996); Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 688 (1975).

<sup>8</sup> See Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3, 16-17 (1979) (observing that diversity focuses on the interests of the white majority rather than reparations for blacks); James P. Sterba, *Completing Thomas Sowell's Study of Affirmative Action and Then Drawing Different Conclusions*, 57 STAN. L. REV. 657, 684-85 (2004). Non-minorities who gain admission to a school may benefit not only from a broader education, but may enjoy higher grades and salaries due to the apparent effects of affirmative action. See Sander, *supra* note 3, at 481-82; see also Lino A. Graglia, *Gutter and Gratz: Race Preference to Increase Racial Representation Held "Patently Unconstitutional" Unless Done Subtly Enough in the Name of Pursuing "Diversity,"* 78 TUL. L. REV. 2037, 2050-51 (2004) (asserting that racial preferences serve to assuage the distress that liberal faculties and administrations would face if their institutions were nearly non-black).

<sup>9</sup> See, e.g., Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW INCOME STUDENTS IN HIGHER EDUCATION 101 (Richard D. Kahlenberg ed., 2004) (examining whether low-income students should reap the benefits of affirmative action programs); R. Richard Banks, *Meritocratic Values and Racial Outcomes: Defending Class-Based College Admissions*, 79 N.C. L. REV. 1029 (2001) (defending class-based admission programs); Richard H. Fallon, Jr., *Affirmative Action Based on Disadvantage*, 43 UCLA L. REV. 1913, 1913-14 & n.1 (1996) (making the argument for economically based affirmative action); Richard H. Sander, *Experimenting with Class-Based Affirmative Action*, 47 J. LEGAL EDUC. 472, 481-82 (1997) (considering the effects of a "class-based admissions system"). *But see* Malamud, *supra* note 7, at 1891-94.

<sup>10</sup> See JULIAN R. BETTS & JOHN E. ROEMER, EQUALIZING OPPORTUNITY THROUGH EDUCATIONAL FINANCE REFORM 25-29 (2004), available at <http://pantheon.yale.edu/%7Ejer39/EOptext.12.01.pdf>; Joint Project Between Bureau of Lab. Stat. and Bureau of the Census, Ann. Demographic Surv. (Mar. 2002), available at [http://ferret.bls.census.gov/macro/032002/pov/new01\\_001.htm](http://ferret.bls.census.gov/macro/032002/pov/new01_001.htm); see also Thomas J. Kane, *Racial and Ethnic Preferences in College Admissions*, 59 OHIO ST.

Proponents of racial preferences generally tolerate the failure of elite school programs to address the needs of students most disadvantaged by past and present racism.

The first element of the proposal offered here would remedy this shortcoming, using affirmative action to directly aid K-12 students in communities suffering most from past racism. Colleges and universities would designate a substantial number of places in their classes for applicants qualified and willing to commit to mentor and tutor such students. Within as little as two years, this proposal should improve disadvantaged students' chances of gaining entrance to colleges that they would have merited, but for racism's direct and indirect effects on them.

Another serious problem with per se racial preferences, which this proposal attempts to remedy, is the need to answer three intractable questions: (1) which racial/ethnic groups can receive the greatest preference (and which groups can be left out of that set); (2) which individuals qualify as members of such preferred groups; and (3) how large a preference can be awarded to the most preferred groups.

The second and third parts of the plan proposed here resolve this problem, and the one raised by Sander, by avoiding preferences based on race or ethnicity per se. Still, the proposal recognizes that mere passive color-blindness does not provide equal opportunity to disadvantaged minorities.<sup>11</sup> The substantial, documented current effects of past and present

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L.J. 971, 989-90, 992 (1998) (noting blacks and Hispanics would represent less than half of high-scoring lower income youths); Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. REV. 1, 39-45 (1997) (explaining that white lower income youths have more exposure to wealth and opportunity for advancement). *But see* Banks, *supra* note 9, at 1067-70 (contending that consideration of specific neighborhood and wealth would significantly increase the benefit to blacks); Kane, *supra*, at 990; Deborah C. Malamud, *Affirmative Action, Diversity, and the Black Middle Class*, 68 U. COLO. L. REV. 939, 957-58 (1997) (claiming that white families have more access to wealth than black families only within the same economic class).

<sup>11</sup> See *United States v. Fordice*, 505 U.S. 717, 729 (1992) (finding implementation of a purely colorblind admissions policy is not sufficient to avoid perpetuating past racial discrimination); 144 CONG. REC. S2699 (daily ed. Mar. 5, 1998) (statement of Sen. Robb) ("[W]hen it comes to providing economic opportunities to women and minorities, passivity equals inequality."); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100 (explaining that failure to use affirmative action may sometimes be unconstitutional).

racism,<sup>12</sup> as well as the great difficulty of eliminating its unconscious form,<sup>13</sup> and the resulting inequalities of schools and wealth are too great. As Justice Harry Blackmun's 1978 opinion in *Regents of the University of California v. Bakke* asserted: "In order to get beyond racism, we must first take account of race."<sup>14</sup> Still, under the proposal, an individual's race and ethnicity would only be considered for the purposes of providing context to a candidate's achievements and experiences, i.e., to confirm the significance of obstacles faced or uncommon backgrounds. Schools would credit candidates for overcoming special burdens or for personal histories that enabled them to broaden the horizons of their classmates, but not for their race or ethnicity per se.<sup>15</sup>

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<sup>12</sup> See ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999 (2002), available at [http://www.eo1.com/1999\\_NR/Title.pdf](http://www.eo1.com/1999_NR/Title.pdf); IAN AYRES, PERVASIVE PREJUDICE? UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION (2001); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004); Harry Holzer & David Neumark, *Assessing Affirmative Action*, 38 J. ECON. LITERATURE 483, 493–503 (2000) (stating that measures of economic success display severe inequalities in the American labor market between blacks and whites); Adam Fifield & Elise O'Shaughnessy, *Shopping While Black*, GOOD HOUSEKEEPING, Nov. 2001, at 129.

<sup>13</sup> See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 927–40 (1998); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 153–54 & n.162 (2003); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1491–525 (2005); Erica Goode, *With Video Games, Researchers Link Guns to Stereotypes*, N.Y. TIMES, Dec. 10, 2002, at F1; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the failure of equal protection to take account of unconscious racism); *infra* note 161.

<sup>14</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring); see also *Associated Gen. Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9, 16 (1st Cir. 1973); BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 120 (1973); Arval A. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*, *De Funis v. Odegaard*, 49 WASH. L. REV. 1, 20–24 (1973).

<sup>15</sup> See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 623 (1990) (O'Connor, J., dissenting) (advising that institutions could "simply favor applicants whose particular background indicates that they will add to the diversity of programming, rather than rely solely upon suspect classifications" of race and ethnicity); *cf. Bakke*, 438 U.S. at 324 (concurring opinion) ("Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it."). It is "race-blind," but not "race-indifferent," see GLENN C. LOURY, THE ANATOMY OF RACIAL INEQUALITY 133–37 (2002), and "weak colorblind," see T. Alexander

In practice, the last two parts of the proposal would probably operate much like the process approved in *Grutter*, with some creative, incremental improvements.<sup>16</sup> The racial neutrality of the approach, however, would enable schools to avoid both the previously mentioned three questions, and also the more-frequently-discussed drawbacks of per se racial preferences. The latter include the opposition to preferences based on skin color by the general public (white and black),<sup>17</sup> and by many

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Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1079 (1991).

<sup>16</sup> The second and third elements build on ideas suggested in *Grutter v. Bollinger*, 288 F.3d 732, 806–08 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003); James C. Blackburn, *Alternatives to Race Based Admissions for Achieving Diversity*, in *HOPWOOD, BAKKE, AND BEYOND* 117 (Daren L. Bakst ed., 1998); Lani Guinier, *Confirmative Action*, 25 LAW & SOC. INQUIRY 565, 581–82 (2000) (stating that “affirmative-action-type admission processes are far superior to generic test-based ones”); Daria Roithmayr, *Direct Measures: An Alternative Form of Affirmative Action*, 7 MICH. J. RACE & L. 1 (2001) (advocating a “direct measures” program that would grant admission based on the applicant’s personal experience with racism, contribution to classroom perspective, and desire to work with underserved community members).

<sup>17</sup> A 2001 Washington Post/Kaiser/Harvard racial attitudes survey found strong opposition to the use of race or ethnicity as a factor when deciding who is hired, promoted, or admitted to college from blacks (86%) as well as others. See *Washington Post/Kaiser/Harvard Racial Attitudes Survey*, Question 50, WASH. POST ONLINE, <http://www.washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm> (last accessed Sept. 20, 2002); see also PAUL M. SNIDERMAN & THOMAS PIAZZA, *BLACK PRIDE AND BLACK PREJUDICE* 143–54 (2002) (pointing out that more than 75% of blacks surveyed favored the selection of whites over slightly lower-scoring blacks); Seymour Martin Lipset & William Schneider, *The Bakke Case: How Would it be Decided at the Bar of Public Opinion*, PUB. OPINION, Mar.–Apr. 1978, at 38, 38 (surveying nearly 100 polls); Charlotte Steeh & Maria Krysan, *The Polls—Trends: Affirmative Action and the Public, 1970–1995*, 60 PUB. OPINION Q. 128, 135–37 (1996) (stating that black support for social assistance programs dropped by nearly 40% during the 1970s); David G. Savage, *Bush’s Opposition to Racial Preferences Gets Big Support*, L.A. TIMES, Feb. 6, 2003, at A16. There appears to be particular disapproval of racial preferences by well-educated whites. See Guinier, *supra* note 13, at 189 n.298. But see Louis Harris, *The Future of Affirmative Action*, in THE AFFIRMATIVE ACTION DEBATE, *supra* note 7, at 326, 326 (explaining that there is strong public support for equal opportunity); Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347, 355–58, 364–65 (2003) (observing strong support for racial preferences among many political and social leaders even before so many went on record in amicus briefs supporting the University of Michigan in 2003); *infra* note 24 (strong public support for equal opportunity). Also, the lack of overwhelming support for the California and Washington State referenda against racial preferences in higher education suggest that minorities may not have opposed them. See Cal. Sec. of State, 1996 General Election Returns for Ballot Propositions, <http://vote96.ss.ca.gov/Vote96/html/vote/prop/page.961218083528.html> (showing that Proposition 209 passed 54.6% to 45.4%); Wash. Sec. of State, Proposed Initiatives to the Legislature—1997, <http://www.secstate.wa.gov/elections/initiatives/legislature.aspx?y=1997> (reporting that Initiative 200 passed 58.22% to 41.78%).



longstanding, strong advocates of racial justice, who cringe at the government teaching that race matters.<sup>18</sup> In fact, opposition to preferences threatens the long-term political survival of effective affirmative action,<sup>19</sup> particularly in light of the recent appointments to the Supreme Court of two conservative justices who would likely have voted with the *Grutter* dissenters. In addition, using per se preferences for race encourages the public to question the level of qualifications of all minority members. This fosters stigmas that may damage the reputations of minority members who would be most qualified absent per se preferences, possibly unfairly diminishing their self-confidence.<sup>20</sup>

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[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate . . . the differential treatment of other human beings by race. Indeed, that is the great lesson for government itself to teach . . . Let that be our fundamental law and we shall have a Constitution universally worth expounding.

William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979); see also ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975); Virginia Black, *The Erosion of Legal Principles in the Creation of Legal Policies*, in *REVERSE DISCRIMINATION* 163 (Barry R. Gross ed., 1977); Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986). There is also the related problem that schools may be forced to lie about how they use race. See Sander, *supra* note 3, at 405–10.

<sup>19</sup> Two states have legislated against racial preferences. See CAL. CONST. art. I, § 31 (codifying Proposition 209); WASH. REV. CODE ANN. § 49.60.400 (West 2002) (codifying I-200). Washington's statute is interpreted in *Parents Involved in Community Schools v. Seattle School District, No. 1*, 72 P.3d 151, 153 (Wash. 2003). See *Court Revives Diversity Issue in Michigan*, N.Y. TIMES, June 14, 2004, at A11. There also appears to be significant public resentment to racial preferences. See CAROL M. SWAIN, *THE NEW WHITE NATIONALISM IN AMERICA: ITS CHALLENGE TO INTEGRATION* 148–55, 168, 221–39 (2002). On the other hand, in 1997, twenty-six states and the U.S. House and Senate had bills proposed to eliminate racial preferences, but they were not successful. See Dr. Ronald Walters, Address at the AACRAO Policy Summit (Oct. 6, 1997), in *HOPWOOD, BAKKE, AND BEYOND*, *supra* note 16; see also H.R. Amend. 612 to H.R. Res. 6, 105th Cong., 2d Sess. (1998) (reporting failure, by vote of 171-249, of proposal banning public colleges and universities that accept federal funding from using racial preferences in admission); NAT'L ASS'N FOR COLL. ADMISSION COUNSELING, *DIVERSITY AND COLLEGE ADMISSION IN 2003: A SURVEY REPORT* 32 (2003) [hereinafter NACAC REPORT]; Greg Winter, *Judge Rules Against Foes of Preferences Based on Race*, N.Y. TIMES, Mar. 27, 2004, at A9.

<sup>20</sup> Many prominent blacks state they have felt stigmatized. See, e.g., THOMAS SOWELL, *BLACK EDUCATION: MYTHS AND TRAGEDIES* 292 (1972) (claiming that quotas send the message that blacks "just don't have it"); Loury, *supra* note 7, at 53–56, 63–64 (stating that affirmative action results in feelings of doubt about black workers and students qualifications, black men and women questioning their achievements, and patronization of black workers and students). There is clear

The Article views affirmative action as a policy for eradicating all of the present effects of conscious and unconscious, direct and indirect, racial and ethnic discrimination on the incoming student selection process. The Article presumes that a fair process would produce a racially and ethnically diverse student body. Racial diversity would be a desirable byproduct of the process, but not the primary goal. Furthermore, if the position of elite schools is that "if genuinely race-neutral (and educationally appropriate) methods were available, colleges and universities would long ago have gladly embraced them"<sup>21</sup> in

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evidence that many whites believe that affirmative action beneficiaries are less qualified than others. See RICHARD D. KAHLENBERG, *THE REMEDY: CLASS, RACE AND AFFIRMATIVE ACTION* 65–71 (1996); Bell, Jr., *supra* note 8, at 18. Some Justices of the Supreme Court have complained about stigmas. See *Grutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., dissenting); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989); *De Funis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting). More detailed reviews of the current situation, however, indicate that a large portion of beneficiaries do not feel stigmatized, or feel that it is only short-term and can be alleviated with more information. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 197–200, 216, 243–52, 265 (1998) (reporting that most black graduates of selective colleges do not believe that they have been victimized by racial preferences); DENNIS DOVERSPIKE ET AL., *AFFIRMATIVE ACTION: A PSYCHOLOGICAL PERSPECTIVE* 127–42 (1999) (reviewing the literature); DAVID A. KRAVITZ ET AL., *SOC'Y FOR INDUST. & ORGANIZATIONAL PSYCHOLOGY, AFFIRMATIVE ACTION: A REVIEW OF PSYCHOLOGICAL AND BEHAVIORAL RESEARCH* 46–48, 52–53 (1996); Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 582–87 (2002); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1330–34 (1986); James Traub, *The Class of Prop. 209*, N.Y. TIMES, May 2, 1999, § 6 (Magazine), at 44 (sampling students at Berkeley). Still, others believe that racial stigmas are endemic. See LOURY, *ANATOMY*, *supra* note 15, at 133–37. White perceptions may also be alleviated by additional data. See DOVERSPIKE, *supra*.

<sup>21</sup> William G. Bowen & Neil L. Rudenstine, *Race-Sensitive Admissions: Back to Basics*, CHRON. HIGHER EDUC., Feb. 7, 2003 at B7, available at <http://chronicle.com/free/v49/i22/22b00701.htm> (the authors are former presidents of Princeton and Harvard Universities); see also *Wessmann v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998) (discussing how the school board's expert's report found that "unless race and ethnicity were explicitly factored into the admissions calculus, attainment of racial and ethnic diversity might be jeopardized"); Lee Bollinger, *Seven Myths About Affirmative Action in Universities*, 38 WILLAMETTE L. REV. 535, 544–45 (2002) (responding to myth six: that race-neutral alternatives can be effective); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1806–40 (2004) (discussing the myth of race-neutral approaches); Roland G. Fryer, Jr. et al., *Color-Blind Affirmative Action* (Nat'l Bureau of Econ. Research, Working Paper No. 10103, 2003) (finding that the short-run efficiency losses of implementing race-neutral

place of the racial preferences they now use,<sup>22</sup> then this approach deserves serious consideration.<sup>23</sup> The three aspects of the Article's proposal are presented in detail in sections I, III, and IV.

Section I describes the mentoring and tutoring program in more detail. It explains that, to be eligible, candidates would have to demonstrate their ability to serve a specific community and commit to the terms of service designated by the selector. If these requirements were relatively light, for example, only a few hours each week, schools might even consider setting aside most or almost all of their openings for this program.

Section III discusses how candidates' true capacities can be measured by considering their applications in the context of any special obstacles they have overcome that may have obscured their true potential, including handicaps of various sizes due to race or ethnicity. Such unbiased evaluations of candidates enjoy wide public support,<sup>24</sup> and are similar to the admissions process used at most elite schools. This Article also discusses some ideas for improving that process and some practical mechanisms that larger schools (e.g., state schools with smaller budgets for admissions (on a per applicant basis)) could use to achieve

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affirmative action in one sample are four to five times as high as using color-conscious affirmative action).

<sup>22</sup> All selective schools appear to have long used racial preferences. See SUSAN WELCH & JOHN GRUHL, *AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOL* 74-75 (1998) (finding that the vast majority of law and medical school admissions offices did not significantly alter their preferences after the *Bakke* case); Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343, 345 (1974) (stating that a majority of law schools use some form of preferential admissions); Lee Bollinger & Nancy Cantor, *The Educational Importance of Race*, WASH. POST, Apr. 28, 1998, at A17 ("Virtually all institutions with selective admissions consider race when they choose among applicants."). Furthermore, most, including Harvard College, may be using quasi-quotas. See *infra* note 107 and accompanying text. The use of racial preferences, however, appears to be limited to only the minority of schools that are selective. See NACAC REPORT, *supra* note 19, at 9 (noting that only 33% of colleges and universities consider race or ethnicity as a factor in the admissions decision).

<sup>23</sup> After all, in reaching the result in *Grutter* the Court stated: "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003). *Grutter* might even be read to require consideration of approaches like this. *Id.* at 339.

<sup>24</sup> Polls show that a large majority of the public supports "affirmative action" defined as ensuring "equal opportunity." See Harris, *supra* note 17, at 326, 328. On the other hand, most oppose racial preferences, i.e., "preferential treatment." *Id.* at 328-29; *supra* note 17.

reasonably comparable results.

Section IV discusses how preferences should be granted to candidates who are able to add diversity of perspectives or experiences to a campus, but criticizes efforts focused primarily on admitting all “minimally qualified” applicants in any specific racial or ethnic group. Again, schools with sufficient resources have long been able to individually review applicants’ records in the manner now virtually mandated by *Grutter*; but, this Article suggests some economically practical ways that *all* schools might undertake holistic evaluations of *all* applicants, consistent with *Gratz v. Bollinger’s* rejection of mechanical formulas.<sup>25</sup> This section also advocates preferences for those with the ability to increase diversity indirectly by fostering supportive environments that will encourage admitted minority candidates to actually enroll.

Section II explains the enormous difficulties raised by the need to answer the three questions triggered by per se racial preferences, and why such preferences may not be as critical to effective affirmative action as many think. Section V responds to the charge that race-neutral mechanisms are inefficient tools for achieving the goal of racial diversity.

This Article does not pretend that this three-element approach would provide full equal opportunity. The costs of solving the nation’s racial problems, including massive investments in better schools, housing, and other social services<sup>26</sup> (which might only just begin to approach truly equal opportunity), appear to be prohibitive.<sup>27</sup> In fact, even less expensive, class-based preference systems,<sup>28</sup> which would require major funding for scholarships and remedial aid for lower-income students, have gained only limited political traction.<sup>29</sup> Sadly,

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<sup>25</sup> 539 U.S. 244, 271–74 (2003).

<sup>26</sup> See *infra* notes 33–36 and accompanying text (discussing reforms of public schools); see also Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997) (theorizing that large financial contributions to urban public schools would be more effective than current affirmative action programs).

<sup>27</sup> See BETTS & ROEMER, *supra* note 10, at 2, 25–29; JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* (1998) (using economic analysis to note costs to efficiency); David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, 34 WM. & MARY L. REV. 171 (1992). Providing truly equal opportunity is almost inherently impossible because successful parents seek to give their children educational advantages.

<sup>28</sup> See *supra* note 9 and accompanying text.

<sup>29</sup> But see Scott Jaschik, *Now, the Poor Don’t Need to Mortgage Their Future*,

additional changes seem unlikely as education budgets are cut<sup>30</sup> and demand grows for merit scholarships.<sup>31</sup> This approach would, admittedly, in the short run, yield lower numbers of minority students on campus, but it would target the benefits of affirmative action more fairly and utilize a framework unlikely to be upset by the more conservative Supreme Court, which now serves.

### I. EARLIER INTERVENTION TO AID THOSE MOST HARMED BY PAST RACIAL DISCRIMINATION

Affirmative action programs generally neglect the most disadvantaged students. Elite schools have found that by the time students in the worst high schools are seniors, most have fallen too far behind to perform at a level comparable to other enrolled students.<sup>32</sup> Ideally, states would improve their entire

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N.Y. TIMES, Aug. 1, 2004, § 4A, at 8; Greg Winter, *Yale Cuts Expenses for Needy in a Move to Beat Competitors*, N.Y. TIMES, Mar. 4, 2005, at B5; MARTA TIENDA & KIM LLOYD, TEX. HIGHER EDUC. OPPORTUNITY PROJECT, UT'S LONGHORN OPPORTUNITY SCHOLARS (LOS) AND A&M'S CENTURY SCHOLARS PROGRAMS (n.d.), <http://www.texastop10.princeton.edu/stats/los-cs.pdf>. Although race-based scholarships are suspect, they can be modified. See Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006, at A1; Daniel Golden, *Not Black and White: Colleges Cut Back Minority Programs After Court Rulings*, WALL ST. J., Dec. 30, 2003, at A1; GARY R. HANSON & LAWRENCE BURT, RESPONDING TO HOPWOOD: USING POLICY ANALYSIS RESEARCH TO RE-DESIGN SCHOLARSHIP CRITERIA (n.d.), <http://www.utexas.edu/student/research/reports/Hopwood/Hopwood.html>.

<sup>30</sup> Timothy Egan, *States, Facing Budget Shortfalls, Cut the Major and the Mundane*, N.Y. TIMES, Apr. 21, 2003, at A1; Jane Bryant Quinn, *Colleges' New Tuition Crisis*, NEWSWEEK, Feb. 2, 2004, at 49.

<sup>31</sup> See Susan Dynarski, *The New Merit Aid*, in COLLEGE CHOICES: THE ECONOMICS OF WHERE TO GO, WHEN TO GO, AND HOW TO PAY FOR IT 63–100 (Caroline M. Hoxby ed., 2004); Alan Finder, *Aid Lets Smaller Colleges Ask, Why Pay for Ivy League Retail*, N.Y. TIMES, Jan. 1, 2006, §1, at 1; Kate Zernike, *What a Deal!*, N.Y. TIMES, Nov. 9, 2003, § 4A, at 23; U.S. COMM'N ON CIVIL RIGHTS, BEYOND PERCENTAGE PLANS: THE CHALLENGE OF EQUAL OPPORTUNITY IN HIGHER EDUCATION 109–11 (2002) (draft staff report), <http://www.umich.edu/~urel/admissions/research/beyondpercentplns.pdf> [hereinafter USCCR]; Robert B. Reich, *How Selective Colleges Heighten Inequality*, AM. PROSPECT ONLINE, Sept. 15, 2000, <http://www.prospect.org/webfeatures/2000/09/reich-r-09-15.html>.

<sup>32</sup> See CLIFFORD ADELMAN, PRINCIPAL INDICATORS OF STUDENT ACADEMIC HISTORIES IN POSTSECONDARY EDUCATION 1972–2000, at 34 (2004), available at <http://www.ed.gov/rschstat/research/pubs/prinindicat/prinindicat.pdf> (finding of 1992 high school graduates who started postsecondary education, only 15.7% of those in the lowest quintile gained a bachelor's degree compared to 71.6% of those in the highest quintile); RON SUSKIND, A HOPE IN THE UNSEEN: AN AMERICAN ODYSSEY FROM THE INNER CITY TO THE IVY LEAGUE 91, 242, 336 (1999); Lino A. Graglia,

educational systems, freeing affirmative action programs from the difficulty of compensating for such unpreparedness.<sup>33</sup> Society, however, appears either unwilling or unable to muster the necessary political pressure and funding to remedy the excess inequality in state education.<sup>34</sup> Federal government programs, like Head Start and the TRIO programs, appear to help,<sup>35</sup> but truly effective early intervention is expensive.

Many creative programs, several supported by colleges and universities, are attempting to serve this need.<sup>36</sup> For example,

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*Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 357–61 (1970) (discussing the evolution of a double standard of grading for "special admission" students); Robert M. O'Neil, *Perferential [sic] Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 762–64 (1971); Terrance Sandalow, *Minority Preferences Reconsidered*, 97 MICH. L. REV. 1874, 1902–08 (1998); Sander, *supra* note 3, at 379–80. *But see* Carnevale & Rose, *supra* note 9, at 135–38 (contending that many disadvantaged students being overlooked by selective colleges are well-qualified to attend those schools).

<sup>33</sup> See JONATHAN KOZOL, *SAVAGE INEQUALITIES* (1991); Charles R. Lawrence III, Essay, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 942–58 (2001) (arguing that California's failure to improve its educational system is racially discriminatory and can only be remedied through the implementation of antistatutory theories); Nick Madigan, *California Will Spend More to Help Its Poorest Schools*, N.Y. TIMES, Aug. 13, 2004, at A12 (discussing the settlement of a class-action lawsuit which alleged that thousands of students in poor neighborhoods had been denied equality of education).

<sup>34</sup> See Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 83–84 (2002); Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained?*, 63 ALB. L. REV. 1147, 1180–82 (2000) (listing state court challenges to funding).

<sup>35</sup> See, e.g., 34 C.F.R. § 645 (2004) (setting forth the regulations of the Upward Bound Program); USCCR, *supra* note 31, at 90–99 (describing the success of the various TRIO programs); EDWARD ZIGLER & SUSAN MUENCHOW, *HEAD START: THE INSIDE STORY OF AMERICA'S MOST SUCCESSFUL EDUCATIONAL EXPERIMENT* (1992).

<sup>36</sup> See, e.g., Robert Pallitto & Shelli Soto, *Affirmative Action Revived: What is the Future for Law Schools?*, 10 TEX. HISP. J.L. & POL'Y 29, 35–36 (2004) (discussing the Law School Preparation Institute); Katie Zezima, *Hard Work Opens College Door for Whole Class*, N.Y. TIMES, June 4, 2003, at B8 (praising the innovative partnership between Clark University and an urban high school in Massachusetts); see also SUSKIND, *supra* note 32, at 77–100 (outlining the success of MIT's Minority Introduction to Engineering and Science—"MIT MITES"—program); USCCR, *supra* note 31, at 26–27, 80–81 (discussing programs such as "Early Outreach" and "Young Black Scholars"); U.S. DEPT' OF EDUC., *RACE-NEUTRAL ALTERNATIVES IN POSTSECONDARY EDUCATION: INNOVATIVE APPROACHES TO DIVERSITY 10–23* (2003), available at <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html> (outlining alternatives to traditional diversity programs); Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 515–17 (2001) (discussing the "Posse Program"); College Summit, <http://www.collegesummit.org> (last visited Oct. 18, 2005) (presenting a creative community-based organization that increases college enrollment of low-income

the programs established by California, Florida, and Texas admitting the top "X-percent" of each high school class, encourage state colleges to improve local K-12 programs.<sup>37</sup> And some private schools have taken comparable laudable actions. For example, in 1997, Clark University successfully created the University Park Campus [High] School in the disadvantaged school district across the street from its campus.<sup>38</sup> Columbia University fills half of the seats in its exceptional elementary school for faculty children with interested students from Harlem and nearby neighborhoods.<sup>39</sup> Many elite schools also recognize the need to provide remedial aid to their least-prepared students.<sup>40</sup>

This Article challenges colleges and universities to take the next step. Rather than limiting affirmative action to admitting better-prepared, less-disadvantaged minority applicants, schools should seek to do more to directly aid the students most disadvantaged by racial discrimination. They should use affirmative action to offer these students mentoring and tutoring during their K-12 years so that more of them will be prepared to attend better colleges and universities.

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students); National Academy Foundation, <http://www.naf.org> (last visited Oct. 18, 2005) (showing a foundation dedicated to developing "career-themed" academics through business and public school partnerships). *But see* Daniel Golden, *Brain Drain: Initiative to Leave No Child Behind Leaves Out Gifted; Educators Divert Resources From Classes for Smartest to Focus on Basic Literacy; Blow to Bright Minority Kids*, WALL ST. J., Dec. 29, 2003, at A1.

<sup>37</sup> See discussion *infra* note 210 and accompanying text. For effect of "X-percent" programs on state secondary schools, see USCCR, *supra* note 31, at 28–29, 55–56 (describing California and Florida college partnerships with disadvantaged state high schools, middle schools, and elementary schools); Lawrence, *supra* note 33, at 973 n.148 (describing partnering programs in California and Texas, and offering other ideas that address the root causes of discrimination); Traub, *supra* note 20, at 973 & n.148 (discussing efforts of the University of California to partner with local public schools). Improvements in this vein were predicted by David Orentlicher, *Essay, Affirmative Action and Texas' Ten Percent Solution: Improving Diversity and Quality*, 74 NOTRE DAME L. REV. 181 (1998). See Karen W. Arenson, *Turn Around, and You're in College; A Dozen High Schools Thrive on CUNY Campuses*, N.Y. TIMES, Mar. 24, 2003, at D1.

<sup>38</sup> Elizabeth Mehren, *University's 'Leap of Faith' Becomes Lesson in Community*, L.A. TIMES, Mar. 16, 2003, Part 1, at 1.

<sup>39</sup> Karen W. Arenson, *What Would Teachers Do If They Had the Chance? This*, N.Y. TIMES, Sept. 17, 2003, at B1 (discussing the school's lottery program which ensures that half of the student body be comprised of local neighborhood students).

<sup>40</sup> See *infra* notes 188–89 and accompanying text.

### A. College & University Traditions of Serving Communities

All colleges in early nineteenth-century America were committed to serving the needs of society first. "When college presidents thought of their students they were reminded not of society's obligation to young men but of the obligation of young men to society."<sup>41</sup> Today, this duty to serve is recognized not only in the mission statements of most American public universities,<sup>42</sup> but also in many elite private institutions.<sup>43</sup> In fact, Woodrow Wilson coined the phrase, "Princeton in the Nation's Service,"<sup>44</sup> and Harvard University President James Bryant Conant's dream was to create elite scholars who would be socially committed, even selfless, willing to devote their lives to public service.<sup>45</sup> And the goals of these mission statements are carried out in practice. Many students volunteer to tutor, mentor, or work in homeless shelters.<sup>46</sup> Often, professional school students work in faculty-supervised legal or medical clinics, learning while also providing free community services. Furthermore, an increasing number of high schools impose community service graduation requirements.<sup>47</sup> Maryland already has a statewide prerequisite,<sup>48</sup> and Illinois and New Jersey are among other

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<sup>41</sup> FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 59 (1962).

<sup>42</sup> See NACAC REPORT, *supra* note 19, at 1–6 (providing statistical analysis of nationwide university diversity statements); Guinier, *supra* note 13, at 125–27 (recognizing that institutions of higher learning play a role in creating a public service-oriented citizenry).

<sup>43</sup> Guinier, *supra* note 13, at 126 n.55.

<sup>44</sup> See Woodrow Wilson, *Princeton in the Nation's Service*, Address at Princeton's Sesquicentennial Celebration (Oct. 1896), in *AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY* 684–95 (Richard Hofstadter & Wilson Smith eds., 1961).

<sup>45</sup> See DAVID BROOKS, *BOBOS IN PARADISE: THE NEW UPPER CLASS AND HOW THEY GOT THERE* 26 (2000); NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 5–8, 49–50 (1999).

<sup>46</sup> The willingness of top students to help improve the conditions of disadvantaged K-12 students is clear from the success of the Teach for America program. See Tamar Lewin, *Options Open, Top Graduates Line Up to Teach to the Poor*, N.Y. TIMES, Oct. 2, 2005, §1, at 1.

<sup>47</sup> See Mari Zimmerman, *Making the Grade by Volunteering: Schools Add Community Service into the Mix of Graduation Requirements*, MILWAUKEE J. & SENTINEL, Dec. 15, 2003, at E4 ("[A] new trend in the world of education is sweeping the country: a community service graduation requirement.").

<sup>48</sup> See Rebecca R. Kahlenberg, *Life Lessons That Last; Maryland Students Make the Most of Volunteering Mandate*, WASH. POST, June 3, 2003, at C9 (noting that Maryland requires students to perform seventy-five hours total of volunteer work during middle and high school).



states considering imposing a similar requirement.<sup>49</sup> Some college scholarships are also awarded based on community service.<sup>50</sup>

### *B. Mentoring & Tutoring K-12 Students in Disadvantaged Minority Communities*

Under the mentoring and tutoring component of this affirmative action proposal, schools would designate a substantial number of spots specifically for candidates who commit to mentor and tutor K-12 students in communities most disadvantaged by past racism. Although surveys find that minority members are more prone to serve underprivileged minority communities,<sup>51</sup> it is unreasonable to rely on them to do so.<sup>52</sup>

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<sup>49</sup> See Alexa Aguilar, *Proposal Requiring Community Service Gets Mixed Reviews*, ST. LOUIS POST-DISPATCH (Cherry Hill, N.J.), Jan. 19, 2004, at A1 (noting Illinois governor's proposal to make forty hours of community service required for high school graduation and discussing ramifications of such a plan); Editorial, *Student Volunteer Plan Well Worth Considering*, COURIER-POST, Apr. 19, 2004, at 8G (endorsing proposal requiring New Jersey high school students to complete fifteen hours of volunteer service to graduate).

<sup>50</sup> See Sam Dillon, *Alabama Scholarships for Service, Not Just Grades*, N.Y. TIMES, Jan. 12, 2005, at B7 (describing ten million dollar scholarship program aimed at students with "a record of service to family and community").

<sup>51</sup> See David L. Chambers et al., *Doing Well and Doing Good: The Careers of Minority and White Graduates of the University of Michigan Law School, 1970-1996*, LAW QUADRANGLE NOTES, Summer 1999, at 60, 69; Kenneth DeVille, *Defending Diversity: Affirmative Action and Medical Education*, 89 AM. J. PUB. HEALTH 1256, 1258 (1999) (citing empirical evidence that African American and Hispanic physicians "cared for a larger percentage of minority patients than did their White counterparts and that they were more likely to practice in communities with insufficient numbers of primary care practitioners and to care for Medicaid patients and uninsured patients"); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 439-40 (2000) (examining tendency of Michigan minority alumni to "disproportionately serve persons of their own race or ethnicity" in their professional careers); Timothy Ready, *The Impact of Affirmative Action on Medical Education and the National Health*, in DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 205, 212-14 (Gary Orfield ed., 2001) [hereinafter DIVERSITY CHALLENGED] (reviewing multiple studies). *But see* DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 53-54 (1991) (arguing that minorities are less apt to enter public service due to lesser wealth).

<sup>52</sup> Cf. Harry T. Edwards, *New Role for the Black Law Graduate—A Reality or an Illusion?*, 69 MICH. L. REV. 1407, 1421 (1971) ("[T]here is a popularized notion that the greatest volume of demand for Black lawyers is among the poor community . . . [however,] placement after successful study must be opened to Black students according to their area of legal interest and to the community's area of legal need."); Redish, *supra* note 22, at 391 & n.203 ("There is no reason to assume that most or

## 1. Selecting Communities to Serve

Schools would select geographically-defined communities whose disadvantaged condition was due, at least in part, to past racial discrimination. Each school's governing board would make the selections, although recommendations could also be sought from other sources, including alumni and faculty. Choosing communities in terms of geographic boundaries—whether by school district, congressional district, or city limits—and actual history, rather than skin color, should not offend even the *Grutter* dissenters' concern for the equal protection rights of individuals.<sup>53</sup> Even if most communities selected were almost wholly black, equally poor non-minority communities would not be rejected due to their skin color, but rather because their condition was not aggravated by illegal and immoral racism. As Lyndon Johnson's 1965 commencement speech recognized: "Negro poverty is not white poverty. . . . [T]here are differences—deep, corrosive, obstinate differences. . . . [And t]hese differences are not racial differences. They are solely and simply the consequence of ancient brutality, past injustice, and present prejudice."<sup>54</sup> Moreover, the Supreme Court has already held that race can be considered in fashioning voting district boundaries, provided that it is not the predominant factor.<sup>55</sup>

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even many of the new black law school graduates will choose to assist the poverty stricken members of their race. . . . It may well be, however, that black attorneys working for powerful corporate firms will constitute a valuable asset to blacks.").

<sup>53</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 392–93 (2003) (Kennedy, J., dissenting) ("To be constitutional, a university's compelling interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process.").

<sup>54</sup> Lyndon B. Johnson, To Fulfill These Rights, Commencement Address at Howard University (June 4, 1965), in *THE AFFIRMATIVE ACTION DEBATE*, *supra* note 7, at 16, 20.

<sup>55</sup> See *Easley v. Cromartie* 532 U.S. 234, 241 (2001) (citations omitted) ("Race must not simply have been 'a motivation for the drawing of a majority-minority district,' but 'the 'predominant factor' motivating the legislature's districting decision.") (citations omitted); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("A State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests."); *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[R]edistricting differs from other kinds of state decisionmaking in that the legislature always is *aware* of race when it draws district lines, just as it is aware of age . . . and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination."); see also Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1581 (2002) ("Is it that 'racial classification' is a term of art, so that the government can

Here also, benefits would not be limited to those of a specific race or ethnic group;<sup>56</sup> any individual seeking to share in the benefits provided to select communities would be free to relocate to those disadvantaged areas.

## 2. Selecting Applicants

Schools would designate a specific number of class seats for the most qualified applicants of all races and ethnicities most eager and best qualified to serve disadvantaged communities. To preserve high standards, though, the number of spots would shrink if there were not enough highly qualified applicants. If the required commitment was only a few hours per week, schools might allocate half (or more) of the seats in their class for the program. Some might even make participation a prerequisite for graduation, following the example of others that impose volunteer work requirements.<sup>57</sup> To the extent that time requirements were greater, or could be met during the summer, however, schools might limit the available spaces, as greater financial aid might be necessary since students would have less time available for summer or part-time jobs.

Any stigmas that student participants faced would be no more harmful than those that applied to varsity athletes, oboe players, or others preferred for meeting a particular school "need." Moreover, participants would not be easily identifiable (e.g., by skin color) to those who did not know them. Finally, those admitted this way would, arguably, deserve their acceptance (based on exceptional efforts) more rather than those admitted merely due to their natural talents.

### *a. Committing to Serve*

All those applying for the program would be required to make a binding commitment to provide the designated mentoring and tutoring,<sup>58</sup> although if they were assigned to a student in a

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use race as long as that use does not rise to the level of being the preeminent factor? The Court's . . . cases suggest the answer is 'yes' . . .").

<sup>56</sup> This approach is distinguishable from Randall Robinson's proposal for scholarships earmarked for blacks. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 244-45 (2000) (supporting proposal to create private trust exclusively for benefit of black Americans).

<sup>57</sup> See *supra* notes 48-49 and accompanying text.

<sup>58</sup> Cf. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 310-11 (1978) (referencing medical school program that favored minority admissions candidates

geographically distant community they might conduct much of their communication by phone and email. Given the high level of Internet access in even the poorest schools, this should be affordable everywhere.<sup>59</sup> Schools could enforce these commitments by expelling those students who failed to provide the promised services.

*b. Demonstrating an Ability to Relate*

Those who had grown-up in a given neighborhood would be presumed capable of relating to its inhabitants, but those who shared the same race or ethnicity, yet came from a different economic or cultural background, would need to offer evidence of their capacity to establish a significant relationship with the designated population.<sup>60</sup> Applicants would not need to possess the same racial, ethnic, religious, or economic identity as the students served, even if that was the mentored students' preference.<sup>61</sup> Nevertheless, candidates would need to

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expressing an interest in practicing in disadvantaged communities: "The University concedes it cannot assure that [those minority doctors] will actually do so. . . . [T]here are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race." (quoting *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152, 1167 (Cal. 1976)); Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 589-90 (1975) ("Racial identity is, at most, one small aspect of effective [legal] representation. A more talented white lawyer will usually represent blacks better than a less talented black one. . . .").

<sup>59</sup> See NAT'L CTR. FOR EDUC. STATISTICS, INTERNET ACCESS IN U.S. PUBLIC SCHOOLS AND CLASSROOMS: 1994-2003, at 4 (2005), available at <http://nces.ed.gov/pubs2005/2005015.pdf> (finding that in 2003, roughly one hundred percent of public schools in U.S. had Internet access).

<sup>60</sup> Cf. Sandalow, *supra* note 7, at 687-88 (noting favorable qualities often possessed by lawyers that share client's racial or ethnic identity). Sometimes, lower income individuals may be more comfortable with those in their same class than those of their same race. See SUSKIND, *supra* note 32, at 199-200, 205-06, 245-49, 277-80, 304-06 (positing that some minority students may function best with other non-minority peers); O'Neil, *supra* note 32, at 739 (observing black students' preference for white classmates from "hard-hat homes").

<sup>61</sup> That is, selectors would not be able to treat these as bona fide occupational qualifications ("BFOQs"). Cf. 29 C.F.R. § 1604.2(a)(1)(iii) (2005) ("The refusal to hire an individual because of the preferences of . . . clients or customers" does not warrant application of BFOQ exception.); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Platner v. Cash & Thomas Contractors, Inc.*, 908 F.2d 902, 905 n.5 (11th Cir. 1990) ("An employer may not illegally discriminate simply because some third party urges or pressures him to do so."); *KAHLENBERG*, *supra* note 20, at 59-61 ("[W]hen racial preferences are justified by reason of social utility rather than as compensation for past wrongs, there is nothing to stop white people

demonstrate an ability to understand and empathize with the K-12 students, to make it likely that they could provide effective service.<sup>62</sup> Such an assessment could be based on previous, successful volunteer work in similar communities.

One might also expect this program to attract a

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from plausibly making the same arguments.”); Samuel Issacharoff, *Law and Misdirection in the Debate Over Affirmative Action*, 2002 U. CHI. LEGAL F. 11, 37–38 (“Suppose, per hypothesis, that students . . . learned more effectively in homogeneous environments . . . [Could] such reasoning . . . justify the use of racial classifications to reinforce segregation? . . . [T]he expected half-life of such an argument should be very short indeed.”); George Sher, *Diversity*, 28 PHIL. & PUB. AFF. 85, 88 (1999) (“[A]nyone who defends preferential treatment on the grounds that it maximizes utility, yet insists that mere utility can never justify outright racial or sexual discrimination, is committed to the view that blacks and women differ from white males in some morally important dimension.”). In fact, while the Civil Rights Act of 1964 recognized that BFOQs might override some prohibitions against discrimination based on religion, sex, and national origin, there is no exception for race. See 42 U.S.C. § 2000e-2(e) (2000); Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 475–77 (2001) (“Notably, the only three grounds for a BFOQ defense are sex, religion, and national origin, not race or color.”). *But see* Reynolds v. City of Chi., 296 F.3d 524, 528, 530–31 (7th Cir. 2002) (finding that promotion preference for black, Hispanic, and female police officers is not violative of equal protection); Wittmer v. Peters, 87 F.3d 916, 921 (7th Cir. 1996) (upholding as constitutional race preference for black applicant to lieutenant position in county boot camp).

<sup>62</sup> Cf. Banks, *supra* note 13, 890 (suggesting that capacity to empathize and understand indeed extends to interracial relationships as evidenced by studies of transracial adoptions and their effects on participants); Luz E. Herrera, *Challenging a Tradition of Exclusion: The History of an Unheard Story at Harvard Law School*, 5 HARV. LATINO L. REV. 51, 111–15 (2002) (examining role model theory in context of Latino professors and students); Ian Haney López, *Community Ties and Law School Faculty Hiring: The Case for Professors Who Don't Think White*, in BEYOND A DREAM DEFERRED: MULTICULTURAL EDUCATION AND THE POLITICS OF EXCELLENCE 100, 112–13 (Becky W. Thompson & Sangeeta Tyagi eds., 1993) (asserting that impact of minority scholars under role model theory “depends to a large degree on the extent to which they have retained ties to their community of origin” and that superficial ties are insufficient). Thus, when Thurgood Marshall joined the D.C. Circuit Court he recommended the white Jack Greenberg to replace him as a top leader of the NAACP. See KAHLLENBERG, *supra* note 20, at 62–63 (discussing controversy surrounding Greenberg); see also Nick Madigan & Charlie LeDuff, *Naming of New Police Chief Raises Minorities' Hopes*, N.Y. TIMES, Oct. 4, 2002, at A25 (discussing impact of nomination of white replacement of current black LA police chief). Meanwhile, white voters in several majority-white cities have elected black mayors. See Richard H. Pildes, *The Politics of Race*, 108 HARV. L. REV. 1359, 1366 & n.41 (1995) (listing cities). Equating the race of a community and the race of its leader can be disastrous for all. See Schuck, *supra* note 34, at 65–66 (“[S]tudies show[ ] that the majority-minority districts benefit the few black politicians who occupy or aspire to the safe seats they yield, but not their black constituents who would be better represented substantively by representatives, white or black, in districts where black voters constitute a significant minority.”).

disproportionate quantity of minority applicants, given the greater likelihood that they would have ties to those participating communities and be less apt to feel like outsiders.<sup>63</sup> Thus, this would likely serve to increase the racial and ethnic diversity. Still, a review of the racial and ethnic composition of Peace Corps volunteers suggests that this result is not a certainty.<sup>64</sup>

### C. Additional Consequences

In addition to the immediate positive impact of academic tutoring upon disadvantaged K-12 students, many of the relationships born through the program would, hopefully, extend beyond the limited commitments made. Having invested significant time and effort, mentors would likely want to help their students enter good colleges and continue to succeed. The resulting lifelines could dramatically improve social capital, the lack of which often handicaps disadvantaged persons throughout their lives. Such relationships might even develop into close friendships, benefiting both parties. Schools could also foster such relationships by establishing loan-forgiveness programs for graduates who continued to devote themselves to tutoring or mentoring beyond graduation.

The program would strengthen incentives for well-prepared high school students—eager to improve their chances for acceptance to elite colleges—to volunteer in hospitals, “big brother or sister” programs, or the Americorps.

This, and the preference for indirectly aiding diversity (discussed in Part IV.B., *infra*), would encourage more pre-college, inter-cultural activity, such as “Seeds of Peace,” a program that unites teenagers from conflicting nations in order to inculcate peace-making skills.<sup>65</sup> These two changes could also

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<sup>63</sup> See *supra* note 51.

<sup>64</sup> Peace Corps statistics show that minorities comprised only about fifteen percent of volunteers in recent years. See Peace Corps: Facts and Figures, <http://www.peacecorps.gov/index.cfm?shell=learn.whovol.peopleofcolor.factsandfigs> (last visited Oct. 20, 2005).

<sup>65</sup> See Ira Berkow, *Camp Tries Teamwork to Ease Tension in Middle East*, N.Y. TIMES, Aug. 1, 2002, at D4 (reporting about sleepaway camp where Israelis and Palestinians, among others, comprise the campers); *Nightline: Seeds of Peace, Broken Bridges* (ABC television broadcast May 18, 2001) (transcript available on Lexis-Nexis); *Seeds of Peace: Empowering Leaders of the Next Generation*, <http://www.seedsofpeace.org> (last visited Oct. 20, 2005). Ideally, this would lead

help stimulate the integration of neighborhoods.<sup>66</sup> Meanwhile, the Internet provides an exciting, low-cost opportunity for students to nurture relationships with those of different backgrounds by way of Internet "pen pals" or "I-pals."<sup>67</sup> These activities should be more attractive than expensive test prep courses, especially if both are equally helpful to students' quest for elite college admission.<sup>68</sup>

## II. THE PROBLEMS CREATED BY USING PER SE RACIAL AND ETHNIC PREFERENCES

The *Grutter* decision could have held that racial consciousness was only acceptable if race was only used to provide context to help admissions offices identify any and all applicants who would add diversity to a campus in terms of their specific background and experiences.<sup>69</sup> The Court, however, held that selectors could grant a greater preference to applicants who were members of one of the racial and ethnic groups identified by the school for special treatment than to those who could provide

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more secondary schools to adopt sister schools abroad. *But see* Lawrence, *supra* note 33, at 971 & n.142 (proposing that universities give preference to students that were racially isolated in high school).

<sup>66</sup> Magnet schools generally have not exerted a sufficiently strong pull to reverse white flight, *see* GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 262 (1996), but the additional advantage this would provide in terms of college admissions could strengthen that pull. *See* Lawrence, *supra* note 33, at 971 & n.142 (arguing that giving preference to students that experienced racial isolation would create incentive for "parents to choose schools where their children are not in the majority and thus further the goal of school integration"); Orentlicher, *supra* note 37, at 187-91 (positing that deconcentrating school quality encourages the wealthy to "spread their wealth and political influence over a wider range of schools").

<sup>67</sup> Building on the pen-pal model, schools could encourage students to develop Internet relationships with those in communities very different from their own. *See* Press Release, White House, *Friendship Through Education Fact Sheet* (Oct. 25, 2001), available at <http://www.whitehouse.gov/news/releases/2001/10/print/20011025.html> (describing encouragement of email contacts between U.S. students and Muslim peers abroad); *see also* Sarah Milstein, *Volunteers Are Virtual, but Connections Are Real*, N.Y. TIMES, Dec. 5, 2002, at G7 (highlighting emerging "virtual volunteering" trend). Students that develop these types of contacts into useful projects or organizations are already recognized by admissions offices, but parents and schools likely would devote more resources to them if selectors granted special credit for such activities.

<sup>68</sup> Socially conscious parents should particularly encourage such arrangements. *See, e.g.*, Richard Kaye, *My Ghetto Days*, N.Y. TIMES, Feb. 27, 2005, § 6 (Magazine), at 116 (describing author's regular sleepovers in minority household).

<sup>69</sup> *See supra* note 15.

other types of diversity,<sup>70</sup> i.e., racial preferences. Although such per se racial preferences are constitutional under *Grutter*, there is good reason to believe that they do not represent good policy. Three of the many shortcomings of per se racial preferences have already been noted above: lack of public support for a government-tolerated policy that race matters, the harm of stigmas, and the effect of being less qualified on students' performance.<sup>71</sup> Section A, below, reviews three terribly problematic questions triggered by per se racial preferences, and section B contends that the benefits of using such preferences instead of the alternative racially conscious mechanisms proposed in this Article do not appear to justify their high cost.

### A. *Three Intractable Questions Triggered by Per Se Racial and Ethnic Preferences*

Possibly the biggest problem with per se racial preferences is that they may require public officials to grapple with three sets of uncomfortable, if not intractable, questions:<sup>72</sup> 1) which racial/ethnic groups can receive the greatest preference (and which groups can be left out of that set); 2) which individuals qualify as members of such preferred groups; and 3) how large a preference can be given to the most favored groups.

#### 1. Which Groups to Favor & Who Qualify as Bona Fide Members?

First, courts may be called on to decide whether a school can omit a particular ethnic group from its list of groups granted preferences. Given the scarcity of available places, each racial/ethnic group has an incentive to seek inclusion, as well as limit the number of other groups with whom they must share those few openings.<sup>73</sup> The tension this incites is manifest in the

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<sup>70</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 334, 337 (2003) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317–18 (1978)).

<sup>71</sup> See *supra* notes 3, 17–20 and accompanying text.

<sup>72</sup> These are, for the most part, separate and apart from the questions that Justice Scalia expects to be litigated. See *Grutter*, 539 U.S. at 348–49 (Scalia, J., dissenting). Whether the programs were voluntary or mandated, once they were challenged by the individuals harmed, courts would be involved and would publicly permit them to function. See Schuck, *supra* note 34, at 85–91.

<sup>73</sup> See Hugh Davis Graham, *Affirmative Action for Immigrants? The Unintended Consequences of Reform*, in *COLOR LINES*, *supra* note 2, at 53, 61–66; George R. La Noue & John C. Sullivan, *Deconstructing Affirmative Action Categories*, in *COLOR*



history of the federal government's definitions of a "minority group."<sup>74</sup> Because the plaintiffs did not claim membership in a disadvantaged ethnic group, the *Grutter* and *Gratz* decisions did not have to wrestle with the issue of whether any group was unfairly denied preferential treatment.<sup>75</sup> In the future, however, members of groups omitted from such lists may present courts with a terrible dilemma. "Benign" racial preferences<sup>76</sup> are not benign to disadvantaged minority groups denied a special preference; they are harmed by preferences for those in competing groups.

Some argue that blacks deserve *sui generis* treatment given the nature of their historical injuries,<sup>77</sup> but recent and wealthy

LINES, *supra* note 2, at 71–73; Rimer & Arenson, *supra* note 7; Rachel L. Swarns, 'African-American' Becomes a Term for Debate, N.Y. TIMES, Aug. 29, 2004, §1, at 1. Understandably, American Indians appear to prefer that preferences be allocated to them by that name so that they do not have to share the spoils of a program with other non-Indian Native Americans.

<sup>74</sup> See Clark D. Cunningham et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835, 859–73 (2002) (describing the federal government's difficulty over time in assessing the list of "official minorities").

<sup>75</sup> The Court acknowledged that race-based preferences must minimize harm to other innocent, competing parties. *Grutter*, 539 U.S. at 341. In addition, it has already indicated its unwillingness to simply defer to an entity's determination of which groups to favor with preferences. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989); see also Mark W. Cordes, *Affirmative Action After Grutter and Gratz*, 24 N. ILL. U. L. REV. 691, 712–13, 721–22 (2004) (noting the Supreme Court's strict scrutiny of the affirmative action programs challenged in both the *Grutter* and *Gratz* cases).

<sup>76</sup> See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1473 (2004).

<sup>77</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 400–01 (1978) (Marshall, J., concurring) (applauding the majority for its determination that a university may consider race in the admissions decisions, while also recognizing the need for a class-based remedy for African Americans due to the profound discrimination they have suffered historically); Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 900 (1995) (arguing that no other group can compare to African Americans in deserving inclusion in affirmative action programs); Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1610–11, 1616 (2003) (pointing out a common perception that admitting more blacks into the work-force and universities is of unique importance as a result of their "background of slavery, state-enforced segregation, and widespread discrimination"); James Boyd White, *What's Wrong With Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927, 1932–34 (2002) (suggesting that the nature as well as the character of discrimination against African-Americans in this country is far worse and different than any other in our nations experience).

black immigrants, or black Africans, lack such injuries.<sup>78</sup> Also, if a school granted a special preference to blacks only, and a minimally qualified American Indian brought a suit for racial discrimination, would the Court tolerate a mechanism that permitted the American Indian to be harmed by a preference for a slightly less qualified wealthy black student?<sup>79</sup> Also, would the *Grutter* Court's great deference to a school's judgment lead it to uphold an admissions process that granted special preferences to different sets of groups in different years?<sup>80</sup> Suppose the list omitted blacks one year and it was challenged as racially discriminatory by a minimally qualified, rejected black applicant?

In fact, the Michigan program challenged in *Grutter* appears to have had a harmful impact on Hispanics, and the Law School's Director of Admissions from 1979 to 1990 testified that "faculty members were 'breathhtakingly cynical' in deciding who would qualify as a member of underrepresented minorities."<sup>81</sup> Certainly, it would be exceptionally difficult and uncomfortable

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<sup>78</sup> See ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS* 193 (1997) (distinguishing between African Americans and persons of African ancestry from Africa and the Caribbean); see also Rimer & Arenson, *supra* note 7 (pointing out the disagreement over whether admissions officials should differentiate between blacks immigrating from other countries and those whose families have been here for generations); Swarns, *supra* note 73 (discussing whether foreign-born blacks should be able to claim the term "African-American").

<sup>79</sup> See, e.g., *Hopwood v. Texas*, 78 F.3d 932, 966 (5th Cir. 1996) (Weiner, J., concurring). "[B]lacks and Mexican Americans were the only two minority categories granted preferential treatment in admissions . . ." *Id.* at 936 n.4; Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 501 (2004). But see Brest & Oshige, *supra* note 77, at 881-83 (detailing disadvantages faced by Native Americans, and the question of how affirmative action has and will address their needs); Christopher F. Edley, Jr., *Justice in the Eye of the Beholder*, HARV. L. SCH. BULL., Spring 1984, at 6, 7 ("I actually believe that the moral claim of American Indians is even greater than that of Afro-Americans.").

<sup>80</sup> See Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889, 896-97 (2004) (questioning the legality of an affirmative action program that would give more preference to one minority group over another in any given year); Who Gets In? The Quest for Diversity After *Grutter*, Panel Discussion at the 2004 James McCormick Mitchell Lecture (Mar. 8, 2004), in 52 BUFF. L. REV. 531, 579 (2004) [hereinafter Panel Discussion] (David Chambers, observing that a law school in a state with a large Mexican-American population might solely favor Mexican-Americans).

<sup>81</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting). Chief Justice Rehnquist was also of the opinion that disparate treatment of certain minority groups by admissions directors at Michigan Law School should have been deemed impermissible. *Id.* at 382-83 (Rehnquist, C.J., dissenting).

for courts to use strict scrutiny to evaluate whether a plan that helped some racial/ethnic groups (including wealthy members) but harmed omitted disadvantaged minority groups was consistent with the long term goal of non-discrimination.<sup>82</sup> This would be even more difficult because, although a broad racial or ethnic group may be successful, subgroups of that group might be as deserving of special preferences as other disadvantaged minorities.<sup>83</sup>

The second of the three intractable questions is the difficult issue of how to confirm who qualifies as a member of a preferred group. Relying solely on self-identification is confusing for those of mixed heritage,<sup>84</sup> and would probably engender too much

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<sup>82</sup> Identifying which minority groups deserve special treatment is a virtually impossible task. See, e.g., *Bakke*, 438 U.S. at 296–97; *De Funis v. Odegaard*, 416 U.S. 312, 338–40 (1974) (Douglas, J., dissenting); *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 834, 851–52, 859 (E.D. Mich. 2001), *rev'd in part and vacated in part*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003); TERRY H. ANDERSON, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* 265 (2004); Cunningham et al., *supra* note 74, at 859–73 (noting the federal governments difficulty over time in distinguishing between and defining the different minority groups); Theodore Hsien Wang & Frank H. Wu, *Beyond the Model Minority Myth*, in *THE AFFIRMATIVE ACTION DEBATE*, *supra* note 7, at 191, 196, 199–200 (describing sub-groups of Asian Americans and the problems with the Census Bureau's all-inclusive definition of Asian-American). *But see* PATTERSON, *supra* note 78, at 192–93 (proposing which groups should be eligible for minority preferential treatment and when); Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 *LAW & SOC'Y REV.* 263, 276–85 (2000) (agreeing with Justice Powell's argument that "strict scrutiny" of affirmative action programs and allowing for flexible racial preferences will accomplish the goal of non-discrimination).

<sup>83</sup> John Hart Ely contended that the Constitution would permit whites to discriminate against themselves if "no particular ethnic subset of Whites experiences a disproportionate disadvantage . . ." John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 *U. CHI. L. REV.* 723, 737 n.52 (1974). On the other hand, since upper-class whites are often admitted through alumni preference or as children of large donors, see *infra* note 240 and accompanying text, or even as faculty children, see Greenawalt, *supra* note 58, at 573, those most likely to have benefited from past discrimination are often spared from paying for the remedy, passing the bill to disadvantaged whites. See *Bakke*, 438 U.S. at 295–96; KAHLBERG, *supra* note 20, at 48–51; THOMAS SOWELL, *AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY* 168 (2004); Greenawalt, *supra* note 58, at 599. *But see* Paul Brest, Foreword, *In Defense of the Antidiscrimination Principle*, *The Supreme Court 1975 Term*, 90 *HARV. L. REV.* 1, 18 (1976) (arguing that noninclusion will not frustrate the opportunities of the non-preferred group).

<sup>84</sup> See Tanya Kateri Hernandez, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 *MD. L. REV.* 97, 101–102 (1998); cf. GREGORY H. WILLIAMS, *LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK* (1995). Adding to the confusion is the fact that,

abuse.<sup>85</sup> Yet there are no obvious or effective alternatives. The visual inspection (phenotype) criteria used by police departments and the Equal Employment Opportunity Commission are quite flawed,<sup>86</sup> and neither South Africa's apartheid laws, India's caste rules, nor other such standards offer appealing models.<sup>87</sup> In addition, the Supreme Court has long viewed race as a social, rather than biological, construct.<sup>88</sup>

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there are minority children who are adopted by whites.

<sup>85</sup> See *Price v. Civil Serv. Comm'n*, 604 P.2d 1365, 1389-90 & n.8 (Cal. 1980) (Mosk, J., dissenting) (discussing the Ethnic Designation Committee created by the Los Angeles Unified School District); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231, 1232-34 (1994) (discussing the Malone brothers' claim, in *Malone v. Haley*, No. 88-339 (Sup. Jud. Ct. Suffolk County, Mass. July 25, 1989), to the Boston Fire Department that they were in fact black, despite a lack of evidence that they were); Michael Dorgan, *Desegregation or Racial Bias?*, SAN JOSE MERCURY (Cal.), June 5, 1995, at 1A, 10A ("[S]ome black families in Bayview-Hunter's Point have gone so far as to take Hispanic surnames to protect their children from busing."). The issue resembles the difficult task of identifying the "learning disabled." See generally Craig S. Lerner, *"Accommodations" for the Learning Disabled: A Level Playing Field or Affirmative Action for Elites?*, 57 VAND. L. REV. 1043, 1057-78 (2004) (recognizing that it is almost impossible to define and diagnose a learning disability).

<sup>86</sup> See Cunningham et al., *supra* note 74, at 862-64 (discussing the EEOC's flawed history and process in determining minorities based on visual identification); Gregory Rodriguez, *Who are You? When Perception is Reality*, N.Y. TIMES, June 3, 2001, § 4, at 1 (reporting that New Jersey State troopers are instructed on how to classify a motorist's race by judging "skin color" and "facial characteristics"). A quasi-visual approach has long been used in Latin America. See Tanya Kateri Hernandez, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1101-09 (2002) (describing Latin America's "prejudice-of-mark" racial classification system, which focuses on physical appearance rather than origins).

<sup>87</sup> See *Fullilove v. Klutznick*, 448 U.S. 448, 531 (1980) (Stewart, J., dissenting). Justice Stevens was of the similar opinion that "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Id.* at 534 n.5 (Stevens, J., dissenting); see BITTKER, *supra* note 14, at ch. 10; Ford, *supra* note 85, at 1232; Ariela J. Gross, *Litigating Whiteness: Trials of Racial Determination in the Nineteenth-Century South*, 108 YALE L.J. 109 (1998); Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1 (1994); Hernandez, *supra* note 84; Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995); Luther Wright, Jr., Note, *Who's Black, Who's White, and Who Cares: Reconceptualizing the United States's Definition of Race and Racial Classifications*, 48 VAND. L. REV. 513 (1995); Van Alstyne, *supra* note 18, at 807-08.

<sup>88</sup> See Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1375 (1999); Thomas C. Sawyer, *Measuring Race and Ethnicity: Meeting Public Policy Goals*, 52 AM. STATISTICIAN 34, 34 (1998) (The categories of minorities "are culturally determined descriptors that reflect societal concerns and perceptions. They are not grounded in scientific, genetic, or anthropological bases, nor are they

## 2. Size of the Preference

The third terribly difficult question that courts are forced to address when allowing racial preferencing is how to evaluate the size of such preferences. To be more precise, how much additional weight can a school give to the contributions of those individuals of preferred racial and ethnic groups, than to the contributions of all other applicants to a diversity of cultures, backgrounds, and perspectives? Specifically, what level of inequality is acceptable?

Justice Powell's *Bakke* opinion held that admissions officials could only use race to "tip" the balance; but the holding did not answer the question of what size tip would be too large.<sup>89</sup> Estimates of the tips now being awarded in admissions programs are nearly one point of a four point grade point average or several hundred points on the SAT.<sup>90</sup> The *Gratz* decision rejected a 20-

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fixed and unchanging."). Traditionally, in the United States, under the "one-drop rule," individuals with even one ancestor of African descent have been treated as black, regardless of appearance. F. JAMES DAVIS, WHO IS BLACK? ONE NATION'S DEFINITION 5 (1991); cf. Genetics for the Human Race, 36 NATURE GENETICS (SPECIAL ISSUE) (2004), available at <http://www.nature.com/cgi-taf/dynapage.taf?file=/ng/journal/v36/n11s/index.html> (publishing special issue on race and genetics); Brent Staples, *Why Race Isn't as 'Black' and 'White' as We Think*, N.Y. TIMES, Oct. 31, 2005, at A20.

<sup>89</sup> See *Grutter v. Bollinger*, 288 F.3d 732, 799–800 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003); William H. Hastie, *Affirmative Action in Vindicating Civil Rights*, 1975 U. ILL. L.F. 502, 517 (advocating courts consider "whether the weight assigned to minority status in a given circumstance is no greater than objective and unbiased professionals in education could reasonably consider essential to the effective pursuit of important educational objectives"); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 690–91 (1998).

<sup>90</sup> See Thomas J. Kane, *Misconceptions in the Debate Over Affirmative Action in College Admissions*, in CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES 18 (Gary Orfield & Edward Miller eds., 1998) [hereinafter CHILLING ADMISSIONS]; Mark C. Long, *Race and College Admissions: An Alternative to Affirmative Action?*, 86 REV. ECON. & STATS. 1020, 1025–27 (2004) (revealing a tip of 0.21 on GPAs or 101 points on the SAT on average for minority applicants). These numbers are much greater at more selective schools. See Greenberg, *supra* note 20, at 525–27. However, one expert found little difference between the credentials of minority students admitted under affirmative action and the lowest decile of non-minority students admitted. See Linda F. Wightman, *Are Other Things Essentially Equal? An Empirical Investigation of the Consequences of Including Race as a Factor in Law School Admissions*, 28 SW. U. L. REV. 1, 4–5 (1998). But that overlooks that those in the lowest decile of non-minority students were likely admitted based on talents in other areas, like sports and the arts, leading them to be preferred to other non-minority students with better academic records.

point tip, and Justice Rehnquist's opinion found the size of the tip dispositive,<sup>91</sup> but it may not have been so for Justices O'Connor and Breyer. The latter pair may have permitted a 20-point tip for members of a preferred under-represented minority group, as long as it was in addition to credit available to all students for their potential contributions to campus diversity.<sup>92</sup>

The Court's view, that seeking proportional representation or quotas is unconstitutional, is clear and was reiterated in *Gratz* and *Grutter*.<sup>93</sup> The *Grutter* decision, however, enabled Michigan Law School's process to survive by sliding past this issue, whether intentionally or not. That is, the law school admitted that it was seeking a "critical mass" of each preferred racial and ethnic group, but when pressed on the size of that critical mass, three of the school's former admissions directors denied that it represented any specific fixed number or percentage.<sup>94</sup> Justice O'Connor's decision was content to treat the critical mass they sought as a vague goal, rather than a more specific, unacceptable quota.<sup>95</sup>

But the issue of what size preference is acceptable would have come into focus had the directors of admissions been forced to admit that the pursuit of a critical mass of black students was a clear effort to admit a specific minimum number of black students.<sup>96</sup> This would have forced Justice O'Connor to wrestle with the question of whether the preference the law school granted to black applicants was so large as to effectively

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<sup>91</sup> *Gratz v. Bollinger*, 539 U.S. 244, 273 (2003) ("[A]s the University has conceded, the effect of automatically awarding 20 points is that virtually every qualified underrepresented minority applicant is admitted."). *But see id.* at 295–96 (Souter, J., dissenting) (arguing that such a point system as used in *Gratz* would not convert race into a "decisive" factor).

<sup>92</sup> That is, Justice O'Connor might have rejected the formula in *Gratz* because it treated all preferred minorities as if they all had the identical potential for contributing to campus diversity, ignoring their varying backgrounds and abilities to contribute. *Id.* at 279 (O'Connor, J., concurring).

<sup>93</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 329–30 (2003) (finding that "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin" . . . would amount to outright racial balancing, which is patently unconstitutional" (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978))); *supra* note 18.

<sup>94</sup> *See Grutter*, 539 U.S. at 318–19.

<sup>95</sup> *See id.* at 335.

<sup>96</sup> To treat the critical mass as a range seems disingenuous since anything but the lower bound would be irrelevant for any purpose. There was no upper limit on the number of under-represented minority applicants the school would have accepted, had that number been qualified.

represent an unconstitutional separate track for admissions.<sup>97</sup> This is clear from a careful analysis of this specific matter.

To begin, the admissions directors must have had a specific minimum number in mind. Otherwise, it would have made no sense for one of them to have consulted daily reports that tracked the racial and ethnic composition of the class "to ensure that a critical mass of underrepresented minority students would be reached[.]"<sup>98</sup> How would he know without a reference point? Similarly, when another director stated that "a critical mass of underrepresented minority students could not be enrolled if admissions decisions were based primarily on undergraduate GPAs and LSAT scores,"<sup>99</sup> she must have been comparing some upper bound on how many would have been admitted to a specific minimum number. If none of the directors recognized a specific minimum number for the critical mass of a minority group then none could claim that a colorblind process would not achieve it.

Now it appears that the minimum number was not a *strict* quota. That is, if the goal was to admit at least four American Indians and only three of ten American Indian applicants met Michigan Law School's high minimum standards, then the school probably would have admitted only three. Then again, the quota Powell rejected in *Bakke* had the same *non-strict* form.<sup>100</sup> Under Powell's approach, the key issue was whether the admissions office was using a two-track mechanism that reserved spaces to "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants."<sup>101</sup> Thus, in this example, the key question would be whether Michigan would have admitted at least four American Indians as long as they met its minimum standards, irrespective of how they compared to the most qualified other applicants who were not

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<sup>97</sup> Cf. *Grutter*, 539 U.S. at 391-93 (Kennedy, J., dissenting) (explaining how the "[t]he Law School has the burden of proving, in conformance with the standard of strict scrutiny, that it did not utilize race in an unconstitutional way" and why it failed to carry out this burden).

<sup>98</sup> *Grutter*, 359 U.S. at 318 (quoting Dennis Shields, Director of Admissions).

<sup>99</sup> *Id.* (quoting Erica Munzel, successor Director of Admissions).

<sup>100</sup> *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (stating, "[t]o the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats," a line was drawn on the basis of race, whether it was a goal or quota).

<sup>101</sup> *Bakke*, 438 U.S. at 315; see also *Grutter*, 539 U.S. at 334.

admitted.<sup>102</sup>

Specifically, suppose that one of the seven “unqualified” American Indian applicants from the example was able to raise his test scores just enough so that he nosed infinitesimally above the “unqualified” benchmark. Would Michigan Law School’s policy of ensuring a critical mass of American Indians have led them to admit that fourth American Indian ahead of the “last” person that had been admitted? If so, that fourth American Indian was not really competing against other non-minority applicants for a seat; rather, the seat was his to have, as long as he was minimally qualified.<sup>103</sup> This was the form of preference rejected by Powell in *Bakke*.<sup>104</sup>

In this example, Michigan could have explained that it had simply granted the fourth American Indian applicant a bonus that raised the candidate’s rating of “minimally qualified” to “accepted,” which is what the Court found in *Gratz*.<sup>105</sup> Yet this illustrates why Justice Powell’s rejection of two-track approaches limits per se racial preferences to no more than tiebreakers, if that.<sup>106</sup> With experience, most selectors can discover the

<sup>102</sup> See Sander, *supra* note 3, at 400–05 (finding the preferred size for minority students effectively created separate tracks for admissions for nonminority applicants and minority applicants).

<sup>103</sup> Such preferences appear comparable to those granted by many schools to star athletes. Bill Pennington, *One Division III Conference Finds That Playing the Slots System Pays Off*, N.Y. TIMES, Dec. 25, 2005, at § 8, at 9 (some colleges are open about reserving slots for athletes). While there is substantial controversy over the minimal standards that academically elite schools should require for athletes, see WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 135–36 (2003); Bill Pennington, *Books and Bouncing Balls in a Delicate Balancing Act*, N.Y. TIMES, Dec. 4, 2005, at § 8, at 9, quotas for minimally qualified athletes or others are not prohibited by the Constitution.

<sup>104</sup> As Justice Powell observed about University of California at Davis’s quota, “[n]o matter how strong their . . . potential for contribution to educational diversity, [many] are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats.” *Bakke*, 438 U.S. at 319; see also Sander, *supra* note 3, at 397–400 (describing two of the four unconstitutional scenarios that universities could adopt as their affirmative action policies).

<sup>105</sup> *Gratz v. Bollinger*, 539 U.S. 244, 254 (2003) (claiming “it is undisputed that the University admits ‘virtually every qualified . . . applicant’ from these groups” (quoting Petition for Writ of Certiorari at 111a, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516))).

<sup>106</sup> This appears so even though Justice Powell expressly stated that schools could vary the weight they gave race year to year. *Bakke*, 438 U.S. at 317–18. Yet the analysis below contends that, it is logically inconsistent to tolerate racial preferences of any significant size if one believes that the Constitution does not tolerate separate tracks that insulate some racial or ethnic minority applicants from



correlation between a specific tip size and an approximate quota of positions, thereby making tip size and quotas equivalent tools.<sup>107</sup> As the four liberal members of the Supreme Court observed in *Bakke*, tips of any significant size are equivalent to quotas:

There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.<sup>108</sup>

Therefore, it would make little sense to set a tip size divorced from its impact on how many preferred students it was likely to admit.<sup>109</sup> Any race-based tip that is larger than a tiebreaker could force courts to evaluate whether the relative sizes of tips awarded to the preferred racial/ethnic groups unfairly harm other disadvantaged minority groups who deserve the protection accorded to insular groups.

In addition to the legal arguments against more-than-slight per se racial preferences, there are a number of policy arguments. Richard Sander's recent article examines in detail

full competition with all others. See *Grutter*, 539 U.S. at 334; *Grutter v. Bollinger*, 288 F.3d 732, 800-03 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003) (discussing how the Law School indeed had a "quota" system, which was found by *Bakke* to be unconstitutional); cf. Bloom, Jr., *supra* note 79, at 492-93 (explaining Justice Souter's and Justice Powell's views on determinative race in admissions processes).

<sup>107</sup> See Archibald Cox, *Harvard College Amicus Curiae De Funis v. Odegaard*, in REVERSE DISCRIMINATION 184, 197 (Barry R. Gross ed., 1977); Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1833 (1996). Thus, the key is the implementation. In fact, it appears that most selective schools that claim to follow the "Harvard College Model" actually have minimum levels, i.e., quotas, of minority students that they will not go below. See JACQUES STEINBERG, THE GATEKEEPERS: A PREMIERE COLLEGE ADMITS A FRESHMAN CLASS 177-78, 253-54, 268 (2002); Alan Dershowitz, *Powell's Beau Ideal*, NEW REPUBLIC, July 22, 1978, at 14; J.W. Foster, *Race and Truth at Harvard*, NEW REPUBLIC, July 17, 1976, at 16. *But see Grutter*, 137 F. Supp. 2d at 842 n.27 (noting that between 1986 and 1999, minority levels varied from 9.8% in 1999 to 19.2% in 1994, except in 1998 where the minority levels were 5.4%).

<sup>108</sup> *Bakke*, 438 U.S. at 378.

<sup>109</sup> See AM. COUNCIL ON EDUC., ASS'N OF AM. LAW SCH., THE *BAKKE* DECISION: IMPLICATIONS FOR HIGHER EDUCATION ADMISSIONS 21 (Wayne McCormack ed., 1978) ("It is difficult to see how an admissions officer or committee can exercise any degree of preference in a race-conscious program without some notion of how many minority applicants are desired in the final mix of the student body' . . .").

the cascading effects that large preferences have by promoting many minority candidates into a tier of schools one level above the ones for which they are best qualified.<sup>110</sup> Yet relegating minority applicants to slightly less prestigious schools would deny them the greater financial aid and other assistances that wealthier elite schools can afford.<sup>111</sup> The latter may be at least partly responsible for the relative success and satisfaction enjoyed by minority graduates of elite schools.<sup>112</sup>

Another argument is that as the preference size increases, there will be a greater danger that relatively less-qualified minority members will reinforce the stereotype of minority groups having inferior abilities.<sup>113</sup> This factor would seem to weigh heavily against Michigan's articulated policy of altering the scale to seek a "critical mass" of minority students so that minority students shatter racial stereotypes rather than feeling pressure to articulate the position associated with their ethnic group.<sup>114</sup> Given the size of most classrooms, that goal would

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<sup>110</sup> See Sander, *supra* note 3, at 369–70; see also Long, *supra* note 90, at 1029–30. Many have also recognized the danger of providing minority communities with less, albeit "minimally" qualified service providers. See ANDREW HACKER, *TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL* 173 (1992) (demonstrating lower quality teachers among the black population as compared to among the white population); WILLIAM MCGOWAN, *COLORING THE NEWS: HOW CRUSADING FOR DIVERSITY HAS CORRUPTED AMERICAN JOURNALISM* 148–57 (2001) (referring to lower quality police officers); SOWELL, *supra* note 20, at 62–63 (narrating a scenario involving less qualified teachers); SOWELL, *supra* note 83, at 150–51 (speaking about inferior medical treatment by minority doctor admitted to medical school under affirmative action). Meanwhile, graduates of less elite colleges have been relatively successful. Stephan Thernstrom & Abigail Thernstrom, *Reflections on the Shape of the River*, 46 *UCLA L. REV.* 1583, 1617–20 (1999); Traub, *supra* note 20, at 46, 50 (reporting that many minority students are glad that they chose U.C. Riverside over more elite U.C. schools).

<sup>111</sup> Those resources appear critical. See BOWEN & BOK, *supra* note 20, at 63–64, 197–200, 243–52, 265; Sandalow, *supra* note 7, at 692 n.117; Rimer & Arenson, *supra* note 7. This is reinforced by a greater share of federal aid. See Greg Winter, *Rich Colleges Receiving Richest Share of U.S. Aid*, *N.Y. TIMES*, Nov. 9, 2003, § 1, at 1. But see Greg Winter, *Push is on to Limit Aid to Rich Universities*, *N.Y. TIMES*, Mar. 26, 2004, at A11.

<sup>112</sup> Minority graduates of selective institutions achieve high professional status, satisfaction, income, civic participation and leadership. See BOWEN & BOK, *supra* note 20, at 265; Lempert et al., *supra* note 51, at 401.

<sup>113</sup> THOMAS E. WOOD & MALCOLM J. SHERMAN, *SUPPLEMENT TO RACE AND HIGHER EDUCATION* 29–30 (2003), available at [www.nas.org/rhe2.pdf](http://www.nas.org/rhe2.pdf); see *infra* note 139 and accompanying text.

<sup>114</sup> See *Grutter v. Bollinger*, 288 F.3d 732, 737 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) (stating that Michigan sought a number sufficient to enable minority students to avoid feeling isolated or like spokespersons for their race.); see also Akhil

seem a bit unrealistic anyway. Further, this Article contends that it is better to view critical mass as solely the level of students necessary to give minority students comfort, as discussed below.<sup>115</sup>

### B. *The Value of Per Se Racial & Ethnic Preferences for Other Purposes*

There is little doubt that students benefit from attending an integrated school. In fact, the *Grutter* decision holds that achieving a racially diverse student body is a "compelling state interest."<sup>116</sup> The Court recognizes that "'cross-racial understanding,'" "break[ing] down racial stereotypes," and "'enabl[ing] students] to better understand persons of different races,'"<sup>117</sup> would be difficult to provide in segregated schools.<sup>118</sup> Yet integration is not really the issue,<sup>119</sup> except when schools face the difficult question of what level of self-segregation they should permit on campus.<sup>120</sup> The crux of the matter is the relative educational value of two alternatives: the student body selected using per se racial preferences and the one selected with the best

Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1777 (1996). *But see* *Grutter*, 288 F.3d. at 804–06 (Boggs, J., dissenting) (criticizing the Law School's pursuit of a "critical mass" of minority students).

<sup>115</sup> See *infra* notes 234–239 and accompanying text.

<sup>116</sup> *Grutter v. Bollinger*, 539 U.S. 306, 327–28 (2003).

<sup>117</sup> *Id.* at 330 (quoting Petition for Writ of Certiorari at 246a, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

<sup>118</sup> See Brest & Oshige, *supra* note 77, at 871–72 (suggesting that negative stereotypes are reduced when individuals have more contact with competent minority professionals through affirmative action programs); Greenawalt, *supra* note 58, at 592–93 (maintaining that stereotypes will be ameliorated by increasing the number of blacks in professional positions); Gary Orfield & Dean Whitla, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED, *supra* note 51, at 159–67 (most students said that their diverse environment led them to rethink their values or otherwise grow); Sandalow, *supra* note 7, at 686 (arguing that because of the social significance of race, students should have more knowledge about racial minorities). Successful minority members can help erase prejudices of their inferiority. See Adeno Addis, *Role Models and the Politics of Recognition*, 144 U. PA. L. REV. 1377, 1462 (1996) (noting that black judges are role models for minority members); Herrera, *supra* note 62, at 111–12 (stating that having Latinos on a law school faculty will help overcome presumptions of inferiority).

<sup>119</sup> *But see* Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1225 (2002) ("'Diversity' should be thought of as another way of talking about integration.").

<sup>120</sup> See *Grutter*, 539 U.S. at 349 (Scalia, J., dissenting); Samuel G. Freedman, *Yeshivish at Yale*, N.Y. TIMES, May 24, 1998, § 6, at 32; *infra* notes 203–04.

alternative form of racial consciousness, such as the program proposed in this Article.

Many justify racial preferences because a class selected solely on raw test scores and grade point averages would have exceptionally little racial diversity. Yet this is a red herring. No one suggests that selectors ignore commonly considered attributes like exceptional determination, unusual backgrounds, and life experiences.<sup>121</sup> The best empirical data concerning how much racial and ethnic diversity schools could achieve without using per se racial preferences is provided by looking at the levels of diversity that universities in Texas and California attained after they had time to adjust to prohibitions against racial preferences.<sup>122</sup>

The difference between the two alternatives is that one would include members of preferred racial and ethnic minorities who would be accepted at the school only if it used racial preference (the P-group), while the other would include those who would be Displaced by the P-group (the D-group). The question then is whether a school's educational environment would improve by replacing the D-group with the P-group. To the extent that black skin color always produces substantial significant experiences that lead applicants to add educationally relevant diversity to a class, holistic consideration of their experiences would yield the same result as looking at race per se. On the other hand, since there is tremendous diversity among black applicants, candidates should receive varying levels of credit based on how unusual their background and experiences

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<sup>121</sup> See Sarah C. Zearfoss, *Admissions of a Director*, 30 HASTINGS CONST. L.Q. 429, 436–37 (2003) (discussing the criteria used that did not involve decisions based on race per se).

<sup>122</sup> See *Grutter*, 539 U.S. at 367 (Thomas, J., dissenting) (citing figures of minority enrollment for University of California, Berkeley Law School after the California barred racial preferences); Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the Michigan Cases*, 90 CORNELL L. REV. 463, 500 (2005) (describing the successful efforts at Texas A&M); Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View From a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1606 (2003) (describing the assessment criteria of applicants to University of Texas); Panel Discussion, *supra* note 80, at 565 (Margaret E. Montoya's observations about the University of New Mexico Law School). Texas was formerly operating under the *Hopwood* ruling and California is still subject to a state legislative prohibition against racial preferences. See *supra* note 19. But see Long, *supra* note 90, at 1021, 1031–32; Michael Dobbs, *Universities Record Drop in Black Admissions*, WASH. POST, Nov. 22, 2004, at A1; *supra* note 19; *infra* note 212.

would be in the class, not simply on their skin color or ethnicity per se.

Certainly the P students can be assumed to help white classmates improve their cross-racial understanding and break down racial stereotypes better than the D students, but efforts to measure the net educational benefit have had mixed results.<sup>123</sup> After all, the loss of the D-group would deny the class the contributions to diversity that the D-group would have made.<sup>124</sup>

<sup>123</sup> See *Grutter v. Bollinger*, 288 F.3d 732, 804 n.36 (6th Cir. 2002) (Boggs, J., dissenting), *aff'd*, 539 U.S. 306 (2003) (citing Peter Schmidt, *Debating the Benefits of Affirmative Action*, CHRON. HIGHER EDUC., May 18, 2001, at A25, quoting scholar Alexander Astin that a link between racial diversity and improved educational results has “yet to be convincingly demonstrated”); ROBERT LERNER & ALTHEA K. NAGAI, *DIVERSITY DISTORTED: HOW THE UNIVERSITY OF MICHIGAN IGNORED INCONVENIENT DATA IN ORDER TO SELL “DIVERSITY” TO THE COURTS AND THE PUBLIC* 1, 8–9 (2003), available at <http://www.ceousa.org/pdfs/hiddendata.pdf>; THOMAS E. WOOD & MALCOLM J. SHERMAN, *IS CAMPUS RACIAL DIVERSITY CORRELATED WITH EDUCATIONAL BENEFITS?* (2001), available at [http://www.nas.org/reports/umich\\_diversity/umich\\_uncorrelate.pdf](http://www.nas.org/reports/umich_diversity/umich_uncorrelate.pdf); WOOD & SHERMAN, *supra* note 113; Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action's Destiny*, 59 OHIO ST. L.J. 811, 882–84 (1998) (discussing the benefits of the diversity achieved through educational affirmative action); E. John Gregory, *Diversity is a Value in American Higher Education, But it is Not a Legal Justification for Affirmative Action*, 52 FLA. L. REV. 929, 935–36 (2000) (noting a problem with judicial acceptance of an institutional determination of the value of diversity); Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 884–94 (2000) (discussing the reasons for caution regarding use of the diversity argument to justify affirmative action admission programs); Stanley Rothman et al., *Does Enrollment Diversity Improve University Education?*, 15 INT'L J. PUB. OPINION RES. 8, 22–24 (2003); Schuck, *supra* note 34, at 41–46 (explaining various challenges to the diversity rationale); Panel Discussion, *supra* note 80, at 558–61 & n.68 (Charles E. Daye observing that he is pursuing a study to remedy the lack of scientific investigation of the relationship between race and educational diversity); see also Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2062 (1996).

<sup>124</sup> Whether replacing a white student with a black student would add diversity would depend on the individuals involved. See MICHELE A. HERNÁNDEZ, *A IS FOR ADMISSION: THE INSIDER'S GUIDE TO GETTING INTO THE IVY LEAGUE AND OTHER TOP COLLEGES* 191–93 (1997). For example, those squeezed out might include immigrants from Eastern Europe or South America, while those replacing them could include minority members who add relatively little diversity to a class. See Lopez, *supra* note 62, at 112–13 (stressing the importance of community ties held by minority scholars); Alex M. Johnson, Jr., *Destabilizing Racial Classifications Based on Insights Gleaned from Trademark Law*, 84 CAL. L. REV. 887, 948 (1996) (contending that not all black persons are culturally African-American); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 948 (1994) (noting that “not all Black families identify with Black culture”); Steve Stecklow, *Higher Yearning: College-Bound Senior is in the Right Place But at the Wrong Time*, WALL ST. J., Apr. 21, 1998, at A1 (reporting that one black applicant to Berkeley wrote on her application

Thus, some have accused schools of using diversity merely as a legal cover for prohibited efforts to achieve racial balance.<sup>125</sup> Given the assumption that the D-group would be selected over the P-group absent racial preferences, the D-group's combination of academic record and ability to contribute to the diversity of background and experiences (but not race) of the class was judged to be more valuable to the class than those same attributes of the P-group. In fact, the racially conscious reviews discussed in IV.A should consider virtually all of the contributions to diversity that the P-group students could provide.<sup>126</sup> This point can be illustrated with a few examples.

Selectors can, and should, favor students who appear able to help teach classmates to overcome initial prejudices against those who are often unfairly ostracized based on an appearance beyond their control. Selectors could give varying levels of credit to applicants based on their experiences of having been discriminated against and terribly isolated due to some attribute of their appearance or medical condition, such as genetic obesity or dwarfism. In addition to preferring "a racial minority in a society,"<sup>127</sup> selectors might also favor Caucasians who had lived in communities abroad that treated them as inferior outsiders or those who grew up as the only Muslim or Jew in a Christian, rural, farm community where they were considered outsiders. Candidates who assimilated to minority cultures would also

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that " 'Race has not played a significant part in my life.' ").

<sup>125</sup> See *Grutter*, 539 U.S. at 380–86 (Rehnquist, C.J., dissenting); *Wessmann v. Gittens*, 160 F.3d 790, 798 (1st Cir. 1998) ("[T]he School Committee's flexible racial/ethnic guidelines appear to be less a means of attaining diversity in any constitutionally relevant sense and more a means for racial balancing."); *Johnson v. Bd. of Regents of the Univ. Sys. of Ga.*, 106 F. Supp. 2d 1362, 1371 (S.D. Ga. 2000) ("The record shows that [Univ. of Ga.] is plying a 'diversity = proportionalism' rationale."). Per se racial balancing is prohibited. See *supra* note 93. Many have observed that programs claiming to seek educational diversity appear to ignore most significant forms of diversity other than race and ethnicity. See Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 585-91 (1998) (suggesting that the use of religious belief as a proxy to enhance debate and learning is at least as practical as the use of race); Michael E. Rosman, *Thoughts on Bakke and its Effect on Race-Conscious Decision-Making*, 2002 U. CHI. LEGAL F. 45, 60 n.63, 61 (questioning the fairness of the respective weights given to race and other criteria in the admissions process); Schuck, *supra* note 34, at 37–39 (encouraging a broader definition of diversity).

<sup>126</sup> See *supra* note 125. The distinction between diversity of views and racial diversity must be carefully considered. See Bloom, Jr., *supra* note 79, at 471–73.

<sup>127</sup> See *Grutter*, 539 U.S. at 333.

deserve credit.<sup>128</sup> Similarly, selectors can and should prefer applicants who appear able to help break down stereotypes,<sup>129</sup> such as black conservatives, pacifist Muslim Fundamentalists, and fashion models planning to major in physics. Schools can also try to promote trust and friendships among future leaders of different racial and ethnic groups<sup>130</sup> by giving preferences to applicants with records evidencing their potential as future leaders of under-represented communities.

Admittedly, the narrower subjects of racial stereotypes and cross-racial understanding are especially important. Nevertheless, if the schools' goal is truly educational, then the use of broader, more open-ended concepts of diversity<sup>131</sup> should aid, rather than compromise, achievement of that goal. Clearly, students would benefit from classmates that helped them break down racial, cultural, and religious stereotypes. Similarly, since those in business and the military are apt to interact with many cultures, religions, and races, learning to overcome all forms of stereotypes would provide a better educational experience.<sup>132</sup>

Ideally, most classes would include highly diverse student populations, but there is no way to include representatives of all the hundreds of minorities (including cross-racial students, black

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<sup>128</sup> See Johnson, Jr., *supra* note 124, at 950 n.222; Rachel F. Moran, *Diversity, Distance, and the Delivery of Higher Education*, 59 OHIO ST. L.J. 775, 788 (1998) (stating that some black Internet users assumed that their white correspondents were also black based on their familiarity with black culture); 8 MILE (Universal Pictures 2002). These preferences also provide an incentive for families to integrate communities. See *supra* note 65 and accompanying text.

<sup>129</sup> While class materials can demonstrate the wide spectrum of viewpoints within different minority groups, a diverse group of students is likely to achieve this more effectively. See Brest & Oshige, *supra* note 77, at 856 n.4; *infra* note 198 and accompanying text. It may even teach minority members, themselves, about their own breadth.

<sup>130</sup> See Anthony Lising Antonio, *Diversity and the Influence of Friendship Groups in College*, 25 REV. HIGHER EDUC. 63, 83 (2001); Maureen T. Hallinan, *Diversity Effects on Student Outcomes: Social Science Evidence*, 59 OHIO ST. L.J. 733, 745-46 & n.74 (1998); see also *infra* note 198 and accompanying text. Cross-fertilization does not always result. See *infra* notes 203-03. Racial diversity is especially important in more selective entities, such as leadership training institutions. See *Grutter*, 539 U.S. at 332-33.

<sup>131</sup> See Garrick B. Pursley, Note, *Thinking Diversity, Rethinking Race: Toward a Transformative Concept of Diversity in Higher Education*, 82 TEX. L. REV. 153, 189-99 (2003) (advocating a similar open-ended form of diversity).

<sup>132</sup> See Brief for 65 Leading Businesses as Amici Curiae Supporting Respondents at 5-7, *Grutter v. Bollinger*, 539 U.S. 309 (2003) (Nos. 02-241 and 02-516).

female conservatives, and gay Catholics) in each classroom for each course offered by the school, particularly seminars. On the other hand, those with interesting backgrounds and experiences that would otherwise be least represented in a class could be granted the greatest credit for contributions to diversity.<sup>133</sup>

Some have justified per se preferences based on the future value of role models for members of under-represented racial and ethnic groups. Role models can demonstrate that people "like them" can succeed, provide examples to follow, and be potential mentors.<sup>134</sup> Yet the value of role models appears to depend more on the obstacles they have overcome, such as poverty, societal prejudices, and lack of a father living at home, than on simply their race or ethnicity.<sup>135</sup> Thus, cancer survivor and seven-time Tour de France champion cyclist Lance Armstrong<sup>136</sup> is a great role model for those suffering from life-threatening medical conditions, whatever their race, sex, or life pursuit.<sup>137</sup> A mentor's ability to understand a mentored student's values, lifestyle, and burdens, combined with the willingness to devote the time to counsel them, seems to be more important than his or her race or ethnicity.<sup>138</sup> Providing role models based primarily on race per se can even be counterproductive. If role models are among the

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<sup>133</sup> Thus, an Orthodox Jew from Israel might not deserve any credit for adding diversity at Brandeis University, but a substantial preference for adding diversity at Vanderbilt, and visa-versa for a Fundamentalist Christian.

<sup>134</sup> See Addis, *supra* note 118, at 1406–11; Brest & Oshige, *supra* note 77, at 869–71. This is also so for role models who are fictional characters. See *id.* at 870 & n.57 (noting the black and Hispanic lawyers on television's "L.A. Law").

<sup>135</sup> See STEPHEN COLE & ELINOR BARBER, *INCREASING FACULTY DIVERSITY: THE OCCUPATIONAL CHOICES OF HIGH-ACHIEVING MINORITY STUDENTS* 169 (2003); KATHARINE T. KINKEAD, *HOW AN IVY LEAGUE COLLEGE DECIDES ON ADMISSION* 51–52 (1961) (noting that when the blacks of New Haven wanted to honor New Haven native Levi Jackson, Yale's first black football captain, with a Cadillac, Jackson suggested, instead, that they establish a scholarship fund and that it be open to any needy New Haven boy, not just blacks); Addis, *supra* note 118, at 1409–11; Herrera, *supra* note 62, 112–13; Louis P. Pojman, *The Moral Status of Affirmative Action, in AFFIRMATIVE ACTION: SOCIAL JUSTICE OR REVERSE DISCRIMINATION* 178–79 (Francis J. Beckwith & Todd E. Jones eds., 1997). Of course, accessible role models are more effective. See Sandalow, *supra* note 7, at 689 n.106.

<sup>136</sup> See LANCE ARMSTRONG & SALLY JENKINS, *IT'S NOT ABOUT THE BIKE: MY JOURNEY BACK TO LIFE* (2000).

<sup>137</sup> See Jeff Berman, *Armstrong's Clear Example for All People With Cancer*, N.Y. TIMES, July 27, 2003, § 8, at 10. Thus, while midgets, beauty queens, and the obese might prefer identical role models to show them how to survive and prevail over disparaging remarks and ostracism, one with a more universal appeal can be quite effective.

<sup>138</sup> See *supra* note 62 and accompanying text.



least qualified in their profession, they can create stereotypes of inferiority, rather than erase them.<sup>139</sup> Their value is greatly diminished if their success is significantly attributable to racial preferences used by colleges, law schools, or employers.<sup>140</sup> In any case, the Supreme Court has held that the need for role models does not justify racial preferences.<sup>141</sup>

Sections III and IV offer mechanisms for achieving most of the effects of affirmative action, without resorting to per se racial preferences.

### III. PLACING ACHIEVEMENTS IN CONTEXT: AVOIDING UNCONSCIOUS BIASES

Predicting who is most likely to succeed in the long term is inherently difficult, as most adults browsing through an old high school yearbook can confirm.<sup>142</sup> Professional sports teams spend millions of dollars to comprehensively evaluate and identify which of those candidates available in the annual drafts are most likely to excel;<sup>143</sup> yet teams grossly misjudge many players.<sup>144</sup>

<sup>139</sup> See SOWELL, *supra* note 83, at 148–49; Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 UCLA L. REV. 1953, 2016–17, 2022–23 (1996); *supra* note 20. The data indicates a large disparity between the average grades/scores of black and white students. See BOWEN & BOK, *supra* note 20, at 72, 262–63 (conceding that at elite schools, the average admitted black student in the study graduated at the 23rd percentile); MCGOWAN, *supra* note 110, at 166–70; SOWELL, *supra* note 83, at 146–49, 155; Sander, *supra* note 3, at 427; Sandalow, *supra* note 32, at 1886–87, 1895–96 (noting that more than 20% of black law school graduates do not pass the bar exam on the first or second attempt v. 3% of whites); Schuck, *supra* note 34, at 21, 76; Thomas Sowell, *The Plight of Black Students in the United States*, DAEDALUS, Spring 1974, at 179; Thernstrom & Thernstrom, *supra* note 110, at 1605. In fact, admitting less qualified minority students may even have a negative effect on more qualified minority students due to lower expectations or anti-intellectualism. See *id.* at 1606–07, 1612 n.109; see also Holzer & Neumark, *supra* note 12, at 530, 545–48.

<sup>140</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., dissenting).

<sup>141</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497–98 (1989); *id.* at 520 (Scalia, J., concurring); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274–76 (1986); *id.* at 288 (Connor, J. concurring); cf. Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222, 1223 (1991).

<sup>142</sup> See Colin F. Camerer & Eric J. Johnson, *The Process-Performance Paradox in Expert Judgment: How Can Experts Know So Much and Predict So Badly?*, in TOWARD A GENERAL THEORY OF EXPERTISE 195, 203 (K. Anders Ericsson & Jacqui Smith eds., 1991).

<sup>143</sup> See RICHARD WHITTINGHAM, *THE MEAT MARKET: THE INSIDE STORY OF THE NFL DRAFT* 14–28, 40–41, 49–54, 81–82 (1992).

And college and university admissions offices, with much more limited budgets, must rely on much less rigorous and accurate methods.

Selective schools, which are more likely to factor race and ethnicity into admission decisions,<sup>145</sup> may evaluate candidates by computing a composite rating based on a combination of grades, national test scores, and other accomplishments.<sup>146</sup> Despite the limited predictive value of quantitative metrics for measuring candidates' potential, schools understand that grades and test scores are often the least flawed of affordable, imperfect options for comparing students.<sup>147</sup> Tests designed to measure the achievements of those who have had full opportunities to realize their potential may, however, fail to accurately portray those whose paths have been strewn with obstacles.

Thus, many selectors are especially sensitive to minority applicants: marking their files with special codes or colors, often considering them on an ad hoc basis. They generally assume that the academic achievements of such applicants are limited by the constraints of racial discrimination. Some schools set up special committees or different standards for evaluating these students. For example, the University of Michigan's undergraduate admissions process awarded a bonus to applicants of a particular race or ethnicity. Many believe that racial preference is the only economically practical way to adjust for obstacles that are too expensive to identify and evaluate on an individual basis.<sup>148</sup>

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<sup>144</sup> *Id.* at 21, 206–07. Additionally, financial securities analysts also spend significant money to identify the investments with the best potential for future earnings, and yet the best analysts hope to guess correctly only slightly more often than they guess incorrectly.

<sup>145</sup> See NACAC REPORT, *supra* note 19, at 12.

<sup>146</sup> Sometimes this rating is a score, e.g., A, B; other times it is less quantitative. See, e.g., GRETCHEN W. RIGOL, ADMISSIONS DECISION-MAKING MODELS: HOW U.S. INSTITUTIONS OF HIGHER EDUCATION SELECT UNDERGRADUATE STUDENTS 19-20 (2003), available at [http://www.collegeboard.com/repository/adm\\_decision\\_making\\_23500.pdf](http://www.collegeboard.com/repository/adm_decision_making_23500.pdf).

<sup>147</sup> It is important to recognize, however, that metrics which only account for a relatively small portion of an outcome, may actually represent relatively good predictors. See Sander, *supra* note 3, at 421–22.

<sup>148</sup> The costs of holistic reviews can be very large. See Greg Winter, *After Ruling, 3 Universities Maintain Diversity in Admissions*, N.Y. TIMES, Apr. 13, 2004, at A22. Therefore, many schools have long believed that using race as a proxy for a holistic evaluation was the only economically practical way to ensure a “diverse” admitted class. See *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1256 (11th Cir.

The decisions in *Grutter* and *Gratz* rejected this assumption, holding that schools that desire to provide racial preferences must bear the cost of "holistic" evaluations.<sup>149</sup> Section A, below, discusses some statistics that could effectively serve, like golf "handicaps," to adjust disadvantaged candidates' national test scores to levels they would have been expected to reach if they enjoyed genuine equal opportunity regarding educational resources. In addition to seeking metrics for quantifying the achievements of those for whom traditional measures fail, selectors should continue seeking to identify and test new statistics for predicting candidates' potential for success; this strategy is discussed in section B.

Neither of these options would involve per se racial preferences. Most admissions offices already frequently reevaluate and adjust their evaluation processes to improve the quality of their selections. They should, however, consider more radical reform, along the lines of the plan implemented by Billy Beane, general manager of the Oakland Athletics baseball team. Rather than relying on the conventional wisdom of baseball veterans, which was often more misleading than helpful,<sup>150</sup> Beane builds on the analyses of baseball statistician Bill James. James evaluates players according to a significantly different set of performance statistics that he has found relevant to predicting

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2001); Abraham L. Wickelgren, *The Efficiency of Affirmative Action with Purely Historical Discrimination* (Nov. 15, 2001) (working paper), available at <http://ssrn.com/abstract=296943>; Issacharoff, *supra* note 89, at 678; Edmund S. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972); Richard A. Posner, *The De Funis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 9, 21 ("[I]t may be that most discrimination in today's America can be explained simply by the cost of information."); Robert Reinhold, *U.S. Backs Minority Admissions But Avoids Issue of Racial Quotas*, N.Y. TIMES, Sept. 20, 1977, at 1 (quoting the U.S. government *Bakke* brief: "The consequences of discrimination are too complex to dissect [sic] case by case . . . . A professional school dealing with imponderables of this sort ought not to be confined to the choice of either ignoring the problem or attempting the sisyphian task of discerning its importance on an individual basis."). Nevertheless, the *Grutter* and *Gratz* decisions affirmed previous decisions rejecting this as an excuse for racial discrimination. See *infra* note 223. Furthermore, the fact that schools were pleased with the *Grutter* decision suggests that those costs are not impractical.

<sup>149</sup> *Gratz v. Bollinger*, 539 U.S. 244, 271–75 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 337–39 (2003).

<sup>150</sup> See MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* 14–42, 66–91 (2003) (observing that walks and a high pitches-faced-per-at-bat, among other statistics, were traditionally severely undervalued, while RBIs and saves are overvalued).

who will contribute most towards winning games.

### A. *Adjusting for Obstacles that Distorted Records*

Because past discrimination can mask an individual's achievements and potential, it is well recognized that ignoring its affects compromises the accuracy of purely merit-based, selection processes. As President Lyndon Johnson recognized in a 1965 commencement address, it is unfair to judge two runners by the same standards when one has been in shackles for part of the race.<sup>151</sup> Thus, in the late 1970s, Secretary of the Army, Clifford Alexander, ordered that the records of black army colonels, including Colin Powell, be reassessed after eliminating biased ratings and missed opportunities attributable to the prejudices of rating officers.<sup>152</sup>

In fact, irrespective of what form of affirmative action one favors, adjusting measurement tools to account for factors that distort their predictive value is necessary to achieve "non-discrimination."<sup>153</sup> Selectors already review the records of blind or other disabled persons in the context of their disabilities;<sup>154</sup> similar efforts are necessary for victims of discrimination. The key is to focus more on a candidate's relative achievement, i.e., how well they have taken advantage of available resources,<sup>155</sup>

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<sup>151</sup> Johnson used Martin Luther King, Jr.'s metaphor of a long-shackled runner facing a race unshackled. See Johnson, *supra* note 54, at 16, 17 ("You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."); see also WHITTINGHAM, *supra* note 143, at 50–51 (scouts failed to consider context). *But see* Adam Clymer, *Service Academies Defend Use of Race in Their Admissions Policies*, N.Y. TIMES, Jan. 28, 2003, at A17.

<sup>152</sup> See Clifford Alexander, *Colin Powell's Promotion: The Real Story*, N.Y. TIMES, Dec. 23, 1997, at A19 (stating that Colin Powell's promotion was based solely on his performance, not on any affirmative action program).

<sup>153</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 n.43 (1978) (positing that, to the extent race considerations cure inaccuracies in testing and grading procedures, "it might be argued that there is no 'preference' at all"); Kane, *supra* note 90, at 19–20; Alexander, *supra* note 152. Their primary impact may be to eliminate existing biases, which favor the advantaged. See *infra* notes 159–67 and accompanying text.

<sup>154</sup> See REBECCA ZWICK, *FAIR GAME? THE USE OF STANDARDIZED ADMISSIONS TESTS IN HIGHER EDUCATION* 98–99 (2002). Accommodating those with learning disabilities and keeping tests sufficiently standardized to make scores comparable, is difficult in the face of apparent abuse. *Id.* at 98–101; Lerner, *supra* note 85, at 1107.

<sup>155</sup> See *De Funis v. Odegaard*, 416 U.S. 312, 331 (1974) (Douglas, J., dissenting); HERNÁNDEZ, *supra* note 124, at 186 (discussing how admissions offices are

rather than absolute results. As Johnson observed in his 1965 speech: "Ability is stretched or stunted by the family you live with, and the neighborhood you live in, by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the infant, the child, and the man."<sup>156</sup>

Thus, it was misleading for the plaintiffs in the *Grutter* case to infer racial preferences from the grid-like charts they introduced, which segregated applicants based on their race, grades and LSAT scores and showed that whites were accepted at much lower rates than blacks for each range of test scores.<sup>157</sup> While the content of national tests do not appear to be biased against minorities,<sup>158</sup> the test scores of a disproportionate

particularly aware of relative achievement for first-generation college applicants); BOOKER T. WASHINGTON, *UP FROM SLAVERY: AN AUTOBIOGRAPHY* 39 (Corner House Publishers 1989) (1900) ("[S]uccess is to be measured not so much by the position that one has reached in life as by the obstacles which he has overcome while trying to succeed."); Banks, *supra* note 9, at 1062 (championing a "relative achievement" standard).

<sup>156</sup> See Johnson, *supra* note 54, at 18.

<sup>157</sup> See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 836–39 (E.D. Mich. 2001), *rev'd in part and vacated in part*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) (discussing testimony of statistics professor, Dr. Kinley Larntz). While Dr. Larntz testified that his results were not significantly altered even after taking into account which applicants received admissions fee waivers, *id.* at 837, this was not a very good proxy for adjusting for the level of preparation applicants received. Many of those receiving waivers may have been the best prepared minority students who were well advised by supportive college counselors, while most non-minority applicants who did not receive waivers probably did have extensive test preparation assistance. Furthermore, large disparities between average minority and non-minority test scores often do not represent evidence of racial discrimination. See BOWEN & BOK, *supra* note 20, at 16 (analogizing differences in average national test scores of different races to the disparity that would exist between the average height of men and women admitted if schools admitted all students over 5'6").

<sup>158</sup> For a review of studies on the issue of cultural bias, see ZWICK, *supra* note 154, at 109–42. The best evidence appears to indicate that the SAT I test actually over-predicts the academic performance (grades) of minority students, although the explanation is unclear. See BOWEN & BOK, *supra* note 20, at 76–81; ZWICK, *supra* note 154, at 120–24. Some contend that lower grades are due to biases in the system. See Timothy T. Clydesdale, *A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age, and Related Gaps in Law School Performance and Bar Passage*, 29 LAW & SOC. INQUIRY 711, 737, 754–55 (2004); William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 TEX. J. WOMEN & L. 167, 180 (2000); Michael Winerip, *In the Affluent Suburbs, An Invisible Race Gap*, N.Y. TIMES, June 4, 2003, at B8. In addition, some minority members may reduce their effort to avoid being labeled as "acting white." See KAROLYN TYSON & WILLIAM DARITY, JR., *BREEDING ANIMOSITY: THE "BURDEN OF ACTING WHITE" AND OTHER PROBLEMS OF STATUS*

number of non-minorities deserve to be deflated to remove the distorting effects of test preparation courses,<sup>159</sup> so as to reflect the applicants' relative abilities. Similarly, students with well-educated parents and access to tutoring are likely to produce better grades and application essays than similarly talented and motivated students lacking such aid.<sup>160</sup>

In fact, a failure to recognize and attempt to remove the distorting effects of data like this would perpetuate past discrimination and represent, what some have called, "white affirmative action."<sup>161</sup> The differing acceptance rates based on race at Michigan Law School suggest that the admissions office recognized the need to correct for these distortions, although the data provided to the court leaves unclear whether the corrections they made were too large or too small.<sup>162</sup>

GROUP HIERARCHIES IN SCHOOLS (2004); Roland G. Fryer, *Acting White*, EDUCATION NEXT, Winter 2006, at 53. The lower bar set by affirmative action may also play a part, see JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 232-33 (2000). Inflated scores of the non-minorities taking test-prep courses, see *infra* note 159; ZWICK, *supra* note 154, at 159-73, could also have this effect. For a more recent debate on one aspect of this issue compare Jay Mathews, *The Bias Question*, ATLANTIC, Nov. 2003, at 130, 132-36 (discussing Roy O. Freedle, *Correcting the SAT's Ethnic and Social-Class Bias: A Method for Reestimating SAT Scores*, 73 HARV. EDUC. REV. 1 (2003)), with NEIL J. DORANS & KARIN ZELLER, EXAMINING FREEDLE'S CLAIMS ABOUT BIAS AND HIS PROPOSED SOLUTION: DATED DATA, INAPPROPRIATE MEASUREMENT, AND INCORRECT AND UNFAIR SCORING (2004).

<sup>159</sup> Test scores of many students are artificially inflated by test prep courses. See *Grutter*, 137 F. Supp. 2d at 860-61; ZWICK, *supra* note 154, at 159-73 (reviewing research finding that coaching yields respective increases of about 8 and 16 points on the verbal and math sections of the SAT I test). *But see* Michael Winerip, *Test Prep Help for Students Who Can't Afford Kaplan*, N.Y. TIMES, Nov. 16, 2005, at B9.

<sup>160</sup> Courses for preparing applications are also increasingly available to those who can afford them. See Coeli Carr, *The Multiple Choices of Prepping for the SAT*, N.Y. TIMES, Oct. 3, 2004, § 3, at 8; Tamar Lewin, *How I Spent Summer Vacation: Going to Get-Into-College Camp*, N.Y. TIMES, Apr. 18, 2004, § 1, at 1. Some may be subsidized. See Sam Dillon, *American Indians Expand College Hopes*, N.Y. TIMES, Aug. 1, 2004, §1, at 22. Grades and application essays may also be the co-productions of parents and consultants. See PATRICIA M. McDONOUGH, CHOOSING COLLEGES: HOW SOCIAL CLASS AND SCHOOLS STRUCTURE OPPORTUNITIES 114-20 (1997); William Sorensen, *Am I Dad, or a Tutor?*, N.Y. TIMES, Sept. 19, 2002, at A35; Bess Kargman, *Writing Wrongs*, WASH. POST, Jan. 15, 2006, at B1. Schools, however, try to adjust for such effects. See *infra* note 162.

<sup>161</sup> See Richard Delgado, *Redrigo's Chronicle*, 101 YALE L.J. 1357, 1364 (1992); Schuck, *supra* note 34, at 24-28; George Sher, *Justifying Reverse Discrimination in Employment*, 4 PHIL. & PUB. AFF. 159, 162-70 (1975); Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953, 968-97 (1996). This is further exacerbated by alumni preference. See *infra* note 240.

<sup>162</sup> Many, if not most, admissions offices appear to make this adjustment. See

To make appropriate adjustments to remove distortions, selectors must be able to identify which applicants' records are distorted and what size of an adjustment is warranted. Such tasks seem practical for selective schools, which generally have sufficient resources for at least two staff people to evaluate applicants holistically and individually.<sup>163</sup> Moreover, many schools have made specific commitments to carefully evaluate individual applications against the background of any handicaps an applicant identifies.<sup>164</sup> The task is more difficult, however, for schools that receive tens of thousands of applications and lack huge budgets for the task.

Quantifying the effect of impediments for each applicant is particularly difficult. While it would be easy for schools to assume that the records of all candidates of a particular race were deflated by a uniform amount because the candidates had faced the same obstacles, such an assumption would be an inaccurate generalization. On the other hand, neither the *Grutter* nor *Gratz* decision precludes the use of colorblind formulas for identifying over-achieving students with low test scores like the Educational Testing Service's "Strivers" concept for SAT tests and William Goggin's "Merit Index."<sup>165</sup>

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KINKEAD, *supra* note 135, at 26, 53 (quoting Yale Dean of Admissions, Arthur Howe, Jr., who always hopes that Yale has not admitted "a lot of twerps who have . . . listened to their counselors, and learned to take tests and to give the right answers to interviewers—a bunch of conformists who will keep right on doing the smart thing . . ."); MCDONOUGH, *supra* note 160, at 119; STEINBERG, *supra* note 107, at 188–89; Kate Stone Lombardi, *College Prep; Ready, Or Not*, N.Y. TIMES, Nov. 9, 2003, § 4A, at 13; *see also* Zearfoss, *supra* note 121, at 436–37 (discussing leapfroggers, those students who show initiative and ambition even though they have lower LSAT scores); Barron H. Lerner, Letter to the Editor, *Under the Summer Sun, Training for the SAT's*, N.Y. TIMES, Apr. 20, 2004, at A18 (proposing that colleges ask students to disclose if they received special help).

<sup>163</sup> See RIGOL, *supra* note 146, at 39–41.

<sup>164</sup> See Henry Gottlieb, *How to Save Affirmative Action*, 160 N.J. L.J. 1095 (2000) (explaining the Rutgers mechanism); Rachel F. Moran, *Diversity and its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2247–48 n.12 (2000) (discussing process at Berkeley's law school); Susan A. Wilbur & Marguerite Bonous-Hammarth, *Testing a New Approach to Admissions: The Irvine Experience*, in CHILLING ADMISSIONS, *supra* note 90, at 111, 114–15, 119; Traub, *supra* note 20, at 78 (discussing program at University of Texas).

<sup>165</sup> These formulas simply identify students whose scores are relatively high for those from their community, i.e., that they appear to be overachievers. See ZWICK, *supra* note 154, at 138–40; Anthony Carnevale & Elhum Haghghat, *Selecting the Strivers: A Report on the Preliminary Results of the ETS 'Educational Strivers' Study*, in HOPWOOD, BAKKE, AND BEYOND, *supra* note 16, at 122; Amy Dockser Marcus, *Education: New Weights Can Alter SAT Scores—Family is Factor in*

Furthermore, many schools have developed race-blind adversity indexes.<sup>166</sup> These attempts to use “soft” variables to quantify the obstacles that the applicants have faced based on the economic characteristics of the applicants’ schools and neighborhoods (e.g., spending per pupil), the crime rate, teenage pregnancies, and quality of healthcare. Applicants claiming special handicaps could also check off items on detailed lists of obstacles, e.g., “lost one parent to death or prison,” (or “lost two”), “forced to play a quasi-parental role in raising siblings,” “victim of child abuse,” “forced to move often due to financial problems,” “number of different school districts attended during K-12.”<sup>167</sup> Admittedly, trying to quantify complex conditions this way with any precision is a bit ridiculous,<sup>168</sup> but no more so than assigning

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*Determining Who’s a ‘Striver,’* WALL ST. J., Aug. 31, 1999, at B1; Nathan Glazer, *Should the SAT Account for Race? Yes.*, NEW REPUBLIC, Sept. 27, 1999, at 26; Edward P. St. John et al., *Merit-Aware Admissions in Public Universities*, THOUGHT & ACTION, Winter 2001–2002, at 35, available at <http://www.nea.org/he/heta01/w01-02p35.pdf>; Abigail Thernstrom, *Should the SAT Account for Race? No.*, NEW REPUBLIC, Sept. 27, 1999, at 27; William J. Goggin, *Maintaining Diversity at Selective Colleges Under Imposed Race-Blind Admissions Systems* (Mar. 2000) (unpublished manuscript, on file with author) (describing a Merit index). An earlier effort to adjust SAT scores to account for backgrounds was quashed by ETS. See LEMANN, *supra* note 45, at 270–75; CENTER FOR RESEARCH ON MINORITY EDUCATION, *THE MEASURE OF ACADEMIC TALENT (MAT)* (University of Oklahoma, Norman 1990) (discussing Winton H. Manning’s approach); see also Mathews, *supra* note 158, at 134–38 (discussing Ray O. Freedle’s proposed R-SAT); *infra* note 166–74.

<sup>166</sup> See Roithmayr, *supra* note 16, at 13 n.47; Sander, *supra* note 9, at 483 (discussing UCLA’s use of seven variables to capture socioeconomic status); Torres, *supra* note 122, at 1606 (discussing University of Texas’s personal achievement index); see also KAHLBERG, *supra* note 20, at 128–44 (defining class using seven criteria); Michelle Adams, *Intergroup Rivalry, Anti-Competitive Conduct and Affirmative Action*, 82 B.U. L. REV. 1089, 1113–16 (2002) (discussing relevance of neighborhoods, schools, and jobs); *infra* note 167. *But see* Malamud, *supra* note 7, at 1870–97 (discussing the difficulties quantifying the criteria for defining class).

<sup>167</sup> See, e.g., TEX. EDUC. CODE ANN. § 51.805(b) (Vernon 2005) (listing 18 factors that might be considered for use on such checklists); see also Grutter v. Bollinger, 288 F.3d 732, 790, 907 (6th Cir. 2002) (Boggs, J., dissenting), *aff’d*, 539 U.S. 306 (2003) (listing factors to be considered); Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234, 1255 (11th Cir. 2001) (noting other criteria); Daniel Golden, *Extra Credit: To Get Into UCLA, It Helps to Face Life Challenges—University of California System Raises Number of Blacks and Hispanics Admitted—Are Obstacles Created Equal?*, WALL ST. J., July 12, 2002, at A1 (discussing inclusion of “victim of a shooting” and other factors). Evaluators can note that students listing part-time jobs to finance their education may well have been foreclosed from taking an unpaid internship. See Jennifer 8. Lee, *Crucial Unpaid Internships Increasingly Separate the Haves From the Have-Nots*, N.Y. TIMES, Aug. 10, 2004, at A16.

<sup>168</sup> See Schuck, *supra* note 34, at 81; Michael Kinsley, *The Spoils of Victimhood*,



precise grades to student poetry and artwork. Meanwhile, to try to minimize fraud on self-supplied check-off forms, selectors at comparable schools might pool resources to verify a reasonable sample of those to be accepted.<sup>169</sup>

### *B. Additional Relevant Attributes, Statistics, and Selection Mechanisms*

Despite significant research on measuring multiple forms of intelligence and attempting to predict future performance,<sup>170</sup> no new statistics for measuring students' potential have gained credibility comparable to the baseball statistics recommended by Bill James, and used by Billy Beane.<sup>171</sup> The Educational Testing Service ("ETS") abandoned its previous efforts to develop a comprehensive evaluation as too costly.<sup>172</sup> Of course, one major obstacle is the difficulty of defining what forms of future performance would qualify as the "success" that schools are seeking.<sup>173</sup>

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NEW YORKER, Mar. 27, 1995, at 62, 66.

<sup>169</sup> Admittedly, fraud occurs, and verification would be difficult. See KAHLBERG, *supra* note 20, at 122 (quoting and agreeing with Abigail M. Thernstrom, *A Class Backwards Idea; Why Affirmative Action for the Needy Won't Work*, WASH. POST, June 11, 1995, at C1, that verification would be impractical); Stuart Silverstein, *UC to Review New Admissions Policy: The System's Most Selective Campuses Will Examine How Hard-luck Stories Affect Choices*, L.A. TIMES, Nov. 7, 2002, at B24. Selectors could require a guidance counselor signature on the form, and coordinate audits of the forms by using an independent third-party, the way credit card companies verify credit history. An entity like the American Association of Collegiate Registrars & Admissions Officers ("AACRAO") might offer the service and inform members of any frauds discovered. *Cf. Applicants for M.B.A.'s are Getting More Scrutiny*, N.Y. TIMES, Mar. 16, 2003, § 1, at 24 (stating that UC Berkeley and Wharton run background checks on applicants). Although privacy concerns might ordinarily trump requests for such personal data, schools already collect a tremendous amount of students' data, including parental tax returns for those who seek financial aid. See, e.g., John Schwartz, *The Nation: Surveillance 101; Privacy vs. Security on Campus*, N.Y. TIMES, Aug. 4, 2002, § 4, at 3.

<sup>170</sup> Compare HOWARD GARDNER, *MULTIPLE INTELLIGENCES: THE THEORY IN PRACTICE* (1993); Cecilia Capuzzi Simon, *College Prep: The SAT III?*, N.Y. TIMES, Jan. 18, 2004, § 4A, at 15 (discussing research by Robert Sternberg and others), with LEWIS, *supra* note 150, at 14-42, 66-91.

<sup>171</sup> *Cf.* Paul L. Caron & Rafael Gely, *What Law Schools Can Learn From Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1485 (2004); Malcolm Gladwell, *Personality Plus; Employers Love Personality Tests. But What do They Really Reveal?*, NEW YORKER, Sept. 20, 2004, at 42.

<sup>172</sup> See LEMANN, *supra* note 45, at 86-95 (discussing ETS's goal of a more comprehensive assessment of talents).

<sup>173</sup> See *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 828 (E.D. Mich. 2001), *rev'd in part and vacated in part*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003)

To begin, more schools should consider devaluing, if not ignoring, an applicants' scores on national tests. These tests could be used, instead, to help determine the value of the outstanding grades an applicant received from an unknown feeder school or to confirm that the candidate is at least minimally prepared to handle an elite school.<sup>174</sup> Such tests may be more useful to calibrate the quality of the student body of a school as a whole, rather than to evaluate individual students.<sup>175</sup> Of course, as long as those compiling rankings of colleges (and graduate and professional schools), like *U.S. News & World Report*, list school averages of these scores and give significant weight to them in computing their rankings,<sup>176</sup> it may be difficult for selectors—concerned about marketing themselves to applicants—to ignore them.<sup>177</sup> Thus, the solution may need to include modifications to such college ranking mechanisms.<sup>178</sup>

On the other hand, there appear to be a number of promising candidates for new “soft variable” statistics, deserving of direct, rather than indirect, measurement. With respect to selecting law students, one study has already identified twenty-six criteria to

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(quoting the Director of Admissions at the law school as saying “our mission is to pick winners”); THE COLLEGE BOARD, BEST PRACTICES IN ADMISSIONS DECISIONS 11–13 (2002), available at <http://www.collegeboard.com/html/pdf/BestPractAdmis.pdf> (listing measures of “success”).

<sup>174</sup> Many schools have already stopped using the “SAT I” test. See Tamar Lewin, *College Board to Revise SAT After Criticism by University*, N.Y. TIMES, Mar. 23, 2002, at A10. In addition, the “top X%” state programs discussed *infra* note 210 virtually ignore national scores, at least for in-state applicants. *But see supra* note 147.

<sup>175</sup> Average achievement test scores are already commonly used to evaluate the relative quality of lesser-known institutions, see St. John et al., *supra* note 165, at 38, and selectors often compute a multiplier for the GPAs of candidates from the school based on the performance of previous graduates. See KINKEAD, *supra* note 135, at 47–48.

<sup>176</sup> See Guinier, *supra* note 13, at 144–46; see also STEPHEN P. KLEIN & LAURA HAMILTON, THE VALIDITY OF THE U.S. NEWS AND WORLD REPORT RANKINGS OF ABA LAW SCHOOLS (1998) (contending that “90% of the overall differences in ranks among schools can be explained solely by the median LSAT score of their entering classes”).

<sup>177</sup> See Amanda Griffith & Kevin N. Rask, The Influence of the U.S. News and World Report Collegiate Rankings on the Matriculation Decision of High-Ability Students: 1995-2003 (Aug. 2004) (working paper draft), available at <http://www.ssrn.com/abstract=595223>.

<sup>178</sup> An example of an alternative is Christopher Avery et al., *A Revealed Preference Ranking of U.S. Colleges and Universities* (Nat'l Bureau of Econ. Research, Working Paper No. 10803, 2004).

consider.<sup>179</sup> For example, "perseverance" is usually necessary to, and thus implicit in, high grades, given its exceptionally high correlation with success,<sup>180</sup> but efforts could be made to quantify it independently. Similarly, although "emotional intelligence," is generally a necessary element of, and thus manifested by, significant leadership positions, the tremendous value of that skill, even to non-leaders, should encourage all schools to seek ways to measure it.<sup>181</sup> The ability to relate to others with a very different background is another important quality possibly deserving of a separate statistic, and it is also discussed in section I.B.2.b, above, and IV.B, below. There are, undoubtedly, many other qualities that may deserve similar, if not greater, attention<sup>182</sup> because they correlate well with long term success and thus justify efforts to try to quantify them. Certainly, these qualities are often flagged in faculty recommendations and essays, but if selectors asked the schools feeding them applicants to provide a numerical grade for each applicant on the specific quality, it would be easier to use the quality in a formula rather than treating it on an ad hoc basis.

Where applicants appear to have the talent and motivation to perform, but lack the appropriate training and opportunities to manifest the skills required at an institution, they might be given a special chance, the equivalent of an apprenticeship or trainee position for a probationary period.<sup>183</sup> For example,

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<sup>179</sup> See Panel Discussion, *supra* note 80, at 542–50 (discussing the Phase I Final Report of a project by Marjorie Shultz and Sheldon Zedeck entitled "Identification and Development of Predictors for Successful Lawyering").

<sup>180</sup> See Margaret Y. K. Woo, *Reaffirming Merit in Affirmative Action*, 47 J. LEGAL EDUC. 514, 518–21 (1997) (suggesting the creation of a statistic to measure perseverance); David K. Shipler, *A Leg Up; My Equal Opportunity, Your Free Lunch*, N.Y. TIMES, Mar. 5, 1995, § 4, at 1 (discussing one study finding the most successful Harvard graduates were those with lower SATs from blue-collar backgrounds).

<sup>181</sup> See DANIEL GOLEMAN, EMOTIONAL INTELLIGENCE (1995); Gary Orfield, *Campus Resegregation and its Alternatives*, in CHILLING ADMISSIONS, *supra* note 90, at 13–14; Sturm & Guinier, *supra* note 161, at 976; Panel Discussion, *supra* note 80, at 546–47 (discussing the inclusion of emotional intelligence as a variable in Marjorie Shultz and Sheldon Zedeck's study to determine ways to measure law student success).

<sup>182</sup> These include leadership skills, entrepreneurial skills, compassion, and curiosity. The University of California approved four "supplemental" criteria to use. See UNIV. OF CAL., OFFICE OF STRATEGIC COMM'NS, FACTS ABOUT THE UNIVERSITY OF CALIFORNIA (2001), available at <http://www.ucop.edu/news/factsheets/2001/comprev.pdf>; see also Simon, *supra* note 170. Such research might focus on the "soft" data in admissions files. See Guinier, *supra* note 16, at 574 n.28.

<sup>183</sup> Programs like these have existed for decades. See GARDNER, *supra* note 170,

schools with sufficient resources might use a preliminary summer session to assess the performance of many of the latter hard-to-evaluate students. The military and some college premed programs already use a probational approach, which had previously been used by law schools.<sup>184</sup> The University of California (“UC”) adopted a related 12.5% “Dual Admissions” program, whereby all students ranking in the top eighth of their high school class would be guaranteed admission to a state community college, and upon two years of good grades, would be admitted to one of UC’s eight campuses.<sup>185</sup> Under its “Coordinated Admission Program” (“CAP”) begun in 2001, the University of Texas (“UT”) admits any Texas high school graduate who has taken the SATs or ACTs, as long as that student can earn at least a 3.0 GPA for 30 credit hours of classes in affiliated UT feeder schools.<sup>186</sup> To avoid compromising their quality standards,<sup>187</sup> elite campuses like UC Berkeley and state professional schools, are not as open, although they admit transfer students. None of these mechanisms involves racial

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at 161–86; D.A. Ijalaye, *Concessional Admission of Underprivileged Students*, 20 BUFF. L. REV. 435, 441–43 (1971); John F.T. Murray, *The Tryout System*, 21 J. LEGAL EDUC. 317 (1969) (discussing Univ. Georgia Law School’s summer program); Sturm & Guinier, *supra* note 161, at 1003–22; *see also* Jason S. Marks, *Legally Blind? Reevaluating Law School Admissions at the Dawn of a New Century*, 29 J.C. & U.L. 111, 147–49 (2002) (suggesting test of actual skills, such as dispute resolution, for applicants to law school as well as other essay topics); Gladwell, *supra* note 171, at 47–48 (discussing the direct evaluations of the Assessment Center); *infra* note 189 and accompanying text.

<sup>184</sup> *See* LEMANN, *supra* note 45, at 171–73 (discussing how California state universities over admitted and flunked out less capable students during freshman year before changing their admission program); W. Barton Leach, *Look Well to the Right . . .*, 58 HARV. L. REV. 1137, 1138 (1945) (quoting Harvard’s legendary Professor Edward Henry “Bull” Warren: “Look well to the right of you, look well to the left of you, for one of you three won’t be here next year. Ours is the policy of the Open Door.”); G.I. JANE (Buena Vista 1997).

<sup>185</sup> *See* Michelle Adams, *Isn’t it Ironic? The Central Paradox at the Heart of “Percentage Plans,”* 62 OHIO ST. L.J. 1729, 1743 (2001). However, budgetary problems arose. *See* Press Release, Univ. of Cal. Office of the President, Regents Approve “Dual Admissions” Plan, Expanding UC Access for High-Achieving Students (Sept. 18, 2001), available at <http://www.ucop.edu/news/archives/2001/july19art2.htm>. Prior to 1973, these top 12.5%-of-the-class students were automatically accepted at Berkeley and UCLA. LEMANN, *supra* note 45, at 243.

<sup>186</sup> *See* Univ. of Tex., Coordinated Admission Program 2005–2006, <http://bealonghorn.utexas.edu/freshmen/admission/cap/offer>; *see also* Sturm & Guinier, *supra* note 161, at 1018–19 (discussing community colleges as feeders); Greg Winter, *Junior Colleges Try Niche as Cheap Path to Top Universities*, N.Y. TIMES, Dec. 15, 2002, § 1, at 1.

<sup>187</sup> *See supra* notes 32 & 110 and accompanying text.

preferences.

Most elite schools also recognize an obligation to assist their least-prepared students,<sup>188</sup> and many offer summer programs, remedial classes, and tutoring.<sup>189</sup> Absent such assistance, schools would soon face two unattractive choices for responding to the inferior grades that such less-prepared students would likely receive: (1) lower the school's standards or (2) fail many of the students.<sup>190</sup>

Eliminating the effects of past racial discrimination also requires schools to target marketing campaigns to those communities that were long told that their members were not welcome at all, proclaiming that such members will now be highly valued and treated well.<sup>191</sup>

#### IV. ENLIGHTENING SCHOLARLY COMMUNITIES ABOUT "MINORITY" PERSPECTIVES/EXPERIENCES

The value of cultural pluralism, having access to a diversity

<sup>188</sup> See *De Funis v. Odegaard*, 416 U.S. 312, 341 (1974) (Douglas, J., dissenting); NACAC REPORT, *supra* note 19, at 15 (reporting that 42% of schools appear to be taking such steps); Derrick A. Bell, Jr., *Black Students in White Law Schools: The Ordeal and the Opportunity*, 1970 U. TOL. L. REV. 539, 548–58; Karen W. Arenson, *Colleges Struggle to Help Black Men Stay Enrolled*, N.Y. TIMES, Dec. 30, 2003, at A1.

<sup>189</sup> See THE COLLEGE BOARD, OUTREACH PROGRAM HANDBOOK (2001); RAMIN AFSHAR-MOHAJER & EVELYN SUNG, THE STIGMA OF INCLUSION: RACIAL PATERNALISM/SEPARATISM IN HIGHER EDUCATION 14–18 (2002), [http://nycivilrights.org/reports/pdfs/nycrc\\_campusreport.pdf](http://nycivilrights.org/reports/pdfs/nycrc_campusreport.pdf); PATRICIA MARIN & EDGAR K. LEE, THE CIVIL RIGHTS PROJECT, APPEARANCE AND REALITY IN THE SUNSHINE STATE: THE TALENTED 20 PROGRAM IN FLORIDA 35–36 (2003), <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf> (discussing CARE); Sanford Jay Rosen, *Equalizing Access to Legal Education: Special Programs for Law Students Who Are Not Admissible by Traditional Criteria*, 2 U. TOL. L. REV. 321, 341–63 (1970); Jane Gross, *Intense Tutoring for the Suburban, Smart and Disadvantaged*, N.Y. TIMES, Nov. 18, 2002, at B1 (discussing Prep for Prep in the New York metro area); *M.I.T. to Open Two Programs for Minorities to All Races*, N.Y. TIMES, Feb. 12, 2003, at A34.

<sup>190</sup> See *supra* note 32.

<sup>191</sup> See NACAC REPORT, *supra* note 19, at 12–14, 26–28 (listing marketing strategies and reporting that about 74% of schools appear to be taking such steps); Traub, *supra* note 20, at 46 (observing that in the aftermath of California's prohibition against racial discrimination, the state legislature authorized \$38.5 million for outreach programs and required public schools to spend an additional \$31 million on similar initiatives); CATHERINE L. HORN & STELLA M. FLORES, THE CIVIL RIGHTS PROJECT, PERCENTAGE PLANS IN COLLEGE ADMISSIONS: A COMPARATIVE ANALYSIS OF THREE STATES' EXPERIENCES 51–58 (2003), <http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf>. On providing a supportive environment, see *infra* section IV.B.

of perspectives, experiences, and lifestyles,<sup>192</sup> has long been recognized by schools,<sup>193</sup> businesses,<sup>194</sup> governmental bodies,<sup>195</sup> and individuals themselves.<sup>196</sup> Thus, it was not surprising that the Court in *Grutter* found a “compelling state interest” in the pursuit of diversity in education.<sup>197</sup> Although a multi-cultural curriculum can provide students with a wide spectrum of perspectives, a diverse student body enables students not only to read about, but also to observe interactions between those of diverse backgrounds, ask and answer questions in classrooms, and hear personal stories that may challenge their abstract theories and beliefs.<sup>198</sup> Moreover, it fosters educational dialogue

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<sup>192</sup> Cultural pluralism, however, is in tension with the concept of assimilation and the melting pot. See BILL ONG HING, *TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION* 174–81 (1997); Kevin M. Fong, Comment, *Cultural Pluralism*, 13 HARV. C.R.-C.L. L. REV. 133, 133–46 (1978).

<sup>193</sup> See NEIL L. RUDENSTINE, *POINTING OUR THOUGHTS: REFLECTIONS ON HARVARD AND HIGHER EDUCATION 1991–2001*, at 19–32 (2001); NACAC REPORT, *supra* note 19, at 1–6; Hallinan, *supra* note 130, at 745; Anthony T. Kronman, *Is Diversity a Value in American Higher Education?*, 52 FLA. L. REV. 861, 868–77 (2000); Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 944–61 (2002) (reviewing multiple studies). In refusing to grant undergraduate Orthodox Jews permission to live outside close proximity from their classmates, Yale’s President stated: “This university has been committed to offering an encounter with difference as part of its educational mission. These students want the education, but they don’t want the encounter.” See Freedman, *supra* note 120.

<sup>194</sup> A survey of human resource professionals from top Fortune 100 companies found that 91% of the respondents said diversity initiatives “help the organization keep a competitive advantage.” See SOC’Y FOR HUMAN RES. MGMT., *IMPACT OF DIVERSITY INITIATIVES ON THE BOTTOM LINE* 16 (2001); see also Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516); Brief for General Motors Corp. as Amicus Curiae Supporting Respondents at 12–17, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516); Black, *supra* note 193, at 961–63; Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85 (2000); *infra* note 207 and accompanying text.

<sup>195</sup> For example, a leader benefits greatly from an inner circle that includes someone trusted by significant foreign communities. See Sandalow, *supra* note 32, at 1911–12. Thus, a chief of police might seek out those intimately familiar with and able to reach out to different neighborhood groups. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 314–15 (1986) (Stevens, J., dissenting); *Sturm & Guinier, supra* note 161, at 983–85; Joseph D. McNamara, *N.Y.P.D. White*, N.Y. TIMES, June 10, 1995, §1, at 19.

<sup>196</sup> See BOWEN & BOK, *supra* note 20, at 220–24.

<sup>197</sup> *Grutter v. Bollinger*, 539 U.S. 306, 327–33 (2003).

<sup>198</sup> See *id.* at 330 (stating benefits of diversity are important because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” (quoting Petition for Writ of Certiorari at 246a, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241))); Sanford Levinson, *Diversity*, 2 U. PA. J. CONST. L.

to continue outside the classroom where much learning on college and university campuses occurs.<sup>199</sup> Interestingly, the primary beneficiaries of a diverse student body may be the non-minority students enrolled, some highly qualified minority enrollees,<sup>200</sup> and those seeking to offset the message implicit in state decisions to repeal programs for increasing minority enrollment.<sup>201</sup>

Meanwhile, the value to the student body of access to students with uncommon experiences and perspectives is dependent, in large part, on how widely these minority students are willing to share them.<sup>202</sup> Even those who segregated themselves socially<sup>203</sup>—refusing to educate other students outside of class<sup>204</sup>—would add perspectives during class discussions and orientation.<sup>205</sup> Yet applicants able and likely to

573, 592–98 (2000); Moran, *supra* note 128, at 785–88; *see also* Lawrence, *supra* note 33, at 960–62; Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 775–76 (1997); Schuck, *supra* note 34, at 43–44; Sara Rimer, *Colleges Find Diversity is Not Just Numbers*, N.Y. TIMES, Nov. 12, 2002, at A1 (discussing new efforts at Dartmouth to enhance cross-racial connections).

<sup>199</sup> *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (quoting Princeton University President William Bowen); Patricia Gurin et al., *Diversity and Higher Education: Theory and Impact on Educational Outcomes*, 72 HARV. EDUC. REV. 330, 352–53, 359 (2002); Moran, *supra* note 164, at 2306–11, 2314–21; Gary Orfield & Dean Whitley, *Diversity and Legal Education: Student Experiences in Leading Law Schools*, in DIVERSITY CHALLENGED, *supra* note 51, at 143, 159. Interracial contact in schools generally leads to increased interracial sociability and friendship. *See supra* note 130 and accompanying text.

<sup>200</sup> *See supra* note 8.

<sup>201</sup> *See* Mark C. Long, *College Applications and the Effect of Affirmative Action*, 121 J. ECONOMETRICS 319 (2004).

<sup>202</sup> *See* Zearfoss, *supra* note 121, at 440.

<sup>203</sup> Voluntary segregation of diverse school campuses is common. *See* AFSHAR-MOHAJER & SUNG, *supra* note 189, at 10–11; Moran, *supra* note 164, at 2304–05, 2320–21; Orfield & Whitley, *supra* note 199, at 158 (finding that about 40% of the law students at Harvard and Michigan rarely or never study with students of another race); Thernstrom & Thernstrom, *supra* note 110, at 1607; Traub, *supra* note 20, at 76. This may be due in part to the handicap faced by less qualified minority students. Schuck, *supra* note 34, at 45. *Cf.* Karen W. Arenson, *Study of Elite Colleges Finds Athletes Are Isolated From Classmates*, N.Y. TIMES, Sept. 15, 2003, at A12.

<sup>204</sup> *See* Malamud, *supra* note 10, at 963–64; William Borders, *Racial Diversity Unsettles Wesleyan*, N.Y. TIMES, Jan. 31, 1969, at 41 (quoting juniors at Wesleyan as stating “I don’t give a damn for educating white boys about what it’s like to be black” and “I don’t have time to make friends with white guys”); Fred M. Hechinger, *New Challenges to the Value of Separatism and ‘Black Studies,’* N.Y. TIMES, Jan. 19, 1969, § E, at 19 (quoting a black Yale student as stating, “[w]e’re tired of being textbooks for whites”); Sara Rimer, *Blacks’ Guide to Harvard Covers History and Tips*, N.Y. TIMES, Feb. 1, 2003, at A15.

<sup>205</sup> *See* Supplemental Expert Report of Patricia Y. Gurin at 22, Grutter v.

help educate classmates about their unusual life experiences by fraternizing across racial, ethnic, class, and religious boundaries (as demonstrated by past actions) would deserve greater preferences. To enable those who were lower-income students to afford enrollment, remain active within their home community, and participate in a full slate of cross-fertilizing activities, selectors would also need to provide sufficient financial support.<sup>206</sup>

Admittedly, some exchanges between those of different economic classes, and with differing religious values, political views, ethnicities, and home environments would almost inevitably lead to disruptive cultural clashes. Still, these would help teach sensitivity towards the feelings of those with different backgrounds, and also help individuals learn to criticize minority views, but while showing respect for those they disagree with. These cross-cultural competencies are very important to businesses and other entities responsible for dealing effectively with diverse sets of employees, customers, and suppliers.<sup>207</sup>

Section A discusses how to identify applicants with valuable diversity in a manner that involves racial consciousness, but not racial preferences, and thus could be used by admissions offices

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Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001) (No. 97-75928). Orientation programs are critical to exploiting the value of diversity. See SUSKIND, *supra* note 32, at 173–78; Mark Hicks & Patricia Marin, *Diversity as a Tool to Promote Cultural Understanding and Tolerance*, in HOPWOOD, BAKKE, AND BEYOND, *supra* note 16, at 25; Rimer, *supra* note 198.

<sup>206</sup> See *Minority Participation and Retention in Higher Education: Hearing Before the S. Subcomm. on Educ., Arts and Humanities of the Comm. on Labor and Human Res.*, 103d Cong. 9, 44–45, 51 (1994) (statement of Cornelia M. Blanchette, Assoc. Dir., Educ. and Employment Issues, U.S. Gen. Accounting Office) (reporting that grants are more effective than loans in steadying minority drop-out rates in colleges); ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, *EMPTY PROMISES: THE MYTH OF COLLEGE ACCESS IN AMERICA* (2002), available at <http://www.ed.gov/about/bdscomm/list/acsfa/emptypromises.pdf>; USCCR, *supra* note 31, at 99–111; Greg Winter, *College Loans Rise, Swamping Graduates' Dreams*, N.Y. TIMES, Jan. 28, 2003, at A1. Cutbacks in Pell Grants aggravate this problem. See Greg Winter, *Students to Bear More of the Cost of College*, N.Y. TIMES, Dec. 23, 2004, at A1. Merit scholarships do too. See *supra* note 31; See also *Nondiscrimination in Federally Assisted Programs*, 59 Fed. Reg. 8756, 8759-62 (codified at 34 C.F.R. § 100.3(b)(6)(i) & (ii)). Still, there are some encouraging examples to follow. See *supra* note 29.

<sup>207</sup> See, e.g., Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, at 7, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516); Brief for General Motors Corp. as Amicus Curiae Supporting Respondents, at 12–17, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241, 02-516). This is highly valued emotional intelligence. See GOLEMAN, *supra* note 181.



even if the *Grutter* decision was reversed. Section B explains why applicants should receive a preference for adding to diversity indirectly by inducing enrollment of classmates who would provide that diversity. Section C addresses preferences for children of alumni.

#### A. *Practical Mechanisms for Adding Diversity of Views/Backgrounds*

The challenge to academic admissions offices has long been finding an economically practical, constitutional, and principled mechanism for identifying students who can provide an intellectually desirable diversity of perspectives and knowledge, particularly those students most willing to discuss their views and background with those different from themselves.

Most schools already favor applicants from states or individual schools that are otherwise severely under-represented at their institutions,<sup>208</sup> presuming that students from such locations are likely to be significantly different from the rest.<sup>209</sup> The California, Florida, and Texas "percentage" programs mentioned earlier go one step further by opening the state university to the top X-percent of each high school class in the state.<sup>210</sup> To the extent that those high school student bodies are

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<sup>208</sup> The Harvard plan, praised by Powell in *Bakke*, favors applicants from underrepresented states. See Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 412-13 & n.108 (1979). UCLA Law School has also taken this approach. See Sander, *supra* note 9, at 482-83. *But see infra* note 212 and accompanying text.

<sup>209</sup> *But see* KINKEAD, *supra* note 135, at 27 (quoting the Yale Dean of Admissions: "Geographical diversity doesn't mean too much . . . What we're really after is diversity of talent and interest . . ."); Dershowitz & Hanft, *supra* note 208, at 410-14.

<sup>210</sup> Florida, Texas, and California automatically admit students in the top 20%, 10%, and 4%, respectively, of their high school classes into state universities, subject to a few qualifications. See FLA. ADMIN. CODE ANN. r. 6C-6.002(5) (2005); TEX. EDUC. CODE ANN. § 51.803 (Vernon Supp. 2004-2005); Adams, *supra* note 185, at 1736-46; *Regents Adopt 4% Plan, Arts Requirement*, UC NOTES, Apr. 1999, available at [http://www.ucop.edu/pathways/ucnotes/cn\\_archives/apr99\\_plan.html](http://www.ucop.edu/pathways/ucnotes/cn_archives/apr99_plan.html). Texas colleges are also pursuing additional programs for disadvantaged schools. See USCCR, *supra* note 31, at 35. Colorado and Pennsylvania also considered such plans. See *id.* at 1 n.2. In the 1920s, Harvard accepted the top seventh (15%) from "approved" schools, but not for schools in New Jersey, Long Island, and Eastern New York, to keep out Jews and other groups. See MARCIA GRAHAM SYNNOTT, *THE HALF-OPENED DOOR: DISCRIMINATION AND ADMISSIONS AT HARVARD, YALE, AND PRINCETON, 1900-1970*, at 85-93, 107, 109-10, 193 (1979).

relatively homogeneous in terms of class, ethnicity, politics, religious values, or other indicators of viewpoint diversity, this mechanism can effectively produce diversity of these characteristics.<sup>211</sup> Yet where feeder schools are more heterogeneous, such programs may well be ineffective.<sup>212</sup> Furthermore, such mechanisms are not relevant for graduate and professional schools.

Meanwhile, the inherent tensions between openness, selectivity, and the limited resources states commit to education, leads the percentage programs to impose a significant cost on minority members in the “better” high schools in the state. These programs can also lead less qualified applicants from lower quality schools to crowd out better qualified minority students from the better high schools, thereby encouraging parents to enroll their children in less vigorous courses and schools, discouraging the maintenance of integrated magnet schools.<sup>213</sup>

While states can expand schools to accommodate students who previously would have been rejected, such students’ lack of the same qualifications as their classmates will likely lead them to perform at lower levels.<sup>214</sup> Schools would then be forced to take at least one of the three actions mentioned above: expand remedial classes, lower the school’s grading standards, or fail many students.<sup>215</sup> If the special-program students actually did

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<sup>211</sup> See Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2365–67 (2000); Lawrence, *supra* note 33, at 970–71. Recent data, however, shows an increase in virtually segregated schools. See GARY ORFIELD & CHUNGMEI LEE, *BROWN AT 50: KING’S DREAM OR PLESSY’S NIGHTMARE?* 19 (2004), <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>; Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1593 (2003).

<sup>212</sup> It is also unclear how effective these percentage programs have been. See, e.g., MARIN & LEE, *supra* note 189, at 32–37; Laycock, *supra* note 21, at 1811–14, 1833–36; Marta Tienda et al., *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* (Jan. 21, 2003) (working paper), available at [http://www.texas10.princeton.edu/reports/wp/closing\\_the\\_gap.pdf](http://www.texas10.princeton.edu/reports/wp/closing_the_gap.pdf).

<sup>213</sup> See Laycock, *supra* note 21, at 1817–25; Rick Casey, *White Flight in Age of 10 Percent*, HOUS. CHRON., Sept. 5, 2003, at A25; Jonathan D. Glater, *Diversity Plan Shaped in Texas is Under Attack*, N.Y. TIMES, June 13, 2004, § 1, at 1.

<sup>214</sup> See Sander, *supra* note 3, at 369–70.

<sup>215</sup> See *supra* note 32 and accompanying text. Thus, California’s “Eligibility in the Local Context” (“ELC”) program does not grant all top 4% ELC students access to the campus of their choice, so elite campuses, like Berkeley, can retain their selectivity. Still, this eliminates ELC’s effect on diversity at Berkeley. Florida’s “Talented 20” program also does not grant automatic access to its flagship colleges—

well,<sup>216</sup> that could merely signal that the school's evaluation process was flawed and needed correcting.

As noted above, many have proposed that selectors focus on seeking diversity among economic classes,<sup>217</sup> but the poorest primary and secondary schools in the nation seem unlikely to have sufficiently prepared their graduates for the rigor of elite colleges,<sup>218</sup> even if sufficient financial aid was provided,<sup>219</sup> although the first element of this proposal could help to change that.

Wealthy, elite colleges have the resources to read each candidate's application carefully and give appropriate preferences to those with backgrounds, lifestyles, or perspectives that would add significant diversity.<sup>220</sup> These would include minority students who had been isolated in white schools, white students who had been isolated in predominantly black or Hispanic schools,<sup>221</sup> and non-minorities who had assimilated to minority cultures.<sup>222</sup>

For schools with limited resources, the *Gratz* decision clearly prohibits the use of race as a cost-effective alternative to evaluating each individual's potential contribution to diversity.<sup>223</sup>

University of Florida and Florida State. See USCCR, *supra* note 31, at 52–74. One creative reform would limit percentage plans to only the schools in the state with the lowest representation in the state's flagship colleges. See Laycock, *supra* note 21, at 1826. Yet that would still likely lead to the admission of possibly under-qualified students and could create a race to the bottom among a state's weakest schools to gain guaranteed places for their graduates.

<sup>216</sup> This appears to have occurred in Texas, where students admitted under the 10-percent plan actually excelled. See Torres, *supra* note 122, at 1604.

<sup>217</sup> See *supra* note 9 and accompanying text.

<sup>218</sup> See *supra* note 32 and accompanying text.

<sup>219</sup> See *supra* note 206.

<sup>220</sup> See RIGOL, *supra* note 146, at 39–41; Bruce Weber, *Inside the Meritocracy Machine*, N.Y. TIMES, Apr. 28, 1996, at 44. The Director of Admissions at the University of Michigan Law School discussed forms of diversity that the school was seeking other than racial preferences. Zearfoss, *supra* note 121, at 440.

<sup>221</sup> See Lawrence, *supra* note 33, at 971 & n.142.

<sup>222</sup> See *supra* note 128 and accompanying text.

<sup>223</sup> *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003). Despite the high cost of individual attention, the courts have generally refused to permit race-based presumptions on grounds of efficiency. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973); *supra* note 148. In *Bakke*, Justice Brennan noted that University of California at Davis had considered each *minority* (but not white) applicant individually to confirm their disadvantage. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 377 (1978); see also Van Alstyne, *supra* note 2, at 1522 n.4 (quoting Toni Morrison saying in an interview, *60 Minutes* (CBS television broadcast Mar. 8, 1998), "When you know

Rather, schools granting racial preferences must holistically evaluate the potential contributions to diversity that each applicant may be able to make.<sup>224</sup> A more practical option might be to provide applicants with a checklist of perspectives that were regarded as particularly likely to expand the horizons of the student body. These might include all of the items on the “obstacles checklist” discussed above,<sup>225</sup> as well as particular politically relevant social, religious, and economic viewpoints that were relatively rare on campus. Most schools already give students the opportunity to explain how their unusual attributes would enable them to add diversity, particularly “cultural diversity,”<sup>226</sup> and provide examples of their cross-cultural communications, in an essay. Schools could also give special credit to those who showed interest in particular minority issues.<sup>227</sup> Although applicants would be considered as individuals, their contribution to campus diversity would depend on the rest of the pool.<sup>228</sup> Using checklists might resemble the

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somebody’s race, *what* do you know? Virtually nothing.”).

<sup>224</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 337–39 (2003); *Gratz*, 539 U.S. at 271–75; see also *Grutter v. Bollinger*, 288 F.3d 732, 806 (6th Cir. 2002) (Boggs, J., dissenting), *aff’d*, 539 U.S. 306 (2003); cf. 49 CFR § 26.67(a)(1) (2004) (basing advantage on actually having experienced social and economic disadvantage); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1187 (10th Cir. 2000); Hall, *supra* note 125, at 573–74. Interestingly, this could lead selectors to treat two brothers differently due to their very different experiences. See Brest & Oshige, *supra* note 77, at 875–76.

<sup>225</sup> See *supra* note 167 and accompanying text. The Rutgers Law School program asked students to check a box on their applications if they believed that their life experiences and viewpoints would contribute a “particularly unusual” perspective on “important issues,” whether political, economic, spiritual, or otherwise. See Gottlieb, *supra* note 164. The University of Michigan has crafted an 18-page form that seeks more details about a candidate’s background and potential contribution to types of diversity he or she might add. See Keith Naughten, *A New Campus Crusader*, NEWSWEEK, Dec. 29, 2003/Jan. 5, 2004, at 78.

<sup>226</sup> See Brest & Oshige, *supra* note 77, at 876 & n.80 (proposing that schools ask applicants to discuss their cultural backgrounds, community ties, or social and political viewpoints); Lopez, *supra* note 62, at 104–09 (discussing community ties); Ramirez & Rumminger, *supra* note 36, at 511–18; see also Greg Tanaka et al., *An Admissions Process for a Multiethnic Society*, in CHILLING ADMISSIONS, *supra* note 90, at 123, 127–28 (discussing a suitable essay question). The issue of verification is discussed *supra* note 166 and accompanying text.

<sup>227</sup> See Daniel Golden, *Case Study: Schools Find Ways to Achieve Diversity Without Key Tool*, WALL ST. J., June 20, 2003, at A1. To put this example in the context of law school, law reviews could allocate spaces for those with the best grades in a course on discrimination or on a single writing competition question on racism.

<sup>228</sup> See David M. Halbfinger, *Black College Diversifies, Luring Russian Town*,

mechanical formula rejected in *Gratz*, but that practice would not be vulnerable to constitutional attack since it would not involve racial preferences. It would also address the complaint that efforts to achieve broad, educationally valuable diversity are really mere legal cover for more narrow efforts to achieve a prohibited racial balance.<sup>229</sup>

*B. Aiding Diversity Indirectly by Providing Support that Induces Others to Enroll*

Students wanting to join a soccer team, newspaper, or glee club will seek a school that annually enrolls the critical mass of classmates needed to support the activity; in fact, admissions offices are often reminded of this need for critical masses by coaches<sup>230</sup> and other activity leaders. In this vein, schools should aid diversity indirectly by granting preferences to candidates who can make an institution more hospitable to minority students who would otherwise feel isolated. Although some minority applicants may be able to tolerate isolation,<sup>231</sup> or even being perceived as tokens, almost everyone prefers to be part of a community to which they can relate,<sup>232</sup> as some courts have

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N.Y. TIMES, Mar. 12, 2003, at A23.

<sup>229</sup> See *supra* note 125 (citing examples where it appears that affirmative action was not being used to achieve diversity, but to instead attain a racial balance).

<sup>230</sup> See JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* 35–42, 128–32 (2001) (revealing the historical strategies for the recruitment of, and admission advantages for, male and female student athletes); STEINBERG, *supra* note 107, at 71 (chronicling conversation with the Wesleyan University Dean of Admissions about the need to admit good athletes); Bill Pennington, *In Winnowing the Candidates at Haverford, Every Little Thing Counts*, N.Y. TIMES, Dec. 4, 2005, at §8, at 1.

<sup>231</sup> Many are accustomed to being loners. See SUSKIND, *supra* note 32, at 3–6, 59, 92, 332–33 (documenting the lonely plight of African American student Cedric Jennings). Thus, many are willing to continue as pioneers. STEINBERG, *supra* note 107, at 53, 189, 273–74 (introducing a student willing to be the only Native American at Wesleyan); Stecklow, *supra* note 124 (keeping a record of African American student Angel Malone's attempts to attend the University of California at Berkeley despite the small number of black students currently attending).

<sup>232</sup> See Brief for Am. Educ. Research Ass'n et al. as Amici Curiae Supporting Respondents at 26–29, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241) (listing studies that indicated race-neutral admissions drastically decreased the number of minority enrollments); James Alan McPherson, *The Black Law Student: A Problem of Fidelities*, ATLANTIC, Apr. 1970, at 93, 98 (claiming that anxiety and dependence upon friendly whites "can be reduced only when there are enough blacks on white campuses to establish an interdependent, self-sufficient black community").

recognized.<sup>233</sup>

People are generally most comfortable with others of the same race and ethnicity,<sup>234</sup> but selectors should not treat race or ethnicity as the *sine qua non* regarding compatibility.<sup>235</sup> It is reasonable for selectors to assume that applicants would be able to relate to those similar both in economic class and ethnic background. Still, as part of the holistic review required by *Grutter* and *Gratz*, selectors should give preferences to applicants of all races and classes who appear able to relate well to different types of people, including those applicants able to “cross over.”<sup>236</sup> Applications could use a check-off option (supplemented by an essay) to identify and give preference to applicants especially qualified to relate to, comfort, and support members of racial, ethnic, and other minorities likely to feel most isolated. The system would help combat voluntary segregation on campus.<sup>237</sup> Countering loneliness was one of the rationales the University of Michigan offered for pursuing “critical mass[es],” and it appears much more defensible than protecting minority members against pressure to be spokespersons for their groups.<sup>238</sup> As an added

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<sup>233</sup> See *Brewer v. W. Irondequoit Cent. Sch. Dist.*, 212 F.3d 738, 752 (2d Cir. 2000) (finding that reducing racial isolation might serve a sufficiently compelling governmental interest even in the absence of actual past discrimination); *Hopwood v. Texas*, 861 F. Supp. 551, 573 (W.D. Tex. 1994), *rev'd and appeal dismissed*, 78 F.3d 932 (5th Cir. 1996) (holding that eliminating the isolation of minorities caused by past discrimination is an important government objective); see also *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 834, 856–57, 859 (E.D. Mich. 2001), *rev'd in part and vacated in part*, 288 F.3d 732 (6th Cir. 2002), *aff'd*, 539 U.S. 306 (2003) (hearing testimony on the isolation felt by minority students at predominantly white universities).

<sup>234</sup> See, e.g., *SUSKIND*, *supra* note 32, at 323 (“There is an almost irresistible comfort to being with your own, being able to share what’s common and familiar, to be with someone who really understands.”).

<sup>235</sup> In civil rights parlance, selectors should not be permitted to treat race as a BFOQ. See *supra* note 61 (listing cases dealing with the issue of BFOQs). To do so would create the same difficulties discussed in IIA, above. Schools should not tolerate even bona fide prejudices.

<sup>236</sup> See *supra* note 128 (citing articles and a movie about friendships between black and white people). In fact, some minority students might bond best with non-minority students. See, e.g., *SUSKIND*, *supra* note 32, at 199–200, 205–06, 245–49, 277–80, 304–06 (detailing a friendship that developed between an African American student and a Caucasian student who shared similar interests).

<sup>237</sup> See *supra* note 203.

<sup>238</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 318–20 (2003) (examining testimony from the University of Michigan Law School dean, who defined critical mass as a number such that “underrepresented minority students do not feel isolated or like spokespersons for their race”). But see *SOWELL*, *supra* note 83, at 142 (uncovering no

incentive, applicants who had already mentored or tutored disadvantaged minority students, or participated in other related activities, could seek credit for significant relationships they had developed through those activities.<sup>239</sup>

### C. Preferences for Children of Alumni & the Wealthy

Some view racial preferences as offsetting the racially discriminatory effect of giving strong preferences to children of alumni, i.e., legacy preferences. After all, favoring children of alumni and relatives of major benefactors perpetuates the effects of former racial or ethnic discrimination.<sup>240</sup> Thus, many, including Yale legatee, President George W. Bush, have urged the elimination of alumni and political preferences,<sup>241</sup> and some schools have done so.<sup>242</sup> On the other hand, having some

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evidence confirming the effectiveness of the critical mass approach). Although O'Connor's majority opinion referenced the spokesperson rationale, see *Grutter*, 539 U.S. at 333, Rehnquist's dissent pointed out the inconsistency between that rationale and the need to admit six times as many blacks as American Indians between 1995 and 2000, see *id.* at 380–81 (Rehnquist, C.J., dissenting); *supra* note 114.

<sup>239</sup> See *supra* notes 65–68 and accompanying text.

<sup>240</sup> See KINKEAD, *supra* note 135, at 54–56; MICHAEL LIND, *THE NEXT AMERICAN NATION* 152–53, 169–71 (1995) (criticizing legacy preference as “affirmative action for the white overclass”); SHULMAN & BOWEN, *supra* note 230, at 40–41 (using the term “insider affirmative action” to describe the admittance of legacies); Ralph Frammolino & Mark Gladstone, *Donations and Admissions—Is There a Tie at UCLA?*, L.A. TIMES, May 6, 1996, at A1 (describing cases in which students were most likely admitted to UCLA due to their relatives' past or promised donations); *Naked Hypocrisy: The Nationwide System of Affirmative Action for Whites*, J. BLACKS HIGHER EDUC., Winter 1997–1998, at 41 (“It turns out then that the most important nonacademic question on the Ivy League colleges' application form is not, ‘What is your race?’ The magical question is, ‘Where did your parents go to college?’”); Jacques Steinberg, *Of Sheepskins and Greenbacks*, N.Y. TIMES, Feb. 13, 2003, at A24 (“‘Affirmative action remedies past discrimination . . . Legacy admissions give more to kids who already have more.’” (quoting Senator John Edwards)).

<sup>241</sup> See KAHLLENBERG, *supra* note 20, at 124, 166, 234 n.75 (advocating the elimination of unfair legacy preferences); Ernest Gellhorn & D. Brock Hornby, *Constitutional Limitations on Admissions Procedures and Standards—Beyond Affirmative Action*, 60 VA. L. REV. 975, 1006 (1974) (doubting the constitutionality of special treatment for politicians' children); Elisabeth Bumiller, *Bush, a Yale Legacy, Says College Should Not Give Preference to Children of Alumni*, N.Y. TIMES, Aug. 7, 2004, at A12 (reporting that Bush proposed that admission to Yale be “based on merit”).

<sup>242</sup> See Daniel Golden, *No More Boost for ‘Legacies’ at Texas A&M*, WALL ST. J., Jan. 13, 2004, at B1 (reporting that Texas A&M University became the third public university in the last few years, joining the state universities in Georgia and California, to eliminate the legacy preference); see also Daniel Golden, *Bill Would*

students with longstanding ties to a school may add a useful perspective.<sup>243</sup> More importantly, children of alumni, important officials, and wealthy donors may aid diversity indirectly by generating greater financial resources to subsidize needed financial aid.<sup>244</sup> In any case, such preferences do not conflict *per se* with important constitutional principles, despite their racially disparate effects<sup>245</sup>—effects that are diminishing as the alumni of elite schools become more diverse.

## V. ARE RACE-NEUTRAL APPROACHES INEFFICIENT?

Section III noted that one strong argument for using skin color in the admissions process was its efficiency as a proxy for the obstacles faced by virtually all blacks.<sup>246</sup> Some economists now contend that considering race is the efficient way to achieve racial diversity. They accurately observe that if the goal is to maximize the quality of enrolled students (based on the economists' definition of quality), subject to the constraint that

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*Make Colleges Report Legacies, Early Admissions*, WALL ST. J., Oct. 29, 2003, at B1 (conveying that a bill proposed in Congress sought to require colleges to report data on legacy and early decision admissions in an effort to limit "white affirmative action"). *But see* JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 359-63, 452-55 (2005) (chronicling a similar experience at Yale in the late 1960s); Greenberg, *supra* note 20, at 537 (noting that Columbia University eliminated legacy preference but quickly restored it when its fundraising suffered significantly).

<sup>243</sup> See Daniel Golden, *Shaking Up Harvard*, WALL ST. J., June 8, 2004, at B1 (quoting Harvard University President Lawrence Summers, that "Legacy admissions are integral to the kind of community that any private educational institution is.")

<sup>244</sup> See Greenberg, *supra* note 20, at 537 (explaining how universities look to wealthy alumni for continuing support); Debra Thomas & Terry Shepard, *Legacy Admissions are Defensible, Because the Process Can't be 'Fair,'* CHRON. HIGHER EDUC., Mar. 14, 2003, at B15 (recognizing the enormous contribution wealthy donors make to the affordability of every college student's education). The 1998 policy of the University of California on such favoritism illustrates the conflict here. See Kenneth R. Weiss, *UC Regents Decry but Keep Entrance Favors*, L.A. TIMES, July 17, 1998, at A3 (declaring that monetary or other benefits that a student's attendance could bring to the school should not be considered in the admissions process).

<sup>245</sup> These preference programs have been accepted by the Department of Education's Office of Civil Rights and one federal court. See KAHLLENBERG, *supra* note 20, at 234 n.75; *cf.* Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979) (allowing a veteran's preference despite its discriminatory effect on women); Malamud, *supra* note 7, at 1699-700 (recounting the historical approval of a veteran's job preference despite a meritocratic economy).

<sup>246</sup> In fact, it appeared to be the only economically practical way for large schools to account for such obstacles. See *supra* note 148.



some specified level of racial diversity will be achieved, it is inefficient not to consider race directly when comparing candidates. Trying to achieve that level of racial diversity without considering race per se leads one to sacrifice a significant level of quality in the class. The use of non-racial factors leads to the acceptance of some minority and non-minority students of lesser quality than those that would have been admitted if there had been no need for contortions.<sup>247</sup>

There are, however, a number of reasons to challenge the economists' efficiency rationale for a race per se preference policy. First, the Constitution does not permit efficiency to justify the violation of individual rights.<sup>248</sup> Second, emphasizing racial diversity over broader forms of diversity may reduce the educational value provided by diversity.<sup>249</sup> Third, research by advocates of the economists' approach has ignored the inefficiency of coping with the issues addressed in section II.A. Fourth, proponents of the position define students' qualities too narrowly. They omit or undercount many qualities noted in section III, like emotional intelligence. Students admitted to schools to add diversity probably have greater amounts of these qualities than those that they displace. Furthermore, mechanisms that use race place less pressure on selectors to identify better metrics for measuring applicant quality.

Schools seeking the value generally provided by racial diversity should instead favor applicants with special knowledge or passion for black history, literature, or customs, rather than those who merely have black skin. The same would be true if a Catholic college sought to ensure some degree of religious diversity. Admitting the three smartest Jews, if all of them happened to be Jews by birth but secular in practice, would not be an efficient or even effective means of providing that diversity. Rather, it would be more valuable to favor applicants with a

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<sup>247</sup> See Jimmy Chan & Erik Eyster, *Does Banning Affirmative Action Lower College Student Quality?*, 93 AM. ECON. REV. 858, 858 (2003); Dennis Epple et al., *The Practice and Proscription of Affirmative Action in Higher Education: An Equilibrium Analysis* 4-5 (Nat'l Bureau of Econ. Research, Working Paper No. 9799, 2003); Fryer, Jr. et al., *supra* note 21, at 16 (finding in one sample that trying to achieve a level of racial diversity using non-racial factors rather than racial factors resulted in a loss of four to five times the amount of quality).

<sup>248</sup> See *supra* note 223 (cataloguing Supreme Court cases).

<sup>249</sup> See *supra* notes 123-31 and accompanying text (supporting a broader concept of diversity beyond that based on race).

knowledge of, and passion for, Jewish history, values, and literature, even if they were somewhat weaker academically.

The quality score the economists use to rate each applicant is independent of the composition of the rest of the class. Unlike the value of a specific GPA, however, the value of having an “unusual” background would depend on the scarcity of that background within the class, just as a star quarterback or oboe player is more valuable to the school if no others are enrolled.<sup>250</sup> In particular, the economists’ model would value three upper-middle-class suburban blacks with excellent test scores over three blacks likely to have lower GPAs if admitted, but whose varied life experiences would broaden the horizons of their classmates.

### CONCLUSION

For too long, affirmative action programs have neglected those suffering most from the effects of past and present racism. Elite colleges and universities have concluded that students receiving inferior K–12 educations are too far behind to handle an elite school’s rigorous academic program. Thus, affirmative action programs at top tier schools focus on admitting the most qualified of the best-prepared minority students, those generally from middle- and upper-class communities. Unfortunately, the success of these programs is measured by how many minority students are enrolled, irrespective of their socio-economic class. Selective colleges and universities view too many of those most harmed by racism as beyond the scope of their affirmative action programs.

The current affirmative action system must change. Selective colleges should provide those most harmed by racism with mentors and tutors during their K-12 years. The assistance would significantly improve disadvantaged minority students’ chances for admission to the colleges and universities that they would deserve to attend, but for the effects of racism. Colleges should designate a substantial portion of, if not all of, the places in their classes for applicants qualified and willing to commit to mentor and tutor disadvantaged minority students—affirmative action can thus begin to serve those who need it most. In

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<sup>250</sup> The value of the attributes would vary inversely with their frequency in the admitted class.

addition to its direct impact on students in disadvantaged minority communities, the program would stimulate secondary school students to reach out to students in disadvantaged communities, if only to increase their own chances of attending elite schools.

Colleges and universities should also consider the other two elements of this Article's proposal for replacing *per se* racial preferences with racially conscious approaches that would avoid the many serious shortcomings of *per se* preferences discussed above. Admittedly, the new evaluation metrics may require years to identify, and the short-term effects may reduce the number of minority students enrolled, but it is not clear that such reductions would be large or long-term, particularly when considering the effects of the mentoring program discussed above. Meanwhile, colleges, universities, and courts would avoid the discomfort of struggling to deal with the three intractable questions concerning the administration of *per se* preferences—which racial/ethnic groups can receive the greatest preference, which individuals qualify as members of such preferred groups, and how large a preference can be awarded to the most preferred groups—and their programs would be less vulnerable when a more conservative Supreme Court next considers racial preferences. The approach would also avoid both harmful racial stigmas and the “serious problems of justice connected with the idea of [racial] preference.”<sup>251</sup>

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<sup>251</sup> *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978)).